PROHIBITED BEHAVIOUR ORDERS BILL 2010

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 19: Court to take into account certain principles and considerations —

Debate was interrupted after the clause had been partly considered.

Clause put and passed.

Clause 20 put and passed.

Clause 21: Application —

Mr J.R. QUIGLEY: Clause 21(1) reads —

> An application to vary or cancel a PBO may be made at any time while the PBO is in force by —
>
> (a) the prosecutor; or
>
> (b) the constrained person.

Upon what notice is it anticipated that this will happen, given our earlier discussion about service under clause 33?

Mr C.C. PORTER: I think the answer to that can be found at clause 22, which reads —

> (1) If an application is made under section 21, a registrar must give a hearing notice and a copy of the application to each party to the PBO proceedings.
>
> (2) If a party is given the hearing notice but does not attend the hearing, the court may, as it thinks fit —
>
> (a) proceed with the hearing; or
>
> (b) if the party is an applicant under section 21 and the court is satisfied that he or she was given the hearing notice — dismiss the application; or
>
> (c) adjourn the hearing.

We can then cross-reference that with the previously discussed clause 33, which establishes that any notice given must be given in certain time frames.

Mr J.R. QUIGLEY: But that can be sent by post.

Mr C.C. PORTER: Yes, to vary. That is one of the reasons clause 33 has been drafted as it has, because variations hearings do not need to be notified upon the constrained person in person, but rather by post.

Mr J.R. QUIGLEY: That is where I was going with the question I wanted to ask. I am trying to recall the Attorney General's words, but the variation proceeding could substantially impinge upon the person's civil rights; in other words, it might be a variation to further delimit what would otherwise be lawful conduct.

Mr C.C. Porter: It might vary on an existing substantial limitation.

Mr J.R. QUIGLEY: By adding new limitations.

Mr C.C. Porter: That is a possibility, yes.

Mr J.R. QUIGLEY: And the requirement now is for service by post.

Mr C.C. Porter: That's correct.

Mr J.R. QUIGLEY: Does the Attorney General not think that that could present a problem for people if government records are not up to date as to the last residential address, as happened in the D'Orazio case, bearing in mind that we are dealing with restrictions of civil rights?

Mr C.C. PORTER: Again, this is a question of balance. If the state, in every matter—be it prohibited behaviour orders or licensing matters—was required to deliver personal service on everyone every time there was a variation of an order, whether it be a restraining order or otherwise, the system would be unworkable. We have tried to reach a fair balance, and this is what we consider to be a fair balance. The member may have a different view.

Clause put and passed.

Clauses 22 to 25 put and passed.

Clause 26: Evidence in PBO proceedings —

Mr J.R. QUIGLEY: Clause 26(3)(d) reads —

> admit any evidence relating to the circumstances of an offence specified on a criminal record admitted under paragraph (c) …

That would presumably be evidence of a related offence, another trigger offence, or one of those other matters that the court could take into account, which might not be a trigger offence but is conduct that the court will take into account when exercising its discretion to grant a PBO. We often have pleas of guilty for offences but during a plea in mitigation contest the summary facts. How does the Attorney General envisage those contests being involved, because they might be relevant, might they not, to the issue of the PBO; in other words, there might be other offences for which people say that they have more to explain?

Mr C.C. PORTER: I think I see the point the member is raising. He is saying that someone is convicted or enters a plea of guilty to an offence but there is a trial of the issues, which might be progressed in two weeks' time or one week's time —

Mr J.R. Quigley: Just by way of interjection, often in courts of summary jurisdiction it is not actually the trial of the issue. These things are raised in pleas of mitigation and the prosecution then says that it does not need to really worry about that. In other words, a lot of those contests are not done in a formal way, as they are in the superior courts.

Mr C.C. PORTER: I appreciate that. Not all transcription occurs or is readily available in the Magistrates Court. But I think the point the member is raising is this: if someone is convicted of an offence but there were certain mitigating circumstances and those are circumstances that the person who then becomes subject to a PBO application wants brought before the court, he can do that. But I do not see that he is at any necessary disadvantage by this subclause (3)(d) evidentiary provision, because what it says is that the court can admit any evidence relating to the circumstances of an offence specified on a criminal record. The sorts of matters that are going to relate to a criminal offence that are specified on a criminal record are going to be relatively limited. I would imagine that they are specific recordings of the fact that there was a circumstance of aggravation—for instance, in an assault or something of that matter—so I do not see that the applicant will be at any necessary disadvantage. Applicants can still bring into evidence, by whatever means they choose, matters that were put on previous sentencing occasions. The evidence that would be admitted by virtue of subclause (3)(d) will be very limited. There would obviously be other ways in which that evidence could be adduced, but this is a simplification of the process.

Clause put and passed.

Clause 27: PBO proceedings, general provisions about —

Mr J.R. QUIGLEY: Clause 27(1) reads —

> PBO proceedings are taken to be civil proceedings for all purposes.

That would be for the standard of proof and certain questions of rules of evidence and the like. Is a breach proceeding under clause 35 to be considered in the same way; and, if not, why not? It does not make it clear in clause 35 that a matter under clause 35 will be treated as a criminal proceeding, but the penalties in there are significant criminal penalties.

Mr C.C. PORTER: As the member has pointed out, clause 27(1) requires that PBO proceedings are taken to be civil proceedings for all purposes. There is a definition of PBO proceedings in clause 3, which is the definition clause, which reads —

> ***PBO proceedings*** means proceedings in which the court makes, varies or cancels a PBO against a person or considers doing any of those things;

Clause 27(5) reads —

> Except in relation to an offence under this Act, a rule of construction that is applicable only in relation to the criminal law does not apply in the interpretation of this Act.

Clause 27(5) qualifies the definition of a PBO by stating that, except in relation to an offence, an offence being a breach, "a rule of construction that is applicable only in relation to the criminal law does not apply in the interpretation of this Act"; so breaches have to be proved beyond reasonable doubt.

Clause put and passed.

Clause 28 put and passed.

Clause 29: Application of this Part —

Ms M.M. QUIRK: I just want some clarification on basically clauses 29 and 30, but I will deal with clause 29 first. It deals with a court making a PBO, and the constrained person at that time is prohibited from being in possession of a firearm or holding or obtaining a firearm licence. Can the Attorney General confirm that that applies to both licensed and unlicensed firearms or is it only licensed firearms?

Mr C.C. PORTER: I will address that. I might very quickly, just as a matter of courtesy, go back to the member for Mindarie. With respect to his previous question, just to be absolutely clear for the purpose of *Hansard* if this is considered at any point in the future, the breach of a PBO is a criminal offence, and criminal standards apply; the breach would need to be proved beyond reasonable doubt. That is the clear intention of clause 27(5). I say that just so that is on the record.

With respect to the question the member for Girrawheen has asked, I think the plain reading of this is that it would apply to both licensed and unlicensed firearms, but the additional provision, clause 29(b), has been inserted simply so that it recognises the fact that someone could be prevented from having a firearms licence per se, without making any order about the actual possession of a firearm, but obviously things would flow from that.

Clause put and passed.

Clause 30: Constrained person to give up possession of firearms and licences —

Ms M.M. QUIRK: I just want to explore this in some detail because, frankly, the firearms licensing regime at the moment is in some level of chaos. I am concerned that this may in fact add to that level of chaos. Clause 30(1) reads —

> The constrained person must give up possession of all firearms and firearm licences held by the constrained person —
>
> (a) to a prescribed person; and
>
> (b) in a prescribed manner; and
>
> (c) within a prescribed period after the making of the PBO.

I gather that that would be as prescribed, presumably, by the Firearms Act or the Firearms Regulations. I also note that there does not seem to be a time, so presumably that means it will be "in a prescribed manner" as outlined in clause 30(1)(b). I ask the Attorney General, in his capacity of having some responsibility for legislative drafting, why would it not have been possible to set out a time in which this will be done, the person to whom the firearm must be surrendered and the manner in which it must be surrendered? It might be repetitive but it is important that people who have obligations to meet understand what those obligations are. I find this provision not very helpful.

Mr C.C. PORTER: I am certainly aware of the debate that the member is talking about. I have listened to the debate in this chamber, but I have not been intimately involved in the policy decisions. I am informed that clause 30 is, in effect, a direct copy of a similar provision in the Restraining Orders Act. Under the Restraining Orders Act, the prescribed person and manner are set out by regulation. Clause 3 of this bill also provides for that to be the case. In the definitions clause, prescribed means "prescribed in regulations made under section 39". It is the same drafting formula that is used in the Restraining Orders Act. I imagine that the regulations will be drafted in such a way that they are very similar to, if not precisely the same as, the Restraining Orders Regulations so that there is consistency. Whether that is the best or most elegant way of going about it, it is certainly done that way under the Restraining Orders Act. I think the drafters' view, without putting words in their mouths, is that consistency is a merit in this circumstance.

Ms M.M. QUIRK: Consistency but obscurity.

Mr C.C. Porter: Just out of interest, how would you go about it? Would you say that the time lines and prescribed person should be in the legislation for clarity?

Ms M.M. QUIRK: I do not see why that would be a major problem. If the Attorney General can let me know what his intention is on the time frame in which a person must give up the possession of a firearm, who is contemplated will be the prescribed person and what the prescribed manner will be, that would be helpful.

Mr C.C. PORTER: I appreciate the question. As I say, the intention is that the regulations will be similar to, if not precisely the same as, the Restraining Orders Regulations. Off the top of my head, I do not know what those regulations say specifically. I imagine that we would be able to get those relatively quickly. The undertaking is to make them as consistent as possible, if not perfectly consistent, with the Restraining Orders Regulations. I am afraid that I am not aware, off the top of my head, of what they exactly say.

Ms M.M. QUIRK: I have to confess that I have not committed the Restraining Orders Act to memory and so I do not know what it contains. There is already considerable confusion about where firearms are. For example, police at the firearms branch are overwhelmed with applications. The Auditor General released a report last year that indicated that the records were so bad that a number of dead people were believed to be still in possession of firearms. This provision does not even make it clear who will be responsible for taking possession of a firearm, when that will need to be done by and how it will need to be done. Given that the possession of a firearm is a serious matter, we need absolute clarity on how the constrained person will have to deal with it and in what time frame.

Mr C.C. PORTER: I take the point, but the other consideration in drafting the legislation so that it sets out the time period and prescribed person is that from time to time governments may change, views may change, the prescribed person may change and the appropriate time frame may change, and to effect that change we would have to debate the matter, which would be a time-consuming process. I am not an expert in this field, but I imagine that for what is lost in terms of obvious "findability" and clarity of having that in an act and making it consistent among all acts, we have the ability to put it in regulations precisely so that it can be changed. If we take the view that the present system is not working terribly well, we have the opportunity to change the regulations relatively swiftly in response to problems that might develop from time to time. Again, it is a matter of balance. I am aware of some of the difficulties that are being experienced, but I am not terribly certain that this will add to them in any further way than does the Restraining Orders Act and the way it is drafted. However, I take the point.

Ms M.M. QUIRK: I accept what the Attorney General is saying about these matters being more properly prescribed in regulations, if that is his contention. I really only made the comments about the obscurity of the drafting by way of a rhetorical statement. What I am interested in is: what does the Attorney General contemplate those regulations will say? I would very much like to know that. I am concerned about passing this clause when I do not know what it purports to say.

Mr C.C. PORTER: I have asked the excellent staff of the chamber to track down a copy of the Restraining Orders Regulations. The intention is that these regulations will be the same as the Restraining Orders Regulations. As soon as the Restraining Orders Regulations arrive, we will have a look.

Ms M.M. QUIRK: I will also ask about the process that the Attorney General contemplates will happen when a constrained person who is the subject of a prohibited behaviour order is in the process of obtaining, or currently holds, a firearm licence or is in the possession of a firearm. What does he anticipate the procedure will be? Will the procedure be that at the time the order is made, the magistrate or whoever is making the order will make a specific order for a firearm, and so that information will be provided to the maker of the order by the prosecutor? Is that correct? I note that clause 30(4) provides that when making a PBO the court may shorten the prescribed period—we are still waiting to find out what that period is—within which the person must give up possession of firearms and a firearm licence. That is very problematic for the reasons that I raised earlier about there being major difficulties about data matching to enable the police to have the ability to locate firearms. My main question is: how is this being done? As part of any advice on rights, responsibilities and obligations under these orders, how will people be advised of their obligations in terms of firearms?

Mr C.C. PORTER: I think the answer to that question starts with a brief reconsideration of clause 10. Clause 10 identifies the types of constraints on otherwise lawful activities. They are at large. We had the argument with the member for Mindarie about what may be supported compared with other matters. I believe that a very broad range of extraordinary restraints are supported. Clause 10(3)(a), (b), (c), (d), (e) and (f) lists the possible constraints that might be envisaged by the courts, but it is not an exhaustive list. Clause 29 states —

> This Part applies if a court makes a PBO under which the constrained person is prohibited from —
>
> (a) being in possession of a firearm; or
>
> (b) holding or obtaining a firearm licence.

That is not to say that those two potential restrictions would be exhaustive of all the orders that might restrict someone's usage or possession of firearms, albeit I would find it difficult to imagine someone receiving an order prescribing that that person can possess a firearm only on weekends. It seems likely that the most common forms of orders for firearms are that people are prohibited from being in possession of firearms or from holding or obtaining a firearm licence, but there may be other formulations. If someone were so prohibited, the explanation provisions would apply. I have now been given a copy of the Restraining Orders Regulations 1997.

Ms M.M. Quirk: They're a best-seller, no doubt.

Mr C.C. PORTER: Indeed; it is good to know that they have had a lot of hand!

Cutting to the chase, regulation 4 states —

> (4) Subject to subregulation (5), in any other case the restrained person must give the firearm or firearms licence to the police officer in charge of the police station nearest to where the firearm or firearms licence is located as soon as is reasonably practicable and in any event within 24 hours of the order being served.
>
> (5) If a firearm in respect of which a restrained person holds a firearms licence is in the actual physical possession of a co-licensee of that firearm, the restrained person —
>
> (a) must comply with subregulation (3) or (4), as the case requires, in respect of the firearms licence; but
>
> (b) need not comply with subregulation (3) or (4), as the case requires, in respect of that firearm.

I have not read out the first three subregulations, but I am happy for the member to ask further questions. I would imagine something very similar to these provisions, if not the same. As with the Restraining Orders Act, if an order is made that prohibits someone from being in possession of a firearm, it will be the responsibility of the court to communicate that and to draw the person's attention to what that means, as the court has knowledge of the regulations. The communication will be done through the court.

Ms M.M. QUIRK: I thank the Attorney General. He has anticipated my next question. Can the Attorney General confirm that the court will set out any conditions imposed concerning firearms, such as when the constrained person must surrender his firearm by and to whom he must surrender it, and the consequences of any breach?

Mr C.C. PORTER: Clause 14, "Explanation about PBO to be given", states —

> (1) A court that makes a PBO must explain to the constrained person —
>
> (a) the purpose, terms and effects of the PBO; and
>
> (b) the consequences that might follow if the constrained person contravenes the PBO; and
>
> (c) that the PBO may be varied, cancelled or extended; and
>
> (d) if the PBO imposes constraints relating to the possession of a firearm or to holding or obtaining a firearm licence, the effects of sections 30 and 31 relating to firearms and firearm licences.

We are placing some relatively clear obligations on the court to pass on that information. I imagine that would be sufficient for the purposes the member is seeking to achieve, and quite properly so.

Ms M.M. QUIRK: I wish to raise a couple of other matters. I will deal with them together to save time. The first relates to those who are seeking to obtain a firearm licence. I am of the view that the left hand will not know what the right hand is doing. This is where I come back to the computer resources and data matching. Unless the data is matched, it is quite possible that the firearms branch might not have any knowledge of a PBO having been issued when dealing with an application for a firearm licence. I am not convinced that the data matching is at an optimal stage at the moment. Secondly, under the new regime, firearms are not really handled at local police stations anymore; it is done centrally at the firearms branch. The Attorney General will need to be mindful of that when drafting the regulations. If the regulations are drafted using the same terms as those in the Restraining Orders Regulations, someone could go into a police station to hand over his gun and be told by the sergeant in charge that it is nothing to do with him and that the person must take it to the firearms branch. The Attorney General should be mindful of that when drafting the regulations.

Mr C.C. PORTER: I again take the point; it is well made. I will speak directly to the police about that issue. One very good point the member raised was the circumstance in which someone applies for a firearm licence when he has a restraining order or PBO issued against him. That matter should be taken into consideration in the application. The member is interested to know whether the police will have that information when they are processing an application. I am not an expert on that. I will consult the police to find out how they intend to ensure that they have knowledge of that when assessing applications.

Clause put and passed.

Clause 31: Seizure of firearms —

Ms M.M. QUIRK: Under this clause if someone does not surrender a firearm or a firearm licence in accordance with clause 30, police will be able to enter the premises of that person and seize the same without a warrant.

Why will that be done without a warrant? It is not that complicated to obtain a warrant. I do not see why there is no capacity to require a warrant, other than it seems too much like hard work. I do not understand why it is not possible to seize such material by way of a warrant. It is a mystery to me.

Mr C.C. PORTER: Again, that is a fair point. The obtaining of a warrant is not necessarily an onerous hurdle to cross. This is again a direct replication of the provision in the Restraining Orders Act. I imagine that the rationale behind it is that there is the potential for situations to arise —

Ms M.M. Quirk: There certainly is in that situation—I don't have any problems with that—but this is just non-compliance as far as I can see.

Mr C.C. PORTER: Indeed. As I say, this is a replication of the provision in the Restraining Orders Act. Obviously the situation in mind is one in which time is absolutely of the essence.

Ms M.M. Quirk: It does not say that, though, Attorney General.

Mr C.C. PORTER: No, it does not. I acknowledge that there may be circumstances similar to but not the same as that under this legislation. I imagine that if there is a firearm restriction pursuant to a PBO, it may be necessary to take swift action if there is a breach of the PBO or if the requirement to hand in the firearm applies. All I can say is that, as in the Restraining Orders Act, this clause places a primacy on absolute timeliness to ensure that a firearm is seized if someone has breached a term of a PBO relating to the giving up of the firearm in accordance with clause 30. I take the member's point that it places a strong obligation on the person who has the firearm.

Ms M.M. QUIRK: I note under clause 31(3) that the firearm or firearm licence seized must be dealt with in the prescribed manner. Again, I do not have a copy of the Restraining Orders Act with me. Could the Attorney General outline, for the purposes of *Hansard*, what the prescribed manner is?

Mr C.C. PORTER: The regulations to this bill, should it become an act, will prescribe that manner. Again, there will be a replication of the provision in the Restraining Orders Regulations. Regulation 5 states —

> (1) A firearm or firearms licence given to a police officer under section 14 of the Act, or seized under section 62E of the Act, is to be held in safe custody by the Commissioner of Police until —
>
> (a) the restraining order ceases to be in force;
>
> (b) it is reclaimed by a co-licensee; or
>
> (c) it may otherwise lawfully be disposed of.
>
> (2) Before returning a firearm or firearms licence the Commissioner of Police must have regard to section 20 of the *Firearms Act 1973*.
>
> (3) If a firearm which is being held by the Commissioner has not been reclaimed within 1 month after the restraining order ceases to be in force, the Commissioner may regard the restrained person and any co-licensee as an owner who cannot be found …
>
> (4) If a firearms licence which is being held by the Commissioner is not reclaimed within one month after the restraining order ceases to be in force, the Commissioner may regard the restrained person as having requested, under section 20(4) of the *Firearms Act 1973*, that the firearms licence be cancelled.
>
> (5) Where the Commissioner is holding a firearm under subregulation (1), regulation 11(2) and (3) of the *Firearms Regulations 1974* apply.

The member would be testing my knowledge to ask what those regulations say, but the same system that applies to restraining orders will apply here.

Clause put and passed.

Clauses 32 and 33 put and passed.

Clause 34: Publication of details of constrained people —

Mr P. PAPALIA: Subclause (2) states —

> … the CEO must publish on a website the following in relation to a constrained person —

The subclause lists the details that must be published. What would be the nature and title of the website when the details of an individual are on it? I note that unless otherwise ordered by a court, the chief executive officer must publish on a website the details of a constrained person such as the name of the person, a photograph, the town or suburb where the person lives and the constraints imposed by the PBO on the activities and behaviour of the

person. However, an implication would be made from the webpage on which those details were published. For instance, if the banner headline of the website stated "Name and shame evil wrongdoer", or whatever the heading might be, it would have a part to play in the extent of the impact upon the constrained individual. I assume the Attorney General would have taken that into account in the risk–benefit analysis he referred to earlier.

Mr C.C. PORTER: Obviously the final pictorial layout of the website has not been determined. It will be, obviously, under my policy direction and control. It will be bare. It will be dour. It will not be of an exciting or salacious nature. It will be very limited and confined to the information that can be published. I intend it to be nothing more than an information source.

Mr P. PAPALIA: In that case, how does the Attorney General reconcile that approach with subclause (8)? It states —

> A person may republish in any manner something that has been published under subsection (2).

That would enable anyone else to take that content and paste it onto their hate site at another location over which the Attorney General has no control. How does the Attorney General intend to supervise or monitor the extent of salaciousness of those other sites?

Mr C.C. PORTER: The way in which I intend to monitor a person who places the information otherwise lawfully published pursuant to a PBO on a hate site is to have that person investigated and prosecuted under the relevant provisions of the Criminal Code that prevent incitement to racial hatred or vilification or, indeed, incitement to anyone to commit an offence.

Mr P. PAPALIA: How confident is the Attorney General of his ability to restrain those individuals from being salacious should the person publishing said information on the site in question be located in Monrovia, Hong Kong or California?

Mr C.C. PORTER: No more or less confident than I am now of being able to prosecute any person who might reside in—where was it—Serbia?

Mr P. Papalia: Wherever; out of this jurisdiction.

Mr C.C. PORTER: Out of the jurisdiction. Even if that person resided out of the jurisdiction, the extraterritoriality provisions of our Criminal Code would mean that at least one of the elements of the offence had been committed here and that person would be liable. The relevant provisions are section 553, which is incitement to commit indictable offences; and section 555A, which is attempts and incitement to commit simple offences under the code. There are other provisions that prevent any kind of racial hatred or vilification, such as section 77, which is conduct intended to incite racial animosity or racial harassment. From time to time people engage in some form of publication that falls within the ambit of those sections. Whether it is pursuant to information that comes out because of this legislation or other information, or whatever it might be, the police force of this jurisdiction does its level best to find that person and to engage in the process of putting a brief together so that a prosecution can occur. This will be no different.

I will also make this point to the member for Warnbro. With respect to adults, at least, nothing can be published pursuant to clause 34(2) that is not in any event publicly available. One of the cornerstones of our judicial and court system is that any person, including the good members of the journalists' gallery, can walk into any court and, unless there is a specific prohibition on the publication or the hearing is being conducted in camera, publish all those details. For adults, at least, all those details are at large.

I make the point in response to the notion that racial hatred sites will spring up because of this information, at least as it applies to adults, that it is information that is already widely available and already in the public domain. We have not seen those sorts of websites spring up, given all the information that is out there. I make that point respectfully.

The other point I make on the notion of vigilante action, racial vilification or hate websites is that there is a far more expansive system for publication that exists in the United Kingdom, and I am not aware that that has been the experience in the United Kingdom. There are critics of the publication system in the United Kingdom, but I am not aware that the sorts of problems that the member for Warnbro has identified as potential problems have arisen in that system.

Mr J.R. QUIGLEY: I do not wish to revisit the argument against publication but to go to the mechanics of it now. Subclause (2) states —

> Unless ordered otherwise by a court, the CEO must publish on a website the following in relation to a constrained person —

That is the default position.

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: It then states that the default position is to publish the person's name, photograph, town or suburb and the constraints imposed. Those are the four headings for publication. Subclause (3) states —

> Subsection (2) does not permit the publication of anything that identifies, or is capable of identifying … the exact address of the constrained person;

I raise this matter because I have been preparing for a family funeral on Saturday and I have been looking at war records to see exactly what information I could find out about someone whom I did not take the time to find out enough about during my family member's lifetime. It seems to me that it is not very hard at all to find out information. As soon as the name of a person and the suburb where that person lives is known, the address of that person can be located without much experience on the web. The Australian Electoral Commission publishes—this will not apply to infants, for example—electronic copies of the electoral roll and there are all sorts of other measures on the internet that people can use to drill down to information once they know the name and suburb. I will use my name as an example. Perhaps it is a bad example in that my residence is well known, but if we searched for "Quigley Trigg" and it was published, it would not take long for someone to identify the exact address. How is it, therefore, that this clause will protect the exact address but reveal the suburb?

I have a further point, which is a corollary to that. The Attorney General says that the purpose of publication is to give efficacy to the scheme in that the community can participate in the enforcement of PBOs by identifying people who breach them and report them to the police. If that is the reason—it is the reason the Attorney General gave—how does knowledge of the residential suburb advance the scheme?

Mr C.C. Porter: I am sorry, what was the second part of that question?

Mr J.R. QUIGLEY: The second part is given that the Attorney General has explained to the chamber that he regards publication of the granting of a PBO against an individual as an integral part of this whole scheme, as it allows the public to participate in enforcement by identifying Billy, for example, and knowing what Billy was constrained against doing—entering Northbridge, say—how does knowledge of Billy's residential suburb assist? Knowing what Billy's residential suburb is, will almost inevitably be information that is capable of identifying his exact address.

Mr C.C. PORTER: The first point I will make is that publication as it stands in the United Kingdom allows for publication of the exact address. Dealing with the member's second question first: the rationale behind that is that whilst it may not always be the case, it may often be the case that a person who has offended offends in a geographic proximity to where he lives. Therefore, by allowing people who access the site, or who for other reasons have online publication of information, the ability to know where the constrained person generally lives enhances their ability to be wary of that constrained person. That is a simple rationale.

Mr J.R. Quigley: If I can say this by way of interjection, I will seek further time for the Attorney if required: is knowing that these people are out there so I can be wary of them the explanation or the rationale for publication? The Attorney has told this chamber on several occasions that the reason for publication is that it will enable people to participate in enforcement of the scheme.

Mr C.C. PORTER: Indeed.

Mr J.R. Quigley: How does participating in enforcement of the scheme require the residential suburb to be identified?

Mr C.C. PORTER: Because if it is the case, as we posit that it is, that many offences occur within a close geographic proximity to where someone lives—there is a lot of criminological research to suggest that that is the case—identifying a person who is constrained by visual identification, what he is constrained from doing and where he generally lives, must enhance people's ability to recognise that person if and when an offence is committed, particularly given the assumption that people often offend close to where they live.

Mr J.R. Quigley: I understand what the Attorney is saying. I hear what the Attorney is saying. But to my mind, the Attorney has still not explained why identification of suburb helps in the identification of an offender. For example, I see someone in the street, a person who is restrained from entering Northbridge, which could be a constraint, could it not?

Mr C.C. PORTER: Indeed.

Mr J.R. Quigley: I see someone who is restrained from entering Northbridge and he lives in North Perth. I am sitting outside on James Street—al fresco—with my iPhone or iPad and, looking at the site, I see that Billy is not allowed to be in Northbridge. How does the additional knowledge of Billy's residential suburb assist in this process?

Mr C.C. PORTER: It works less well with a constraint that relates to where people can and cannot go. However, let me give the member an example of the person who can be constrained from being with another person or constrained from carrying a spray can. If it is the case that that person is constrained from being with a person or from carrying a spray can, they may be in possession of a spray can or with that person anywhere, but there is a much greater likelihood that he will be in possession of a spray can and be identifiable as in possession of a spray can by a member of the community close to his house because that is where he is going to spend a great deal of his time. In that way, knowing where the person lives, in opposition to the member's example, is clearly going to enhance people's ability to keep an eye out for someone who is constrained from doing certain things and who lives at or near their suburb.

With respect to the first question the member raised: it is a fair point. For some people at least, the provision of information, which is a name and a general suburb address, may allow them, through internet searches, to find the precise address. Now that is simply another hurdle and no doubt that will be an argument that defence counsel will make at the application process. I would imagine that if a defence counsel says, "Well, this is the internet research I did this morning with respect to my client, and by virtue merely of his suburb and face being run through Google, I was able to find his exact address." Now that is another hurdle that we will have to face and another cautious part of this scheme.

Mr J.R. QUIGLEY: May I suggest it is not a cautious part of the scheme because clause 34(3) states —

> Subsection (2) does not permit the publication of anything that identifies or is capably of identifying —
> …

The name together with suburb, in the day of the internet, and I am not talking about Google, I am talking about the specific government databases that are maintained, would lead to the identification of an exact address.

Mr C.C. PORTER: It is a possibility. For instance, if we were able to look at the electoral roll online, we would have easy access to exact addresses; however, we cannot—I am pretty sure that we cannot.

Mr J.R. Quigley: What is that?

Mr C.C. PORTER: That we cannot look at the electoral roll online.

Mr J.R. Quigley: No; you just go into any AEC office and it is online; you can search it there.

Ms J.M. Freeman: You can search it if you go in; you cannot search it online.

Mr C.C. PORTER: There we go; and in those circumstances, the provision here is unless otherwise ordered by a court. If a court makes a determination that a person's exact address is likely to be easily found by virtue of a search as described by the member for Mindarie or by another description, the court has the ability to make an order otherwise that the suburb not be identified. However, the court would have to be convinced of that in open argument.

Mr J.R. QUIGLEY: I am not sure that that is the case, because clause 34(3) states that "Subsection (2) does not permit the publication of anything that … is capable of identifying" the exact address.

Mr C.C. PORTER: But again, that is up to the court to determine. The court can order publication inside that range of name, photograph, town, suburb and constraints at its discretion. If it is convinced that any or all of that information together or singularly will lead to the very quick and swift ability to find the exact address of a constrained person, the court can modify the terms of the order.

Mr J.R. QUIGLEY: But that is not a criteria in the legislation; that is, the ease or degree of difficulty in going to find the exact address. Clause 34(3) proposes to forbid the publication of anything that is capable of identifying—not easily identifying, but capable of identifying. A person could catch a bus to the AEC, walk in, punch in a name to the AEC roll and an address will come up.

Mr C.C. PORTER: I think what is meant by the word "capable" is a matter for a court to determine. The member quite rightly points out that the words "easily capable" or "swiftly capable" are not contained in the legislation. However, with any amount of searching, including illegal searching, someone's address can be found.

Mr J.R. Quigley: I am not talking about illegal searching, because that is against the law.

Mr C.C. PORTER: Indeed; but the word "capable" does not have infinite extendibility. However, the member has raised a fair point. This matter would have to be raised on a case-by-case basis with respect to the individual in question in each and every circumstance and the court has the discretion and the ability, which is why we have drafted the legislation in this way, to determine what of those things is to be published pursuant to the provisions of the bill.

Mr P. PAPALIA: I am referring to the same subparagraph. I am interested, based on the Attorney's answers earlier in the debate about the extent of the risk analysis undertaken whilst drafting this legislation and the

impact on juveniles in particular. I am interested to hear whether the Attorney considered these sorts of implications—the type referred to by the member for Mindarie.

Mr C.C. Porter: What are those—sorry?

Mr P. PAPALIA: The implications about how easy it is to identify someone's home address, for instance, in the environment in which we live. I am interested because the only evidence the Attorney has provided to date, apart from claiming it works in the United Kingdom—other people claim it does not work in the UK—is that contained in the *European Journal of Homelessness* and a reference to some individuals addicted to substances having benefited from being given a short, sharp prison sentence.

Mr C.C. Porter: You want research but criticise me every time I give you research!

Mr P. PAPALIA: I found that really funny; I found that an entertaining reference. However, just how much risk–benefit analysis was conducted in relation to juveniles? They are the only ones I cared about with regard to publication of identities.

Mr C.C. Porter: Before I stand and answer, when you say the implications of publishing juveniles' details, are you talking about physical implications in terms of whatever, or are you talking about stigmatising juveniles? What are you talking about?

Mr P. PAPALIA: As I indicated earlier, in the modern world—no doubt it will only get more pervasive as we progress into the future—we cannot assume that an instrument such as a prohibited behaviour order will disappear when it is removed from the website. The Attorney General said that he has considered that and has undertaken a significant process of risk analysis to determine that it is in the best interests of the community that these individuals' identities are published on the web, assuming of course that the Attorney thinks this legislation will be effective, for starters, and that this is the only way we can reduce this type of individual's offending and thereby have the benefit part of the cost equation to the community. I asked what that process entailed because the Attorney General has just announced today that he is abolishing a program that was designed to target juveniles of this nature —

Mr C.C. Porter: I am redirecting the funds.

Mr P. PAPALIA: I know, but as the Attorney General acknowledged, it is being redirected from a program that deals with these types of guys to the ones who are at risk and whom we are trying to divert from entering the system.

Mr C.C. Porter: The actual point was that the profile of the people who ended up going through the family intensive teams was not the profile that was expected; it was the people, generally speaking, who were going through the JJTs in any event. As to the point about it not being properly resourced, there was underspending in every year.

Mr P. PAPALIA: Without the benefit of seeing the independent report that the Attorney General has access to, I cannot really comment on that. However, I can say that that program targeted the individuals—effectively, the juveniles—to whom this legislation applies. We know that 30 per cent of the juveniles who go into detention subsequently go on to enter the adult system. We know that if the juveniles are Aboriginal, once they enter the adult system they will reoffend at a rate of 70 per cent. Therefore, I am asking: when the Attorney General did the risk–benefit analysis, did he take into account that lifetime of reoffending and consider that maybe the government is making it a bit more difficult for these individuals to change their life and achieve a more positive path?

Mr C.C. PORTER: The member asked me how seriously we analysed those issues. I take it that the member is talking about the issue of the effects of, for want of a better description, stigmatising. I listened to the comments, but so that I answer the member properly, I will go through the sorts of comments that have been made. One comment was —

> "Once on the internet there is no way of stopping the information being used to harass or stigmatise the person to prevent them from getting employment or an education.
>
> "This will turn petty teenage nuisances into tomorrow's hardened thugs.

I think that was one or another member opposite, but that is the sort of —

Mr P. Papalia: I said that the information is on there and it can be easily accessed by a future employer.

Mr C.C. PORTER: Sorry, I think that comment was made by the member for Mindarie in a press release. Hylton Quail said —

> Naming and shaming will not advance the rehabilitation of these young people and turn them into law-abiding citizens. They will be stigmatised and ostracised in their local communities, only increasing their identification with their immediate peer group.

Mr P. Papalia: In fairness to Hylton, he also said that there are two types; those ones and the other ones who will use it as a badge of honour.

Mr C.C. PORTER: That is right; I am aware of that other complaint about the system. I received a letter from the Commissioner for Children and Young People, who made this point —

> Some of the detrimental outcomes arising from 'naming and shaming' young people include:
>
> - a misuse of the concept of shaming
> - the potential for vigilante action
> - the possibility of interfering with rehabilitative efforts.

Of all the criticisms along this line, to do great credit to the Commissioner for Children and Young People, she was the only person who cited any kind of research to me establishing or supporting the claims that there would be a negative stigmatising effect from publication. The commissioner was the only one.

Mr J.R. Quigley: You don't need research to say water is wet; it's bleeding obvious!

Mr C.C. PORTER: What I am being asked specifically, member for Mindarie, is whether I looked at any research. That is what the member asked, is it not?

Mr P. Papalia: Yes. I want to know a bit about this risk–benefit analysis that you referred to.

Mr C.C. PORTER: I will go into that, but the Commissioner for Children and Young People cited an article by Chappell and Lincoln. Indeed, Professor Chappell gave information to the Standing Committee on Law and Justice in New South Wales. All of this goes back to a theory called labelling theory. The member asked me whether we have conducted a cost–benefit analysis. We have, but not of the type that is a multivariate empirical analysis, which has been conducted in some jurisdictions around the world. I will put to use some propositions about the claims that are made about stigmatising. We dealt briefly with the potential for vigilante action. As I said, there are safety mechanisms in the legislation that a court can order that publication not occur and that information can be ordered, in effect, to be taken down. The other comment that the Commissioner for Children and Young People made was about the possibility of interference with rehabilitative efforts. The member and I disagree on the target cohort of this legislation, but my proposition is that we are attempting to target people for whom extensive efforts at rehabilitation have failed so now another issue becomes paramount—namely, community safety. But to the extent that the Commissioner for Children and Young People actually cited academic research about this idea of stigmatising, it is worth assessing in at least some detail because it is part of the process that we went through in considering whether this legislation was a meritorious addition to the statute books. We did go across a great deal of academic literature that has a variety of views on whether there is any negative effect from stigmatisation or any empirical evidence of labelling theory and whether these types of elevated punishments, whether they apply to juveniles or adults, can actually work to, first, modify behaviour and, second, decrease rates of offending. Interestingly, the Chappell and Lincoln article that was cited by the commissioner does not actually contain any empirical research regarding the criminological impact of the publication of juveniles' identities, but it does refer to other research—an article by Sherman from 1993, and a 2002 book by Strang. As the member follows through, as we did in some detail, the academic history to the idea of labelling theory —

Mr P. PAPALIA: I would like to hear more from the Attorney General.

Mr C.C. PORTER: There is admittedly a variety of views about labelling theory. In Sherman's analysis, which goes back to 1993, he posited the theory, which I think is, if we like, Hylton Quail's badge of honour theory, that offenders react with defiance when they perceive that sanctions are stigmatising or unfair. This was a theory; it was not an empirical analysis by Sherman in 1993 but he, indeed, made this comment —

> Just because defiance fits these facts, however, it does not mean that the facts prove defiance theory… What goes inside the black box is a question still awaiting empirical data, at least in the realm of criminal sanctions.

Therefore, when labelling theory first picked up academic speed in the early 1990s, and previous to that, there were theories and no great deal of academic data. Strang is an Australian academic specialising in restorative justice and her 2002 book deals with victim's experiences; it simply does not deal with the issue of publication and its stigmatising effects—not at all. Therefore, it is a bit like, dare I say, when people look at an academic article and go back for a source and it quotes another academic article that does not actually provide the

information although it was asserted that it did. Chappell and Lincoln, who were the first academics I mentioned and who themselves referred to Sherman and Strang, reviewed the literature in 2009 and stated —

> But none of these provides direct evidence of the impacts, negative or otherwise, of the mass media naming of young people involved in criminal proceedings. Thus we are pursuing such a research agenda.

I do not know whether that research agenda ever came to fruition, but it is not available as far as I can see. Contrary to the labelling theory is the idea that there is a concept of general deterrence. There is strong evidence to suggest that juvenile crime is responsive to harsher sanctions. An article from the *Journal of Political Economy* in 1998 by a fellow called Levitt is a very detailed empirical analysis about how harsher penalties, based on a multivariate analysis, decreased juvenile crime in the areas that he was looking at.

Mr J.R. Quigley: We are not talking about a harsher penalty; we are talking about a civil order.

Mr C.C. PORTER: The breach of which can lead to a harsher penalty. That is why all this is relevant. The cost–benefit analysis that the member for Warnbro talked about is that the benefit based on a rational choice theory of human behaviour is that a person modifies his behaviour if there is the potential of harsher penalties. The other benefit is that if people do not modify their behaviour—we know that there is a cohort that causes a lot of damage to personal property—they are eventually incarcerated, whereas at the moment that is not occurring.

Mr P. Papalia interjected.

Mr C.C. PORTER: Let me go through this, because the member has asked me a fair question. Leaving aside those general deterrent studies, there are two other very excellent studies. One is a 2006 empirical study from the United States by Matsueda. That study is based on youth perceptions of risk and arrest and its effect on offending behaviour. It states —

> Our principal finding that criminal acts of violence and theft conform to a rational choice model may surprise sociologists sceptical of rational choice theories for being reductionist, for being relatively simple models laden with heavy assumptions, and for threatening to usurp the traditional domain of the discipline… Moreover, we find the legal institution, with its dispassionate threats of punitive sanctions, to be an intimate part of criminal decisions through youths' perceptions of the risk of sanction. Perceived risk, in turn, is formed in part by information gleaned from informal peer groups, as well as direct experience with the legal system.

There is another very good study by a number of authors, including Wright. That was an analysis of New Zealand–based data, and it uses a complex regression model, so it is multivariate. It regresses into all the data they received, coefficient to try to wash through the data the fact of someone having a criminal record on their choices. I am almost finished, so if someone could be generous —

Mr J.R. QUIGLEY: I would like to hear more from the Attorney General.

Mr C.C. PORTER: Using the models in that study of the New Zealand–based data, the author said —

> Such propensity theories need not and should not be taken to mean that those at high risk of criminal activity (because of the impulsivity) are incapable of foresight. Although they may, on average, be more present-orientated than most, all individuals discount future consequences to some extent, and all to some degree are responsive to situational contingencies. In fact, our findings suggest that for those most at risk of criminal conduct, such instrumental consideration may be the most influential factors in deciding both if and how to offend.
>
> …
>
> For public policy, our model gives optimism for policies that would deter criminal behavior by increasing its costs. These policies should have their greatest impact on those targeted by policy makers—potential criminals. Given that previous studies have commonly measured deterrent effects across the general population, thereby including many prosocial, less-responsive individuals, these studies may have underestimated the true deterrent effect of various policies among the criminally prone, and so deterrence policies actually might be more successful than currently thought.

I will give members a summary of all the literature that my office staff and I have come across. In the 1970s and 1980s, reaching its peak in the 1990s, with regard to the labelling theory, sociologists were highly involved in the criminology area and they posited the idea that general deterrence, notwithstanding the empirical evidence that existed at the time, was not a very good argument and that personal deterrence was not a very good argument, and that there were significant costs associated with stigmatisation. Subsequently, economists have become more greatly involved in criminological research and they have shown something quite different. When we go back to the labelling theory, I accept what the member for Mindarie said. Obviously, a cost is put upon the

individual who finds his details published, particularly a juvenile between the ages of 16 and 18, because those details would not otherwise be available. However, the research shows that patterns of behaviour can be changed by measures that increase the likelihood of a punitive sanction for a repeat offender or one who is prone to offend. Unfortunately, those analyses have not been undertaken in every jurisdiction. It would require an enormous amount of academic and econometric analysis in this jurisdiction. I have not done that analysis, but we have done a reasonable amount of analysis to work out whether there is a potential for these types of sanctions to have an effect on the behaviour of the cohort we are trying to identify. I will fairly state again for the people who raise the idea of stigmatising juveniles that although it is a matter of commonsense that there is a cost attached to a policy of this nature, there is no empirical or criminological analysis that gives any evidence about how that stigmatisation effect works or whether it even exists.

I will end, in fairness, by relaying one other very interesting study, which is probably the most sophisticated of the Australian studies in this area. It is by Don Weatherburn, Vignaendra and McGrath. In effect, that study considered the subsequent careers of juvenile offenders sentenced to detention in New South Wales. It again used a multivariant systems analysis. It had empirical evidence, it was regression based, and it used econometric coefficients and like-for-like comparisons. Interestingly, the result of the study suggests that in New South Wales, other things being equal, juveniles given custodial orders were not less likely to reoffend than juveniles who were given non-custodial orders. It found that the data was equivocal. They could not say that juveniles who were given custodial orders were either more or less likely to reoffend than another juvenile who, in exactly the same circumstance, did not get a non-custodial order and had all the rehabilitative matters —

Mr P. Papalia: I find it interesting the way you interpret that report compared with the way I would interpret that report.

Mr C.C. PORTER: I think I am giving a relatively fair summary of it.

Mr P. Papalia: What you just said is true, but how are you using that conclusion?

Mr C.C. PORTER: I am saying that there is a range of analyses, each of which show and measure slightly different things. However, on balance, a good survey of the criminological literature says that there is no major evidence for the idea that stigmatisation produces negative ongoing effects on recidivism and reoffending. There is good empirical and econometric evidence to suggest that even with juveniles and hardcore offenders, attitudes and behaviours can be changed, and that incapacitation has a community benefit.

Mr J.R. QUIGLEY: Although that was a very erudite and academic analysis, may I just add—I hope my son forgives me for this—an actual life experience of stigmatisation. I turn to a very well publicised incident in which my son, having just turned 18, attended Skyworks. He was not in any way affected by alcohol or any other substance. I know that because he was arrested and tested by the police. His circumstance was that he saw other young people from the college that he had attended being hit by some older people, and because he was a rower and had a misplaced sense of loyalty, he moved in and grappled with the larger older adults who were hassling the young lads. He was swept up by the police, and he and all the others were charged with being disorderly by fighting, not assault. Because my son's name is Quigley, he received massive publicity. The charges against every other youth and child who were there were withdrawn at the court because it was such a minor incident. However, because a politician's son was involved, the police prosecuted, although not to an offence, because the magistrate accepted that my son was not a bad person. I think the Attorney General has met him. He is a very conscientious and high-achieving law student. I would like to put on the record my life experience about the naming of my son as having been involved in a fight, which was not an assault. As a father, I saw it garner for him a reputation that he did not deserve, which caused other lads in the community to want to take him on. He was swept up because of this rather undeserved reputation. Because they saw him as a "rebel", two things followed: one, others wanted to attack him when he went out to social functions; two, others would goad him into acts to make him try to live up to a reputation that was a myth that had come from publication. I am not asking the Attorney General to be a character reference for Jack, but I know that he has met and interacted with him at a social function and would know that the cut of his jib is not that of a hoon. The ongoing consequences of this sort of publication for a young, conscientious man were devastating.

While we can go into criminological theories, as a parent I know the intensive work that I had to undertake, and I know the effort that Jack had to undertake to overcome the effects of the publication. I am not confident that in other families, perhaps where the father is not present and young lads do not have that presence, the publication of, especially children's names, will drastically interfere and impede with the correction of the child towards good behaviour. I must clarify that Jack was in the first few weeks of his adulthood at the time, but I saw the devastation of a young person who received heaps of publicity for disorderly conduct. I hasten to add that the charges were dropped against everyone else and he was alcohol-tested with a result of zero. But it was so devastating for his life and it took me a long while to help turn him around—as I said rather cryptically, turning him around to want to be a gun lawyer in the Australian Taxation Office means I probably turned him around a

bit far, but I say that light-heartedly. Leaving aside the academic discourse on the matter, that is my experience of parenthood and that is why I do sincerely —

Mr P. PAPALIA: I would like to hear a little more, just so the member can conclude his comments.

Mr J.R. QUIGLEY: I say this not as a matter of political ideology, not as a matter of academic discourse, but as a father still in the process of raising children, who saw the difficulty this publication caused for his son. I know that the publicity was due to my position as a member of this Parliament; it was not because of a prohibited behaviour order, and he would not have got a PBO because he would not have had a trigger offence.

For the type of people targeted by PBOs, publication of this nature can be such a backward step. I saw the document that the Attorney General tabled before, listing all of that person's offences; it went on for pages, and he ultimately ended up in prison in 2009. I cannot see how the naming of that person on the internet will help either society or parents and teachers turn that behaviour around. I have already accepted, in discourse and debate on this bill, that the need to beef up the ability to make some of the orders might justify some aspects of this bill. But the naming and shaming of children, despite the academic discourse, from the point of view of a parent is fraught with danger. That is the one point that I would like to make. I note that the Leader of the House is back and I do not know whether he wants to guillotine the debate.

Mr R.F. Johnson: I do not want to guillotine anything member, but we have other legislation that we need to get through before you go home tonight. The time that you waste will be added to the end of the sitting.

Mr C.C. PORTER: I thank the member for Mindarie and I understand the points he is making. I think that he has argued his opposition thoroughly and eloquently. I will make a couple of brief comments about the points that he has made. I clearly cannot win. I get pressed by the member for Warnbro for some form of empirical, academic or criminological analysis, I give it, and then I have to deal with commonsense and anecdote—I guess I have to deal with both. I appreciate the situation that the member has raised, but I think it is illustrative of a couple of things, and I say this without demeaning in any way the manner in which that kind of event impacts on a family and an individual. In that situation, or one like it, as I think that the member for Mindarie has fairly conceded, this bill will do nothing other than what can already be done. For every adult who goes into the criminal courts, the media or any other person can go down and report on every single thing that is said and done. They can take a person's photo as he leaves the court going to his car. All of that information is readily available forever, unless there is a specific reason why the court has determined that its proceedings would be in camera.

Mr J.R. Quigley: Except for infants.

Mr C.C. PORTER: Except for infants, but I will move onto that in a moment. That system unquestionably comes with costs to individuals at certain points in time. The other benefit is that a system of open justice where every citizen, including the media, can watch and report on everything that is said and done, is seen to be absolutely pivotal to maintaining confidence in the system and creating overarching outcomes. I appreciate that there are many harsh, singular effects of that system. This bill does nothing more, with respect to adults, than can already occur at the moment. I understand what the member for Mindarie is saying about juveniles. The level of publication that I am referring to is not presently available for juveniles. There are of course circumstances in the Children's Court of Western Australia Act where it is presently possible to publish with respect to juveniles. Without having the act open in front of me, if there is a case where somebody needs to be apprehended or there is community interest or —

Mr J.R. Quigley: Danger.

Mr C.C. PORTER: — danger or the justice system requires it. It has never been an absolute rule which was the point we were making with respect to international law. However, what we have said is that the types of people whom we are trying to target—members can accept or reject this but I say it in good faith—based on the way in which we have developed this system and based on what we know about the cautious and sensible nature of our courts, are serious repeat offenders.

We are not targeting the type of people referred to in examples such as the one that the member for Mindarie gave, but individuals, such as those in the examples that we have given, who have continually and repeatedly offended and after many, many offences have not received a term of imprisonment. They are people upon whom, I would argue, the negative effects of stigmatisation, labelling theory or whatever we want to call it will be more moderate, than they would be upon people who have had little or no contact with the criminal justice system. We are trying to target the cohort of serious and repeat offenders. There is a cost involved with having those offenders' names and the terms of their prohibited behaviour orders placed on the website even though they are only aged between 16 and 18. We think that that cost is worth the benefit of trying to achieve some improvement in the behaviour of this cohort and in the outcomes for the community. I will end by saying that I appreciate the

member for Mindarie's views; they are well and eloquently put. However, I also seek some form of concession that in drafting a system of publication, we have devised a cautious system of publication. Clause 34(4) states —

> A court making a PBO may, on its own initiative or on an application by a party to the PBO proceedings, order that all or any of the things referred to in subsection (2) must not be published if, in the opinion of the court, there are circumstances justifying the making of such an order.

Clause 34(5) states —

> In determining whether there are circumstances justifying an order being made under subsection (4) in relation to a PBO against a youth, the court must have regard to the wellbeing of the youth.

I would expect that there will be occasions where it would otherwise be the case that the court would publish, but an application made by defence counsel in the courts may be able to sustain the argument that the cost for this particular individual youth in these particular circumstances is too high; we have drafted legislation to specifically allow for that. To the extent that there is a general cost, it is a cost we are willing to bear.

Mr J.R. QUIGLEY: I would make that concession were it not for the way that clause 34(2) is drafted, which is that if it was permissible for a court and not the default position, I would then say it was more careful; in other words "a court may order the publication in appropriate circumstances" would be cautious, but in this bill the default position and the pressure on the court is to permit publication unless defence counsel can persuade the court otherwise. I am unable to make that concession in view of the way that clause 34(2) is drafted.

I wish to raise one other new point. I will not make the concession, because I do not believe that the default position permits me to do so.

Mr C.C. Porter: I disagree with you on the matter of drafting at least to this extent: that is a default position, but it is a default position that has been put into the legislation because the assumption is that the type of people we are trying to target are people who have had ongoing contact with the criminal justice system, and for whom the costs of publication will be lower than other individuals. But the discretion is pursuant to clause 34(4) at large.

Mr J.R. QUIGLEY: I am conscious of the time, and there was one other matter I wanted to put on the record. When the Attorney General talks about "the sort of people these orders are targeted at", my concern is that all the talk has been about young offenders and social irritants, but I am considering that now in light of the Criminal Code and other more serious offences. I want to hear something from the Attorney General this afternoon that will give guidance to the Director of Public Prosecutions and the police as to whether prohibited behaviour orders are going to be sought against serious offenders. I am now thinking of, for example, the Ponzi scheme frauds that happened recently in the member for Rockingham's electorate, whereby a series of section 409 frauds were committed and the people involved certainly have more than one trigger offence; there are hundreds of them. Another example is that, from time to time, teams come through from Sydney and sell roof restoration to old ladies and say they will restore their roofs, and they then spray on a bit of water-based paint and rip all these people off. Does the Attorney General have an expectation that the director will be seeking PBOs for these types of offences, so that all of the other elderly people in Perth—or any other naive investors in Perth, and other people who are targeted—will be able to go to the website and see that there are PBOs against those who are promoting Ponzi schemes and against any recalcitrant company executives who misbehave with respect to a company's accounts, thereby fooling investors—perhaps that is covered by the Australian Securities and Investments Commission. Certainly, there are offences I have heard no mention of so far, such as unlawful fishing. Under section 436 of the Criminal Code, unlawful fishing carries a penalty of two years' imprisonment or a $24 000 fine, yet people do it recurrently. The definition of an antisocial offence is, is it likely to cause distress, and I can tell the Attorney General that it causes a lot of people distress if foreign fishermen or other people come in and rape our reefs. I do not want to do it a disservice because of the hour, but there is a whole suite of offences that the community needs protection from, and I want to hear something from the Attorney General to say that he will be encouraging the director to put these white collar criminals up on the website so that we, the public, can be protected from them if that is the basis of the scheme.

Mr C.C. PORTER: I think in certain circumstances that will occur. The discretion of the police prosecutor, the prosecuting authority or the DPP will, as it should be under the act, be at large.

Mr J.R. Quigley: But they need direction from you.

Mr C.C. PORTER: They do not need direction from me, because the direction comes from the terms and provisions of the bill. We would look at the person, at his or her offence, at the number of offences he or she has committed, whether or not they are of the same or similar type over a period of time, and whether or not there is something that can effectively be gained in community protection by the types of orders available under the act. It is not impossible that in some of the circumstances raised by the member, the DPP might exercise its discretion to seek a PBO. The experience in the United Kingdom has been that there are a small minority of

more serious offences for which people have served a jail term and had a PBO issued against them, and they serve their PBO when they finish their jail term.

Mr J.R. Quigley: That is the scheme of this bill, isn't it?

Mr C.C. PORTER: Yes, that is possible under this bill. But they form something of a minority in the United Kingdom, and I imagine that that is because the prosecuting authorities consider that their resources and discretion are best directed at high-volume, lower-grade offences from which imprisonment and other punishments have not flowed. But, again, with respect to fishing, that is a possibility. I recall an order that was given in the United Kingdom against a builder who had repeatedly contravened the building code and regulations. They are possibilities, but they are very much in the minority of the scheme in the United Kingdom.

Ms M.M. QUIRK: There is another matter I wish to raise about clause 34. I think the Attorney General said there was no difference, effectively, between photographs being published on a website and media attending court and, for example, filming people on the way out. But with all due respect, I think there is one crucial difference. This website will feature a group of individuals, and I think that that, potentially, could cause some level of difficulty. Western Australia is a diverse community, and I think we have handled that diversity very well, but if we have a situation whereby we have, for example, a number of people wearing certain religious attire or with skin of a particular colour or who are from a particular racial group, there could be a real risk—if that is the preponderance of the people on the website—that that will cause some racial disquiet or vilification of that particular group, when, as the Attorney General knows, no particular group has any propensity towards criminal conduct. I think that is the major distinction between what the Attorney General said about going down and photographing an individual who has been found guilty in the court and having, for all time, the person's details published. I think the founder of Google said that once people are on the internet they are there for all time. Having a group of people, some of whom might share the same ethnic, racial or religious background, may lead to a tendency for vilification to occur, which is not a creative or positive contribution to the community cohesion that we enjoy.

The Attorney General may think that that is a bit bleeding heart and a bit out there, but I am certainly aware of an incident in my electorate in which, some years ago, there was a stabbing incident in Hyde Park for which the Scorpion Boys—a criminal gang predominantly of Vietnamese youth—were blamed. For about three months after that, while the police were investigating it, every Vietnamese boy of a certain age had his vehicle stopped and searched purely on the basis of some sort of racial stereotyping based on that criminal profile. I think there is a real difference in having a set of photographs on the internet to the example the Attorney General gave of having individual media covering a particular person.

Mr C.C. PORTER: I think again that is a fair point. It relates to the point that the member for Warnbro raised as to what this internet website will look like. All I can say is that I will be taking into consideration that very fair assessment of ways in which it can be presented to make it less likely to invoke unhelpful feelings in people, but that is a matter of the presentation. There are a number of ways in which it can be done. The presentation need not look like a photo-board presentation that is put in court, where everyone's face is side by side looking similar. I take the point, but I raise this other point: individual private groups already place on websites the names and what other identifying particulars, including photographs, that they can muster of offenders. In fact, there is one in respect of people who have offended by stealing from building sites. It is perfectly lawful to do that as things presently stand. That occurs already. I have never looked at that website.

Ms M.M. Quirk: That may be the case, but it should not necessarily be sanctioned by the state. We work very hard to have a cohesive community in this state, and we have for many years. It has been a bipartisan effort. Things like this are counterproductive.

Mr C.C. PORTER: I take the point that the member raises. I think that some of those problems can be somewhat alleviated by the presentation of the information on the website. I am certainly alive to the issue.

Clause put and passed.

Clause 35: Breach of PBO —

Mr J.R. QUIGLEY: Just to make it clear for everybody, where the Attorney General talks about there being a more severe punishment available after a PBO has been ordered against a person other than for a relatively minor substantive offence, all the other sentencing options under the Sentencing Act are available in sentencing under clause 35; that is, CRO, CBO, suspended sentence, and—what is it?—supervised suspended sentence.

Mr C.C. Porter: Suspended term of imprisonment with supervision.

Mr J.R. QUIGLEY: Yes, that one as well. All of those are still available, so there is no certainty that this is going to result in any further imprisonment. That was one of the criticisms of the United Kingdom model, was it

not? There was a sagging of public confidence in the whole system because people were coming up on PBOs and they were not going to jail anyway.

Mr C.C. PORTER: I can receive an amendment to make it mandatory imprisonment if the member would wish to move it!

Mr J.R. Quigley: I said at the outset that I would not be moving amendments, but I am just raising things.

Mr C.C. PORTER: I am obviously being facetious. The member is quite right: if a PBO is breached, all of the sentencing options are available. However, I would make a couple of comments about that. The first is that it was an early complaint about the ASBOs system that when they were breached the breaches were not being taken seriously. That was an early criticism and it remains a criticism. Of course, ASBOs, being purely civil orders, were able to be brought out without being preceded by a conviction but by a person with civil standing applying to restrain someone on the basis that the person had done things that may not even have represented a criminal offence or resulted in a criminal conviction.

Mr J.R. Quigley: Similar to our VROs.

Mr C.C. PORTER: Indeed. One of the complaints about VROs, as the member would be aware, is that the punishments are not condign enough when they are breached. However, I would hope very much, and it is certainly the intent of this legislation, that, as it is far more targeted than the UK system, a breach will be viewed as a very serious event. I would also add to that the point the member is making, which is that being sentenced for a breach of a PBO is basically the same as being sentenced for a head offence that might trigger the breach. That is true to some extent but not to a perfect extent, because there are many instances—shoplifting where the value is less than $1 000, disorderly behaviour in public, possession of a graffiti implement—where imprisonment simply is not a sentencing option. Someone could conceivably commit that offence 50, 60 or 100 times and never receive imprisonment, but if someone commits that offence and in the commission of the offence he breaches the terms of this order, then for the first time ever he will face the real prospect of a term of imprisonment.

Mr J.R. QUIGLEY: Suppose the constraint is to constrain him from doing something that was otherwise lawful—for example, entering Northbridge—and he enters Northbridge, not at night-time, the time of entertainment or when alcohol is served or whatever, and his substantive offences have been punching people at nightclubs or whatever. At 11 o'clock in the morning he is seen walking down James Street and not otherwise offending, but that is the breach. The Attorney General is not suggesting that imprisonment in those circumstances is a real option, is he?

Mr C.C. PORTER: If that is a person who has met all the other requirements of this legislation, then he is a person that the court will look very grimly upon should he breach the terms of a PBO that has been issued against him. I cannot predict in every circumstance what the court might do, but I would make this point: the efficacy of this system absolutely relies upon the courts taking very seriously the fact of a breach. Whether that breach involves criminal offending itself or whether it involves conduct that is otherwise lawful, in both circumstances the kernel of the seriousness stems from the fact that an order, which in our view is going to be quite hard to obtain, has been breached.

Ms M.M. QUIRK: I know the Attorney General has already answered this in the context of another clause, but I just wanted to talk a little about police resources for the breaches of these PBOs. The Attorney General would anticipate that it would be the police effectively bringing to book people who have breached PBOs. What additional resources will that entail? It would be true that the whole premise of this legislation is that a breach does need to occur before everything is brought into action. Therefore, effectively, this is not about preventing crime; this is enabling one more crime to be committed, for which the police will need to have resources to enforce the law before this legislation really kicks in.

Mr C.C. PORTER: Very quickly, there are two matters. The sentencing principles are set out in section 6 of the Sentencing Act. Subsection (4) states —

> A court must not impose a sentence of imprisonment on an offender unless it decides that —
>
> (a) the seriousness of the offence is such that only imprisonment can be justified; or
>
> (b) the protection of the community requires it.

Therefore, imprisonment is a last resort, and it should not be imposed unless the court decides that. One of those criteria, importantly, is that the protection of the community requires it. If I am right about this legislation, and it is targeting people who by their previous actions represent a clear threat to community safety, then we are talking about cohorts for whom that is likely to be enlivened at the sentencing for the breach.

Ms M.M. Quirk: By way of interjection, in fact one more offence has to be committed before it kicks in.

Mr C.C. PORTER: Not necessarily. What makes this extraordinary is that a person who had been given a PBO because of a recidivist history of graffiti offences need not have breached the order by the criminal offence of graffiti; he might have breached the order by being with someone —

Ms M.M. Quirk: I understand that, but people have to have an order in force. What I am saying is that that will be prospective, so before they will be back before the court on any matter—then, and only then, will PBOs be enforced. I know that sounds a bit obvious.

Mr C.C. PORTER: There has to be a catching of the person in an act, which need not be a criminal offence but might be any breach of the order —

Ms M.M. Quirk: That is once they have an order. I am saying that the imposition of orders will only occur prospectively, and, therefore, this cohort of hardcore offenders will effectively be offending, as it were, one more time before —

Mr C.C. PORTER: Yes, they will have to have their second trigger offence some time after the act comes to be proclaimed—absolutely.

Ms M.M. Quirk: You would anticipate that the way that a person will be brought before the court for a PBO application would be for something the police had done by effectively enforcing the PBO or supervising that person in some way or another.

Mr C.C. PORTER: Indeed. If I am right again about the cohort of offenders that we are trying to target, police regularly rub up against them, if I can put it that way.

Ms M.M. Quirk: The police have advised you, as you said earlier, that they do not require any additional resources at this stage to enforce this.

Mr C.C. PORTER: They have not yet asked for those resources. It may well be that they ask in future but they have not yet.

Clause put and passed.

Clauses 36 to 47 put and passed.

Clause 48: Section 73 amended —

Ms M.M. QUIRK: This clause seeks to amend the Criminal Investigation (Identifying People) Act by inserting after section 73(1)(m) —

> (na) for the purposes of the *Prohibited Behaviour Orders Act 2010* section 34;

As I understand it, this provision relates to the use of DNA. I understand that it will not permit the taking of DNA per se on the breach of a PBO, but it will permit the use of DNA already taken.

Mr C.C. PORTER: No. This was a lesson that was learnt from some legislation created for railways and the Public Transport Authority. All it seeks to do is allow the use of a police mug shot, for want of a better term—an arrest photograph—on the website once it has been requested. It does not have application to DNA. There is no ability for us to use DNA under a PBO.

Clause put and passed.

Clauses 49 and 50 put and passed.

Title put and passed.