CRIMINAL ORGANISATIONS CONTROL BILL 2011

Second Reading

Resumed from 23 November 2011.

MR J.R. QUIGLEY (Mindarie) [3.27 pm]: I rise as the lead speaker for the opposition to speak on the Criminal Organisations Control Bill 2011. At the outset I indicate to the chamber that the opposition supports the objects of this legislation. The objects of this legislation, as the Attorney is well aware, are set out in clauses 4 and 6 of the bill. The purposes of the bill as stated in clause 4(1) are —

> (a) to disrupt … the activities of organisations involved in serious criminal activity, their members and associates so as to reduce their capacity to carry out activities that may facilitate serious criminal activity; and
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> (b) to protect members of the public from violence associated with those organisations and other persons who engage in serious criminal activity.

The opposition supports that objective 100 per cent. Indeed, that objective was largely lifted from the legislation coming from South Australia and New South Wales that preceded this bill. The second part of the bill I will read from lists the purposes of declaring some organisations criminal organisations, and those are found in clause 6. It states —

> (1) The purpose of a declaration that an organisation is a criminal organisation is to enable control orders to be made to disrupt and restrict the activities of members and former members of the organisation and certain other persons.
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> (2) A declaration also makes it an offence for anyone to recruit persons to become members of the organisation.

We the opposition agree 100 per cent with the objects of the declaration and control orders as set out in the bill. In its wording this bill, especially in parts 1 to 9, first finds its genesis in legislation coming from South Australia, which was struck down by the High Court of Australia for being unconstitutional; and then in legislation coming out of New South Wales, which it closely replicates, which was struck down by the High Court of Australia for being unconstitutional. The Attorney General said in his second reading speech and publicly that the government has learnt from the High Court's judgements and has drafted this legislation making it beyond successful challenge in the High Court. The opposition disputes this, and because we want to see this sort of legislation enacted in Western Australia without further delay, we want to see not just any legislation enacted; we want to see robust legislation enacted that will be beyond successful challenge in the High Court. Therefore, whilst not wanting in this chamber to embark upon a speech that is so legalistic that it would be more deserving of presentation in a court, it nonetheless requires examination as to why the legislation was struck down in other states and why we say this legislation, for a different reason, is susceptible to serious challenge.

The reason that it was struck down in other states is that the process of making a declaration that an organisation is a criminal organisation is not a judicial process; it is an administrative process performed by an administrator for and on behalf of the executive branch of government. That is beyond dispute. Indeed, the legislation provides that the person who can make that declaration will be a designated person who will be a judge—that is, a current judge of the Supreme Court or a retired judge. I will leave retired judges out of it for the moment because the legislation will be tested not upon its best outcome but on what the legislation permits, and it does provide for a current judge to make the declaration. The judge—to introduce the chamber to a neat legal almost-fiction or contortion, if we like, that must be addressed because it is mentioned in the legislation—will not make the declaration in his judicial capacity; he will make it in what is called persona designata. That is, from his breast he makes it as a person; he does not make it in the execution of a function of his office as a judge. I think as long ago as the late 1950s, Sir Owen Dixon referred to persona designata as pointing to the person as being identified as a member of a class rather than having the person selected to exercise a function of his office. Some of the judges have said that, to the public, this almost seems like a mediaeval schoolboy language or device. In Wainohu v New South Wales [2011] HCA 24, the Chief Justice said that the mere provision in legislation that the person is acting persona designata is not determinative of the question as to whether or not in that capacity he could impair the institutional integrity of the court upon which bench he sits. One has to examine what connection there is between the judge who is acting persona designata and any other curial function before that court. In this particular legislation, and as the High Court noted in both the New South Wales and South Australian legislation, the nexus is very close and in this bill, it is closer than it was in either New South Wales or South Australia for the following reasons. First of all, we can look at physically. Judges have been appointed to act persona designata in royal commissions, but often they will be sitting elsewhere than the Supreme Court

itself, in another building. The public can see that although he is a judge, he is not sitting as part of the function of his court; he is sitting in another building, with different staff, and deriving his authority under different legislation. In this bill, there is provision for the Supreme Court to make rules in relation to these applications, and especially in relation to control orders, and the declaration is likely to be heard and determined—it has to be filed and in writing, and we will go through that in consideration in detail—in the Supreme Court building. So Mr Justice X will enter a hearing room to hear and determine an application made by the Commissioner of Police. He will have his same staff in the same building, the same record of proceedings and the same microphones—the whole lot—but it is almost as though he has his fingers crossed behind his back, because no-one else in Perth will know, except the Attorney General, really well informed counsel and members of this chamber now because we are discussing it, that he will not be acting as a judge; he will be acting persona designata.

In the case of Kable (1996) HCA 47, Mr Justice McHugh said that a judge who is conferred a power persona designata and who proceeds to act like that, even though he is not exercising a judicial function, may nonetheless be acting in a way that impairs the institutional integrity of the court upon which he sits. In Totani's case—State of South Australia v Totani & Anor (2010) HCA 39—the High Court was presented with this scenario. The Attorney-General made the declaration in South Australia—it was then Hon Michael Atkinson, MLA—after considering the police application, and then a control order was applied for in the Supreme Court. The provisions of that legislation said that if it could be proved that the respondent was a member of the organisation that the Attorney-General had already declared, the Supreme Court must—"must", a word of compulsion—make the control order. The High Court said that this enacts the Kable principle in that a member of the court acting in that capacity, but acting persona designata, or, in that case, the Attorney-General, could impair the institutional integrity of the court, because the public might think the court is a rubber stamp of the executive. The Attorney-General appeared through counsel in that case, and his argument on that occasion was that this was not unconstitutional because the executive in any event could make a control order. It took the High Court, I think, one sentence to despatch that argument that was advanced through the Attorney-General's counsel, Mr Mitchell, SC, because how could it be, because the executive theoretically claims the power to make a control order, that somehow that makes what is unconstitutional—that is, impairment of the institutional integrity of the Supreme Court of South Australia—constitutional?

In New South Wales, they then said, "Okay; we'll fix that." So when they drew the Crimes (Criminal Organisations Control) Act 2009, they went about it differently in New South Wales. They said, "Okay; as the Attorney General has done in Western Australia, we will specifically legislate that neither the Attorney General nor any member of the executive have anything to do with it. So we'll take the executive out of it so that the court can't be seen to be a rubber stamp of the executive. That's the first thing we'll do." They said that they would give this function to—they did not use the word "designated", but it is as though they did—designated judges of the Supreme Court. There are 38 judges of the Supreme Court in New South Wales. From my recollection, 30 of them accepted the nomination to be eligible, and eight declined. The matter then went before one of them, the Chief Judge at Common Law in the Supreme Court of New South Wales, the Honourable Mr Justice Peter McClellan, who was in the process of hearing an application that the Hells Angels Motorcycle Club be declared a criminal organisation. One would have thought that would speak for itself. The legislation was then challenged before the High Court on a number of grounds by the president of the Hells Angels Motorcycle Club of New South Wales, Mr Wainohu. One ground was that the hearing was to be partly in secret. Justice McClellan would not, therefore, have knowledge of what was happening in secret; he would hear what was described as "police intelligence" in secret. There is a similar provision in this legislation. It would also involve a breach of an implied freedom of speech, which we have heard bikie groups bemoan on the curtilages of this Parliament. This legislation curtails their freedom of speech. This was another ground for Wainohu's challenge.

I just referred to bikie clubs, or outlaw motorcycle gangs, but the legislation nowhere refers, as the Attorney General would confirm, to a bikie or an outlaw motorcycle gang, but, rather, refers to criminal organisations. To anyone who came to the curtilages of this Parliament, such as members of an outlaw motorcycle gang, and said, "This legislation refers to us", I would simply say, "If the helmet fits, wear it." They would be seen to almost make a concession for the purposes of a declaration application. That is the basis upon which the challenge went before the High Court. However, it is not the basis upon which the High Court struck down the New South Wales legislation. I do not know whether there is a lead judgement as such, but the judgement to which the Chief Justice referred—the judgement of Justices Gummow, Hayne, Crennan and Bell—stated, "We reject that this sort of legislation offends an implied freedom of speech or freedom of political expression. We reject that in its totality." They also rejected the notion that to take part in the evidence in secret by a designated judge would reflect badly upon the court itself, even though he or she is sitting persona designata. They rejected that because of the Gypsy Jokers case—Gypsy Jokers Motorcycle Club

Incorporated v Commissioner of Police [2008] HCA 4. The facts in that case involved a fortification notice being served upon the Gypsy Jokers Motorcycle Club Incorporated. The matter was heard and determined by the Corruption and Crime Commission of Western Australia. The Gypsy Jokers sought a review of the removal of fortification order to the Supreme Court under section 76 of that legislation, and the Supreme Court then proceeded to hear and determine it. The Gypsy Jokers sought to force production of the secret police intelligence. The High Court said, "No; this is like public interest immunity. It will destroy the police investigation if they have to release that in public." The High Court also said that not only does it not have to release the police intelligence, it also does not have to refer to it in the reasons that the court must publish. Not only does the High Court not have to refer to it, but also it is specifically prohibited from referring to it by the terms of the legislation that deals with anti-fortification notices, as it is by the Criminal Organisations Control Bill 2011 as presented to this Legislative Assembly by the Attorney General. The legislation contains a prohibition on the publication or release of anything that could be properly classed as police intelligence. The High Court said no on the basis of offending an implied freedom of speech or political right, and said no to the appellants and that the legislation is not invalid because elements of the case would be heard in secret and not referred to in the judge's decision.

But the reason we are going to strike it down is that this bill contains a specific provision that states that the designated judge will not give reasons. The High Court of Australia has said that when a judge is acting—even though he is acting persona designata—he is making a decision as an administrator and is specifically bound by the terms of the legislation from giving reasons for making the declaration, and at the same time he is a member of the court. This will reflect upon the institutional integrity of the court, and on that ground, and that ground alone, it is invalid.

When will legislation be regarded as impinging upon the institutional integrity of the Supreme Court of Western Australia, which is part of a national court structure in which is reposed federal jurisdiction? The government says, "We are going to protect the institutional integrity of a court that holds federal jurisdiction." When will these circumstances arise? Justice Gummow was cited by the Chief Justice French and Justice Kiefel, in the judgment in Wainohu's case, to answer that question. Chief Justice French stated —

> As Gummow J said in *Fardon v Attorney-General (Qld)*
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> > "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."

I have some sympathy with the Attorney General in drawing the legislation, because the High Court is stating, by this passage, that it cannot prescriptively state the minimum requirements to get across the line in a situation like this because —

> … the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes.

The Attorney General says that he has studied the decisions that have gone before in drawing this legislation, and so he warrants to this chamber that the legislation is bulletproof.

Mr C.C. Porter: I have never said bulletproof.

Mr J.R. QUIGLEY: Well, is constitutional.

Mr C.C. Porter: I think it should withstand —

Mr J.R. QUIGLEY: "Bulletproof" is my word, but the Attorney General has said, "We've done the hard yards; we have it right." We say as the opposition that we agree with nine-tenths of this legislation—we agree, in essence, with part 1 through to part 9. It is not that we ideologically oppose part 10, but for the reasons I will set out now, we say that part 10 raises new issues that may well render this legislation invalid. The New South Wales legislation that was struck down by the High Court, which I am holding in my hand for members, comprises 40 sections. In essence, that legislation does the same as parts 1 to 9 of this bill; that is, to provide a scheme for declaring groups to be a criminal organisation; to provide a scheme for control orders; and to provide a scheme by which these matters are heard and determined by a designated judge sitting persona designata. It failed, as I said, because the legislation, as Mr Justice Hayne, I think, said, was anti-ethical in the sense that judges normally in the resolution of controversy give reasons for their resolution; this legislation was anti-ethical in the sense that it prohibited a Supreme Court judge, even though acting in persona designata, from giving any reasons. That was all set out in the larger judgement by Justices Gummow, Hayne, Crennan and Bell. Although the High Court does not give advisory opinions on legislation, it did proffer advices to Attorneys General around Australia who may be minded to introduce this legislation. This is as close as I have seen in recent times to an advisory judgement by the justices of the High Court, when in the third-last paragraph of the judgement, and I am reading from the internet printout and not from the report —

Mr C.C. Porter: Aren't we all?

Mr J.R. QUIGLEY: — so I cannot refer to the page number in the High Court report —

Mr C.C. Porter: Do you have the paragraph?

Mr J.R. QUIGLEY: Paragraph 70 states —

> The provisions of Pt 2 whose validity is directly affected by these conclusions are s 9, relating to the making of declarations, and s 13, … to the conduct of hearings of applications for declarations. The vice of s 13(2) in relation to the provision of reasons is not to be assessed in isolation from the other provisions of Pt 2 to which attention has been directed. No question of severance arises.

Here is the advisory opinion —

> Nevertheless, the problem to which s 13 gives rise may, as suggested in the reasons of Gummow, Hayne, Crennan and Bell JJ, be overcome by the imposition of an obligation on an eligible judge to provide reasons for the decision to make or refuse to make a declaration, or to revoke a declaration.

That is advice given by the High Court that the very reason it is striking down the New South Wales legislation as unconstitutional can be overcome by this measure. If the Attorney General had then proceeded to bring into the Western Australian Parliament something very similar to the New South Wales legislation sans the prohibition in section 13 against giving decisions, he would have brought before this Parliament bulletproof legislation. That is because the High Court had examined it and had ticked off or struck down all of these objections about it being against freedom of speech or against political rights; that has all been dispensed with, as has any prohibition or any offence to natural justice or whatever by having genuine police intelligence heard in camera and not referred to in decisions. That was all dispensed with as long ago as the Gypsy Jokers case. But the Attorney General, or the Western Australian government, has gone someway further in part 10 of the Western Australian legislation, and the question will then arise: does this impugn the institutional integrity of the court? We think it does. If we go to part 10 of the legislation, it provides, amongst other things, an amendment to the Criminal Code by providing a chapter XXVI headed "Facilitating activities of criminal organisations". It inserts into the Criminal Code a number of new sections. Relevantly, it inserts new section 221E, which provides —

> (1) A person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence, by act or omission, participates in or contributes to any activity of the criminal organisation is guilty of a crime, and is liable to imprisonment for 5 years.
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> …
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> (2) For the purposes of subsection (1), facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

So it is a fairly low bar on facilitation. It continues —

> (3) In a prosecution for an offence under subsection (1), it is not necessary to prove that —
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> (a) the criminal organisation actually facilitated or committed an indictable offence; or
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> (b) the participation or contribution of the accused actually enhanced the ability of the criminal organisation to facilitate or commit an indictable offence; or
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> (c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organisation; or

He does not even have to know the nature of the offence. It continues —

> (d) the accused knew the identity of any of the persons who are members of the criminal organisation.

The new section says that the prosecution does not have to prove all of that. However, the prosecution has to prove that the body the accused was assisting was a criminal organisation. What is a criminal organisation? That is defined in new section 221D of new chapter XXVIA of the Criminal Code, which provides —

> (1) For the purposes of this Chapter, an entity is a ***criminal organisation*** if —
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> (a) the entity is a declared criminal organisation; or
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> (b) all of the following apply to the entity —
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> (i) the entity is an organisation;
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> (ii) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;

(iii) the organisation represents a risk to public safety and order in this State.

Therefore, in the prosecution of an offender upon indictment, the prosecutor is able to lead evidence before the judge and jury to prove that the body the accused was assisting was a criminal organisation by proving the following: that the entity is an organisation, that its members associate for planning crime and that the organisation represents a risk to public safety.

Bear in mind—I am sure the Attorney General will agree—that the offence is committed by a person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence, participates in or contributes to the activity of the organisation. One of the elements of the offence to be proved is that the entity the accused was assisting was a criminal organisation. The prosecution must prove that beyond a reasonable doubt. I do not think there would be any controversy between the Attorney General and me on that point. So, the prosecutor starts to lead the evidence about the entity being an organisation whose members associate for the purpose of supporting or engaging in serious criminal activity, or the organisation represents a risk to public safety in this state. What happens if at the end of leading all that evidence, a witness does not come up to proof? I am sure the Attorney General has heard that phrase around the office, if not in his years of personal experience as a prosecutor. What happens if a witness does not come up to proof and not all the evidence the prosecutor was anticipating is delivered by the witness to the court? This all has to be done in accordance with the rules of evidence, so the judge says, in the absence of the jury, "Look, whilst I see that there is evidence here strongly suggesting that the entity is a criminal organisation, Mr Prosecutor, you do not have any evidence upon which a properly instructed jury could convict. You've fallen short on this occasion, so I am directing the jury to acquit." The prosecutor says, "Well, I can't take the matter any further; I've put all available evidence before the honourable court", and the judge says, "I acquit". He brings the jury back in and says, "I direct a verdict of acquittal because there is no evidence upon which a properly instructed jury could find the first element of the offence proven beyond reasonable doubt."

The Commissioner of Police says, "Well, I've learnt a thing or two here—the evidence isn't good enough to prosecute him on indictment for this serious crime", so the commissioner then, upon the advice of the prosecutor, adopts a separate route to prosecute the next one. He goes to the Supreme Court and files an application for the same organisation to be declared a criminal organisation. A brother judge, if not the same judge—there is no prohibition on it being the same judge—sitting persona designata, hearing exactly the same evidence, then makes the declaration and publishes his reasons, as is required by the legislation.

The Attorney General, in the course of consideration in detail, will confirm no more than what is in the legislation; that is, that the declared judge can receive just about anything into evidence. It does not have to follow the rules of evidence; the judge can receive anything that suggests that the entity is a criminal organisation, including hearsay, police intelligence, whatever. If the judge is satisfied that, on the balance of probabilities, the entity is a criminal organisation, he will say, "I'm satisfied that it's a criminal organisation; I'll make the declaration."

Then they prosecute the next member and go back before the court and draw the same trial judge. This time, to prove the first element of the offence, the prosecutor says, "We learnt last time that our evidence doesn't establish a case that can be proven beyond reasonable doubt for a criminal organisation, so we won't make the same mistake this time. We'll just hand up the bit of paper to his honour"; that is, the same judge. His honour cannot challenge that bit of paper or look behind it; that first element is proven beyond reasonable doubt in the second trial on the presentation of the declaration and the notification that has been duly gazetted in the *Government Gazette*. This certainly could impugn the institutional integrity of the court. We would have a system under which, because the prosecution cannot prove beyond reasonable doubt an element of the offence, they go to a brother judge and get him to sign off, to his satisfaction, and take that declaration in and prove it under proposed section 221D(1)(a). This is a different proposition than was ever raised in the Wainohu and Totani cases; this is new ground. The High Court says that one must look at the nexus between the function performed by the judge persona designata, and functions of the court.

Attorney General, if I could breach a little confidence, I said that we will show that in the Western Australian legislation the nexus is even closer than in South Australia or New South Wales because it has been established in those jurisdictions that the nexus is a precursor to a control order, but there is still a discretion to be exercised by the court on an application for a control order. In fact, that is true of New South Wales but not South Australia, because New South Wales remedied that compulsion. In Western Australia, an element of a criminal offence is being proven before a Supreme Court judge, acting persona designata, not being constrained by any rule of evidence and issuing the declaration merely if he is satisfied. In a criminal trial, an element of the offence is proven in that way. I go back to Fardon's case, as referred to by His Honour Chief Justice French and Justice Kiefel. At paragraph 30 of their judgement, they cite Mr Justice Gummow in Fardon v Attorney-General.

Mr C.C. Porter: Is this Wainohu or Totani?

Mr J.R. QUIGLEY: The passage by Mr Justice Gummow in Fardon's case was cited at paragraph 30 of Wainohu. He said —

> … the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes.

I do not think that any of the judges would have anticipated that the declaration has far greater consequences than in New South Wales, where it was struck down on the basis that no reasons were given. The declaration itself, once made, can constitute an element of the offence that needs to be proven beyond reasonable doubt under proposed section 221E. This is wide open to constitutional challenge. In like manner, provisions in this bill amend the Sentencing Act. Specifically, I am now referring to clause 181 of the bill before the chamber, which includes amendments to the Sentencing Act. The clause refers to mandatory minimum sentences when declared criminal organisations are involved. If a member of a criminal organisation commits a relevant indictable offence at the direction of a criminal organisation, or in association with one or more members of a criminal organisation, or for the benefit of a declared criminal organisation, statutory minimum penalties are set out. If the statutory penalty includes life imprisonment, there must be a mandatory minimum of 15 years' imprisonment—the court has no discretion. If the statutory penalty includes a period of imprisonment but not life, 75 per cent of the penalty must be a mandated statutory minimum. We are talking about a declared criminal organisation. The bill goes on to state that if the statutory penalty for the offence—it could be an offence under the Criminal Code or elsewhere—does not include imprisonment, but involves only a fine, the mandatory minimum will be two years even though imprisonment was not provided for.

I do not want to be misunderstood by the Attorney General, and I certainly hope that I am not misunderstood by the media—and there is more chance of the latter than the former. We are not saying as a matter of ideology that these offences committed by members of criminal organisations at the direction of criminal organisations or for the benefit of criminal organisations should not attract that mandatory minimum term. Our objection is not on that basis, Mr Attorney. The basis of our concern or objection is that what enlivens these heavy statutory mandatory minimum terms is a declaration made before another judge of the court on suspicion or suggestion. Ordinarily—I do not think there will be any dispute between the Attorney General and me on this—if an aggravating circumstance in a count on the indictment is pleaded, such as that the victim was a child under the age of 16, there has to be formal proof that the victim was under the age of 16 and that the accused knew beyond a reasonable doubt that the victim was under the age of 16. Ordinarily, an aggravating circumstance requires formal proof. But under this scheme, the aggravating circumstances do not require formal proof. They merely require the certification by a brother judge, who is acting persona designata, to sign off, on suggestion, hearsay or suspicion, that it is a declared organisation, and then the mandatory provisions of this bill are enlivened.

The Attorney General I am sure would say that is beyond dispute. What is the bottom line, then? It is our belief that part 10 of the bill, in the first instance proposed section 221E, requires the court to accept, as formal proof of an element of a serious indictable offence, a declaration made by a judge, hearing secret evidence, and arriving at satisfaction, perhaps on the balance of probabilities—it must be on the balance of probabilities, but just being satisfied—that it is a criminal organisation, and then splicing that into a criminal trial as formal proof of an element of the offence. This goes way beyond what every other jurisdiction has tried.

Mr C.C. Porter: What is the constitutional principle that you say that mechanism offends against? How is that any different from the control order?

Mr J.R. QUIGLEY: It is different from the control order.

Mr C.C. Porter: How?

Mr J.R. QUIGLEY: Because the judge hearing and determining the control order still has, as the High Court identified in Wainohu, a discretion to exercise.

Mr C.C. Porter: Which is to determine whether or not a person is a member or has done this or that. But a judge in a criminal trial would have a discretion to exercise as to whether or not the person is guilty of the offence, which is what the mandatory penalty applies to.

Mr J.R. QUIGLEY: Hang on. No, no, no. As to the element of the offence—the first element of the offence—there is no discretion. He has to instruct the jury that that element must be proved beyond a reasonable doubt.

Mr C.C. Porter: Executives deem elements of offences all the time. You know that.

Mr J.R. QUIGLEY: They do; and I will come to that in a moment, and I am glad the Attorney has taken me to that, with 14 minutes on the clock. The executive does that. But judges of the Supreme Court do not do that. What is happening here is that a judge of the Supreme Court will exercise that function, with his fingers crossed

and saying, "Persona designata", and with the Chief Justice of the High Court saying, "Hang on; just because you include 'persona designata', that is not determinative of the question as to whether the public at large might see the institutional integrity of the court, or this court—that is, the High Court—might see the institutional integrity of the court, in some way impugned." The answer is not that difficult, we say. The answer is that we take it away from the Supreme Court, we take it away from sitting justices, and we give it to the Corruption and Crime Commission. The CCC does exercise that function as a branch of the executive. The CCC is, if can use the colloquial language, bulletproof, because under the anti-fortification laws, the application is made to the CCC. The CCC has to listen to police intelligence, keep that police intelligence close to its breast, and give reasons for making the anti-fortification laws, without revealing that police intelligence.

The opposition's amendments will relate principally to the early sections of the legislation and say that we should not go down this path; that is, in view of part 10, we should not be walking down this path of having the person making the declaration a sitting justice of the Supreme Court, which is the court that will hear a criminal trial in which this will be one of the elements of the offence. If in the early process, the application for a declaration and the declaration were made in the same way as an application for the removal of fortification, which is made to another branch of the executive or the Corruption and Crime Commission performing an executive function, it is beyond constitutional challenge. It would be beyond what concerns Mr Justice Gummow in Fardon's case and beyond having to worry about predicting the critical notions of repugnancy and incompatibility that are insusceptible of further definition in terms which necessarily dictate future outcomes.

Another reason we in the opposition say that it should go to the CCC is that the Premier of Western Australia wants the CCC to become more actively involved in the fight against organised crime. For example, in Wainohu, the task before Mr Justice P. McClellan in the Supreme Court was massive. As stated in the judgement of Chief Justice French and Justice Kiefel, no fewer than 35 lever-arch files were appended to the Commissioner of Police's statutory declaration on the application. Additionally, I see from the transcript of the hearing before the High Court, that Mr Robinson, SC—he has been appointed Mr Attorney since Wainohu was argued—identified that there were a further 61 compact discs, which held the recordings of telephone intercepts. If members understand that one CD can hold 90 minutes, then 61 CDs hold perhaps 100 hours that will require listening to, because the person who is making the declaration has to first determine whether it is properly classified as police intelligence, otherwise the respondent is entitled to it. The task before Mr Justice McClellan in the Supreme Court of New South Wales was massive; and the application for a declaration before any Supreme Court judge is likely to be massive. I also read in the judgement that in New South Wales there are 18 known bikie groups. I do not know whether that holds true for Western Australia—the Attorney General would be privy to that, I am not—but there would be over a dozen by my reckoning. If we are going to declare all of those applications—not for organised criminal groups, but just for bikie groups—this could occupy two or three years, collectively, of judicial time. As the court said, the first thing that the judge has to do is determine whether all the materials before him, which the Commissioner of Police claims are police intelligence and therefore should not be revealed to the respondent, are in fact properly claimed to be police intelligence. So he has a pretty big task, besides making the declaration.

We in the opposition say that this is the sort of task that the CCC is perfectly suited for because not only does the Corruption and Crime Commissioner sit in the hearing by himself listening to all this, but also he has almost unlimited resources to crime analysts who can sit with him, advise him and assist him in a way that an associate might advise or assist a justice in a different sort of way to prepare judgements et cetera. This could very usefully occupy the CCC's time in the fight against organised crime and would also entirely meet the objection that this function, in making this declaration, is in some way impugning the integrity of the Supreme Court because it would not be a member of the Supreme Court who is making the declaration. Just as the Attorney General helpfully interjected upon me, from time to time the executive does deem an element to be proven, but it will be beyond constitutional challenge. The opposition's amendments will be to the early part of the legislation. They conclude at proposed section 27 and there are not a lot of them. They will provide that the designated authority is the Corruption and Crime Commissioner. The person who makes an application is not the Commissioner of Police or the CCC; it is the Commissioner of Police applying to the CCC for the declaration.

Mr C.C. Porter: I see what you're saying, but would you not also consider that the problem in Totani, the first problem that the High Court identified, was that the decision-making body with respect to the declaration was the executive? It was that fact that infected the otherwise judicial function of the Magistrates Court. By having the CCC, whom you've nominated as a member of the executive, become the declaratory organisation, haven't you just gone back to the original problem in Totani?

Mr J.R. QUIGLEY: With respect, no. There are cumulative factors. In Totani, the executive made the declaration but having made the declaration, there was compulsion upon the judge to make the control order at

the behest of the executive. There was not discretion at that stage if the person could be shown to be a member of the organisation.

Mr C.C. Porter: I think what Totani said was that there was some discretion but not enough having regard to the fact that the instruction apropos declaration came from the executive.

Mr J.R. QUIGLEY: It was the compulsive word "must" in the South Australian legislation that really pushed it over the line. I am sure the Attorney would agree that a judge acting persona designata is exercising an administrative function.

Mr C.C. Porter: But what does that even mean? Where in Totani or Wainohu do they use the term "administrative function"?

Mr J.R. QUIGLEY: They did. They said they were not exercising a judicial function. The Chief Justice in Wainohu went so far as to say—at that stage he only postulated—that the judge might even come under the jurisdiction of the Public Service Commissioner because he is doing an executive function, not a judicial function. He went so far as to say that under the Ombudsman's obligation of review, the Ombudsman quite properly sent investigators down to Mr Justice McClellan's chambers to listen to it all and to audit it all. I do not know that the Western Australian judges appreciated that but they will almost necessarily have investigators from the Ombudsman's office looking over their shoulder to conduct their review. We say that by taking the function away from a sitting Supreme Court judge, we have inoculated the court from the proposition that its integrity is impugned by one of its brothers sitting down there in camera making the declaration that is subsequently used in a criminal proceeding.

If part 10 of the act were not there—it is not in the Queensland act, but the Queensland act has not yet been challenged because no declaration has been made; that is the only one that is surviving at this stage—that which I am now advancing would not have substance. Given that the connection between the proving of the element of the offence is being performed by a sitting Supreme Court judge or that the heavy mandatory sentencing provisions are being enlivened by a Supreme Court judge sitting persona designata—that is an administrative function on behalf of the executive—I find it hard to accept that special leave would not be granted to examine that proposition.

All the other matters that people and applicants have raised in public debate have been resolved by the High Court, but part 10, we say, is a bridge too far. It gets a great headline, although I am not saying the Attorney General introduced it for that reason. It creates great headlines—"Mandatory sentencing for organised crime groups" and "Jail for assisting organised crime groups"—but when we look at the way that that is effected, it is open to constitutional challenge, which we say is problematic. This community needs this legislation, and it needs it now. People have been talking for years about taking on organised crime groups, and it has not happened to the degree that the community wants. We do not stand here to ideologically attack the government; we have examined this bill legally. We believe that the community needs a more robust system and we will be moving those amendments.

DR A.D. BUTI (Armadale) [4.27 pm]: I would like to follow on from the excellent contribution from our side. As was mentioned by the shadow Attorney General, the member for Mindarie, we are fully supportive of the need for legislation of this type. I am also sympathetic to the complexities that the Attorney General has had to deal with in trying to make the Criminal Organisations Control Bill 2011 constitutional. As was mentioned by the member for Mindarie, two previous pieces of legislation in South Australia and New South Wales have been struck down by the High Court. Of course, that has provided some benefits to the Attorney General, because he has been able to examine the decisions of the High Court and seek to ensure that the bill before us will withstand any challenge in the High Court. As I think was mentioned by the Attorney General in his second reading speech, there is no doubt that this will be challenged in the High Court at some stage. Obviously any decision of the High Court will not be delivered until after the next state election.

For the benefit of the house and members who will have to vote on any amendments moved by the shadow Attorney General, I want to go over some of the ground that the member for Mindarie has gone over. Sometimes repetition is needed to deal with these complex issues. As mentioned, the New South Wales and the South Australian legislation have both been successfully challenged in the High Court. I concede straight-up that the South Australian legislation—involving the Totani case—is markedly different from the bill that is before the house. The South Australian legislation provided that the Attorney General, on the application of the police commissioner, make a declaration as to whether an organisation was considered a criminal organisation. There is no doubt that the executive and the senior legal officer of the state were making the declaration. As far as I can understand from the judgement and the reading of the South Australian legislation, the magistrate then had no discretion to award a control order. On the declaration of the executive, the magistrate had to, without discretion as far as I can understand from the judgement, award the control order. It is useful to go back to the decision of

the South Australian Full Court regarding the operation of section 14(1), which is the most appropriate section in that legislation, and reads —

> Thus it can be seen that the process of depriving a person of their right to and freedom of association on pain of imprisonment for up to five years, although formally performed by a state court which exercises federal jurisdiction, is in fact performed to a large extent by a member of the Executive Government in a manner which gives the appearance of being done by the court. But the process is devoid of the fundamental protections which the law affords in the making of such an order, namely the right to have significant and possibly disputed factual issue determined by an independent and impartial judicial officer and the right to be informed of and to answer the case put against the person.

The constitutional element here is whether the judicial independence of a court that has federal jurisdiction—under chapter III of the Constitution, state courts do have federal jurisdiction, particularly the Supreme Court—has the separation of power; that is, whether the executive's decisions are separated from the judiciary's decisions, which is a fundamental principle under our federal Constitution.

As I said, the South Australian legislation is different from the Western Australian legislation. Of course, it was the first in the chronology of attempts to utilise legislation to control criminal organisations and, more particularly, bikie organisations. When that legislation reached the High Court, Chief Justice French stated that the act was invalid because it authorised the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with the court's institutional integrity. We are looking here at the institutional integrity of the court system. He went on to state —

> In the exercise of the function conferred on it by s 14(1), the Magistrates Court loses one of its essential characteristics as a court, namely, the appearance of independence and impartiality.

If we then give this function to a judge sitting in their own personal right and not as a judge, can that still affect the integrity of the court system? Arguably, it can in the eyes of the public. Arguably, even if the judge is hearing the declaration application in their own personal capacity, that can still affect the integrity of the court system. As we know, the reputation and integrity of our institutions—Parliament and the court system—are fundamental to the democratic process. If the integrity of the court system is brought into question, that affects our whole democratic process and democratic system.

Let us now move on to the New South Wales legislation which, although different from the South Australian legislation, was also challenged and struck down in the High Court in the case of Wainohu v New South Wales involving the Hells Angels bikie organisation. As I said, it was upheld also as being unconstitutional. Interestingly though, the Attorney General, as he would, has carefully considered that decision, and one of the reasons that decision was struck down was due to the judge not having to give reasons. As members will know from the legislation we are dealing with here, the judge has an obligation to give reasons.

Just before I go on further regarding the New South Wales legislation, it is important to go back to the South Australian legislation, which was, of course, at the high end of unconstitutionality in the chronology of legislation we are dealing with here. There is the South Australian and the New South Wales legislation and, most important for us, the bill before the house, which we are debating. In the Totani case, Justice Hayne said that the legislation purported to confer traditional non-judicial power upon the Magistrates Court—that is, the power to create a rule or norm of conduct in the absence of any pre-existing liability. In many respects under the Kable analysis the executive and judicial functions were reversed and the trigger for the court to act is an executive declaration of something akin to criminal guilt. Of course, criminal guilt is generally a task traditionally performed by the judiciary, at least at the commonwealth level. Therefore, a declaration does not, however, create a normal rule of conduct and the court is required to create such a norm, which is traditionally an executive or legislative task. The South Australian legislation actually reversed the traditional tasks of the executive and the judiciary. In regards to the South Australian legislation, the court had problems with the fact that the trigger for the exercise of the legislation, or the declaration and then a control order, involved major interference with the judicial independence of the South Australian judicial system by the executive, and that it was not necessary for the court to find criminal guilt. Criminal guilt is usually found in a court system. But in this case, the trigger for the court's involvement was a declaration by the executive, which is a reversal of the usual way that our traditional and executive separation of powers operates.

Let us return to the New South Wales legislation. Interestingly, I do not think that the New South Wales government has brought in legislation to require the court to publish reasons for its decision, which we would have thought it would have done in respect to one of the criticisms in the High Court of the legislation. I am not sure of the reasons behind that; maybe the New South Wales government feels that there are actually some other problems with the legislation. The extent to which the executive interfered with the judicial function in the New

South Wales legislation was not as great as it was in South Australia; there was some discretionary room in respect to the judicial role in that piece of legislation. But still, the High Court held that that legislation was in fact unconstitutional. The High Court found that the fact that under the New South Wales legislation the court did not provide an avenue for reasons for the decision to be made went against the integrity of the court system. There is the issue of the judges acting in their own capacity, in persona designata. The fact is that even if the judge acts not as a judge but in a personal capacity, it does not necessarily mean that the integrity of the court system will not be interfered with. It is interesting to go to that aspect, because there was the earlier ns case, which was the 1956 case of R v Kirby; Ex parte Boilermakers' Society of Australia, in which the whole issue of non-judicial powers being exercised by judges was considered. There was an exception to the boilermakers rule. The boilermakers case basically is authority for the principle that the Constitution prevents federal courts from being vested with non-judicial powers. Therefore, we cannot have a court engaging or being given non-judicial powers, unless those powers are incidental to its judicial obligations. However, there is a longstanding exception to the boilermakers rule; that is, that non-judicial functions can be conferred on consenting federal judges in their personal capacity as persona designata. I would imagine that the Attorney General has basically drawn the legislation from that longstanding exception to the boilermakers case. However, that exception, which clearly undermines the traditional judicial role of the courts, came before the High Court in the Grollo v Palmer case of 1995 in which the High Court developed an exception to the exception—as we always do in the legal system; exceptions to exceptions—holding that the functions may not be conferred on persona designata if they are incompatible with the integrity and independence of the judicial institution. The Grollo incompatibility exception to the boilermakers exception was further developed in the 1996 case of Wilson v Minister for Aboriginal and Torres Strait Islander Affairs.

It will be interesting to hear from the Attorney General when we get into consideration in detail or by way of interjection, for my clarification I suppose, about how the persona designata aspect of the government's legislation overcomes the Grollo v Palmer principle, although the Attorney General would probably say that it does not affect the judicial integrity of the court system. If that is the case, of course, it probably does overcome that problem. But if the Attorney General heard the member for Mindarie's contribution, we do differ on that aspect. But in the end —

Mr J.J.M. Bowler: What does that terminology mean?

Dr A.D. BUTI: It means acting in a personal capacity, not as a judge.

Mr C.C. Porter: He's just making it up, member!

Dr A.D. BUTI: Yes, I am just making it up! It basically means that someone is acting in their personal capacity and not as a judge, because one of the problems is that —

Mr E.S. Ripper: Can members of Parliament get away with that?

Mr C.C. Porter: Many have tried!

Dr A.D. BUTI: In the end, this house has to decide. Although it is not really this house that has to decide because we probably know where this house will lie in regards to this piece of legislation. As the Attorney General told us, there no doubt will be challenges to this legislation, so when it gets to the High Court, the court will have to decide whether the fact that we are allowing a sitting judge—it could be a retired judge but, as the member for Mindarie said, we have to take it at its highest point—to hear these applications for declaration, even though they are acting in their personal capacity, will affect the integrity, impartiality and independence of the court system. That will be a question, of course, that will be solved at the High Court level. The member for Mindarie has foreshadowed amendments that we are going to move that could take that out of the framework; take that out of a possible challenge by certain organisations that would no doubt challenge this piece of legislation.

[Member's time extended.]

Dr A.D. BUTI: We can consider this in consideration in detail, Attorney General, but will the secret intelligence—that is, criminal intelligence—that can be brought before the decision maker to determine whether the declaration is granted, be allowed to be seen by the respondent? I presume not. If not, can that affect the due process aspect of the judicial system, because the general principle under a judicial system is that we have a due process—proceedings? If the respondent against whom a declaration has been made, and then a control order, is not allowed to see the evidence that has been utilised to have the control order imposed against them, how is that respondent able to sufficiently defend themselves? That is just a question to declare. I am not 100 per cent sure about the constitutionality of that, but I think it may go to the integrity of the court system, under chapter III. However, I am not 100 per cent sure of that at this moment.

Mr J.R. Quigley: Member, I think that may have been resolved to a degree by the Gypsy Jokers case.

Mr C.C. Porter: I think so.

Dr A.D. BUTI: Okay. There are a couple of other matters to consider. I refer to the legislation and the control order. The Attorney General said in his second reading speech —

> However, the Commissioner of Police can also seek a control order against any person who is, or purports to be, a member of a declared criminal organisation, —

Fine —

> or has ongoing involvement with the organisation, or is a person who engages in, or has engaged in, serious criminal activity or regularly associates with members of a declared criminal organisation or other people who engage in serious criminal behaviour.

There are no problems if a person is a member of a declared criminal organisation; there are no problems if a person is engaged in serious criminal activity or associates with other persons engaged in serious criminal behaviour. But where do we draw the line? If a person is not a member of that criminal organisation, but that person associates with members of that criminal organisation, where is the demarcation? To what degree does that person have to associate with them? To what degree does that person have to engage with them? Of course, we will deal with this in consideration in detail, but does that include family members? There may be something in the legislation, Attorney General, that I missed on this; I probably have. However, if a person is the son of a member of a criminal organisation, will that person be prevented from communicating —

Mr C.C. Porter: We can do this in detail, but there are some exception provisions.

Dr A.D. BUTI: Okay. I thought there would be something in the legislation; I just was not able to see it in my reading of it in preparation for the debate.

Just reiterating, this is legislation that the opposition supports, but, as was mentioned by the member for Mindarie, we are concerned with the constitutionality of certain aspects. We will be moving amendments that we hope will make this legislation bulletproof, or as bulletproof as it can be, because we never know exactly how the High Court will interpret any piece of legislation. It is very complex, and I sympathise with the Attorney General in having to try to draw up legislation that has been struck down in two other cases, but there is no doubt that this legislation has moved a long way forward from the South Australian legislation. It has also had the benefit of the decision in the New South Wales case, and attempts have been made to plug the constitutional holes in respect of the Wainohu case, but whether the legislation has gone far enough to ensure that it would withstand any challenge before the High Court is something that we are not overly confident of at this stage. We hope that the Attorney General and the other side will give full consideration to the amendments to be moved by the member for Mindarie.

MR C.J. TALLENTIRE (Gosnells) [4.49 pm]: I rise to speak to the Criminal Organisations Control Bill 2011. I have two primary areas of concern, but I will begin by saying that I absolutely support the objects of the legislation. There is no doubt that when we see the sorts of contemptuous thuggery that some people described as bikies present against our legal system—they present that sort of behaviour at other times as well—it is appalling. It is a blight on our society. The fact that some bikies hold with such contempt the institutions of our society shows that they are clearly very much on the margins. I wonder how we can look at solving the problem, not just through a legislative means but also through some sort of educational approach. It strikes me that the best people to educate bikies who are in this phase of contemptuous thuggery may be having their reformed peers speak to them. I know bikies are renowned for engaging expensive lawyers, lawyers such as Michael Tudori and Laurie Levy, but I do not know that those lawyers necessarily dedicate themselves to explaining to bikies before the courts what really is at stake in terms of their opportunities to reform themselves. However, I see that people who we might describe as reformed bikies—to use one example, someone such as Eddie Withnell—may have the rapport necessary to engage. I do not know Mr Withnell, but I understand he is a man who has not been to prison for at least 26 years. He is a well-read man, a man who considers things and reflects on life in general. I wonder if someone like that would perhaps have the rapport necessary to engage with bikies who are currently before the legal system, or close to entering the legal system, and explain what is at stake and what the situation really is.

My first concern is that under the law as it stands someone like Eddie Withnell would be precluded from associating with other bikies who might be members of a designated criminal organisation. Someone like Mr Withnell might have the best intentions to engage with those thugs in circumstances we saw early last year before Chief Justice Wayne Martin involving bikies refusing to cooperate with the Corruption and Crime Commission. Had someone of Eddie Withnell's stature been involved, perhaps they would have approached the

situation differently; that is, heard reason and listened more carefully. I am concerned that in tackling this we could create legislation that prevents the sort of longer term education we need while we come up with a legal fix. I look forward to the Attorney General's explanation and consideration of that point. Perhaps he will explain that there is no risk that someone who has previously been considered a bikie, and has convictions, could not associate with others in some sort of educative capacity.

Another concern I have is around the right of freedom of association. No doubt we will go through clause 13 in more detail later, but is it possible that an organisation such as a union body or an environmental organisation could be considered a declared criminal organisation? In clause 13, the criteria spelt out include whether the members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. I think of recent events, when protesters boarded a Japanese whaling ship; perhaps that behaviour could be deemed to be a serious criminal activity. Certainly, they would have been engaged in planning and organising it, and people would have been involved in facilitating and supporting it. On those grounds, I think clause 13 would work against people whose actual intent is not really that of organised criminal intent but of an environmental endeavour. Clause 13(1)(c) states —

> that the organisation represents a risk to public safety and order in this State.

When I look at that, I again think of those people who boarded that Japanese whaling ship and fear that they could well be caught up by this kind of legislation.

I also worry about other associated motorcycle groups and the logistics around keeping the list of declared criminal organisations up to date—how can that be done? What would happen if there was a change in the attitude of members who were previously considered to be very much of a criminal nature, but they then became reformed citizens in the way I mentioned earlier? If this legislation is going to catch those people out, we clearly have problems.

As my colleagues have indicated, the history of legislation of this type around Australia is not good and legal problems seem to surround it. Nevertheless, I emphasise that I fully support its intent, and the last thing I would want to see in this state is the continuation of the type of contemptuous thuggery I mentioned earlier. The behaviour that Chief Justice Wayne Martin and the Corruption and Crime Commission had to face is unacceptable in our society, and that is why we need real reform—not just legislative reform, but educative reform.

I conclude by highlighting the point I made earlier, which is that we must be sure that we have the right sort of educators available to educate people out of criminal activity. We should not just be relying on lawyers, such as those I mentioned earlier, to guide people through the legal system and educate them on what is at stake. I do not think that is possible. I fully respect the right, and indeed the obligation, of the legal people I mentioned before to do their job as advocates for the individuals involved, but where is the educational opportunity? Do we have someone who can guide them out? I return to my point, which is that if a reformed bikie has not committed an offence for 26 years, they should be empowered to work alongside people who are still offending to make them see the ill of their ways. I conclude my remarks there, and I look forward to hearing the Attorney General respond to my concerns.

MR C.C. PORTER (Bateman — Attorney General) [4.58 pm] — in reply: I thank all three members for their contribution to the Criminal Organisations Control Bill; I may focus on the contribution of the member for Mindarie. The members for Armadale and Gosnells raised a number of matters that will likely be adequately covered during consideration in detail, and the member for Mindarie raised some of the broader philosophical or constitutional matters to do with the legislation. It is safe to say, member for Gosnells, without denying the need for many members of organised motorcycle gangs to have counselling, that I doubt whether the best source of that will be criminal lawyers. Firstly, they make terrible counsellors; and, secondly, the incentive for them to do it does not exist because they would, effectively, be counselling themselves out of an enormous amount of work over the next decade. Although I accept that there is probably a need for some of these gentlemen to have counselling, I would not hold my breath on it coming from the criminal bar. We will deal with the matters that the member for Gosnells raised in consideration in detail.

I will focus on the constitutional matters that the member for Mindarie raised. I understand the points he made—I cannot agree with all of them—and I think they are very intelligent points. Let me start off by saying that the health minister walked past me and casually said that this was the most boring debate he had heard in his time in Parliament, and shame on the health minister for his lack of interest in matters constitutional! Member for Mindarie, I think this is probably the best debate we have been involved in, without question.

Mr D.A. Templeman: I think he should resign!

Mr P. Papalia: He is clearly absent during any debate led by the Minister for Planning!

Mr C.C. PORTER: That is a little bit rough, but we will come back to that at a later point.

These are very, very interesting issues and I am going to try to deal with some of those raised by the member for Mindarie. The starting point is to note that when people talk, as they often do, about separation of powers, the decision in Boilermakers established that there is a separation of powers at the federal or commonwealth level. There is no constitutional requirement for a separation of powers at a state level; there never has been. The question arises as to whether state courts that exercise federal jurisdiction can breach what has become known as the Kable principle and, by virtue of exercising federal jurisdiction, breach the separation of powers doctrine as it is enlivened in the decision of Kable. The first point is that there is no constitutional requirement for separation of powers at a state level, and there never has been. This comes to the next point about the constitutional security of this piece of legislation. Going to the points raised by the members for Mindarie and Armadale, there are two points at which I think a person could seek to apply to the High Court through special leave and have this legislation characterised as unconstitutional. There are two potential points for unconstitutionality. One is at the point of declaration. The member for Gosnells spoke about this and we will talk about it during consideration in detail; that is, the process of declaring an organisation, a group of people, as a criminal organisation. There is potentially the ability for any person, subject withstanding, to argue that the process of declaration is unconstitutional. The other point at which unconstitutionality may be argued is at the secondary stage. Certain things may flow from a declaration, most notably a control order. Other things are placed in this legislation, as the member for Mindarie noted, as secondary consequences or potential consequences of a declaration. They are, potentially, mandatory sentencing for a person who goes on to commit an offence having already had a declaration made and, as a member of a declared organisation, certain higher penalties and lower processes with respect to confiscations proceedings. Those are the secondary points. The two decisions spoken about during this debate, Totani and Wainohu, each dealt with unconstitutionality at different points in the process. Totani was an argument about whether, once a declaration had been made, the control orders that the Magistrates Court was obliged to give in certain limited circumstances were unconstitutional. The second decision, Wainohu, dealt with the stage of the declaration itself and whether the declaration—as we have had pointed out was by persona designata—was unconstitutional. In that decision, the lack of reasons from the persona designata became critical in making the decision. The constitutionality was attacked at two separate points in each of the two cases.

I know that the member for Mindarie was using the term administrative function, but I think he was meaning executive function and was using those words interchangeably. However, I do not think that the idea of an administrative function is terribly helpful in determining whether the declaration process or the secondary control order–type process may be unconstitutional. The idea of an administrative function is not necessarily a perfect term of constitutional art. In trying to assess what may be the difficulties in terms of constitutional hurdles for this legislation, it is best to look at the fact that there are different bodies. There is a body that we call the executive. There is a body that we call the judiciary. Now, each perform different functions, but the constitutional principle is this: a judicial body, in this case any court exercising federal jurisdiction, cannot be compelled to exercise its power in such a way that its judicial powers or judicial functioning is substantively detracted from. I will restate that Kable principle. A judicial body—in this case a supreme court exercising federal jurisdiction or a magistrates court exercising federal jurisdiction—cannot be compelled by the executive, cannot be a rubber stamp for the executive and cannot exercise its powers in a way that regards it as under compulsion from the executive, because that detracts from its ability to operate as a chapter-free court under the Constitution. I hope that any constitutional lawyer reading this forgives me and everyone else involved in the debate, as I am not a constitutional lawyer and of course the language and way of summarising these matters in Parliament is for a completely different audience from the audience there might be in a court. However, I will use the paraphrasing of that Kable principle in the headnotes for Kable as it is the simplest way to go about it —

> 3. Does Ch III of the Commonwealth Constitution preclude the vesting of jurisdiction under the Act in the Supreme Court of New South Wales?
>
> 13. Chapter III of the Constitution of the Commonwealth both limits the repositories of the judicial power of the Commonwealth and, in context, prescribes a separation of the function of the High Court and of other federal courts from the functions of the political branches of government. The separation of functions is derived from the structure of the Constitution and, in particular, from the distribution of legislative power to the Federal Parliament (s 1), of executive power to the Queen for exercise by the Governor-General (s 61) and of judicial power to the courts referred to in s 71.

I will go on to read the next paragraph —

> 14. In like manner, no functions that are not judicial can be conferred by the Commonwealth Parliament on a State court …

It is therefore phrased in the negative. A function cannot be conferred on a state court exercising federal jurisdiction that is not judicial. Whether that is described as an executive function, an administrative function or any other function, powers cannot be prescribed on a state court that are not judicial. The headnotes go on —

> … thus the separation of State courts from the Legislative and the Executive branches of the Commonwealth Government is secured. But that separation does not purport to effect a separation of the courts of a State or Territory from the Legislature or Executive of the State or Territory. Nor does the Constitution purport to preclude State Parliaments from conferring a non-judicial power on a State court. It would be surprising if it did. Such a provision would have destroyed the State laws investing mining warden's courts, licensing courts and planning courts—to take only some instances—with extensive administrative powers.

It is the case that the executive often requires the court to undertake what we call an administrative exercise of power; that happens all the time. What we are looking for here in terms of potential unconstitutionality is some compulsion by the executive upon a state court exercising federal jurisdiction to do something in a certain way or arrive at a certain conclusion that means that we are investing in them something that is not a judicial exercise of functional power; that is, compelling the court to do something that is inherently not judicial and detracts from the status of the court as a court.

In one paragraph the Chief Justice describes that possible offensive action. I will come back to that when I find it in a moment. In any event, what is determinative is whether or not what the court is being compelled to do impairs the institutional integrity of the court. Whether or not there is the existence of persona designata is not fundamentally determinative of that fact. Persona designata—many members of this place have described it—is a judge acting in his or her personal capacity. If we want a layman's description of that, I would describe it in this way: a persona designata is neither fish nor fowl. The persona designata is not a court. At times they arguably may be or are very close to the executive, depending on how the executive compels or requires an outcome from the persona designata. But the whole point about using a persona designata is that they sit in this nether region between the judiciary and the executive. However, the point that is made in Kable, and in Totani and Wainohu, is that simply having a persona designata or calling a judge persona designata or having them act as persona designata does not mean that it does not breach the Kable principle, because the persona designata is closely associated enough with the functions of the court that they can infect the court's standing, reputation and functionality by what they are doing. That is the way in which I have always understood the Kable principle to emanate.

In summary, there are judicial bodies and executive bodies, and there is something that sits in between, which is a persona designata. The question is: are the rules under which the persona designata operate, the functions they perform and the conclusions they are required to draw of a type that they exhibit such strong control by the executive that they turn the persona designata into something that is precisely the executive, thus infecting the court with that executive function? That is the question.

Mr J.R. Quigley: It's not that it "so" infects the court, if I may?

Mr C.C. PORTER: Yes.

Mr J.R. Quigley: It is whether the appointment of a judge persona designata gives the appearance of an institution that is not independent of executive government.

Mr C.C. PORTER: Absolutely. If I can rephrase, then, the way in which a persona designata can infect a judicial body and breach the Kable principle is by mere perception of the infection.

Mr J.R. Quigley: That's right.

Mr C.C. PORTER: That is it; okay. But the persona designata sits in between judicial bodies and executive bodies. I guess the fundamental point I would make to structure this debate as we go through is that talking about administrative functions is not overly useful; our courts are invested with administrative functions from time to time. The point is that the executive controlling, forcing or compelling the persona designata in such a way that the persona designata's closeness to the existence of the court—he or she being a judge—could infect the court merely by the perception of the persona designata being a creature of the executive. If that occurs, the rule in Kable has been breached. But we can see that that can occur in one of two ways. In Totani it occurred in terms of assessing the Magistrates Court's function: was the Magistrates Court so infected? In Wainohu it occurred by assessing the functioning of the Supreme Court from which the persona designata was drawn. Those are two ways in which we might find constitutionality.

The member for Mindarie made two points, I think. He said that under this legislation, the persona designata will be closer to the court and more readily identifiable with the court than is the case in New South Wales. He also said that because of certain additions to this —

Mr J.R. Quigley: No; I didn't say "more identifiable with", but the consequences of what the persona designata does is of more consequence than it is in New South Wales.

Mr C.C. PORTER: I think he went a little further than that, and I will come to the reason why in just a moment. I say here that the member took the view or made the assertion that the persona designata, as it is modelled in this bill, is different from the persona designata as it is modelled in the New South Wales legislation, and that there is a greater nexus or closeness to the court under this bill. Can I use the word "nexus", or closeness to the court?

The other argument he made is that, because this legislation contains additional consequential or secondary effects or potential effects from a former declaration, it raises other constitutional issues. I will deal with that second argument in a moment and deal with the first argument first. That argument is that there is something about the nature of this persona designata that is more proximate or has a greater nexus to the court, or creates an enhanced risk of whatever the persona does infecting the court. I cannot agree with that, and the member gave only one example of how our model exhibits greater proximity between the persona designata and the court, which was that the persona designata, under this legislation, is intended to actually sit in the physical confines of the court. That is the one example that he gave.

Mr J.R. Quigley: I've been misunderstood.

Mr C.C. PORTER: He did; he said that they were going to sit in the physical confines of the court and use the registry staff. That is not completely but almost entirely irrelevant to the fundamental question, which is: in their process and function as directed by the executive, is there such great restriction on the persona designata that, if they are drawn from the Supreme Court, they will infect the Supreme Court with that limitation and offend the principles of Kable? Where the persona designata sit or do not sit, or what staff they use or do not use, can only be of the most modest relevance to that question.

Mr J.R. Quigley: The High Court mentions that.

Mr C.C. PORTER: I am not saying that it is completely irrelevant; I am saying that it is almost completely and largely irrelevant to the question. What I put to the member is that his second argument is stronger. I do not think the first argument that somehow the persona designata model that we are using is more proximate to the court and thereby, ceteris paribus, is more likely to infect the court is correct. I think the second argument is a stronger argument. I will go into that in a moment. I might pause for one moment and read from the dissenting judgement of Justice Heydon in Wainohu.

Mr J.R. Quigley: The Privy Council always prohibited publishing dissenting judgements.

Mr C.C. PORTER: That is why the member for Mindarie and I have fled the legal profession and have ended up in this place so that we can do these things! I think a very critical difference between Justice Heydon's dissenting judgement in Wainohu and that of Justices Gummow, Hayne, Crennan and Bell was that in Justice Heydon's judgement, he accepted a submission advanced from Western Australia, as an intervener, by Mr Robert Mitchell, who later will be advising this evening. It was a submission that Western Australia gave in relation to a critical quote from Her Honour Justice Gaudron that was being relied upon and, ultimately, was relied upon by a majority of judges in Wainohu. This is what Justice Heydon said —

> … The Attorney-General for the State of Western Australia submitted that those statements —

That is, Gaudron's statements —

> were not advancing a criterion of validity. Rather they were pointing to elements in her Honour's conclusion that the role of the designated person in that case generated a perception that she lacked independence from the Executive. That perception arose from her duty to report in secret and her lack of control over whether the report would be carried into effect. These matters caused the designated person to have the appearance of acting as the servant or agent of the relevant Minister. It was the impact on the perception of independence, not secrecy in itself, which was the criterion of validity.
>
> … The submission of the Attorney-General for the State of Western Australia is correct. Gaudron J's approach was similar to that of the plurality, who said … "The separation of the Ch III judge acting as reporter from the Minister has been breached." In contrast to the position in *Wilson's* case, here there is no duty to report only in secret (ie no duty not to give reasons), and

> the outcome is not in the hands of a Minister. What the eligible Judge does cannot be controlled by a Minister, and the making of an interim control order or control order, though the Commissioner applies for it, depends on the view of a Supreme Court judge.

I have read that quote for a couple of reasons. First, it is lovely to have the greatest judge in the land talk about the Attorney General being right! I just could not resist the occasion. I thank Mr Robert Mitchell for his eloquent drafting and giving of those submissions. Obviously it is a minority judgement, but it points out very clearly this fundamental issue: is the designated person infecting the judicial body that they are being drawn from by what the persona designata is being required to do? The difference between Heydon and the majority in this case was that he said that the mere lack of reasons in the New South Wales Wainohu instance was not so restrictive of what the persona designata was doing as to give rise to a reasonable perception that the court from which the persona designata was drawn was infected and was being compelled by the executive. The majority disagreed with Justice Heydon; they said that the failure to give reasons, amongst some other things, was absolutely pivotal in determining that the infection spread from the persona designata to the court. I think that is the fundamental question that we will end up dealing with in this legislation. This legislation—we will talk about the secrecy provisions, such that they exist—will obviously not be bulletproof. I know that the member for Mindarie used that word, not suggesting that I would ever use that word. What I can say is that based on the best advice that the government had, which takes into account Totani and Wainohu and the constitutional principle that I have very coarsely described here, this legislation will not breach that constitutional principle. That is not to say that it will not be the subject of special leave applications. That is not to say that it might not be the subject of special leave applications based on precisely the basis that the member for Mindarie has raised. But the advice that we have received is that those additional secondary functions or occurrences, which are in addition to a control order—that is, confiscations, penalties and mandatory penalties—do not change the fundamental constitutional structure of this bill, which is sound.

I will go on to describe why that advice has emanated and why that is the case. So all I can say to members present is that the best advice we have is that this does not offend against any known constitutional principles or any known interpretations of known constitutional principles. But of course the law constantly evolves.

In Wainohu, a control order was unsustainable, because the declaratory process was declared unconstitutional. So it was at that first point of constitutional challenge that Wainohu fell down. Wainohu fell down in that instance—again, by way of core summary—fundamentally because there was not a requirement to give reasons, and that was pivotal in all of the circumstances of the process that the persona designata was engaged in.

Mr J.R. Quigley: But had it been silent as to that circumstance, it would have passed.

Mr C.C. PORTER: Yes.

Mr J.R. Quigley: Sans clause 13(2), it was okay.

Mr C.C. PORTER: That is very much, then—maybe calling it a strong hint is even understating it—what the judges said. One of the pronouncements of the judges in Wainohu—this is from the judgment of Chief Justice French and Justice Kiefel—states —

> Nevertheless, the problem to which s 13 gives rise may, as suggested in the reasons of Gummow, Hayne, Crennan and Bell JJ, be overcome by the imposition of an obligation on an eligible judge to provide reasons for the decision to make or refuse to make a declaration, or to revoke a declaration.

Mr J.R. Quigley: Which your bill does.

Mr C.C. PORTER: Indeed. As the member for Mindarie pointed out, the High Court is not in the business of giving declaratory judgements. But this is quite close, although we would all note the use by Chief Justice French and Justice Kiefel of the words, "may, as suggested". So it may be that those two judges are giving a somewhat less strong view than the judges they are describing. But in any event, it does say that the model is sound—that is, a model which is the New South Wales model, plus reasons for decision, which is what we have.

I come now to the stronger point that the member has made, which is that the difference between the New South Wales model and what we have here is not the fundamental mechanics of declaration by persona designata, where reasons are given, and where there are very similar requirements for the operation and processes of the persona designata in Western Australia and in New South Wales. What the member for Mindarie says is that the fundamental difference here is that the secondary decisions that a court would need to make, or would be asked to make, in control orders are very similar to New South Wales, but that there are another couple of secondary decisions that might be required to be made here. One is about confiscations proceedings, and one is about mandatory sentencing. The member for Mindarie also raised the issue about the separate offence, which is being a member of a criminal organisation, and whether there might be a duality between those. I think that is a

separate issue, and I will deal with that in a moment. That does not go, I believe, to the Kable principle. But I do think the member has raised a fair point with respect to these other secondary issues.

What the member says is that he and the opposition do not disagree with those parts of the legislation—that is, if they were able to be constitutionally valid, that mandatory sentencing could be triggered by someone who persisted in being a member of a previously declared organisation and then committed a certain offence as provided for in this bill, or that someone who was a member and persisted in being a member of a declared organisation would be subject to lower standards before confiscation proceedings ensued. What the member says is that he and the opposition have no ideological or theoretical difficulty with that. But what the member also says is that that is unconstitutional or is highly likely to be unconstitutional, or at the very least is very likely to be the subject of constitutional challenge that is disruptive.

Mr J.R. Quigley: It is not just that clause. It is part of that which will cause it to be.

Mr C.C. PORTER: Okay; I accept that. So I will take the member at his word that it is not an ideological or a theoretical problem with those provisions.

I want to look at the issues raised by the member for Mindarie. I have a fundamental question, which is maybe something we can have some exchange about in consideration in detail, having now described the Kable principles as they apply to Wainohu and Totani. The Kable principle in Wainohu is that the nature of the process and function of the persona designata was so restrictive it infected the court from which it was drawn.

Mr J.R. Quigley: It does not say "restrictive"; it states "of such a nature".

Mr C.C. PORTER: I am paraphrasing for the member, which is why I used the words "process" and "functions". They were of such a nature that was so restrictive, compulsive, unusual or antithetical to judicial function—if I use that term—that they infected the Supreme Court from which the persona designata was drawn. On the other hand, it was said in Totani that by the time the magistrates got around to hearing an application for control orders, there was so little for them to do by way of judicial function—not nothing, but so little—that it could properly be said that they were being compelled or restricted in such a way by the executive who made the declaration—John Atkinson was a very good Attorney General in many ways from my observation—that they were being compelled to operate in a way that was antithetical to judicial function. As I understand it, the member's argument is not the Totani argument; it is not the argument that a court that was required to make a decision about confiscation proceedings or about mandatory sentencing, being compelled in the Totani fashion. The member's argument is that the existence of those ancillary proceedings changes the complexion between the persona designata and what they are required to do, or the function and process, and somehow makes that antithetical to the judicial function, which feeds back on the Supreme Court and infects the Supreme Court in a way that is antithetical to judicial function. The question I would ask is: how is the member saying that would occur? This is something no doubt that we will have some debate on. I put to the member that executives, if you like, deem elements of offences all the time. This goes to the point of whether the persona designata, having declared an organisation, conceivably makes unconstitutional the activities of the court—in this instance—which would be required to determine a control order, confiscation proceeding or mandatory sentencing. Is there anything in that process wedding a declaration in the way that we have envisaged and very similar to what occurred in New South Wales to an outcome beyond a control order that makes the outcome body—the court determining a control order, confiscation proceeding or mandatory sentencing—violate Kable? I cannot see what it is that would be the constitutional basis for unconstitutionality. The point I made to the member is that the executive deems elements of offences all the time. We do that with presumptions, quantities —

Mr J.R. Quigley: Rebuttal.

Mr C.C. PORTER: Exactly.

Mr J.R. Quigley interjected.

Mr C.C. PORTER: There are many examples where we deem things strictly in executive, and that does not warrant the decision of a court in acting on those laws being constitutional. Indeed, this is the point in the recent High Court decision in Mahmood, which dealt squarely with issues about mandatory sentencing. Mandatory sentencing, which compels the judiciary to do something once it finds other things—that is, the substantive issue of guilt—has never been unconstitutional and is not unconstitutional. The member is asking me to accept—which I cannot—that having the persona designata deemed a certain prescriptive precursor, fact, element or whatever you want to call it, which still leaves the secondary decision-making body enough room to exercise judicial function, renders it unconstitutional.

Mr J.R. Quigley: How?

Mr C.C. PORTER: Whether the prescriptive first point emanates from the executive or a persona designate, it is relevant to what the court in second instance is doing.

Dr A.D. Buti: Isn't it generally the court that is the body that determines guilt? In mandatory sentencing the court still finds on guilt.

Mr C.C. PORTER: In this situation they still do that. The court, either with the confiscation issue or the mandatory sentencing issue, must find the guilt on the offence. It is then required to give a higher penalty based on some other body's determination that an organisation has been declared. That sort of thing occurs all the time, with the executive making the determination. The point the member for Mindarie raised when I interjected was that yes, the executive can and does deem such things and as long as enough judicial authority is being exercised by the court at the second instance, as the member for Armadale pointed out, determining guilt or innocence, that does not breach Kable. What would lead us to believe that that situation and principle is any different when the deeming or the first instance decision emanates from a persona designata or, indeed, from another court? To use a few examples, in a restraining proceeding for the breach of a restraining order which can be a criminal offence, the fact of the restraining order having been in existence is a fact that is accepted by the secondary court based on a previous decision of a primary court. In a Court of Disputed Returns decision that says this or that election is valid, if there is a secondary prosecution for failing to vote, that first decision of a court, which deems a certain outcome, leaving room for the secondary body to make judicial reasoning and exercise judicial function, happens all the time.

Mr J.R. Quigley: In the instance you cite, isn't what happens in the first stage a curial process; that is, the making of the restraining order? It is done in a court. According to the rules of evidence, parties are allowed to bring evidence that they are not in any of this declaration proceeding.

Mr C.C. PORTER: Yes, it is. But whether or not process A is curial or executive, does process A leave enough for the court to do in process B that the court can still be said to be properly acting as a court?

Dr A.D. Buti: But can process B, the court, review process A under this legislation?

Mr C.C. PORTER: No, but neither can it do so with mandatory sentencing for people smugglers. Neither can it review a decision of a prior court, the Court of Disputed Returns, that says that an election was valid when it is using that as a basic element for a failure to vote prosecution. I do not think that the reasoning is sound to suggest that having a persona designata exercise function in that way, which then requires to a very limited extent or a sufficiently limited extent body B to come up with some decision based on its own judicial reasoning, is a reason to believe that this is unconstitutional. The reason I will not be able to accept the shadow Attorney General's amendments as they pertain to the CCC is that the more that body A looks like the sheer unadulterated exercise of the executive will, the more likely it is to infect the secondary decision and the secondary decision-making body. This was the point in Totani. If we substitute the declaratory body of a persona designata with an Attorney General or with a CCC or with a body that is truly a body of the executive, which the CCC is, we run much greater risk of having the secondary decision-making levels declared unconstitutional. In those circumstances there is no real argument to suggest that the secondary decision making, the determination by a court as to whether a mandatory sentence should apply based on body A making some decision or making some law or a court determining whether a higher confiscation penalty should apply based on some prior body making some law or making some decision, does not offend against Kable and we cannot see how it does. What we would say is if we have a precursor or a trigger decision that forms an element of an offence or then asks the court or secondary body to make a determination, the further away that precursory decision is made from the court and the executive, the better off the constitutional validity of the legislation. My prediction would be that if we went down the path of having the CCC as the declaratory body, we simply enliven the Totani arguments. We would have all the arguments run in Totani run precisely in this situation. That is why I believe that advice from far better constitutional lawyers than me has been to the extent that we should have a persona designata and allow that persona designata to operate in a way that is more judicial rather than less judicial, unlike in Wainohu.

That is not to say that it is perfectly judicial; it clearly is not—there are secrecy provisions and there are restrictions because of the nature of the proceedings. But what we have done in this legislation is cure the problem identified by the High Court in Wainohu, which said, "Okay, your persona designata is operating in a way that is certainly more judicial than was the case for the Attorney General in Totani, but it is still not judicial enough. You need to do these things." We have done that. We do not, we believe, run a risk of the functioning of the persona designata bringing disrepute on the Supreme Court from which it is drawn by virtue of it exercising a function which is so executive in its compulsion that it is antithetical to the judicial function of the body from which it is born. Equally, the reason that we have the persona designata is that that allows us to have a precursor decision which is not so compulsive and so restrictive in what the secondary decision-making process is going to be that we have the secondary decision-making process declared invalid.

That comes back to my original point. There are two constitutional bases for challenge. One is that the Supreme Court is infected by the persona designata. Of course, we could cure the problem entirely by not having a persona designata and having either the CCC or Attorney General make that decision, but the problem with that course is that we then have the original problem, which is making the secondary judicial body offend the Kable principle, because it is being directed by the CCC or the Attorney General or the executive of the day. To put it simply: damned if you do and damned if you don't. What this legislation does is strike the middle ground. I take the point raised by the shadow Attorney General, which is that there may be something about extra things flowing from a declaration that changes ever so slightly that witch's brew in this matter. That is not an impossibility, but on all the best advice we have been informed that that likelihood is very highly unlikely.

I think that leaves one point made by the member for Mindarie, which was the point about the Kable principle and the provisions in our bill—in fact I might even ask the member to direct me to them—which set up a separate offence —

Mr J.R. Quigley: It is proposed section 221E on page 121 of the bill.

Mr C.C. PORTER: That is clause 173, at which the Criminal Code is amended to insert —

> that the circumstances in which the offence was allegedly committed are such that, if the accused were convicted of the offence, the *Sentencing Act 1995* Part 2 Division 2A would —

Mr J.R. Quigley: I thought you were talking about the creation of an offence of facilitation.

Mr C.C. PORTER: Okay; the two offences are stated in proposed sections 221E(1), "Participating in activities of criminal organisation", and 221F(1), "Instructing commission of offence for benefit of criminal organisation".

I take the member's point here—I think it is different from the Kable point—that this is unusual in that it is not inconceivable that one might argue, for instance, the Gypsy Jokers is a criminal organisation meeting the definition of this bill. One might do that in front of a persona designata; one might fail, but at a later time, based on relatively similar evidence, it might be argued that an individual has instructed the commissioner of an offence for the benefit of a criminal organisation, and part of that trial would involve proving that something was a criminal organisation, where one may have succeeded or failed in a very similar exercise previously.

Mr J.R. Quigley: I've got it the wrong way around. You have a criminal trial.

Mr C.C. PORTER: Yes.

Mr J.R. Quigley: The evidence led does not amount to the definition of a criminal organisation beyond a reasonable doubt.

Mr C.C. PORTER: Yes.

Mr J.R. Quigley: So the count is discharged. Then they go around and get a declaration, because it does not require the rules of evidence, suggestion—whatever—and then come back and do a criminal trial of another person from the same organisation; you are effectively back-dooring the balance of probabilities

Mr C.C. PORTER: The member's argument is a very interesting one. I must say it is not one raised with me in the process of drafting this bill. It may be something that we will have an exchange about during consideration in detail. I do not perceive that that is a constitutional problem. It may be a problem, ironically, given today's second reading about double jeopardy; it seems that is the character of the problem. Even then, it seems to me that that is not a constitutional problem. One might be able to put with a greater degree of specificity what the problem is. I understand in general terms that the member is saying that there may be an attempt at the civil standard in a declaratory proceeding to prove something that has failed to be proved in a criminal proceeding. That is in itself not an unusual state of affairs. It is not. Something might be proved to a civil standard and, indeed, the Gypsy Jokers show some indication of that. Something could be proved to a civil standard in a separate civil action that was failed to be proved in a criminal prosecution. That happens with some regularity.

Mr J.R. Quigley: But to then use the outcome of that civil proceeding to prove an element of offence in a subsequent criminal one does not ever happen.

Mr C.C. PORTER: Again, that may fail. How is that any different from a restraining order situation that failed beyond reasonable doubt to prove an assault but about which there was enough in front of a magistrate to consider that a restraining order should be granted on the same evidence? A restraining order is granted, whereas —

Mr J.R. Quigley: It won't be the same proceeding.

Mr C.C. PORTER: No; it would be a different proceeding, but it would be the same evidence, the same transaction, the same event that has failed to be proved to a criminal standard. That evidence is relied on at the

same event to get a restraining order, and at a later point the restraining order is breached and the person is subject to a criminal proceeding. That is not an unusual situation. I am not certain there is any principle that that does not comply with. But it is an interesting point and one we can raise in consideration in detail.

Mr Acting Speaker, I can see that you have been riveted by this constitutional exposé, which is now drawing to a rapid close.

The ACTING SPEAKER (Mr P.B. Watson): I am absolutely enraptured.

Mr C.C. PORTER: Indeed. We can discuss these matters in consideration in detail. I thank all members opposite who spoke for their contributions. Unfortunately, I will not be able to accept amendments that change the structure of this model because that would be to go against my own best, although rudimentary, instinct on these matters and against the best advice we have, which is that the model we have is sustainable and the model members opposite are presenting is, indeed, less sustainable.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 and 2 put and passed.

Clause 3: Terms used —

Mr J.R. QUIGLEY: I move —

> Page 4, lines 28 and 29 — To delete "a judge or retired judge currently designated under section 26" and substitute —
>
> the Commissioner of the Corruption and Crime Commission

I move this amendment, as outlined in my contribution to the second reading debate, because we say it is not a Totani situation, but akin to the Wainohu case, in which case the infection or the impugning of the integrity of the court was connected to the designated judge. The term "designated judge" was not used in New South Wales; I think "eligible judge" was the term used, but I think it can be interposed with the word "designated" in our legislation. It had the same effect in that someone was an eligible judge if nominated by the Attorney and that nomination was accepted by the judge. It was the performance of his function, albeit persona designata, that caused the general integrity of the institution of the Supreme Court of New South Wales to be impugned. It was not because, as the Attorney had rightly suggested in Totani's case, that the judicial officer was constrained or directed by executive function. In Totani's case, the High Court noted that in the absence of any illegality attaching to membership of an organisation declared by the Attorney General, it is difficult to see how a control order can be explained as resulting from the court's processes. The Wainohu case is different in the sense that the judge acting persona designata, hearing the application for declaration, had a discretion to exercise: was he or she satisfied? Secondly, consequent upon that declaration, it was a precursor to a control order before a Supreme Court judge sitting in that office of Supreme Court judge exercising the powers of that office. They also had discretion as to whether to make the control order, so that the whole matter was very much the process of judicial discretion. We the opposition take issue with what the Attorney General has said in reply that the closer we make it to a judicial function, the safer we are and the less likely we are to impugn the institutional integrity of the Supreme Court. It is quite the contrary; indeed, the High Court has talked about the executive using judges as persona designata to give the colour—I think these are the words of the High Court, as I remember—of neutrality to executive function; in other words, borrowing or using judges' reputation for neutrality in the community for executive function. In our opinion, taking it away from the judiciary and giving it to the Corruption and Crime Commission makes it not less safe but more robust.

Dr A.D. BUTI: I am very interested in the member for Mindarie's contribution.

The ACTING SPEAKER (Mr P.B. Watson): Member for Mindarie, I have no idea what you are saying, but I am very interested!

Mr J.R. QUIGLEY: I can tell that, Mr Acting Speaker, because you were so far onto the edge of your chair. I worried that you were going to fall forwards and off it, you seemed so enthralled!

Indeed, I think in Totani's case it was advanced on behalf of the Attorney General by counsel that the executive could even make a control order, and having at all times the residual capacity or residual jurisdiction to make a control order in itself was indicative of the constitutionality of the process embarked upon by the Attorney General for South Australia. Therefore, the Attorney was saying that both stages were well within the power of the executive. The High Court of course rejected that as a proposition to validate the first process as undertaken

in South Australia. We say, for a couple of reasons, that making the Corruption and Crime Commissioner the designated person is the appropriate way to go not only because it is further removed from the judiciary and whatever the CCC does could not possibly impugn upon the integrity of the Supreme Court, but also for another more practical reason. As stated before in the Wainohu case, given the breadth of materials put before Justice McClellan, Chief Judge at Common Law—which, I think Mr Robinson pointed out during his submission, was 35 lever-arch files plus 61 CDs—a judge first has to decide in the course of those proceedings whether each and every one of those documents, if claimed by the commissioner, is actually police intelligence and cannot be revealed to the respondent, which was a concern of the member for Armadale. That had been largely dealt with on terms of procedural fairness in the Gypsy Jokers case, but in that case the matter was before the Supreme Court for review and the Supreme Court justice and the Gypsy Jokers got to see all the materials anyway; it is just that he did not disclose them to the respondent or in his reasons for decision. We say that the appropriate authority to sift through and analyse what will amount to hundreds, if not thousands, of pages of police intelligence is the Corruption and Crime Commission, with all its crime analysts and whatnot, just on a functional, practical basis, quite apart from the constitutional basis, of pulling the decision for a declaration away from a judicial officer of the Supreme Court of Western Australia. We say that, and the Attorney General had this further problem with my argument before: that he could not see how some down-the-line consequence of the declaration could impact upon the constitutionality of the process. But it was the High Court itself in Totani and in Wainohu that looked at the consequence of a declaration, saying that this declaration was being made by a persona designata not following rules of evidence or procedure, or there not being a contest—none of that—but just he or she being satisfied even on no evidence, just submissions; talkie-talkie. The Commissioner of Police says, "I say this, Sir", and if that satisfies the judge, it is done. The further this is done away from the Supreme Court, where the consequence is that once a declaration is signed, it proves the element of an offence, so we will get a judge signing off on the proof of an element of an offence under proposed section 221E —

Dr A.D. BUTI: Mr Acting Speaker, I know that you enjoy me doing this, but I am enjoying what the member for Mindarie is saying, so could I please hear some more?

The ACTING SPEAKER (Mr P.B. Watson): I thank the member for Armadale. I just remind the lawyers in the chamber that we are not paying them by the minute!

Mr J.R. QUIGLEY: And don't we know it, Mr Acting Speaker; don't we know it!

Anyway, frivolity aside, we have one judge of the Supreme Court finding an element proved on mere suggestion and signing off on that, and the matter then going before the next judge and it being said that that is proof beyond reasonable doubt. We do not say that that process is unconstitutional in the sense that there is something deeply flawed in that process; there will not be if it is not done by a member of the same bench. If the prosecutor goes before court 41 in front of a jury, he fails. It is not akin to the restraining order process; the prosecutor fails because he was unable to prove proposed section 221D(b)(i), (ii) and (iii); and, being unable to prove that beyond a reasonable doubt in relation to that organisation, he back-doors the proof by saying, "I'll go to one of your brother judges down the corridor on an application to have it declared", and then he forgets about proposed section 221D(b)(i), (ii) and (iii); he goes down the corridor and says, "I suggest this; I say this." There is no proof in the standard sense—no rules of evidence—and the judge says, "I'm satisfied", and suddenly there is proof beyond reasonable doubt. The person who facilitates that proof beyond reasonable doubt is a brother judge—this is said not in any way to impugn the reputation of the Supreme Court as a whole for impartiality—and they have just back-doored the proof, one judge to the other. One judge says, "I can't find section 221D(b)(i), (ii) and (iii) proven beyond reasonable doubt." So the prosecutor says, "Okay; I can't prove all that." The case files are taken down the corridor, the commissioner makes an application for the same things to a far lesser standard of proof, and the judge says that he is satisfied to whatever standard and signs it. Another prosecution is then started against another member of the same organisation, and this time the prosecutor says, "There's the declaration. That element is proved beyond a reasonable doubt."

The Attorney was saying that that is similar in the restraining order situation when the assault cannot be proved. The person goes down and gets a restraining order, and then there is a breach, and there can be a breach on a civil standard. That is a different offence. It is not going back to prove the assault; it is not using "on the balance of probabilities" to go back and prove the assault beyond reasonable doubt, which this legislation provides for. So we say that the risk of impugning the reputation or the integrity of the institution in a circumstance such as this —

Sitting suspended from 6.00 to 7.00 pm

Mr J.R. QUIGLEY: We were speaking to the amendment that I had moved. I will not seek a further extension, but in wrapping up my speech about the reason for the amendment, I say that it is not just a concern about constitutionality. I heard what the Attorney General said in that respect—that he does not think a consequence of

the declaration will in any way impact upon it. However, a number of the justices of the High Court referred to the fact that the declaration process did not impact upon or derogate the rights of a citizen; it was just a declaration to an organisation. The declaration process here, as I have said several times—no doubt we will revisit it—can be used as proof beyond reasonable doubt of an element of a criminal offence. One judge could have made the declaration and another could be trying a criminal offence and say, "That's proved by reason of what my fellow judge has already decided on the balance of probabilities, so I'm satisfied of that element beyond a reasonable doubt." The Attorney General or his advisers might be able to correct me if I am wrong, but I think it was Chief Justice Mason who said—I could find the reference, but, as the Attorney General said, this is not a court—that it would be preferable to not use persona designata if there was an alternative to appointing a judge persona designata. As long ago as 1923, some concern was expressed by the judiciary about serving judges being appointed as royal commissioners. However, as the High Court has noted, in some circumstances justices have been appointed as part of the executive, such as an ambassador to the United States; I think that was Sir John Latham during World War II. Plenty of precedent exists in Australia for justices having performed an executive or non-judicial function, but it was said by Chief Justice Mason that it is preferable to use an available alternative; we have the available alternative of the Corruption and Crime Commission. It has all its crime analysts who can go through all the police intelligence. We say that it makes sense and that it is likely to be more constitutionally robust. It is for those reasons that we have moved the amendment. I do not wish to occupy the Assembly's time further.

Mr C.C. PORTER: If I may, I will deal with the weaker of the two arguments raised by the member for Mindarie; namely, the argument about practicality and the notion that the CCC is the more appropriate body because it is more practically able to sift through large amounts of data, evidence or reports. In my view, a person with judicial experience is at least as capable, and perhaps in certain circumstances is possibly even more capable, of doing that as a body such as the CCC. I think any claim that judges are inferior in their ability to wade through large amounts of documents, data or evidence might be put to His Honour Justice Owen after three years on the bench. This is what judges do. They are very well attuned as a matter of practice to make the sort of reasoning required based on a high level of scrutiny of a range of material, all of which is simply evidence. I think that a persona designata, being a person of judicial experience—a judge—is going to be practically well suited to the role.

In response to the constitutional issue, which is the more interesting of the member for Mindarie's two arguments, I say that substituting the CCC for the persona designata will only create a problem in an attempt to cure a problem that does not exist in this legislation. I will deal first with the problem that is being created and then go to my characterisation of this being an attempt to cure a problem that does not arise under this legislation. The problem created by substituting the CCC for the position of persona designata is the Totani problem. In the Totani judgement, there were two ways in which the issue arose or the process was found to be repugnant to the chapter III status of the court—in that case, the Magistrates Court. The first issue was how restrictive, or to use the court's language, how "confined", was the adjudicative process at the Magistrates Court. The adjudicative process was triggered, or required, by there having been a previous declaration. The first issue was how confined or restricted that process was and the second issue, of course, was where that confinement emanated from, and in that case it obviously emanated from the executive. It was, in Totani, the mixture of the two features of the process under the act; that is to say the confinement emanating from the executive and it being a very high degree of confinement that the secondary body, the Magistrates Court, was placed under, which in combination saw the Kable principle, according to the majority, being breached. Going through each of the judgements in Totani, I put it to members that substituting the CCC for the persona designata reignites the Totani problem. The member for Mindarie has a copy of the judgement before him. I refer now to paragraph 71 of the Totani judgement in which His Honour, the Chief Justice, very succinctly describes the problem, stating —

> But these powers in both the Commonwealth and the State spheres are subject to the qualification that they will not authorise a law which subjects a court in reality or appearance to direction from the executive as to the content of judicial decisions.

The first point to note is that if what we are trying to avoid is either the reality or the perception that the secondary court—in this case a Magistrates Court—is being directed from the executive, one sure-fire way to elevate the level of risk is to ensure that the direction or the confinement actually emanates from what is unarguably an executive body, which the CCC would be, or which the Attorney General was in the case of Totani. So you elevate the risk there.

The other point to note in that respect is that the process required to be undertaken here in this amendment is similar to the process that the Magistrates Court was required to undertake in Totani. Probably the most confined or restrictive of those processes is the control-order process. It is slightly different, I would suggest, in this

legislation from the legislation in Totani. Nevertheless, there is an exhaustible range of things that a court would have to consider in determining whether or not someone should be the subject of a control order.

Mr A.J. SIMPSON: I am very interested to hear what the Attorney General has to say on this amendment and I would like to hear more of what he has to say.

Mr C.C. PORTER: I thank the member for Darling Range.

The other secondary issues to be determined about the applicability of the confiscation process and the applicability of mandatory sentencing, I would argue, actually leave more for the secondary court to do than the control order process leaves. The control order process therefore has certain fundamentals to it and on one view might be considered to be somewhat confined or restrictive, albeit I would argue more enlarged under this variant of legislation than under the South Australian legislation. However, the degree of risk is elevated if the direction or the confinement emanates from something that is absolutely and unarguably an executive body. The reason the executive chooses to give birth to a persona designata body in this case is that we wish to, and fully intend to, genuinely take the decision-making process—regarding whether or not this or that organisation meets the relevant criteria and should be specified as a declared criminal organisation—away from the executive, and that it not be simply a matter for the Corruption and Crime Commission or the Attorney General assessing papers, documents and evidence in making that decision. We want something that looks more like the type of reasoning we would get in a judicial process. Persona designata is not in this sense a court; nor is it in this sense, we say, the pure exercise of an executive power or indeed purely of an executive body.

In paragraph 82 of the Totani decision, Chief Justice French refers to the executive enlisting the Magistrates Court. I think that is precisely the type of process that we are seeking to avoid here. It states —

> … if properly classified as "criminal intelligence", would not be disclosable. Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. I agree with the conclusion of Gummow J, Crennan and Bell JJ and Kiefel J that s 14(1) authorises the executive to enlist the Magistrates Court to implement decisions of the executive in a manner incompatible with that Court's institutional integrity.

By having the body that makes the declaration purely and simply an executive body, which the Attorney General or the CCC would certainly be, we would create the risk of it being seen to happen again. Of all the judgements in Totani—there are slight variations between all of them—it is perhaps Justice Gummow who puts this point at its highest. At page 56, paragraph 139, Justice Gummow refers to the executive branch initiating by its own process the declaration procedure, and states —

> Further, it is the executive branch which not only initiates the process of the Magistrates Court, by the Commissioner making the application, but also has by its own processes under Pt 2 already achieved the result that there exists a vital circumstance, the existence of a declaration by the Attorney-General, upon which the Court now must act.

The member for Mindarie is asking me to accept an amendment that would result in this process being played out again, except that His Honour Justice Gummow would replace "Attorney General" with "Corruption and Crime Commission". The direction in this case, "the existence of a declaration by the Attorney General upon which the Court must now act", emanates from the executive, which is one of the features that elevates the risk of the latter decision of the Magistrates Court being contrary to the process or repugnant to the requirement for a separation of powers.

Mrs L.M. HARVEY: Madam Acting Speaker, I am interested in hearing the Attorney General's continued remarks.

Mr C.C. PORTER: I thank the member.

Have a look, member for Mindarie, at paragraph 140 of Totani. That is where Justice Gummow uses that interesting language. The paragraph reads, in part —

> There was no anterior determination by the executive branch which was an essential element in the curial decision.

He is talking there about distinguishing cases like Thomas v Mowbray, which counsel sought to do in Totani. Justice Gummow is saying that, in this case, there is an anterior determination of the executive branch, which is an essential element in the curial decision—the curial decision being a secondary decision of the Magistrates Court, and the anterior determination being the determination of the Attorney General. What is important about Gummow's language there is that he is talking about the anterior determination of the executive branch. The point about making this a persona designata is that it removes that anterior determination some distance from the

executive. We set out the ground rules for the persona designata, but I think it can be fairly said from this legislation that the executive cannot control the result. In terms of getting a determination, I would have thought—given the barriers and the hurdles we have placed in the way of the executive by virtue of the persona designata being required to look at evidence, meet certain standards, and provide reasons—that these will actually be very difficult declarations for the executive to achieve. I would not expect them to be flowing thick and fast.

In paragraphs 142 and 143 of Totani there are further interesting descriptions from Justice Gummow. Paragraph 142 states, in part —

> This is achieved by obliging the Magistrates Court to act upon the declaration by the executive, by making a control order in respect of the defendant selected by the Commissioner, subject only to the satisfaction of the Magistrates Court that the defendant is a member of the declared organisation.

But the primary requirement appears in paragraph 143 which states, in part —

> …there must be a prohibition upon association with other members, except as may be specified in the order…

Again, one of the key elements of the whole process that was seen as offensive is the direction, the anterior determination, being that of the executive. All our best advice is: do not substitute one executive for another; do not substitute the Attorney General for the Corruption and Crime Commission, because that will give life to the Totani problem.

His Honour Justice Hayne states, in part, at paragraph 236 —

> The legislation now in issue does not go down the path of seeking to outlaw particular organisations, or kinds of organisation. SOCCA does not make membership of any organisation (declared or not) a crime. It does not dissolve any organisation, or seek to forfeit or deal with any property that an organisation may own, use or occupy. What s 14(1) does is permit the Executive to enlist the Magistrates Court to create new norms of behaviour …

It cannot be said that the persona designata is truly an executive in the sense that the Attorney General or the CCC is. I put it to the member that, by substituting the CCC for the persona designata, we end up back in Totani territory. That may be worth the risk, although I suggest it would not; but it may be worth the risk if we were trying to cure a real problem. But what is the problem? The problem that the member is identifying is that, instead of the executive tainting the secondary judicial body in the Magistrates Court, somehow or other, by virtue of something we have done in this bill, there now is an elevated prospect of a taint flowing backwards from persona designata to the Supreme Court, the body from which the persona designata will be drawn. To paraphrase George Lucas, that is a bit of a phantom menace. The member has not really sufficiently identified a problem here that is worth running an enormous risk in trying to cure a phantom menace–type problem by putting the executive in the absolute forefront of the process we have here. If we can get further information about that problem, I will consider it, but I do not think that has occurred yet.

Mr J.R. QUIGLEY: I rise to correct a representation that the Attorney General made initially—that is, that I was implying that the justices of the Supreme Court were in some way inferior in their forensic capacity to analyse the materials placed before them on an application for a declaration. Nothing could be further from the truth. In fact, judges of either the Supreme Court or the District Court, as the present case is, sit as commissioners of the Corruption and Crime Commission. What I was referring to was that looking at 35 volumes of lever arch files and 61 CDs of telephone intercepts is an enormous task that any one person would be seeking assistance from their staff just to manage. The CCC is ideally placed to do that task and would seem to have plenty of capacity to take it on. We will deal with that later.

Another clause in the bill provides that the designated judge will remain the designated judge until such time as he resigns or the Chief Justice cancels his designation, because there could be a situation in which too much of the judge's time is being eaten up with a lot of applications coming on. I know that they might also simultaneously be addressing another problem identified in Grollo's case, which is that if a judge spends so much time doing this particular task and becomes so identified with this particular task, that in itself can lead to the impugning of the integrity of the bench upon which he sits.

The second proposition—that is, the judge, the persona designata, is somehow not exercising an executive function—is not right on the cases; the judge is exercising an executive function. That is beyond doubt. The concept that the judge, the persona designata, sits somewhere between the executive and the judiciary was described by the High Court as a tortuous argument of medieval schoolboys. Chief Justice French said the mere fact that the legislation provides that the judge selected to hear the declaration will be persona designata is in no way determinative of whether or not the judge, in acting in that capacity, is impugning the institutional integrity.

We will come to this later, so I will conclude now. I just did not want to be verballed by people saying that the member for Mindarie said that the justices of the Supreme Court are seized of some forensic incapacity that the CCC is not, and therefore that body is superior. I never said that; nor do I imply it. What I do say—we will come to it later—is that when looked at overall and when looking at the effect of the declaration, it goes beyond that which the Attorney General identified in Mr Justice Hayne's judgement; that is, it does not affect property rights or the individual. Here it enlivens a very onerous regime of mandatory sentencing and offences, and the declaration will provide proof beyond a reasonable doubt of an element of that offence. I just wanted to correct that impression.

Mr C.C. PORTER: I did not mean to verbal the member. But I do think that the member is trying to make the point that practically, for a variety of reasons—not about judicial skill, necessarily—the CCC is better placed. I think these practical difficulties can and will be overcome, to the extent that they exist at all, which I would say is modest.

In any event, the member's other more important point is about the persona designata undertaking an executive function. I have never suggested that the persona designata is not undertaking a function at the request of the executive, nor that it is anything other than established by the executive. But the question here is the same question that arose in Wilson v Minister for Aboriginal and Torres Strait Islander Affairs. In that decision, Justice Gaudron described it as follows —

> In general terms, a function which is carried out in public, save to the extent that general considerations of justice otherwise require, which is and which is manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship between the judiciary and the other branches of government.

That statement from Justice Gaudron in Wilson was one that members of the majority, differently constituted, in Wainohu placed some reliance upon. It was that statement that Justice Heydon was referring to when he said the following —

> Gaudron J's approach was similar to that of the plurality, who said: "The separation of the Ch III judge acting as reporter from the Minister has been breached." In contrast to the position in *Wilson's* case, here there is no duty to report only in secret (ie no duty to give reasons), and the outcome is not in the hands of a Minister. What the eligible Judge does cannot be controlled by a Minister, and the making of an interim control order or control order, though the Commissioner applies for it, depends on the view of a Supreme Court judge.

So what Heydon was saying was that as things actually stood in terms of the operation of a persona designata in Wainohu, that did meet the type of criteria that Justice Gaudron was talking about in Wilson; and he disagreed with the majority on that. But what the majority seemed to be saying is that if we have a situation such as that of the persona designata in Wainohu, plus reasons for decision, that meets the general requirements that Justice Gaudron was talking about in Wilson, which is to say that a body—in this case, a persona designata—which is manifestly free of outside influence and which results in a report or other outcome which can be assessed according to its own terms, will not be one that gives the appearance of an unacceptable relationship.

What we have done, in view of the majority decision in Wainohu, is to add to the New South Wales process the thing which seemed to be missing and which the court found triggered or was the catalyst or was the important criterion that offended against the Kable principle. We have added that.

What is interesting is that the member commenced his second reading contribution by saying that had we adopted the New South Wales model in its absolute entirety, with no additional clauses of any type, there would be an almost unassailable likelihood —

Mr J.R. Quigley: Because of the High Court's —

Mr C.C. PORTER: Indeed. But now the member for Mindarie is asking us to accept amendments that will fundamentally change the New South Wales model and remove the persona designata and plug the executive back in—and not just something which the executive appoints and structures, but something which will have a much higher likelihood of the court finding is not manifestly free of outside influence and which does not result in a report or other outcome which can be assessed according to its own terms. The problem is that plugging the executive back into process recreates the Totani problem, for no apparent gain. I do not think that is a submission that is improved by repetition. I think the member and I are just agreeing to disagree.

Mr J.R. QUIGLEY: That is right, and I think this will have to be resolved in another forum. Here, it will be resolved on numbers, and in another forum it will be resolved —

Mr C.C. Porter: Also on numbers.

Mr J.R. QUIGLEY: Yes, also on numbers—the Attorney is quite right—but not on party political numbers.

I will not take the debate on this amendment any further, other than to say that when I talked about the New South Wales legislation, the goalposts have somewhat been moved because of the consequences that can flow from the declaration. Mr Justice Hayne recognised that it was not a benign declaration that did not affect rights here. It enlivens all sorts of other things in criminal courts, and that, we say, changes the character. If we did not have part 10, we would not be here discussing this. That is the conclusion of my remarks in support of the amendment I have moved.

Amendment put and a division taken with the following result —

Ayes (21)

Ms L.L. Baker	Mrs C.A. Martin	Ms M.M. Quirk	Mr M.P. Whitely
Dr A.D. Buti	Mr M. McGowan	Mrs M.H. Roberts	Mr B.S. Wyatt
Ms A.S. Carles	Mr M.P. Murray	Ms R. Saffioti	Mr D.A. Templeman *(Teller)*
Mr W.J. Johnston	Mr A.P. O'Gorman	Mr C.J. Tallentire	
Mr J.C. Kobelke	Mr P. Papalia	Mr P.C. Tinley	
Mr F.M. Logan	Mr J.R. Quigley	Mr P.B. Watson	

Noes (27)

Mr P. Abetz	Mr V.A. Catania	Mr A.P. Jacob	Dr M.D. Nahan
Mr F.A. Alban	Dr E. Constable	Mr R.F. Johnson	Mr C.C. Porter
Mr C.J. Barnett	Mr M.J. Cowper	Mr A. Krsticevic	Mr D.T. Redman
Mr J.J.M. Bowler	Mr J.H.D. Day	Mr W.R. Marmion	Mr M.W. Sutherland
Mr I.M. Britza	Mr J.M. Francis	Mr J.E. McGrath	Mr T.K. Waldron
Mr T.R. Buswell	Dr K.D. Hames	Mr P.T. Miles	Mr A.J. Simpson *(Teller)*
Mr G.M. Castrilli	Mrs L.M. Harvey	Ms A.R. Mitchell	

Pairs

Mr R.H. Cook	Dr G.G. Jacobs
Ms J.M. Freeman	Mr B.J. Grylls
Mr T.G. Stephens	Mr I.C. Blayney

Amendment thus negatived.

Mr J.R. QUIGLEY: I have a question about the definition of "member" at page 5, line 24. I am not talking about members of this chamber but the definition of a member of a declared organisation. The clause defines "member"—we see this in other parts of the legislation—very, very widely. The following definition in particular fascinates me —

> **member**, in relation to an organisation, includes —
>
> (a) in the case of an organisation that is a body corporate, a director or an officer of the body corporate; and

I have no problem with that. From memory, the Gypsy Jokers might have been an incorporated body. The adviser has indicated that that is right. It continues —

> (b) in any case —
>
> …
>
> (ii) a person who identifies himself or herself, in some way, as belonging to the organisation;

I do not have too much difficulty with that because if someone is going around wearing a tattoo or a jacket that says "I am", they are identifying themselves as a member of that organisation. I will be very interested to hear the Attorney General's opinion on what precedes subparagraph (ii), bearing in mind that this can lead to mandatory imprisonment and all sorts of serious consequences. Subparagraph (i) states —

> an associate member —

I probably do not have a problem with that because we talk about associate members and people hold themselves out as being associate members —

> or prospective member (however described) of the organisation;

What does that mean and who identifies the person as being a prospective member? If I see a person in the company of a member of an organisation, are we to regard that person as a prospective member because he is talking to a member of the organisation or, in the case of an outlaw motorcycle gang member, declare that the organisation is a declared organisation and because the person sitting on the pillion seat of the bike is sharing the same bike, he might join up and be a prospective member? I do not know where else in legislation "prospective member" is defined. I am unaware of case law that talks about a "prospective member". I realise that I might be a bit limited there. How could a court, not a judge sitting persona designata—which would be at the control order application stage by now—say that this person is a member? If he said he has not been cut or tattooed or whatever they do, the court could say he does not have to do that. He is a prospective member because he was seen riding on the back of a bike and the guy on the back had a patch so this person is prospectively a member. I look forward to the Attorney General's explanation.

Mr C.C. PORTER: These definitions have been borrowed from the New South Wales act, the act that was under issue in Wainohu. Saying that as a matter of background, in New South Wales there would have been a subparagraph (iii). I am reading from the New South Wales act —

Mr J.R. Quigley: What page are you on?

Mr C.C. PORTER: It is in section 3 in the definitions section. I think the member will find it at section 3 —

Mr J.R. Quigley: It is section 3(b).

Mr C.C. PORTER: Yes, it is section 3(1)(b)(iii). The member will see that that is an additional definition in the New South Wales act as it was considered at Wainohu, which states —

> a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation.

We have not adopted that drafting in this bill. The government took the view that that was probably too expansive. That does not appear in this bill. The point that the member is making is whether clause 3(a)(i) and (b) in the present Criminal Organisations Control Bill 2011 is also expansive.

Mr J.R. Quigley: It looks more expansive.

Mr C.C. PORTER: That is precisely what is in the New South Wales act. I am not saying that it would not be without its difficulties for the court to make a determination, but, as with all legislation, the court would have to make its determination.

Perhaps if I talk about some of the rationale behind that. Outlaw motorcycle gangs call themselves "the one percenters". The theory behind that is that they are the one per cent of the population who are the last true anarchists in society, who should not be bound by the rules that the rest of us are bound by. They are the one per cent, and that one per cent refers to them being anarchists. What is ironic, I think, about the bikies' characterisation of themselves as anarchists is that there are very few organisations that are as rules-based as outlaw motorcycle gangs. They are sort of like an evil version of the Boy Scouts. There are badges and clothes, and often there are incorporated associations; they usually have charters or constitutions; they have a semi-paramilitary structure—sergeants-at-arms—they have nominees, and they have —

Mr J.R. Quigley: Sanctions inflicted.

Mr C.C. PORTER: Indeed. The member looks at clause 3(b)(i) and asks, "Who would be providing evidence?" or "Where might evidence come from that someone was an associate member of —

Mr J.R. Quigley: No, not associate; I can understand that.

Mr C.C. PORTER: Okay. Or a prospective member —

Mr J.R. Quigley: That seems to be closer to it.

Mr C.C. PORTER: Most likely the evidence would come from the bikie gang itself, because they keep the role of people who are noms, and they follow the behaviour of noms and they work out —

Mr J.R. Quigley: Noms?

Mr C.C. PORTER: Nominees—a nominee would be a prospective member. Nominees are quite a well known category of aspirant, an outlaw motorcycle gang hanger-on, who wishes to become a member. They are very often, based on the criminal intelligence I have seen, well known and documented to the club itself. On the widest view, an argument might be put by an applicant for a control order that we are all prospective members of the bikies, insofar as it is at least not inconceivable that any person might wish or try to become a bikie. I think that kind of application would be thoroughly and deservedly rejected by the court. More likely, the type of

evidence and information that would be put before the court would emanate from the organisational structure and documentation of bikie gangs themselves; namely, that this or that person is readily known as a "nominee" in that he is a person trying to ingratiate himself to the bikie gang in question to become a fully patched member of that organisation.

Again, with associate members, the great irony about bike gangs being anarchists is that they keep rolls of who is a member, who has been banned from membership, who is an associate member and who is a nominee. One of the very helpful things, and one of the points of this legislation, is that when we break down that structure that is about being patched and badged and known as a bikie gang member, it loses a lot of the authority and the intimidation effect that individuals have when they are patched and badged as a member. The short answer to the member's question is that it would be incumbent on the party seeking to have a control order placed upon a member to prove that someone is a prospective member. A court would soundly reject the idea that anyone is a prospective member in terms of it being at least a non-impossibility. But I think the information that likely would be used to argue that would come from bikie gangs themselves.

Mr J.R. QUIGLEY: Thank you for drawing my attention, Attorney, to the New South Wales provision, which I had read but not compared with this because it uses different language. The New South Wales provision does not use "prospective member". It refers to a person who is treated by the organisation —

Mr C.C. Porter: It does; it is just above that.

Mr J.R. QUIGLEY: Sorry; in (1)?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: It says "an associate or prospective member". I see that; I am sorry. Thank you.

The Attorney is saying that the prospective member would be one of these people who is hoping to become a member.

Mr C.C. Porter: I would argue that what the prosecution would have to show is someone who has made real steps towards membership.

Mr J.R. QUIGLEY: That would involve some sort of nomination to that club. The Attorney is nodding to that.

Mr C.C. Porter: Yes, I am.

Mr J.R. QUIGLEY: I am going through this in stages. It is a bit of a bad habit of counsel to say, "The witness is doing this." We agree with that. The Attorney has also informed the chamber that these organisations keep lists of the patched associates and nominees. Instead of just following New South Wales, why does not the legislation say in plain language, "or a nominee to become a member"?

Mr C.C. Porter: I think, member, that different outlaw motorcycle gangs have slightly different variance of the terminology and that terminology has been used to encapsulate what we are trying to have proved in its language and theory, rather than use one of the terms used variously by motorcycle gangs.

Mr J.R. QUIGLEY: Thank you for that, Attorney General. I think it is important to have this on the record. Although the Attorney General couched it in terms of prosecution—which it is probably not, at least in the control order stage, but might be in relation to those latter provisions in part 10—in determining whether someone is a prospective member, the court should be looking at whether someone can be shown to have taken some positive steps to join the organisation.

Mr C.C. Porter: That is correct; that is my understanding of what is sought to be achieved by the use of the language "prospective member".

Clause put and passed.

Clauses 4 to 6 put and passed.

Clause 7: Application for declaration —

Mr J.R. QUIGLEY: I have an amendment that is repetitious so we will not take much of the chamber's time on it. The opposition wishes to put this at every opportunity throughout the debate this evening. I move —

Page 10, line 11 — To delete —

or the CC Commissioner

In support of the amendment I have moved I simply refer to all the propositions put in argument against the earlier amendment to the definition of "designated authority".

Mr C.C. PORTER: The shadow Attorney General must have argued this almost ad infinitum now. There is nothing I can add to that and I think the shadow Attorney General accepts that.

Amendment put and negatived.

Dr A.D. BUTI: I am on clauses 7(2) and (4). Clause 7(2)(b) states that the application must —

> identify the particular organisation in respect of which the declaration is sought;

Clause 7(4) states —

> For the purpose of subsection (2)(b), the application may identify the organisation by —
>
> (a) specifying the name of the organisation; or
>
> (b) specifying the name by which the organisation is commonly known; or
>
> (c) providing other particulars about the organisation.

I gather that someone can do one of three; they do not have to do all three. If we do not name the organisation and we look at clause 7(4)(c), what other particulars are we looking at in respect to the organisation? My concern is about clause 8 and the publication of a notice in the *Government Gazette*. If we are not going to name the organisation, how will we refer to the organisation? What other particulars would identify the organisation?

Mr C.C. PORTER: The short answer is that it would not be without its difficulties in writing. We can look at two or three different types of organisations. As I said, outlaw motorcycle gangs are conveniently easy to identify because they self-identify. They often have corporate structures; they give themselves names; and they badge, patch and dress the same, notwithstanding their radical anarchism. Therefore, specifying the name of the organisation or the name by which the organisation is commonly known is a relatively simple task. Then there might be organisations like the Spider Boys who I think had some notoriety in Perth based on an assault and shooting at the Metro City nightclub in Northbridge; that group was well known. That group also, without necessarily having the same sort of hierarchy, organisational structure, badging and the wearing of, almost, uniforms, was known by the name with which its members self-identified. There then might be a certain type of organisation that deliberately tries to not be known by name or was previously known by a name, but in light of the legislation of the type we are debating, abandoned that name. I would imagine that other particulars required about the organisation would be a list of people who it is said are members of the organisation, the nature of the organisation, how its members self-identify and whether there are any names, known or unknown, that they may or may not go by. When organisations deliberately try not to name themselves, the other particulars we would look at providing through the application process, at its foundation, is a list of names—who is said to be a member of an organisation that has been identified.

Mr J.R. QUIGLEY: That is interesting. The Attorney says that organisations can be identified by the names that the organisations might give themselves, and I recall the shooting at Metro City and the Spider Boys, but what about when someone else names that group, but the members do not name themselves or self-identify with that name? From time to time we read in the paper about colourful Northbridge identities. To continue the member for Armadale's question, would the descriptor "colourful Northbridge identities" be sufficient to describe the nature of the organisation if it were an identifier not given by some within the organisation, but by the media or some other commentator?

Mr C.C. PORTER: I think that that would be unlikely to be a very useful starting point for the application. With a group that deliberately tries not to name itself we would be looking at providing other particulars about the organisation. Therefore, the application might state that "the following 15 people who regularly meet at such and such a premises" or "these people consort together on a regular basis in the following areas". In this process a person would be required to identify the individuals and show something about their behaviour, the clothes they wear, the places they go to, the activities they engage in and the places they frequent and meet—things that bind them together as a group. Therefore, simply listing individuals is not an organisation, unless it can be shown that something about them is organisational or cohesive. That might be very simple for organisations that self-identify and have names, as is the case in clause 7(4)(a) and (b). It would be somewhat more difficult, but not impossible, to show that individuals could be described as an organisation not based on names. There could be particulars that we could nominate about their nature or inherent nature as an organisation that are not based on names, either self-naming or other names. To come back to the member's original point, I do not think that simply a name out of the blue that some or other journalist may have determined is appropriate —

Mr J.R. Quigley: Even by notoriety.

Mr C.C. PORTER: Indeed. That would not be likely a wise starting point for anyone seeking to make an application of this nature.

Mr J.R. QUIGLEY: I now move to clause 7(3) at line 26, which states —

> The application must be accompanied by one or more affidavits verifying the contents of the application …

I will probably get some free legal advice from the Attorney through the Deputy State Solicitor here. In the other jurisdictions, it was supported by a statutory declaration. I know that in New South Wales it was a statutory declaration as opposed to an affidavit. Is not the mere usage and format of the word "affidavit" suggestive of a court proceeding, whereas in a more executive function or outside of a court setting, it is a statutory declaration under the act, rather than an affidavit under the court rules?

Mr C.C. PORTER: What the member says may be correct in that it gives the persona designata a more judicial flavour.

Mr J.R. Quigley: Exactly.

Mr C.C. PORTER: I would not dispute that. What we are trying to achieve by it being an affidavit is that it is under a form of oath, if we like, whereas a statutory declaration is not. Again, on the constitutional point, the persona designata having a more judicial-like process is probably a good thing in terms of sustaining the constitutionality of the entire bill, particularly the declaratory procedure. I point out that, in fact not that long ago, at the Standing Committee of Attorneys-General a move was afoot to have a harmonised system of statutory declaration across Australia. This was met with some degree of reluctance by many of the Attorneys General because some of the jurisdictions—I think the Northern Territory might be one—had very low standards as to who can witness a statutory declaration including people with very significant criminal records, as things transpired. But that is a slight aside. The point the member makes is right: this means that the declaratory process from its outset has a range of procedures that are either judicial-like or borrowed from a judicial setting.

Mr J.R. QUIGLEY: I raised that because in New South Wales—I am positive—it was a statutory declaration that the commissioner filed in support of the application before the Supreme Court.

Mr C.C. Porter: It's an affidavit as well.

Mr J.R. QUIGLEY: An affidavit, was it? It must have been South Australia. Anyway —

Mr C.C. Porter: It would be an unusual thing to have an affidavit before an Attorney General, who was the decision maker in the South Australian situation, but of course the persona designata bears more similarity and resemblance, as you point out, to court-based proceedings.

Mr J.R. QUIGLEY: Am I correct that these hearings will be in open session unless dealing with police intelligence?

Mr C.C. Porter: Largely speaking, if there is material that is sensitive, that will be severed from the generally open procedure.

Mr J.R. QUIGLEY: The point that I wish to make from there is that—I do not want to be disrespectful of their Honours—if it looks like a duck and it quacks like a duck, it is a duck. So here we have in all respects something appearing to be judicial that members of the public can follow or go down to the Supreme Court to look at—it is in the Supreme Court building; a member of the bench is sitting on the proceedings; and what is filed before him is an affidavit. Although not judicial, this has a very, very close nexus to being a judicial proceeding.

Mr C.C. PORTER: It will not necessarily be in the Supreme Court building. But, in any event, the point that we took from Wainohu was this: if we have a persona designata—notwithstanding that it is neither the court nor the executive, it is a persona designata—and if the process and the procedure of getting a declaration before a persona designata are limited and do not display the types of procedural fairness that we attach to judicial proceedings, and if it simply looks like the rubber-stamping by the persona designata of some desire of the executive, that is when the difficulty arises that we can taint the body from which the persona designata is drawn. So what we have done here, and what was attempted to be done in New South Wales, is have a procedure that is fulsome—it is argued, it is as best as we can make it, it is open and it requires reasons; and that is the addition that we have that was not existent in New South Wales. I think the point that the member makes is correct, but the reason New South Wales did all this at first instance, and why we have copied New South Wales at second instance, is that this was seen to be the way to avoid the Totani problem.

Mr J.R. QUIGLEY: I have an amendment to move to clause 7(3)(b) to be found on page 11 between lines 1 and 6. As the member for Mindarie, I move —

> Page 11, lines 1 to 6 — To delete the lines.

In support of my amendment, I refer to the arguments that I have advanced in relation to my first amendment to clause 3 of the bill regarding designated persons. This amendment flows from that. I do not wish to take any further time of the Assembly.

Amendment put and negatived.

Mr J.R. QUIGLEY: I now take the Assembly's attention to clause 7(5), to be found at line 13 on page 11, which provides —

> The application —

That is, the application that a body, group or organisation be declared a criminal organisation —

> must be lodged with a registrar nominated for the purpose by or in accordance with the regulations, and that registrar must, without delay, refer the application to a designated authority.

The legislation contains other provisions, which I will come to later, that the Commissioner of Police must keep a register of decisions and organisations et cetera. Because there are no regulations before the chamber, I am asking the Attorney General who is it envisaged the registrar will be for this purpose? Will it be a registrar of the Supreme Court, or will there be a separate registrar for the purposes of this act? Or will this be another situation of a registrar of the Supreme Court being nominated as the registrar under this provision? It is unclear, obviously, because we are not up to regulations yet. I seek that clarification from the Attorney General.

Mr C.C. PORTER: If the member goes to the definition in clause 3, it states —

> ***registrar*** means a person holding or acting in an office designated under the *Supreme Court Act 1935* as the Principal Registrar or a registrar or a deputy registrar;

So the member is correct; just as the persona designata is drawn from the court in the sense that that person is either a sitting or retired judge, the registrar, under the procedure for declarations, is also drawn from the court, and, from the definition there, a registrar of the court.

Mr J.R. QUIGLEY: That adds even more weight or force to what we are saying, which is that in all respects, apart from a clause in the Criminal Organisations Control Bill 2011 relating to persona designata, this appears to be an executive function performed by the Supreme Court. We have difficulties with that because of consequences we will talk about when we get to part 10 of the legislation. I thank the Attorney General for that explanation. I have no further matters in respect of clause 7.

Clause put and passed.

Clause 8: Publication of notice of application —

Dr A.D. BUTI: I assume the purpose of this clause is the notification of the declaration to the respondent, and also, I suppose, the general public; there will be a notice in the *Government Gazette* and at least one newspaper. I wonder, though, whether the respondent should receive some formal notice that an application is to be made that will have serious consequences on persons involved in that organisation and people who associate with people involved with that organisation. I wonder whether we can be confident that a notice in the *Gazette* and at least one newspaper will suffice, and whether a more formal notice, as would happen in normal court proceedings, should be provided to at least someone in the organisation.

Mr C.C. PORTER: Member, it is a fair point. That is the minimum standard. Clause 8(1)(d) states that the notice in the *Government Gazette* would need to invite members of the organisation and other persons who may be directly affected, adversely or not, by the outcome of the application to make submissions to the designated authority at a hearing. Presuming one person makes such a submission, it may be that that submission is that people be individually notified, which is within the power of the persona designata, yet the view was taken just as a matter of procedure that it would be very unwieldy to try to personally serve members potentially of no fixed address or indeed members of organisations who are desperately trying not to be found or located. But that would not stop a persona designata requiring the services of particular individuals and perhaps that would occur by basis of a submission made by someone who receives the gazettal notice. It is a minimum standard. It is considered to be the only way of proceeding administratively in a sensible fashion.

Clause put and passed.

Clause 9: Hearing of application —

Mr J.R. QUIGLEY: We have heard discussion in the chamber on such matters from the lodging of the application with the Supreme Court registrar to the appending of an affidavit that will make that application look like a Supreme Court proceeding. Does the Attorney General anticipate that the affidavit will be headed up as in the Supreme Court of Western Australia—between Commissioner of Police, applicant, or —

Mr C.C. Porter interjected.

Mr J.R. QUIGLEY: That is up to the Supreme Court, ultimately, under here, is it not, because it has the right to set rules? We will come to that later.

Mr C.C. Porter: Affidavits have a certain form, but the heading of an affidavit would have to identify the affidavit as pertaining to this process or this —

Mr J.R. QUIGLEY: But clause 9 sets out the really stark difference between a judicial process and this process. Although there must be a hearing, the first thing is that the rules of evidence do not apply.

Mr C.C. Porter: That is correct.

Mr J.R. QUIGLEY: That is subclause (2). Clause 9(3) states —

> The persons who may attend and make submissions at the hearing of an application may do so personally or by counsel or representative.

Does that include a non-qualified person or representative? Does it have to be a person under the legal practitioners act, because we are not dealing with a court proceeding?

Mr C.C. Porter: Is the question: can a person choose to be represented by a person not holding a practice certificate?

Mr J.R. QUIGLEY: Correct.

Mr C.C. Porter: Subject to all of the requirements of the Legal Practice Board that people who do not hold legal practicing certificates are not to undertake legal duties, I think that would be possible.

Mr J.R. QUIGLEY: By saying "or representative" seems quite clearly to set out that that would be the case. It would be unusual for a judge in ordinary circumstances to accept that, but clause 9 refers to "or representative" without the qualification.

Mr C.C. Porter: That is true, but a person who may be representing someone in this capacity is not immune from other provisions of other rules and statutes, which —

Mr J.R. QUIGLEY: I agree, as to charging for services et cetera.

Mr C.C. Porter: Indeed.

Mr J.R. QUIGLEY: But what about the person who gets some common criminal to come along saying, "Well, you have been through the process several times, could you be our representative?"

Mr C.C. Porter: That is possible.

Mr J.R. QUIGLEY: This also varies from a court proceeding and goes to the executive function, but a designated authority has the powers of a royal commission and the chairman of a royal commission under the Royal Commissions Act, which is clearly non-judicial.

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: My question, Attorney, is that for the purpose of making the declaration—it is not in the powers of the Royal Commissions Act—is it envisaged that the designated judge, to get to the bottom of the issue, will issue summonses under the powers of the Royal Commissions Act to have the person brought before him and examine the person as a royal commissioner can? Is that what is envisaged?

Mr C.C. Porter: The short answer to that is yes. The persona designata could summons people to appear before his declaratory proceedings.

Mr J.R. QUIGLEY: And examine them himself.

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: Which a judge would not do in curial proceedings.

Mr C.C. Porter: I do not know whether you might have met with some reticent judges in your time, but I have seen the odd judge put a few questions to a witness from time to time.

Mr J.R. QUIGLEY: I have seen that. I have seen them take over!

Mr C.C. Porter: That might have been unique to you and me when we appeared in court.

Mr J.R. QUIGLEY: However, in my experience I have not heard a judge say, "I will summons this witness, have him brought before me and I will examine him."

Mr C.C. Porter: No. I know exactly what you are saying and I agree. The judge could suggest something to the prosecution.

Mr J.R. QUIGLEY: They might like to.

Mr C.C. Porter: Indeed.

Mr C.J. TALLENTIRE: I would like to hear the member continue.

The ACTING SPEAKER (Ms L.L. Baker): Certainly, member for Gosnells. Member for Mindarie, please continue.

Mr J.R. QUIGLEY: Thank you, Madam Acting Speaker.

Mr C.C. Porter: But a prosecution, according to the principles of Apostolides, has some significant autonomy in determining who it would actually call.

Mr J.R. QUIGLEY: But the bench—if we can call it the bench—or the person conducting the hearing would have a right to call a witness themselves and say, "I'll get to the bottom of this."

Mr C.C. Porter: Yes. This process bears more in common with a royal commission than with a Supreme Court criminal or civil proceeding. I add, by way of interjection, that these provisions and the structure of the persona designata that we have adopted are slightly different from the New South Wales legislation. Again our advice is that they do not offend against the Kable principle, for the same reason that royal commissions do not.

Mr J.R. QUIGLEY: That is because this confers the power on the determination of the application. I refer to lines 29 to 31 of the clause, which state —

> … as if an application were a matter into which a Royal Commission was appointed to inquire under that Act.

Mr C.C. Porter: That gives the persona designata running the declaratory hearing greater independence than the executive. That is why we have chosen this structure.

Mr J.R. QUIGLEY: They were powers that the CCC had in any event; it has the powers of a royal commission.

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

Mr J.R. QUIGLEY: So nothing would be lost. I know our amendments have been defeated, but nothing would have been lost on that count, and the CCC would have had the powers of a royal commission.

Mr C.C. Porter: No. I don't believe that the characterisation of the persona designata, as distinct from the executive, relies on its powers; it relies on its fundamental, underlying structure—who the person is and how that person is drawn. The CCC unarguably is part of the executive.

Clause put and passed.

Clause 10: Persons who may attend and make submissions —

Mr J.R. QUIGLEY: This clause states —

> The applicant for a declaration may be present and make submissions in relation to the application at the hearing of the application.

That is a right extended to the applicant by clause 10.

Mr C.C. Porter: Indeed, and with reference to clause 9, of course, the applicant might be represented at that hearing by some person other than the applicant.

Mr J.R. QUIGLEY: Yes. The application itself will be supported by the affidavit of the applicant as per clause 7. However, in referring to the "organisation", this clause states —

> The respondent may be present and make submissions in relation to the application at the hearing, but subject to subsection (4).

Subclause (4) states —

> (a) the applicant may object to any person referred to in either of those subsections being present during part …

That is when criminal intelligence is being discussed and the attitude would be: "We're not going to give up our inquiry; you get out of the room." It continues —

(b) the designated authority must deal with the objection under section 110.

We can deal with that paragraph later.

However, does the respondent, although faced with an affidavit of the applicant, have the capacity or right to cross-examine the applicant as to the assertions contained in the affidavit? Normally, under the Supreme Court rules, a party meeting an affidavit can ask to cross-examine the deponent. Is this a right only to make a submission, or can the respondent participate in a more meaningful way, in terms of asking questions of the deponent? That is my first question. My second question is: has the respondent a right to adduce evidence? There might be evidence that suggests he is a nominee, and he may wish to adduce evidence that he is no such thing, or that the organisation is not of the character deposed by the commissioner. I raise this because this is referred to, I think, in Wainohu, as to the rights of the respondent. What is the respondent able to do to meet the application? Is it simply to say, at the end of the day, "I've sat here, I've listened to everything that's happened and this is the submission I want to make", and they have to put in an affidavit to meet the applicant's affidavit; or are they indeed allowed, under the rules of the Supreme Court, to cross-examine the deponent to the affidavit in support of the application?

Mr C.C. PORTER: Perhaps I will put it like this: to avoid any potential of any further level of argument of the broad constitutional type that existed in Wainohu, we have sought to give significant procedural latitude to the persona designata. The executive, in framing these laws—which one hopes will pass through the Assembly and the Legislative Council in due course—is not being proscriptive in terms of the processes that the persona designata might engage in. The answer to the member's question is: if it is contemplated that it would depend upon the persona designata, the respondent might be able to contest material in an affidavit, as the member alluded to, in two ways. One is to cross-examine either the signatory of the affidavit or, indeed, people who are mentioned in the affidavit. Of course, affidavits are framed in the "I verily believe to be true" way and so forth, but that does not mean to say that the signatory of an affidavit would be the best person to cross-examine in terms of a contesting; but nevertheless, one way would be for the respondent to cross-examine the signatory of the affidavit, or people who are mentioned in the affidavit as primary givers of evidence.

Another way would be for the respondent, by way of affidavit or oral submission, to contest in any way they saw fit, assertions of fact made in the affidavit. I would imagine that both or either of those avenues might be allowed from time to time by given persona designata, but that would be a decision of the persona designata in controlling the processes of the proceedings.

Mr J.R. QUIGLEY: I asked that question because in discourse between counsel and the court—I think it was Mr Robinson for the appellant in Wainohu—there was talk that in New South Wales, where there is a similar provision, the court is restricted to permitting only the respondent to make submissions, and there is no capacity under the legislation to do more than make submissions. If it be true that the real intent of this legislation is to extend to the respondent the capacity to adduce evidence and cross-examine witnesses, should the legislation not provide that capacity? We are not networked on that iPad, unfortunately, so I cannot see the Attorney General's crib note!

Mr C.C. Porter: It is just my adviser showing me his Facebook page! Mr Mitchell, who is advising me today, was counsel intervening for Western Australia in both those matters. I think I am testing my friendship with him and testing his memory in asking him whether he can recall particular submissions that were made. Ultimately, the answer to your question is that there is nothing in the provisions of this bill that would forbid or prevent a persona designata determining that in all circumstances the appropriate thing to do would be to allow a respondent to cross-examine either the signatory or someone mentioned in the affidavit as a source of evidence. Whether the persona designata determined that that was the best procedural course in this or that declaratory proceeding would be a matter for him or her. I accept your recollection of those submissions, but on our reading of this legislation that we have brought before this place, there is nothing in the bill that would prevent that from occurring or prevent the persona designata making a decision for that to occur.

Mr J.R. QUIGLEY: But there is nothing there that specifically permits it.

Mr C.C. Porter: No.

Mr J.R. QUIGLEY: Would the Attorney General accept an amendment that the respondent may be present to make submissions, may adduce evidence and may cross-examine witnesses?

Mr C.C. Porter: I would not be disinclined to take an amendment phrasing it as a matter of clarification that the persona designata could make such a determination. I am always in trouble with the Parliamentary Counsel's Office for accepting amendments on the run, but I am sure that in this case an appropriate position for it could be found. If I were to accept it on behalf of the government, I would like it to be framed —

Mr J.R. QUIGLEY: I am trying to take it down.

Mr C.C. Porter: Perhaps if we go to the clause that you are looking at.

Mr J.R. QUIGLEY: Clause 10 —

The ACTING SPEAKER (Ms L.L. Baker): Member, are you moving an amendment now?

Mr J.R. QUIGLEY: Yes; I will move it in a moment.

Mr C.C. Porter: It would need to come after clause 10(2), I would imagine. I might get Mr Mitchell, with his superior drafting skills, to draft something. Perhaps there is something else we can discuss in the meantime.

The ACTING SPEAKER: Members, it is fine for you to draft the amendment now before we move on.

Mr J.R. QUIGLEY: Because once we move on, we cannot come back to this.

The ACTING SPEAKER: We can, member, but you are probably better placed to move the amendment now once you have decided the wording with the Attorney General.

Mr C.C. Porter: If we can have a minute and a half of relative silence, I am sure that we can come up with something.

The ACTING SPEAKER: Are you ready, Attorney General?

Mr C.C. PORTER: We suggest—I will have this passed to you in a moment—a form of words of this type —

> The designated authority may allow a person appearing before the hearing to examine or cross-examine witnesses if the designated authority considers it appropriate to do so in all the circumstances of the case.

The reason that we deliberately have not mentioned the signatory of an affidavit or a person mentioned in an affidavit is that by keeping it broader, it is to the advantage of the respondents. All it does is clarify what we have discussed, which is our view that a persona designata has the ability to control his or her own processes and allow that to occur.

Mr J.R. Quigley: I think your adviser wants to draw your attention to something.

Mr C.C. PORTER: Perhaps this might be circumvented by the point raised by Mr Mitchell in my ear. Section 22 of the Royal Commissions Act is headed "Examination of witnesses by counsel, etc.", and it states —

> A person appointed by the Attorney General to assist a Commission, or authorised by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by a Commissioner.

One of the advantages, it would appear, of empowering the persona designata with the powers of a royal commission is that the persona designata would have, oddly enough, almost precisely the power that we are attempting to draft here. I think, by virtue of this discussion, and on behalf of the government, noting that this is precisely what it is envisaged the persona designata would be able to avail themselves of, which is the power under section 22 of the Royal Commissions Act, that may solve the issue or the problem that the member for Mindarie has identified. Would that satisfy the member?

Mr J.R. Quigley: It sort of does. But because this section refers to it in the particular, I do not know whether this clause also ought refer to that section. Under that proposition, there would be no requirement to have, for example, subclauses (2) and (3). We could just say they are superfluous, because we already have the Royal Commissions Act.

Mr C.C. PORTER: What if we adopt this language? What if we substitute the term "designated authority" for "commission", and that is placed in the body of this bill? That would make it beyond all question, would it not?

Mr J.R. Quigley: Yes—would it not?

Mr C.C. PORTER: Indeed.

Mr J.R. Quigley: It was a point raised in the High Court, and I think it is worth addressing here.

Mr C.C. PORTER: We will draft that for the member now.

Mr J.R. Quigley: I am grateful.

Mr C.C. PORTER: On page 13, after line 13, new clause 10(4) would read —

> Without limiting section 22 of the Royal Commissions Act 1968 the designated authority may, so as far as the designated authority thinks proper, examine or cross-examine any witness on any matter which the designated authority thinks relevant, or allow a person appearing at the hearing to do so.

That is mimicking the language, although not precisely. I would also suggest the need for an addition to the present subclause 10(4) so that, in effect, despite subclauses (2) and (3) and new subclause (4), notwithstanding the ability of a respondent or their counsel to cross-examine a witness, it needs to be clear that if for reasons of criminal intelligence they determine that a respondent or their counsel should not be there, that this proposed amendment does not trump that provision.

Mr J.R. QUIGLEY: I am happy to move that or I will accept it as a government amendment.

Mr C.C. PORTER: I am happy for the member for Mindarie to move that amendment so that I do not have to answer to parliamentary counsel for it!

Mr J.R. QUIGLEY: I move —

> Page 13, after line 13 — To insert —
>
> > (4) Without limiting section 22 of the *Royal Commissions Act 1968*, the designated authority may, so as far as the designated authority thinks proper, examine or cross-examine any witness on any matter which the designated authority thinks relevant, or allow a person appearing at the hearing to do so.

Mr C.C. Porter: The member will also need to move a further amendment to the same clause.

Amendment put and passed.

Mr J.R. QUIGLEY: I move —

> Page 13, line 14 — To delete "and (3)" and substitute —
>
> > , (3) and (4)

Amendment put and passed.

Clause, as amended, put and passed.

Clause 11: Protected submissions —

Mr J.R. QUIGLEY: This clause provides for the protection of protected submissions as opposed to police intelligence. Subclause (1) states —

> For the purposes of this Part, a ***protected submission*** is a submission made by a person who has reasonable grounds to believe that he or she, or a close family member of that person, may be subjected to action comprising or involving injury, damage, loss, intimidation or harassment …

The next subclause appears to be mandatory. It states —

> In proceedings under this Part, a designated authority must take steps to maintain the confidentiality of a protected submission, …

It appears from this subclause that the person who determines whether this is going to be a protected submission is the person making the submission.

Mr C.C. Porter: This was raised in the Gypsy Jokers case as well. The use of the words "reasonable grounds" has been found to infer that it is the designated authority that determines whether someone is requiring a protected submission.

Mr J.R. QUIGLEY: So that is a matter of the case law.

Mr C.C. PORTER: The advice is that the interpretation of it will be as we have suggested—the persona designata, by virtue of those words, is the determiner of whether someone requires a protected submission.

Mr J.R. QUIGLEY: Should it not be permissive in subclause (2)? In other words, should it read "in proceedings under this Part, a designated authority may take steps"—that is, the exercise of discretion as to what he wants published or does not want published?

Mr C.C. PORTER: The discretion to determine whether a protected submission is required is reposed in the designated authority but once they have made that decision, they are compelled to institute the protections that are nominated there.

Clause put and passed.

Clause 12: Designated authority can make declaration despite non-appearance of respondent or others —

Mr C.J. TALLENTIRE: It appears to me that clause 12 makes the assumption that someone or some entity may choose not to attend. It does not consider any circumstances in which perhaps someone is unable to attend. There is an assumption that if someone was physically unable to attend, perhaps they would be able to commission someone to attend in their place. That might not necessarily be the case but we cannot assume that people would necessarily have the funds to pay for professional representation. This clause is headed "Designated authority can make declaration despite non-appearance of respondent or others".

The explanatory memorandum says that this is so; cases can be dealt with when people do not take advantage of the opportunity to attend. I would appreciate it if the Attorney General could explain why that reasoning is there.

Mr C.C. PORTER: The reason it is there is fundamentally in anticipation of a situation that the member has alluded to, in which the members of what is asserted to be a criminal organisation shun the process. They deliberately have nothing to do the process, either because they do not want to be identified or for other reasons. In that case, clause 12 is empowering the designated authority, on a discretionary basis, to make a declaration despite a non-appearance. Other circumstances might arise, including ones the member has nominated; that is, notwithstanding the gazettal or a secondary submission from someone who responded to the gazette that other people should be notified because of the unavailability or other reasons, they have not turned up. The discretion is still reposed in the designated authority to determine whether to make the eventual declaration of the organisation as a criminal organisation when not everyone who was expected to turn up has turned up. It allows them to make that declaration in circumstances in which no-one turns up. It is a discretion on the part of the designated authority. No doubt it would take into consideration issues such as the ones the member has raised in determining whether or not it would give a declaration at the end of the process even though certain respondents did not appear.

Mr C.J. TALLENTIRE: I thank the Attorney General for that explanation. I will have to foreshadow questions that I will ask about clause 13. I am thinking of groups such as Forest Rescue, which boarded the *Shonan Maru 2*. I think such a group could meet the definitions of an organisation involved in serious criminal activity if the charge was accepted, as was put about them in Japan, that they were committing an act of piracy. It is hard to envisage a more serious criminal activity than piracy, relative to the other sorts of criminal activity that we would be talking about with this legislation. They could be thought to be very serious criminals. They would meet the criteria outlined in subclauses (1)(a), (1)(b) and (1)(c), but of course they are out on a boat; they are unable to attend. There could be a certain fervour in the community and a belief that these people are members of a criminal organisation. They are not in a position to represent themselves to put their side of the case. I think they would be severely disadvantaged by the circumstances. We would be totally reliant on the designated authority to make the call in their favour. That is not necessarily going to be the case. I reiterate what I said previously: such an organisation would not likely have the funds to commission someone else to represent them.

Mr C.C. PORTER: I take the point raised by the member but animal rescue groups or groups of that nature will not be caught up in this legislation. The reason for that—I know we are now talking about clause 12—is that clause 13(1) states that the designated authority must be satisfied —

(a) that the respondent is an organisation; and

(b) that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and

(c) that the organisation represents a risk to public safety and order in this State.

Just in reference to clause 13(1)(b), page 7 of the definitions section of the bill states —

serious criminal activity means any of the following —

(a) obtaining material benefits from conduct that constitutes a serious indictable offence;

(b) obtaining material benefits from conduct engaged in outside this State (including outside Australia) that, if it occurred in this State, would constitute a serious indictable offence;

(c) committing a serious violence offence;

(d) engaging in conduct outside this State (including outside Australia) that, if it occurred in this State, would constitute a serious violence offence;

serious indictable offence means an indictable offence for which the penalty specified by a written law is or includes imprisonment for 5 years or more or life;

> ***serious violence offence*** means an offence for which the penalty specified by a written law is or includes imprisonment for 10 years or more or life, if the conduct constituting the offence involves any of the following —
>
> (a) loss of a person's life or serious risk of loss of a person's life;
>
> (b) serious injury to a person or serious risk of serious injury to a person;
>
> (c) serious damage to property in circumstances endangering the safety of any person;

With respect to clause 13(1)(b), the members of the organisation would need to be shown to be associating for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity or engaging in criminal activity of the nature defined.

I think it would be very difficult to argue that even those fellows who boarded that ship at sea associated for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity. I think they would deny that what they did was even a criminal offence; in fact they did so publicly. In any event, it would be near impossible, I suggest, to argue that organisations of that type are associating for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity. It would not need to be shown merely under clause (1)(b), it would also have to be shown under (1)(c) that the organisation is associating for the purpose of organising that serious criminal activity, "that the organisation represents a risk to public safety and order in this State." The member is requesting that the designated authority make a determination on a fairly high hurdle. I have to say to him that it is neither the intention to catch the types of organisations he is talking about, nor would it be the practical outcome.

Clause 4(2) refers to the purposes of the act, which will also guide the designated authority in making its decision. Clause 4(1)(b) reads —

> to protect members of the public from violence associated with those organisations and other persons who engage in serious criminal activity.

Subclause (2) reads —

> Without derogating from subsection (1), it is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action.

The point the member raises is properly raised, but it is certainly not the intention of the government to capture the sorts of activities he mentioned. I have to say to him that on a plain English interpretation of these provisions, they will not be caught.

Mr C.J. TALLENTIRE: I appreciate what the Attorney General was saying. I think it all holds true and, obviously, we share the view that such activity would not be of any serious criminal nature at all. But the fact remains that during the time of that event, charges of piracy were being waged at those individuals. That was a charge well removed from the view that they were actually protesters. I think there is a risk, but I hope that by having it in *Hansard* we can guard against such an eventuality. But there is that risk that eventually somebody in that situation could be deemed to be involved in a form of piracy, which is a very serious criminal activity. The Attorney General and I agree that it is not piracy at all, but there is certainly that potential and that was certainly the view in Japan. I think many people in Western Australia shared the view that it was an act of piracy. They were prepared to ignore the true intentions of those individuals, so we have to be sure that this legislation will guard the rights of those individuals.

Mr C.C. PORTER: I think, again, the member properly raised the issue. The only way to assess the veracity of what I put to him, which is that the types of organisations that we do not want to see caught up in this legislation will not be caught up in it, is to argue, unfortunately, by example, and he has raised that example.

I think it is a perfect example of how the organisations that we would not want caught up in this legislation will not be. I submit to the member that, notwithstanding a view that I would suggest is probably peculiar to Japanese whalers, that was not piracy. There were suggestions that it was, but they are not in my view serious suggestions. There would not even be a basic underlying trigger offence in this legislation to even warrant the first step of consideration in this process. If, by necessity, we need to argue by example about what types of groups might be in or out, based on what we have seen, it is a good example that suggests that that group is not within a bull's roar of this legislation.

Ms A.S. CARLES: I would just like to follow on from the question of the member for Gosnells about the Forest Rescue group. I take the Attorney General back to that definition of serious criminal activity. Could the Attorney General please clarify if aggravated burglary constitutes a serious indictable offence, because I understand that

the Forest Rescue group held a sit-in at a Department of Environment and Conservation office recently and was charged with aggravated burglary, which would then bring it within that provision of serious criminal activity? I would also like to put on the record that special Commonwealth Heads of Government Meeting powers were recently exercised against the same group of individuals and all the main players of Forest Rescue were banned from being near CHOGM, presumably because they were perceived to be a threat to the public. Could the Attorney General please clarify the nature of serious criminal activity and whether it applies to Forest Rescue?

Mr C.C. Porter: Which group was charged with aggravated burglary?

Ms A.S. CARLES: It was Forest Rescue; the people that the member for Gosnells just referred to.

Mr C.C. PORTER: I do not know when that charge occurred or whether there are live court proceedings, therefore I will not go into the detail of that matter while it may be before the courts. But let me say that aggravated burglary is a serious criminal activity; that would be the case whether it was done under the guise of rescue or not. In answer to the member's first question of whether an aggravated burglary fit the definition of serious criminal activity, in terms of that situation, it would potentially—I am talking here in the abstract, because I do not know terribly much about that particular case. However, the definition on page 7 of the bill states —

> ***serious criminal activity*** means any of the following —
>
> (a) obtaining material benefits from conduct that constitutes a serious indictable offence;

Yes, aggravated burglary meets the requirement of a serious indictable offence, but I think in the circumstances the member has alluded to, based on what the member has said, it could not reasonably be argued that the potential perpetrators of that serious indictable offence were doing it to obtain material benefit, and I think it is not the case that they were. In any event, the legislation would have to be read in recognition of clause 4(2), which again states —

> Without derogating from subsection (1), it is not the intention of Parliament that the powers in this Act be used in a manner that would diminish the freedom of persons in this State to participate in advocacy, protest, dissent or industrial action.

And again, clause 13 covers members of an organisation associating for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that an organisation represents a risk to public safety and order in this state. Again, probably by necessity, we would need to argue about whether this legislation captures organisations we would want to capture and does not capture organisations we would not want to capture; we would need to argue that by example. The example that the member for Fremantle has given, although an aggravated burglary, would potentially meet the definition of a serious indictable offence, but it would not meet any of the other criteria. Therefore, I think the answer to that member's question would be no, if the question is whether that organisation would be caught up in this legislation.

Clause put and passed.

Clause 13: Designated authority may make declaration —

Mr J.R. QUIGLEY: This takes me back to the point touched upon by the member for Gosnells and the erstwhile member for Fremantle. I would probably be remiss if I did not ask on behalf of my, dare I say, comrades at the MUA, here to stay, the following question by way of example, because I know that at the height of the industrial activity when things were running pretty high—it remains a concern of some people in the industrial field—during the disputation with Patrick, the Maritime Union of Australia took up positions on the wharves of Fremantle that would no doubt interrupt the workings of the rail network in Western Australia and as such could constitute a serious indictable offence. This is a genuine concern, not under such a moderate Attorney General and Premier as we have at the moment, but looking down the track with someone more extreme in the chair. We have seen extreme examples of government responses to industrial matters going back only a couple of decades. Unionists who take up a position on the wharves blocking a railway commit a serious indictable offence with the purpose to obtain a material benefit for their members. I am now addressing the second serious criminal activity criterion about obtaining a benefit from conduct engaged in in Australia that constitutes a serious indictable offence. I take on board what the Attorney General says about clause 4(2) in that industrial action is excluded; nonetheless, if the industrial action involves the commission of a serious indictable offence as described—that is, blocking a railway—for the purposes of obtaining for the members of the union a material benefit, for example, better working conditions or a pay rise, what is to stop a more extreme administration invoking this proposed section to have that union declared and achieve what Mr Patrick so miserably failed at?

Mr C.C. PORTER: Again, we end up arguing this issue fairly and necessarily by example. In those circumstances I think we would work back from the idea in clause 13(1)(c) of the organisation representing a

risk to public safety and order in the state. I think that would be an impossible hurdle for any applicant to pass in the circumstances that the member has described.

Mr J.R. QUIGLEY: That is the very issue, is that not safety but order of the state the very thing —

Mr C.C. Porter: But it is conjunctive. You'd have to amend your example to have members of the MUA disrupting public safety.

Mr J.R. QUIGLEY: They would never do that.

Mr C.C. Porter: Indeed; I agree.

Mr J.R. QUIGLEY: My comrades would never do that. They would protest, but never endanger public safety.

Mr C.C. Porter: Indeed.

Mr J.R. QUIGLEY: Therefore, perhaps the Attorney General has answered that for us.

Dr A.D. BUTI: There are a couple of points, Attorney General. We, of course, understand the intention of this legislation, which is to try to curtail serious criminal activity. In respect of that, certain outlaw motorcycle gangs are the centre of the attention, I suppose, of much of this legislation, and that is fine. However, I have a couple of points, and I want to put another question to the Attorney General about whether a certain organisation would be considered to be caught up in this legislation. Clause 13(2) states —

> In considering whether or not to make a declaration, the designated authority may have regard to any of the following —
>
> (a) any information suggesting that a link exists between the organisation and serious criminal activity;

Paragraph (a) refers to suggesting a link. My question is: what sort of link? And it is only a suggestion. Further, on page 15, line 1 of paragraph (c) refers to "any information suggesting". They are really incredibly low thresholds to pass. That may be okay in —

Mr C.C. Porter: They are thresholds for admissibility; they are not the thresholds for triggering the actual decision.

Mr J.R. Quigley: Sorry; they are not —

Mr C.C. Porter: They are referring to the things that a designated authority may have regard to in terms of what might be considered admissible as evidence before the —

Dr A.D. BUTI: Okay. So does the designated authority have to obtain evidence that proves that an organisation is a criminal organisation, or engaged in serious criminal activity, on the balance of probabilities?

Mr C.C. Porter: Yes; it is a civil standard.

Dr A.D. BUTI: Fine. My other question is about clause 13(1), which has the three conjunctive criteria —

> (a) that the respondent is an organisation; and
>
> (b) that members of the organisation associate for the purpose of organising, planning, …

Et cetera —

> and
>
> (c) that the organisation represents a risk to public safety and order in this State.

The question I am going to ask is relevant to another piece of legislation that we may be dealing with later in the week. Would a group of prostitutes be considered a serious criminal organisation? They would pass, I would imagine, those criteria in paragraphs (a), (b) and (c).

Mr C.C. PORTER: I would need more information than that. I think the two issues there are, first of all, that the types of offences a prostitute might be committing by not operating in respect of a licence or engaging in activities as a prostitute in a residential area where, under the bill, prostitution is strictly made unlawful are not so high in terms of their criminality and penalty as to meet that trigger definition of "serious indictable offence". So, no, they would fail on that count, and no more needs to be said than that. There would be a whole range of hurdles that in an "even if" scenario they would not meet. Therefore, I think, as best I can gather, the answer would be no.

Clause put and passed.

The SPEAKER: Further clauses, members?

Mr J.R. QUIGLEY: Clause 13.

The SPEAKER: We have already passed it.

Mr J.R. QUIGLEY: I just wanted to ask a question about that word "suggesting".

The SPEAKER: You might have to find a part of the legislation in front of you that enables you to have that opportunity, member for Mindarie. I am calling for further clauses at this point.

Clauses 14 to 18 put and passed.

Clause 19: Application for revocation of declaration —

Mr C.J. TALLENTIRE: This clause brings to light an issue I raised in the second reading speech. I am not sure that the Attorney General was able to hear all that, but I raised the issue of someone who may be what we could term a reformed bikie—someone who perhaps could have a positive and useful influence on bikies going before the courts. Looking at clause 19, I am concerned that such a person perhaps would not be able to have their declaration, or that of their organisation, revoked because the Commissioner of Police may not be able to declare that he or she was satisfied with a revocation; likewise for the Corruption and Crime Commission and other areas. That person may be in a position to provide useful guidance to people, and if that was the case, it would be unfortunate that we have created legislation that would make it illegal for them to provide that advice to people currently before the courts. In my contribution to the second reading debate I gave a hypothetical example but tried to colour it with a few names. I thought of those people who were before the courts at about this time last year and imagined a circumstance where perhaps Eddie Withnell would be able to give them some advice. As I and the Attorney General agreed, it is highly unlikely that their legal counsel would be able to give them that sort of guidance. But somebody who has been through that sort of situation—somebody who is a reformed bikie, but, nevertheless, has this taint hanging over them—would be able to provide that useful guidance that I think would help our system work much better. I am keen to hear the Attorney General's response to that. If I have not made that entirely clear, I will have another go at explaining it.

Mr C.C. PORTER: I think I understand the point the member for Gosnells is making. Let me commence by saying I am not personally sure of Mr Withnell's personal reformation, but I take it from what the member says that it is at least a possibility. The point the member raised using Mr Withnell as an example is that if one member of an organisation has truly reformed, repented and changed their ways, what might occur to allow for that situation. Clauses 19, 20 and 21 have some—albeit limited—relevance to that situation. I think the fairest answer to the member's question is to say that if it were merely one member of an organisation that had previously been declared who had seen the light and reformed, that would not be sufficient to overturn the declaration, even upon their own application. Clause 21 refers to the termination of application for revocation, and clause 21(1)(a) states that we would be looking for a substantial change in the nature or membership of the declared criminal organisation. If enough members of an organisation have reformed and there was an application by one or more of them to revoke the declaration on that basis, that possibility is certainly contemplated in the act. More to the point, if an individual had truly reformed, the mechanism to allow for that reformation is control orders, which we will come to under the relevant clause. A control order can be set aside or modified, and it could be modified or set aside for the express purpose of allowing that reformed member to communicate with those who are still treading the ill-gone path in the organisation, to try to reform them. But that would come in terms of modifications to the control order, not the overarching declaration. One reformation probably would not overturn the declaration, but it is a possibility that a number could and that it is contemplated for, but one or two reformations would be dealt with in the control order provisions.

Mr J.R. QUIGLEY: I move —

> Page 19, lines 7 and 8 — To delete the lines.

Once again, this amendment to this clause goes straight to the point that we have made previously; that the designated authority should be the Corruption and Crime Commission, and therefore the application should not be an application by the CCC. I move that amendment, but I do not want to speak on it any further.

Amendment put and negatived.

Mr J.R. QUIGLEY: In relation to clause 19, I wish to move a further amendment. I move —

> Page 19, lines 25 to 26 — To delete "or the CC Commissioner, give both of those persons" and substitute —
>
> > give that person

Once again, that is consistent with our contention—from the second reading debate right through to what will ultimately be the third reading debate—that the appropriate designated authority be the CCC.

Amendment put and negatived.

Clause put and passed.

Clause 20: Consideration of application for revocation may be dismissed —

Mr J.R. QUIGLEY: I move —

Page 20, lines 10 and 11 — To delete "or the CC Commissioner".

I have a number of these amendments and in place of submissions in favour of the amendment I rely on that which I have said in this regard before.

Amendment put and negatived.

Clause put and passed.

Clause 21: Determination of application for revocation —

Mr J.R. QUIGLEY: I am sorry, Mr Speaker; if you could bear with me for a minute, because I have a number of these amendments.

The SPEAKER: Certainly.

Mr J.R. QUIGLEY: I refer to clause 21, and lines 24, 13 and 15. I will move —

Page 21, lines 13 to 15 — To delete the lines.

The SPEAKER: Can you clarify again, for our edification, member for Mindarie, the lines that you are proposing your amendment delete?

Mr J.R. QUIGLEY: Certainly—page 21, Mr Speaker, line 13 through to line—I am sorry; I will have to move it in two parts because the Commissioner of Police is in the middle of it.

Mr R.F. Johnson: Is this the same as the previous one?

Mr J.R. QUIGLEY: Yes.

Mr R.F. Johnson: When you lose that kind of thing, you normally do not move the others in the other clauses. That is the normal practice in the house, because they are repetitious amendments.

Mr J.R. QUIGLEY: I will save it until clause 26 and 27, which we will do, but as I have said, I am instructed to move these amendments and they will be moved. Therefore, I move —

Page 21, line 13 — To delete the line.

Amendment put and negatived.

Mr J.R. QUIGLEY: I will also move amendments at lines 15 and 24 to delete "or the CC Commissioner".

The SPEAKER: I respect what you are saying, member for Mindarie, but you need to seek the leave of the house to move them because there is considerable wordage between those two proposed deletions.

Leave granted for the following amendments to be considered together.

Mr J.R. QUIGLEY: I move —

Page 21, line 15 — To delete "or the CC Commissioner".

Page 21, line 24 — To delete "or the CC Commissioner".

Amendments put and negatived.

Clause put and passed.

Clause 22: Reasons for decision —

Mr J.R. QUIGLEY: I move —

Page 22, line 13 — To delete the line.

In moving the amendment, I rely upon the arguments that I advanced previously.

Amendment put and negatived.

Clause put and passed.

Clause 23 put and passed.

Clause 24: Notice of revocation or expiry of declaration —

Mr J.R. QUIGLEY: I move —

> Page 22, line 23 — To delete "or the CC Commissioner".

Once again, for the reasons set out in my contribution to the second reading debate and earlier in debate on this legislation, the Australian Labor Party is firmly of the opinion that that should be the designated authority.

Amendment put and negatived.

Mr C.J. TALLENTIRE: It is a good thing that the revocation of a declaration referred to in clause 23 takes immediate effect. In clause 24, however, I am concerned that parliamentary counsel is still using old technology or old methods. I think in other legislation we have updated things somewhat. Here there is reference to the publication of the revocation or expiry in the *Government Gazette* and in at least one newspaper that is circulated throughout the state. There is no actual time limit on that, so that publication could be a week after the revocation went through with immediate effect. I am sure I have seen provision in other legislation for parliamentary counsel to make some reference to internet websites and what have you, so that there is immediate communication to the public—indeed on Twitter—of the revocation of an important declaration.

Mr C.C. PORTER: The fact that the member says that the Parliamentary Counsel's Office seems to be doing things in a somewhat old-fashioned way, and that he says that with some degree of surprise, suggests to me that he has never met anyone from the Parliamentary Counsel's Office! They are a very traditional bunch. However, the member should take note of the provision in clause 24(b), which states —

> … the applicant … must … take all reasonably practicable steps to give notice of the revocation or expiry to every person who made a submission (including a protected submission) at the hearing at which the declaration was made; …

That would include electronic communications, if it were the case that the applicant had easy access to email addresses and so forth. It may be that some of the types of people who would be involved at some point in time with this declaratory process may not have volunteered email addresses, or they may be hard to find, but I can assure the member that that formulation of words would encapsulate electronic communications.

Clause put and passed.

Clause 25 put and passed.

Clause 26: Designation of judges or retired judges to determine applications —

Mr J.R. QUIGLEY: This clause goes right to the heart of the government's scheme, as opposed to what the opposition proposed. These declarations, for the reasons previously explained by me on behalf of the opposition, should be made by someone having regard to the procedure to be adopted on them; the fact that things will be proven before a Supreme Court judge by way of mere suggestion; that there will be no rules of evidence and that mere suggestion of a proposition will count as proof positive of that which is being contended by the suggestion; and that there will be a high probability of impugning the institutional integrity of the court from which the persona designata is drawn. As I have said before, they should especially have regard to the latter provisions contained in part 10 of this legislation, which will enliven the confiscation laws in an even harsher way than those harsh laws are currently applied, and particularly to proposed section 221E. Under that proposed section, as we have seen under the clauses that have been passed already, an element of the offence—that is, the facilitation of a criminal organisation—can be proved before a judge of the Supreme Court on mere suggestion, and the judge then signs a declaration to put it beyond reasonable doubt for the purposes of proposed section 221E. A judge doing that, to facilitate another judge in convicting an accused person, is almost certain to impugn the institutional integrity of the court; that is, a judge accepting proof by way of mere suggestion, signing the declaration and, in so doing, providing for another judge proof beyond reasonable doubt of what is in the declaration, when everyone in the community knows that the first judge arrived at that conclusion on mere suggestion, hearsay evidence, or submission by the Commissioner of Police. The opposition certainly opposes clause 26 of the bill.

Dr A.D. BUTI: This is not necessarily a question that goes to the legality of the legislation, but as Treasurer, I am sure the Attorney General is very interested in my question, or will be able to provide me with an answer. Clause 26(3) states —

> The period of designation and, in the case of a retired judge, the terms and conditions of appointment of a designated authority are as set out in the instrument of appointment.

What budgetary considerations has the Attorney General allowed in respect of the possibility that we may need to appoint retired judges, who are not on the current payroll?

Mr C.C. PORTER: None at this stage. In circumstances such as this, when an application is envisaged by the police or the Corruption and Crime Commission and it becomes obvious that there is a need for a retired judge or sitting judge to become, and to take the place of, the persona designata, we would no doubt get notification of that from the potential applicant, and then we would deal with that. But we would not write that into, for instance, a line item in the impending budget without knowledge of the application. It is a bit like the situation we had recently when a Family Court judge became ill and an application was made for extra funding on a basis that it would necessarily be temporary. So we would deal with it in that way.

Mr J.R. QUIGLEY: Further on clause 26, I will conclude by saying that the Attorney General, as advised by the Deputy State Solicitor, says that the Labor opposition is wrong in its view of the law. Of course, the contention of the Attorney General, through counsel, before the High Court was that the appellant in Totani and the appellant's counsel in Wainohu were wrong in their view of the law. We now know who was wrong in their view of the law—it was the Attorney General and his counsel, who sit at the table today. We do not say that disparagingly, but it has to be said publicly because we do not want anyone to think that the Attorney General is the final arbiter of the law in these matters. It will be ultimately the High Court in the protection of the institutional integrity of the Supreme Court, which is a crucial and integral part of the federal judicial process. We do not say it to berate or put the Attorney General down, but, equally, we do not want the community or members of this Parliament to think that we are taking some remote point without substance simply because the Attorney General and his adviser assert it to be so. We know that they have asserted it to be so twice on previous occasions in the High Court and got it wrong. Ultimately, I accept that that will likely be the final arbiter of this. All that the Labor opposition ever wanted to do in the amendments it has moved and the position it has taken is to make sure that we have a robust situation in Western Australia that is beyond challenge and that the Western Australian bill, when passed, does not meet the same fate as the legislation from South Australia and New South Wales, both of which were consigned to the dustbin of history by the judgement of the High Court in each respective case.

Mr C.C. PORTER: We did make a submission in both Totani and Wainohu. Justice Heydon, as I read out in Wainohu, did agree with our submission. Surely the member is not expecting us to concede points when we argue points in the High Court.

Mr J.R. Quigley: Your points were just wrong.

Mr C.C. PORTER: According to the majority, that is correct. We argued points in the High Court. Of course, what was before the High Court in both those instances was not our legislation, but we were seeking to defend a position that we may like to have adopted, all other things being equal in our legislation. In the end, we got two decisions. We have based this legislation on those two decisions. The fact is that I consider the best advice I have received is of the view that this is the best possible model to withstand constitutional challenge. What the member proposes in essence is that what we say should be done by the designated authority should be done under his model by something that is unarguably and purely the executive. We say that that makes this more, rather than less, susceptible to constitutional challenge. But I make this point: the member is suggesting that we adopt the model that was adopted in Totani save for one salient change; that is, that the Attorney General be substituted by the CCC as the declaratory authority.

Mr J.R. Quigley: That's not the only difference.

Mr C.C. PORTER: What the member for Mindarie is asking is that the declaratory authority in this instance be the CCC. What we all agree is that the CCC is part of the executive. What I would like everyone to think about for a moment is the situation in which the CCC, upon application by the police, has reposed in it the discretionary power to declare an organisation a criminal organisation. That would, just as matter of practicality, make the CCC an unbelievably powerful organisation. What would be very interesting is to consider the fact that the CCC at the moment can compel witnesses, under pain of jail time if they do not answer appropriately or answer at all. The CCC can do that at the request of the police, as I understand the machinations of the CCC act. That information could be used by the police to underpin an application to have an organisation declared a criminal organisation, which application would be made to the CCC. Does anyone really think that it would be wise to repose that level of power in one single organisation in any jurisdiction? What we would say is that having the executive power more heavily involved in the declaratory process makes the situation in terms of constitutional challenge worse, not better. If we had to pick the wrong body to inject executive authority into the declarative process, we could not pick a worse body than the CCC. That is not disparaging of the CCC. That is having regard to the already very fundamental investigative powers that the CCC has. I just think, given what we have known about the CCC's operations, that to empower the CCC with the ability to make declarations under the provisions of an act like this, on application from the police, is to repose far too much power in one body that

has a fundamental investigative underpinning. I actually do not think that anyone could sensibly consider that that would be a good practical move.

Mr J.R. QUIGLEY: In response to which I would say that the CCC has been invested with the authority, after doing all those things that the Attorney General says it can do—compel witnesses, et cetera et cetera—to still hear and determine anti-fortification notices, the result of which is to affect the property rights of serious organised criminal groups, and other people from whom serious organised criminal groups may lease property.

Mr C.C. Porter: Member, that is enough power for the CCC. To give it this additional power would be unwise.

Mr J.R. QUIGLEY: This is the very power that the state of Western Australia has successfully defended in Gypsy Jokers v Commissioner of Police. So it is constitutionally sound. For those reasons, and for the reasons I have previously explained, we take issue with the government. We say this is not a question of ideology or of our being against this legislation because of the objectives it seeks to achieve. We agree with the objectives it seeks to achieve in clauses (4) and (6). But we do not think that should be done by the Supreme Court. When the Attorney General says that is too much power, I return to the point: here we have the Supreme Court of Western Australia, where one judge, perhaps sitting in secret, on mere suggestion, signs a certificate that becomes proof beyond reasonable doubt in a criminal trial, and that is said not to compromise the Supreme Court or impugn in any way its institutional integrity. We cannot accept that. That is why we oppose clause 26 as printed.

Clause put and a division taken with the following result —

Ayes (26)

Mr P. Abetz	Dr E. Constable	Mr R.F. Johnson	Mr C.C. Porter
Mr F.A. Alban	Mr M.J. Cowper	Mr A. Krsticevic	Mr D.T. Redman
Mr C.J. Barnett	Mr J.H.D. Day	Mr W.R. Marmion	Mr M.W. Sutherland
Mr J.J.M. Bowler	Mr J.M. Francis	Mr J.E. McGrath	Mr T.K. Waldron
Mr I.M. Britza	Dr K.D. Hames	Mr P.T. Miles	Mr A.J. Simpson *(Teller)*
Mr T.R. Buswell	Mrs L.M. Harvey	Ms A.R. Mitchell	
Mr G.M. Castrilli	Mr A.P. Jacob	Dr M.D. Nahan	

Noes (21)

Ms L.L. Baker	Mrs C.A. Martin	Ms M.M. Quirk	Mr M.P. Whitely
Dr A.D. Buti	Mr M. McGowan	Mrs M.H. Roberts	Mr B.S. Wyatt
Ms A.S. Carles	Mr M.P. Murray	Ms R. Saffioti	Mr D.A. Templeman *(Teller)*
Mr W.J. Johnston	Mr A.P. O'Gorman	Mr C.J. Tallentire	
Mr J.C. Kobelke	Mr P. Papalia	Mr P.C. Tinley	
Mr F.M. Logan	Mr J.R. Quigley	Mr P.B. Watson	

Pairs

Dr G.G. Jacobs	Mr T.G. Stephens
Mr B.J. Grylls	Mr R.H. Cook
Mr I.C. Blayney	Ms J.M. Freeman

Clause thus passed.

Clauses 27: Termination of designation —

Mr J.R. QUIGLEY: One section puzzles me a little, and I draw the Attorney's attention to subclause 3(b), in which "in the case of a judge" the designation is terminated "if he or she ceases to be a judge". Is that a judge who retires? If the designated person can be a retired judge, why does the designation finish upon retirement?

Mr C.C. Porter: I think you're designated in your capacity as a judge or retired judge. If your status changes from judge to retired judge, it would need to be notified and redesignated.

Mr J.R. QUIGLEY: Secondly, in relation to clause 27(3)(b)(ii), the Chief Justice himself can end the designation if the proceedings before the designation were taking up too much of the designated judge's time. Does this not also weigh against having a Supreme Court judge as the designated person hearing a declaration? As I said, in Wainohu, there were 35 lever arch files plus 61 CDs, which was beyond our control. Bearing in mind the list that the Supreme Court has and the waiting time to get a matter on, we might get some way down the track and the Chief Justice can say that it is all over and they have to go somewhere else. Does this not weigh against the designated person being a Supreme Court judge?

Mr C.C. PORTER: I would imagine in practice that it will weigh in favour of the Chief Justice making robust arguments that his court should be properly resourced, taking into account the possibility that judges might be requested to be persona designata. There is a provision in the bill that potentially could cause disruption and difficulty to the executive but it is there to protect the resources that the Chief Justice has at his disposal.

Mr J.R. QUIGLEY: Although the Attorney General said that that might support a robust argument by the Chief Justice that the Supreme Court be further resourced, will he—do not give us the answer yet; we will wait until May—be considering in this budget the possibility of increasing the size of the Bench of the Supreme Court to cater for this very function?

Mr C.C. PORTER: No, I will not be. Our Supreme Court is well appointed at the moment. If the member looks at the report on government services, our Supreme Court represents more judges per capita than is the case in any other state or territory. At present we do have a well-resourced Supreme Court. I have these discussions with the Chief Justice from time to time. That is not to say that in further budgetary submissions there may not be a need to consider this issue, but not this year.

Mr J.R. QUIGLEY: Without giving away police intelligence, how many criminal organisations does the Attorney General estimate could be subject to applications for declarations? In other words, if we leave out other possibilities of criminal organisations, how many outlaw motorcycle gangs or groups, for example, might there be, to give us an idea of the workload that might be thrust upon the Supreme Court?

Mr C.C. PORTER: I am sure I can receive that briefing precisely from police. In general answer to the member's question, the police have been involved in the process of developing and drafting this legislation. They are aware that there is a high prospect of legislation being passed through this Parliament. I understand they are already commencing the process of preparing to make applications under this legislation. They would obviously have target organisations in mind. I do not know precisely how far advanced they are with that process. Once this legislation comes into being, I would expect to see applications made before too long. I could not give an estimate of the number at this point.

Mr J.R. QUIGLEY: Finally, in relation to clause 27(3)(b)(ii), the Chief Justice can also terminate the designation if the exercise of the functions is likely to compromise the ability of the court to perform its functions. Is that not covering the possibility that, if the proceedings of the application start to impugn the institutional integrity of the court, the Chief Justice can terminate it? What other purpose could those lines be for?

Mr C.C. PORTER: That clause is squarely directed at issues of resourcing. I think it would be almost unimaginable that a Chief Justice would take it upon himself, in the middle of a process for declaration being undertaken by a designated authority, to judge that the process was offensive against the Kable principle by virtue of clause 27(3)(b)(ii). That would in itself be an extra-curial decision; a decision made about an issue of law but outside an appellant court's longstanding jurisdiction to hear those matters.

Clause put and passed.

Clauses 28 to 31 put and passed.

Clause 32: Record of proceedings —

Mr J.R. QUIGLEY: I have to refer back to the definition section for a moment; I will not be long. Does the record of proceedings include generating a transcript of the proceedings for review subsequently? I appreciate with these proceedings, as the High Court noted, that whilst they are not appellable in view of, I think, Kirk's case—I might have that wrong—they are susceptible to collateral challenge, although forensically, as the High Court noted, that might be next to impossible if the challenge relies on police intelligence. Is the record of the proceedings just the formal record of the application and the signing of the declaration, or will the evidence of the proceedings be recorded? How does this work? Will a transcript be generated, as in normal proceedings of the Supreme Court?

Mr C.C. PORTER: I might just state by way of clarification, and to clarify the record, that I did say that the Western Australian Supreme Court has more judges per capita than any other state or territory, bar the Northern Territory—I have been reliably reminded. Nevertheless, we are well appointed compared with all the other states and territories besides the Northern Territory. My assumption had always been that this would be transcribed as any other proceeding would be. There is no reason for me to consider that that would not be the case, but I would imagine that would occur through regulation.

Mr J.R. Quigley: That is why I ask, because we do not have regulations before the chamber at the moment.

Mr C.C. PORTER: No, but the regulations may regulate and prescribe the procedure and practice to be followed. To the extent that I am in charge of those regulations being generated, my intention is to ensure that proceedings are fully transcribed.

Clause put and passed.

Clauses 33 and 34 put and passed.

Clause 35: Application for interim control order —

Mr J.R. QUIGLEY: An application for an interim control order can be made only in respect of those people described in clause 57. We will come to that, obviously, later because the Attorney General and I had a discussion outside the chamber concerning clause 57.

I understand the other jurisdictions also have interim control orders. What is the purpose of an interim control order? Is it anticipated that less evidence will be presented to the Supreme Court on an interim control order than on a control order? If there is not to be a lesser standard or less evidence, what is the purpose of the interim control order as opposed to the control order?

Mr C.C. PORTER: The difference in the standard is similar to the way in which the Dangerous Sexual Offenders Act works. Under clause 38, "Making of interim control order", subclause (1)(b) reads —

> that, on the basis of the application and any further information supplied by the Commissioner of Police, the court could make a control order under section 57 …

If we like, the process in section 57 is the court determining that a control order should be made. This is a sort of prima facie case standard where we are requiring the court to have regard to whether it could be sustainably argued that the actual control order should exist. Does that assist?

Mr J.R. QUIGLEY: It is a bit circuitous. I take it that the Attorney General is saying that what is required for an interim control order is some evidence of what is required for a control order. How is it shorter?

Dr A.D. Buti: What is the point of it?

Mr J.R. QUIGLEY: As the member for Armadale has helpfully interjected, in brief words, what is the point of it, given that the things that will be demonstrated are the same things that will be demonstrated for a control order?

Mr C.C. PORTER: That is like asking the question: what is the point of refusing someone bail? Of course, in a bail proceeding there is regard to the likelihood of a certain outcome. The point of this is urgency. If there is concern on the part of the applicant, in this case the police, that someone, if not subject to a control order, would do something calamitous or criminal, the police could make that order urgently on the basis that the court has to assess whether a later court in a full hearing could make a control order under section 57. The court would still have the discretion to give or not to give the interim control order, but the standard it will be applying will be to look at the application that is before the court for the interim control order and consider whether it could be sustained and whether it could form the basis for a permanent control order under section 57. I am not sure whether that is an overly unusual process.

Dr A.D. Buti interjected.

Mr C.C. PORTER: It can be.

Mr J.R. QUIGLEY: The Attorney General mentioned something that I have not seen in the bill, which is that it would be made on an urgent basis if something calamitous were about to happen and unless the person were restrained that calamity would not be avoided. Without pinning the Attorney General to his choice of language—"calamitous", nonetheless a serious offence—would the court need to be convinced that, without an interim control order, something is about to happen, which, but for almost interlocutory relief, will happen? Is there something new? I do not see the difference between interim control order and the requirement to obtain the interim control order and how it is different to a control order.

Mr C.C. PORTER: In using the word "calamitous" I am envisaging the types of circumstances in which police would go for an interim control order rather than just go in the first instance for a control order under clause 57, because under this legislation they are compelled, after an interim control order, to return for a permanent control order. Why would a police officer or an applicant put themselves to the difficulty of two applications, one after the other? I would imagine that there would be circumstances of urgency accompanying an application for an interim control order. I would imagine that in exercising the discretion under clause 38, it is something that the court would have regard to. I am not putting it any higher than that.

Clause put and passed.

Clause 36 put and passed.

Clause 37: Application for hearing without notice or on notice —

Ms A.S. CARLES: I would just like the Attorney General to clarify the circumstances in which an interim control order would be made without notice to, and in the absence of, the person to whom the application relates. Could the Attorney General also clarify whether we have a provision like that in any of our other criminal legislation, by which something happens and a person is not given any notice that it is about them, and then something happens in their absence, so there is the complete absence of natural justice and procedural fairness.

Mr C.C. PORTER: On that description, there is probably no sense of natural justice and procedural fairness in a whole range of proceedings. Ultimately, under clause 37, the court to which the application for an interim control order would be made would have to consider and determine that there was good reason for the interim control order to be given, even though the application was ex parte and the subject of the control order was not there. The court would have to be convinced that there was good reason for that to occur, because of urgency or an unwillingness of the person who is the subject of a control order to attend; there might be any number of reasons. But that is, again, not an unusual process, and although I appreciate the language that the member used to describe that process, a restraining order in a domestic violence situation can be, and very often is, granted at first instance on an ex parte basis. It is not unusual, but the court would need to be satisfied that there is good reason to give out the interim control order and to determine that there should be an interim control order even though the subject of the control order was not present.

Ms A.S. CARLES: Could the Attorney General just clarify where in the bill it actually says what he has just outlined? In clause 37 the explanation is simply provided; where does it say that in the legislation?

Mr C.C. PORTER: It is a pure discretion at large. The wording in clause 35 requires that in the application, the court can be asked to give an interim control order. If a person had no good reason whatsoever for asking the court to give them an interim control ex parte in the absence of the subject of a control order, I would imagine that they would be very likely to fail in their request. The discretion of the court is uninhibited in that respect.

Mr J.R. QUIGLEY: I am looking at the subsequent clauses that cover the interim control order and specifically concerning hearings held on notice—under section 37 a hearing can be done in the absence of the subject or on notice. When it is on notice, do we have provision for procedure as we did for the declaratory proceedings—that is, that he or she is permitted to attend?

Mr C.C. Porter: You're in a court at this stage, member, so there is all the court's inherent jurisdiction to control its own process.

Mr J.R. QUIGLEY: I am sorry, yes.

Clause put and passed.

Clauses 38 and 39 put and passed.

Clause 40: Court to fix hearing date for application for control order —

Dr A.D. BUTI: This is in regards to fixing the court date for the application of the control order to move it from an interim order to a more permanent basis. Clause 40(1)(b) states —

> the court must fix a date, time and place for the hearing of the application for a control order.

Clause 40(2) states —

> The date fixed under subsection (1)(b) —
>
> (a) must be as soon as practicable after the interim control order is made; …

That is fair enough. Clause 40(2) also states —

> (b) must allow the person to whom the interim control order relates sufficient time to prepare and file a notice of objection under section 55 and serve a copy of the notice on the Commissioner of Police.

It is not provided for in this clause, but should there not be a provision of some threshold date by which that service must take place, because otherwise it is just open-ended?

Mr C.C. PORTER: We simply left it to the discretion of the court. The difficulty with setting a minimum time might be that it disadvantages the person who is the subject of the order. If we said that the final control order hearing has to occur within 28 days of the issue of the interim control order and the person needed greater time than that to be prepared, we could potentially disadvantage the subject of the control order. Therefore, we have just followed the procedure that is used fairly often in these types of processes and have left it to the discretion of

the court. I would have thought, again, knowing the courts, that they would take a dim view of a police application that sought a delay and that they would be fairly generous to the subject in terms of the time needed to prepare.

Clause put and passed.

Clauses 41 and 42 put and passed.

Clause 43: Powers to request particulars and detain for purposes of service —

Mr C.J. TALLENTIRE: I have concerns about the first part of this clause; indeed, it is terminology that is repeated in the second part as well. Clause 43(1) states —

> A police officer who has reasonable cause to suspect that someone is a person on whom notice of the making of an interim control order is required to be served under section 41 may —
>
> (a) require the person to disclose his or her personal details; and
>
> (b) require the person to remain at a particular place for as long as is reasonably necessary (but no longer than 2 hours) …

I am concerned that this is exactly the sort of wording that could allow for the stereotyping that we have discussed in regard to other legislation, such as the stop-and-search legislation, whereby because someone happens to be on a motorbike and of a particular appearance, they could be someone who a police officer may feel that he or she has reasonable cause to suspect has some sort of interim control order out on them. Clearly, we need to have some sort of assurance around what is actually intended by the term "has reasonable cause to suspect".

Mr C.C. PORTER: Let me start by saying that the declaration of an organisation as a criminal organisation will be a rare event and control orders, then, will also be rare events. Looking at the history of legislation of this type in other jurisdictions, I think there have been only two groups declared to date, both the subject of High Court challenges. What we will find, I consider, with a police officer having reasonable cause to suspect that someone is a person on whom notice of the making of an interim control order is required, is that the officer will be acting on police intelligence. It will not simply be someone who is behaving oddly or who has this or that colour skin; this will be clearly based on police intelligence. The sort of people who would be subject to interim control orders and whom we are trying to locate for the purposes of serving them with the interim control order so that we can progress the final control order would be people who would be well known and identifiable to the police. I can give the member that context to give him some assurance.

The other interesting point to make is that under section 128 of the Criminal Investigation Act, the arrest power for offences does not look dissimilar to some of the abilities of the police in clause 43(1)(a) to require a person to disclose his or her personal details. So that in itself is not unusual. I take the member's point, which is: what would be "reasonable cause" in this situation? It would have to be based on internal police information and intelligence and notification to officers. For instance, I would imagine that the fact that someone had an interim control order placed upon them would be published widely to members of the police force—their photograph, their name, their aliases, the way they dress, their height and their eye colour—and people would be on the lookout for them.

Clause put and passed.

Clauses 44 to 56 put and passed.

Clause 57: Circumstances in which control order may be made —

Dr A.D. BUTI: Once again, Attorney General, I am sounding a bit like a broken record. As we know, the ramification of a declaration and a subsequent control order can have a severe consequence on a person's life, so we have to ensure that we are doing only what is necessary for the purpose of the legislation, and that is to try to curb criminal activity, particularly organised criminal activity, and that is the premise of my question. So I am not trying to be smart or sneaky about this. However, clause 57(2) states —

> Any of the following is a ground for making a control order in relation to a person —

There are then a number of paragraphs. Subclause (2)(d) states —

> (d) that the person —
>
> (i) engages in, or has engaged in, serious criminal activity; and

(ii) regularly associates with other persons who engage in, or have engaged in, serious criminal activity.

I flagged this in my second reading contribution. I suppose the argument is the famous statement by one of the United States Supreme Court judges about pornography: "I know it when I see it". But what do we actually mean by "engage"? What is the degree of engagement? What is the degree of regular association? I suppose we can take guidance from the *Oxford Dictionary* or judicial notice or something, but in this place I think we need to at least put in *Hansard* what we actually mean by, in particular, "regularly associates with other persons who engage in, or have engaged in, serious criminal activity".

Mr C.C. PORTER: This is a clause that has been raised with me over the preceding several days by the member for Mindarie. It is a clause that was in operation in South Australia. With a very slight variation to this wording, it is a clause that was in operation in Queensland. I must say that the government debated whether to include or not include this clause on the basis of it having been part of the operative provisions of other acts, particularly in circumstances in which we had undertaken through the Standing Committee of Attorneys-General to have as great a degree of harmonisation between laws as possible. If either the member for Armadale, or the member for Mindarie, were inclined to seek an amendment to remove it, I would not object to that, and neither would the government.

Mr J.R. QUIGLEY: I will move that amendment now, and then we can concentrate the debate at this late hour. I will have to sign the amendment. I move —

Page 45, lines 18 to 23 — To delete the lines.

I think that is clear enough. I have moved this amendment because, wrongly, this legislation has been—or lazily, should I say, not wrongly—called bikie legislation. Someone handed me a copy of tomorrow's *The West Australian*, which also refers to "bikie law". Of course, we have to make absolutely clear that nowhere in the Criminal Organisations Control Bill 2011 is the word "bikie" used.

The SPEAKER: Member for Mindarie, could you hand up a copy of that amendment you made?

Mr J.R. QUIGLEY: It is clause 57(2)(d). I will just sign the one that has been handed to me.

The SPEAKER: It will expedite proceedings somewhat, member.

Mr J.R. QUIGLEY: Thank you, Mr Speaker.

The legislation is lazily called "bikie law", whereas nowhere in the bill is the word "bikie" referred to, and to get a declaration or a control order, one does not have to demonstrate that a person—to use colloquial language—is a bikie. This law could apply to any criminal grouping or criminal organisation, the members of which associate for the purposes of, as it states in clause 57, facilitating or assisting in the commission of serious criminal activity. I understand that the headline writers are just using shorthand, but I think it is important to not lose the concept of the stretch of this bill. It will apply to any people in organisations, the members of which associate for the purposes of serious criminal activity. Clause 57(2), which sets out the circumstances in which control orders can be made, outlines four different circumstances. It states —

(a) that the person is a member of a declared criminal organisation;

(b) that the person —

(i) is or purports to be a former member of an organisation that is a declared criminal organisation (whether or not the organisation was a declared criminal organisation at the time of the person's former membership); but

(ii) has an ongoing involvement with the organisation and its activities;

(c) that the person —

(i) engages in, or has engaged in, serious criminal activity; and —

Conjunctive, "and" —

(ii) regularly associates with members of a declared criminal organisation;

Each of paragraphs (a), (b), and (c) require the person against whom a control order is being sought to be the member or associate with a declared criminal organisation.

Several members interjected.

The SPEAKER: Take a seat, member for Gosnells.

Mr J.R. QUIGLEY: Clause 57(2)(d), however, takes it out of that realm. Paragraph (d) allows for the —

The SPEAKER: Member for Gosnells?

Mr C.J. TALLENTIRE: I would like to hear the member continue.

The SPEAKER: I am puzzled by that request. Please continue, member for Mindarie.

Mr J.R. QUIGLEY: Paragraph (d), as I have discussed with the Attorney General, who has informed the chamber that we have had discussions outside the chamber, applies to people who are not even members of criminal organisations. Forget about being a bikie; a person does not have to be a member of an organisation. This could apply to two people who have served time in prison for serious indictable offences, which were committed to derive a material benefit: for example, a burglary to get goods, which carries a sentence of at least five years' imprisonment. Therefore, we would never have to worry about declaring an organisation or even addressing the question of criminal groupings because this paragraph captures any two people with criminal records that involve a serious indictable offence committed for gain, and goes right beyond the object laid out in clause 4(1)(a) of the bill, which all members will recall is —

> to disrupt and restrict the activities of organisations involved in serious criminal activity, …

That is the purpose of the bill. Clause 57(2)(d) goes way beyond that; it almost goes to re-legislate the old vagrancy laws—I mean the consorting laws—by which a person with a criminal record cannot regularly be in the company of another person with a criminal record. However, this legislation comes with far greater consequences than the old consorting laws ever had. It is for that reason that I indicated to the Attorney General that the opposition would oppose this clause; not because we are somehow going wobbly kneed on controlling members of outlawed motorcycle gangs or other groupings of serious organised criminals. Not at all! We oppose this because it just does not come within the rubric of organised crime. It is a catch-all as are the old consorting laws. I say that in support of the motion. I do not know what the Attorney General's response will be, but he did say that he would give it some consideration.

Mr C.C. PORTER: I am intending on the part of the government to accept the amendment, which is to remove clause 57(2)(d), which is a consorting provision based loosely on the types of consorting provisions in the American RICO legislation that were used to great effect. I would say that there is some merit to provisions of that type. I am not sure that I would absolutely agree that it is outside the rubric for the purposes of this legislation. What I would say is that I think the strength of the structure of this legislation is that certain consequences flow or potentially flow from a declaration of an organisation as criminal. And that declaration will be very far from easy to achieve. The fact that the consequences are significant and serious, being predicated on an earlier declaration, is what gives strength to this piece of legislation. I will accept the amendment on the basis that that provision detracts from the overall structural scheme of the legislation and the strength of the two-stage process.

Amendment put and negatived.

The SPEAKER: Members, the question is that clause 57 stand as printed.

Dr K.D. HAMES: My apologies, Mr Speaker; I have in error voted against the amendment. What do I need to do to rectify that—perhaps apologise and sit down and recommit the item to the house? What would be the normal procedure?

The SPEAKER: That is what is going to have to happen, member for Dawesville.

Dr K.D. HAMES: I am sorry; I thought we were opposing it. We had trouble hearing you from back here.

Point of Order

Mr D.A. TEMPLEMAN: Mr Speaker, could you just give us a bit of clarity as to what is happening?

The SPEAKER: Clause 57 will be resubmitted at the end of consideration in detail.

Debate adjourned, on motion by **Mr R.F. Johnson (Leader of the House).**