

Hon Kate Doust; Hon Michael Mischin; Hon Sue Ellery; Hon Lynn MacLaren; Hon Ken Travers; Hon Martin Pritchard; Hon Darren West; Hon Simon O'Brien; Deputy Chair; Hon Adele Farina; Hon Robin Chapple; Hon Dave Grills; Hon Rick Mazza

CRIMINAL CODE AMENDMENT (PREVENTION OF LAWFUL ACTIVITY) BILL 2015

Committee

Resumed from 16 February. The Chair of Committees (Hon Adele Farina) in the chair; Hon Michael Mischin (Attorney General) in charge of the bill.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon KATE DOUST: The difficulty we have had since last night is that unfortunately yesterday's *Hansard* is not available. We have other *Hansards* but not that particular one. I wanted to review where we left off last night. I raised an issue that I thought would have been covered under this bill. It related to potential cyber-activity preventing a lawful activity. Reality meets curiosity, I suppose, because before we left the chamber we discovered that a virus had infected the parliamentary network —

Hon Michael Mischin: I thought you were responsible for that, just to make the point!

Hon KATE DOUST: I want to make it very clear that I was not responsible for that. It is just serendipitous that it happened at the same time as I was on my feet. God works in mysterious ways.

Hon Michael Mischin: I thought God had better things to do with his time, but anyway.

Hon KATE DOUST: The Attorney General would be surprised. He is always on the side of the right.

Hon Ken Travers: He would have got the UN announcement.

Hon KATE DOUST: He would be very upset about that.

Last night the Attorney General was of the view that when there might be an occasion similar to the one we experienced of a virus being inserted into an IT system, creating chaos and preventing people from going about their business and for certain activities to happen, he said it would be picked up elsewhere. Given what has occurred here, has that given the government cause to reflect upon that and consider whether those types of activities would be picked up under this legislation? As I was saying last night, the only things we have talked about are traditional protests. In the media today Minister Harvey came out and reinforced her view that this legislation was really written around those incidents that happened at James Price Point and some of those forestry issues that Hon Sue Ellery raised last night. I was simply trying to expand it. Given that this bill has a very broad title, which includes the words "prevention of lawful activity", we would assume that would pick up any type of protest that would prevent any type of lawful activity. That is why I raised my concerns about what happens in the cyber-sphere. As we experienced yesterday, a simple virus in the system can shut down a facility such as this. Has the Attorney General had cause to reflect based on that experience?

Hon MICHAEL MISCHIN: I think I made the position plain yesterday. The bill does not cover that sort of activity. Whether other legislation is necessary to do so is a totally different issue. I think adequate legislation is in place from the commonwealth's point of view. Specific offences under the Criminal Code could embrace certain things that are done by the medium of telecommunications. By its terms, this bill does not embrace that.

Hon KATE DOUST: I thank the Attorney General for that. Perhaps that is something that the state needs to tackle. I have said in a number of speeches over time that we are concerned about how these things are changing. At a state level, we need to think about how cybersecurity measures are applied, but we will not solve that today.

Given that this bill is crafted very narrowly around a couple of incidents that have occurred and the development of particular projects, perhaps the short title of the bill should not read as it stands now, in such broad terms. Perhaps the government should have come up with something like "prevention of lawful activity on state development sites" or "prevention of lawful activity on crown land" or something like that.

Hon Ken Travers: What about "prevention of lawful protest"?

Hon KATE DOUST: Maybe. Should the short title of this very small, albeit significant, piece of legislation be more constrained or tighter in its language about its real intent? I am sure that my colleagues can provide a range of examples about different types of protests that may occur. I would be interested to hear whether they are picked up. From what we have heard in the response to Hon Sue Ellery and the response to my question about cybersecurity, the minister responsible, Hon Liza Harvey, says that in her mind this bill is about legislating for those particular experiences that occurred if they were replicated and nothing else. I do not understand why the government did not provide more clarity in the title of the bill about its intent and how narrow its target was.

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Hon MICHAEL MISCHIN: It could have been called all sorts of things. It was not. It is called what it is. It is a short title. It is simply a shorthand note as a reference. As for the hypotheticals that the member wants to raise in due course, the sooner we get through clause 1, the sooner we will get on to clause 4, which is the substance of the bill.

Hon SUE ELLERY: I asked questions last night relating to the examples that had been used, such as the photographs taken of activity around Mowen Forest and James Price Point that were tabled by the Attorney General yesterday. I asked a series of questions about what charges were laid in relation to those events. I was trying to establish whether it was possible to show that the police had not been able to lay any charges, which therefore adds to the government's argument for why we need this bill. The Attorney General very helpfully read out to me a list of the sorts of charges that police were able to rely on. My intention was to look at that list in *Hansard* and then refer back to it. I am not able to do that and my recollection is that the Attorney General was reading from a list. Is it possible for us to get a copy of the range of charges that he referred to for me to rely on during the rest of the discussion on the bill in committee?

Hon MICHAEL MISCHIN: If the member is referring to offences that are currently commonly charged by police in protest situations, I am happy to table that document.

[See paper 3838.]

Hon SUE ELLERY: In my contribution last night I made the point that when using the cases that the government relies upon and the police have no existing charges to bring against the people who have undertaken the activities that we are told this bill is designed for, the Attorney General cannot demonstrate to us why we need this legislation. I mounted an argument that it seemed the only reasonable conclusion that could be drawn was that the motivation behind this bill was not to address a gap in the legal system when charges were relied upon that had not been tested in the court. The Attorney General made that point because the defendants just paid the fine and accepted the charge. I made the point that the main driver for this bill seemed to be police resourcing and the inconvenience, in particular because of the distance from the major metropolitan centre of James Price Point. It was all about the extent to which resources had to be relied upon to get particular equipment and extra numbers of police to attend the incident. The issue that raises is not that there is an argument that we need a law to address that, but that this bill reverses the onus of proof, so we have to wait. Is the reason for reversing the onus of proof strong enough that we will take that important step? I completely recognise that it is not unusual for us to reverse the onus of proof in criminal law matters, and I referred to that in my second reading contribution. We have done it before and we will do it again in the future but each time we do it, we have to wait. What is the purpose here and have we got the balance right? I do not accept an argument that police resourcing and inconvenience to the police is enough of a reason to reverse the onus of proof. Members can imagine my surprise this morning when listening to the Minister for Police on the Geoff Hutchison program on ABC radio when I did not have to wait longer than five seconds for the Minister for Police to say that this is about police resources; those were the words that she used. It appears that she is quite clear that this is about police resourcing, the costs and the inconvenience to police. I again invite the Attorney General to put an argument for why the clauses in this bill that reverse the onus of proof ought to be agreed to. Does he accept that we have the weighting right and that it is appropriate to reverse the onus of proof in a circumstance when the motivation for the bill is about resources and inconvenience to police as opposed to protecting the state from, for example, terrorism or one of the other reasons we might choose to reverse the onus of proof?

Hon MICHAEL MISCHIN: This is, once again, drifting into clause 4 of the bill rather than clause 1, but the reversal of the onus of proof as it is being categorised has nothing to do with police resources.

Hon SUE ELLERY: Provisions in the subclauses of this bill set out the nature of the offences and then there is the mechanism by which the state views these offences so seriously that it will be up to the defendant to demonstrate what was in their head at the time. The defendant has to demonstrate that despite the fact that he was driving down a road in the south west and had a piece of chain in the back of his ute, he did not intend to participate in whatever the action was that was going on down there. It is up to that person to demonstrate that their intention was not to do the things set out in the provisions of this bill. That is a really serious issue that is at the core of the bill. The bill is not just about the offence but about making it easier for police to execute the offence because the police do not have to demonstrate what the intent was; it is the defendant who has to demonstrate the intent. It is an essential principle that we test to what extent it is reasonable that we reverse the onus of proof. The Minister for Police, who is responsible for this bill, said in the first five seconds of her appearance on the radio this morning that this is a bill about police resources. I invite the Attorney General to tell me this again: was she wrong or is the Attorney General wrong? Who has got the policy intent of this bill correct?

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Hon MICHAEL MISCHIN: Neither of us is wrong. The member is wrong because the policy intent of the bill—the mischief that is being aimed at—is public order and the wastage of police resources in having to deal with certain types of conduct that are extreme and of no benefit to anyone in the community and are a danger to not only the persons engaging in that behaviour, but also those exercising their duty of care towards those nuisances by having to save them from the consequences of their actions. By having specific offences that deal with that sort of conduct, one hopes to deter that sort of conduct and punish it sufficiently in order to be a deterrent to them and to others; they are the principles of general and specific deterrence. How that is affected by facilitating the proof of charges after they are laid is another factor entirely. It has nothing to do with the policy of the bill in that regard. It is a mechanism to give effect to the offence-creating provisions in the proposed act. I should also add that it is not the most serious offences in the criminal calendar that have this facilitation-of-proof-type provision. It is generally the ones that are relatively low level but also involve the peculiar knowledge of the person engaged in that conduct; namely, working out what their intent is. When we get onto clause 4 and the specifics of how it operates, all that will become clear.

Hon SUE ELLERY: I appreciate the advice from the Attorney General. I thought I was right last night when I deduced from the information he provided to us that, in fact, this was about resourcing and not about anything else. I thought I was right last night, and the Minister for Police confirmed it for me on the radio this morning.

Hon Michael Mischin: Hang on; the bill, as opposed to specific clauses that we will get to and specific provisions which operate in various ways. Clause 2 has nothing to do with resources. Clause 3 has nothing to do with resources.

Hon SUE ELLERY: The bill does. I do not want to repeat this again, but in the course of this section of the debate, we can canvass and cross the range of provisions in a bill, and that is what I am doing.

Hon Michael Mischin: Yes, but don't mix up the concepts, that's all.

Hon SUE ELLERY: I am not mixing up the concepts. I want to make this point, because the Attorney General just took us to another point: I want him to show me where it is provided in the clauses of this bill that the bill applies only to extreme circumstances, because the definitions for physical barriers et cetera have no qualifications about extremity or otherwise; it is about a physical barrier. How is it the case that the Attorney General can use the language in this chamber and the Minister for Police can use the language on ABC Radio this morning that this is only about extreme circumstances? It is not. The bill states that it is an offence to create a physical barrier; it does not state that it has to be a particular kind of physical barrier, despite the fact that the Attorney General says that that is what it is about and despite the fact that the Minister for Police said this morning that that is what it is about. There is nothing in the bill that tells us that is what it is about.

Hon MICHAEL MISCHIN: When we get onto clause 4 I will expand on it and the Leader of the Opposition can put the particular propositions that she has regarding her interpretation of the way it operates.

Hon Sue Ellery: I look forward to it.

Hon LYNN MacLAREN: I have a few amendments on the notice paper when we get to clause 4 that I want to move to try to improve the bill. As the Attorney General knows, we have some concerns with the clauses and I have made some suggestions for how we can improve this piece of legislation we have before us. I do not want to go into detail about the specific amendments I am going to move. One is to try to fix the reversal of the onus of proof and the other is to do with recouping costs and whether there are already existing powers to recoup costs. In the clause 1 debate I just want to ask a few clarifying questions that are related to scenarios in a protest, because we seem to have locked onto the idea—if I can use the expression “locked on”—that there is going to be one person on a tree and they are going to be the one who participates in the behaviour that prevents the lawful activity. What I am concerned about is whether the legislation before us has anticipated what could happen. Typically, what happens in a protest is that lots of people turn up. Some people are prepared to go so far, while other people will draw the line a bit further as to how much risk they will place themselves in. The two clauses work together, and one is about the preparation to prevent a lawful activity. I am concerned about when there is a group of people together and perhaps one or two of them are going to participate in a lock-on activity, but 30 or 40 of them are just there in a peaceful capacity to try to gain the attention of the media or are there in some other capacity of solidarity with the people there. How do the police determine who is preparing to prevent this lawful activity and who is just there to support the person who might be prepared to lock on? That is why civil society is concerned about this, because it is concerned about many people being captured as preparing to prevent lawful activity when, in fact, there might be a strategic decision that one or two people go to the point of being arrested, if our laws enable them to be arrested. I would like the Attorney General to address that notion: how do we decide who is preventing a lawful activity and who is preparing to prevent a lawful activity in those circumstances?

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Hon MICHAEL MISCHIN: I am not sure how I can answer that in the abstract until the member points me to the offence that is being created that she thinks would be covered by it, and all that is in clause 4, if there is one at all. Talking in vague terms about charging people with preparing for things is not helpful. If the member can point to which particular offence she is talking about that is contemplated by the bill, I might be able to answer sensibly on the subject and put up a scenario, but when we get to clause 4, we can explore all that.

Hon LYNN MacLAREN: I was not wanting to introduce any new thing; we have been talking about someone who locks onto a tree, for example. There might be people who are there at a campsite, preparing soup for the evening; there might be people who have brought in fresh water for the day; there might be an occupation, for example, near a coupe that is going to be logged, but then there are one or two people who are prepared to actually save a gorgeous old tree that has been identified as a habitat tree and for some reason they feel it is at risk. What about the people in the camp in that circumstance? Are they preparing to prevent a lawful activity?

Hon MICHAEL MISCHIN: The member should show me the offence that she is talking about—not just in vague terms, “Are they preparing?” Preparing what? When we get to clause 4, which is where the offence-creating provisions are, then by all means we can explore those concepts, and the member will presumably be able to show me which offence-creating provision she is talking about and whether that scenario fits it.

The CHAIR: Just in relation to that, I think the way the questions are being asked, Hon Lynn MacLaren, is that you are asking questions in relation to the offence provisions under the bill as it is before us, in which case it probably is more appropriate to have those questions asked during consideration of clause 4.

Hon KEN TRAVERS: My apologies if the issue I want to raise was covered last night when I was away on urgent parliamentary business. As members are aware, we have not been able to check *Hansard* to tell whether those matters have been covered. The thing that I think needs to be covered in the clause 1 debate on this bill is to get a correct understanding of how the policy of the bill, which was established in the second reading debate and outlined in the Attorney General’s second reading speech, actually matches the detail of the bill as we go through all the clauses. I find it very difficult to understand and I seek some clarification from the Attorney General about how the detail of the bill matches what would appear to be the policy of the bill in this matter. If we go back to the second reading speech, I would suggest that the policy intent we agreed to during the second reading debate was very much about people using devices. The Attorney General’s second reading speech stated —

A common tactic used by protesters is to lock themselves onto equipment, trees and other objects in order to block roads, or otherwise obstruct lawful activity.

Then, pretty much the whole of the second reading speech expanded upon protesters locking themselves onto equipment. My view, when I read the second reading speech of the Attorney General, is that the bill is very narrow. The detail of the bill would be expected to be very narrow and would focus on those people, because in my view that was what the policy was. I think this is the only point at which we can look at this issue, because we may or may not need to make amendments to ensure that the detail reflects the policy, and this is where I think the disconnect comes in this bill. In reading the clauses as a whole, it would appear that the detail of the bill does not reflect that very narrow policy as outlined in the second reading speech, but that the detail as currently structured in the bill is quite broad—in fact, it is extremely broad. The reason I want to understand this point at this stage before going further into the bill is that a person does not need to lock themselves onto something to be covered by the detail of this bill. If they stand in the middle of a roadway and say that they are not moving and that they are using their peaceful right to protest against what is being done, they will be captured by the provisions of this bill. They do not have to lock themselves onto anything at all; they just have to use physical force. I would have thought that me standing in middle of the road with a police officer telling me to move and me saying that I will not is captured by the detail of this bill. The policy that we agreed to not that long ago and the detail are completely disconnected. I expect a clear understanding from the Attorney General about that disconnect between the bill and the policy. Was his second reading speech just a press release to get a headline and is he trying to expand the policy of the bill by the clauses as they are written or am I misunderstanding the bill? If I am misunderstanding it, why was more detail not given in the second reading speech? At this point of the debate I think we clearly need to understand that complete disconnect between what was outlined in the second reading speech and the detail contained in the clauses of this bill.

Hon MICHAEL MISCHIN: No and yes, and when the member raises particular scenarios in the context of clause 4 and the offence-creating provisions, I will deal with them.

Hon KEN TRAVERS: We have a right to have the Attorney General explain this to us. We can get into the detail, but that is what this is about at this point. We cannot move through to clause 4 if there are issues. I think we are going to find this bill extremely hard. My personal view is that it will probably become impossible to

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write amendments, but that decision cannot be made until we get a clear understanding of the policy of the bill from the Attorney General. Is the policy of the bill—as we go through the bill we would expect the detail to reflect this—intended to capture someone physically just standing and refusing to move?

Hon MICHAEL MISCHIN: No.

Hon KEN TRAVERS: If that is the case, does the Attorney General accept that the clauses of this bill as currently constructed would capture that scenario; that is, someone standing in the middle of a roadway and refusing to move will be captured and be able to be prosecuted under the bill as per the detail of this bill?

Hon MICHAEL MISCHIN: No.

Hon KEN TRAVERS: It is going to be a fascinating debate.

Hon Michael Mischin: When we get to it, I am sure it will be, but we have not. We have been skirting around clause 1.

Hon KEN TRAVERS: No, we are not skirting around. I missed last night's debate but I know that there was a fair bit of debate about what does or does not happen in debate on the short title of a bill. I am focusing very much on what a clause 1 debate is about. It is about ensuring we get an understanding of the detail of a bill in its totality and its reflection. It is extraordinary for the Attorney General to give us a straight-out denial. I think that when we get to clause 4, we will find that it does cover the scenarios I am talking about, but we then run the risk of the Attorney General saying that we are too far into the bill and cannot do anything about it. He may want to put something in before clause 4 to address the concerns I am raising.

I will move on from that point for a little while. The thing I find interesting about the detail of this bill as it stands, which again is another area that members may want to think about, is how it intersects with the policy of the bill. It strikes me that the detail of this bill as it is outlined provides both broad scope, as I mentioned earlier, and a significant degree of discretion to the officers who will seek to use these provisions. Does the Attorney General agree with that statement?

Hon MICHAEL MISCHIN: I am sorry, I cannot. Discretion to do what?

Hon KEN TRAVERS: The detail of the bill as it is currently structured provides for significant discretion by police officers when using the provisions outlined in the bill.

Hon MICHAEL MISCHIN: If the member is talking about the offence-creating provisions in clause 4, I am happy to explore what he regards as their discretion under it. Is the member talking about their discretion in respect of clauses 2 or 3, or 1, or is he talking about discretions that are inherent, if any, in clause 4?

Hon KEN TRAVERS: I am talking about the detail as a whole. The substantive part of that detail may be contained in clause 4.

Hon Michael Mischin: It is all in clause 4.

Hon KEN TRAVERS: Yes, but if someone wanted to amend this bill to ensure it more accurately reflected the second reading speech or limited the scope of that discretion, it would not necessarily be done in clause 4.

Hon Michael Mischin: Where else would you put it?

Hon KEN TRAVERS: You might do it in a new clause.

Hon Michael Mischin: You might, and then you add it on the end, don't you?

Hon KEN TRAVERS: That might be the case, but the point at which that needs to be understood is before we get to clause 4. To be able to understand the detail of this bill and how it reflects back to its policy and scope is very much about us understanding it now before we progress. For instance, in those scenarios the Attorney General may want to make regulation-making powers to limit the scope, or he might want to introduce different clauses, at which point he might need to move to amend clause 2 and when those new clauses might commence. He might need to amend another act of Parliament and it might have to come back to the house. In order to get the scope and the detail of the bill to connect correctly, we might need to amend clause 3. I do not know. Until I understand how this detail matches the policy of the bill and its totality, it is impossible to know. As a learned lawman, the Attorney General should understand that. The Attorney General cannot sit there and say, "Let's wait until clause 4", but we may find that we need to introduce a new clause that will require us to somehow amend clause 2 or 3 to allow us to do that and at that point we will be told, "Sorry, it's too late." That is why I need to know now and why we need to look at the detail of the bill. The Attorney General's attempt to avoid answering questions at this point is just prolonging the debate. These are not hard questions. They are about discretion —

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Hon Michael Mischin: Discretion to do what? Help me out here! Is it discretion to get up in the morning? Is it discretion to have breakfast, to give evidence or to do what?

Hon KEN TRAVERS: Seriously!

Hon Michael Mischin: Tell us: what discretion are you talking about and where does it fit within the bill? Do you understand what discretion you are talking about?

The CHAIR: I am sorry, but I do not think I have given anyone the call.

Hon Michael Mischin: I am sorry; I am just trying to help the honourable member direct his focus, so I can help him out.

The CHAIR: At this point in time I might state for the purposes of the record that without a copy of *Hansard*, I do not have a copy of the President's ruling in front of me; we are trying to obtain a copy at the moment so that I can be clear about the parameters of the President's ruling that was made yesterday in relation to this. From my recollection, the President's ruling said that issues that deal specifically with the technical nature of the offence provisions should be dealt with in clause 4 and not in clause 1 of the bill. I do not particularly want to be quoted on that—that is just a general overview—because I do not have a copy of the ruling to be able to read that out.

Hon KEN TRAVERS: I completely accept that ruling, as you do, and that is a good ruling of the President. I am not trying to go into the technical issues of clause 4. When we get to clause 4, we can go through all those technical issues. At this point of the debate, which is the point at which it needs to be understood, I need to understand the interconnection between the policy of the bill and all the clauses as written so that we can decide whether amendments will be required as we progress through the bill. I am not getting into the nitty-gritty of the provisions as outlined in clause 4. I am trying to get a general understanding from the Attorney General, who seems to be more intent on trivialising the debate than in assisting the chamber to progress through this legislation. I am trying to fully understand whether the Attorney General accepts that in exercising the powers that are granted—should the detail of this bill as it is currently structured be passed—that will then allow significant discretion by a police officer. We need to understand that at this point, because we need to start to look at what other amendments would be needed. If the intent is to have a very narrow bill with very precise terminology, we need to be moving a range of amendments that potentially could impact upon clauses other than clause 4. To get a sense of whether the intent of the bill is to provide for police officers to have discretion over whether to lay charges and about how people are charged is something that is important to have an understanding of at this point in the debate.

The CHAIR: I have just obtained a copy of the President's ruling. To aid members and help facilitate consideration during committee, I might just read the President's ruling so that we are all clear on the content and the scope of the ruling. The President stated —

Hon Kate Doust has asked for a ruling regarding the scope of the clause 1 debate. In particular, some members have been asking questions of a technical nature regarding specific instruments that may be capable of falling within the offence provisions of the bill. The offence provisions of the bill are contained in clause 4. The Attorney General, who has charge of the bill, has indicated that he will address questions of a technical nature relating to the offence provisions in this clause rather than in the clause 1 debate.

Other members have also referred to various definitions and phrases used in the Attorney General's second reading speech and in the explanatory materials associated with the bill. These phrases do not appear in the bill itself but provide some guidance of the government's policy intentions to members. Although it is not appropriate to debate issues of policy at the committee stage of the bill, it has been suggested by Hon Adele Farina that the clause 1 debate is the only opportunity to understand the practical aspects of these definitions and phrases as they relate to the offence provisions. This is not the case in circumstances in which other clauses, such as clause 4 in this case, afford an equivalent opportunity. My ruling in this respect is consistent with prior rulings of the Deputy Chairs of Committees presiding over the Committee of the Whole on this bill. I also remind members that the member in charge of a bill takes responsibility for the answer he or she provides. Some members may not like it or agree with it, but that is the answer. The point of order is not sustained.

Hon KEN TRAVERS: I have another area I want to cover in this bill and I want to get an understanding on this from the Attorney General. He gave Hon Sue Ellery a copy of the offences currently commonly used by police in protest situations but, interestingly, it did not refer to damage. I would have thought that if damage had occurred that wilful damage would be an offence. In fact, I listened to Hon Paul Brown's speech yesterday in

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which he gave an example of someone going on to a vessel at Fremantle port. I would have thought a whole range of offences would have been committed as a result of that. The area that I want to get a broad understanding of in the detail of this bill is whether the Attorney General would envisage that people will potentially be charged both with an offence under this bill but at the same time be issued with a move-on notice and also with obstructing vehicles and pedestrians. Is it envisaged by the government that someone could end up with three different charges—a charge under this bill, a charge under the Road Traffic Act and a charge under the Criminal Investigation Act for failing to comply with a move-on notice—or is it the intent of the government that if someone is charged under this bill, they would not be charged under those other pieces of legislation?

Hon MICHAEL MISCHIN: That is a very good question. As with much of our legislation, it is possible that a particular course of conduct can give rise to a variety of potential offences. The usual practice is to charge either the most serious offence that has been committed or is apparent. Certainly it is practice to charge only those offences that the evidence can bear, and whether one or more charges are laid depends on the circumstances. It must be remembered that where the same act or omission can give rise to several charges, to lay several charges would be futile and would give rise to an issue of double jeopardy. If a particular course of conduct can give rise to several charges and those charges are laid and do not give rise strictly to double jeopardy, it would nevertheless be the case that a court would consider the gravity of the circumstances and whether they overlapped to some significant degree and may very well impose any penalty as concurrent with other penalties. That is not unusual. Depending on the circumstances, yes, it is possible that there may be several charges laid or it may be a charge for the most significant offence.

Hon KEN TRAVERS: I appreciate the Attorney General's comments, and I understand the complexity of the matter.

Hon MICHAEL MISCHIN: I am sorry, but can I add one other thing? Now that I understand that Hon Ken Travers was touching on police prosecutorial discretion, that also comes into play in the decision about whether to lay one or more charges. Again, it will be a question of what is the most significant course of conduct that created the problem that needs to be addressed. Charges might be laid under this legislation, or it might simply be trespass. It would depend on how strong the case is, and perhaps one of those charges would be laid and not another.

The CHAIR: I want to let members know that it has just been brought to my attention that we will be going through until 6.20 pm tonight, because I was getting ready to leave the Chair until the ringing of the bells. So, if members are wondering what the discussion at the table has been about, it has not been about the debate.

Hon KEN TRAVERS: Madam Chair, if we are talking about discretion, there is always the discretion to leave the Chair until the ringing of the bells, and I suspect that you would become an incredibly popular Chair at that point.

The CHAIR: On one side of the chamber, maybe!

Hon KEN TRAVERS: I suspect other than the Minister for Mental Health and the Attorney General.

Hon Helen Morton: What makes you think she is not popular now?

Hon KEN TRAVERS: See! I told you, Madam Chair, that the acting Leader of the House wants you to leave the Chair until the ringing of the bells!

The CHAIR: Perhaps we could focus on the bill before us.

Hon KEN TRAVERS: I appreciate the issue around discretion. This takes us into an interesting area. We are putting in place a range of penalties under this bill. However, as the Attorney General has noted, there will be many other cases. There is a range of discretions in the bill and a range of decisions that a police officer will need to make to determine intent, and ultimately a decision will be made about whether to charge under this bill or another piece of legislation. That is one of the reasons I am asking these questions at this point in the debate. One interesting question is whether we will need to move amendments to the bill to restrict the circumstances in which people can be charged. The penalties under this bill are significantly high. I am trying to understand whether we are just trying to set up some sort of system within the bill that will provide a hierarchy of offences —

Hon Kate Doust: Before it kicks in.

Hon KEN TRAVERS: Yes. If a move-on notice is able to be taken and the person is able to easily discharge themselves from the locked-on device, would we then not want to amend the bill to say that in that circumstance, the person should simply be charged with the offence of not obeying a move-on notice, rather than have the person charged under this bill, with the significantly increased penalty? I think the penalty is almost double.

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Hon Michael Mischin: No, it is not. It is the same penalty.

Hon KEN TRAVERS: It is in circumstances of aggravation.

Hon Michael Mischin: Or endangering or injuring and that sort of thing, which is fair enough I would have thought.

Hon KEN TRAVERS: There is also the offence of obstruction under the Road Traffic Act. There is a range of permutations and combinations about how the detail of this bill could still meet the policy of the bill, at the same time as seeking to potentially move amendments. I appreciate the Attorney General's view. However, as we go further in the bill, we will need to consider this matter, and also the reversal of onus of proof, which is a significant issue. As one of the most longstanding members of this place, I want to make some comments about the onus of proof. Earlier, some comments were made by members about how it is not uncommon in legislation to have a reversal of onus of proof. It is becoming more and more common to have a reversal of onus of proof. When I first arrived in this place, it was not as common. In fact, that debate was often had in this place, by greater legal minds than mine. One of the things they always said is that the problem is that once we start on the slippery slope of reversal of onus of proof, it becomes normal and we have yet another justification and another justification. We are now getting to the point at which we are saying that we will accept a reversal of onus of proof, because it is common practice, and all we need to do is put in place some tests that will apply to the reversal of onus of proof. That undermines the fundamental tenets of the justice system. It is always based on the argument that it will make it easier for the police. It might make it easier for the police. However, it undermines the fundamental principle that a person is innocent until proven guilty. When we are dealing with a bill such as this, and as we get into the detail of the bill, we need to be cognisant of the fact that every time we reverse the onus of proof, it becomes a marker for the next example of reversal of onus of proof.

Therefore, the comments made earlier by the Leader of the Opposition are very important. We are very concerned that the reason these provisions are in the bill is to make it easier for the police. We need to accept that there is a price for justice, there is a price for locking people up and there is a price for investigation. There is a range of costs. If we want to have a civil society, we need to accept those costs. I ask members how they would feel if they were the person against whom the reversal of the onus of proof was being applied. It is often very hard to prove that something did not happen. Therefore, when the onus of proof is put back onto a person through a reversal, there could be a miscarriage of justice. If we were the person who was subjected to that miscarriage of justice, how would we feel? As we go through the clauses of this bill, every member of this house should give consideration to that matter. It concerns me that we are seeing more and more examples of reversal of onus of proof. It is playing out exactly like Hon Peter Foss, and other people, said it would. It is becoming the norm. It is becoming the common, easy approach. I ask members on the other side and members of cabinet to think about that when they put these types of bills through. It is easy for someone in the drafting office to write that into a bill. However, we need to be the protectors of the onus of proof. If anyone is going to protect the onus of proof, it should be the upper house.

The CHAIR: Hon Ken Travers, I am going to make this point now. I let you go on, because I did not get a chance to interrupt, but based on the ruling of the President last night, discussion about reversal of onus of proof is reserved for clause 4. I just put that on the record.

Hon KEN TRAVERS: I was just accepting the latitude that you had shown earlier in the debate, Madam Chair, and I appreciate it.

The CHAIR: That was before I read out the President's ruling.

Hon LYNN MacLAREN: I have some queries about the charges that can be laid under this Criminal Code amendment bill, and other charges that are currently laid, along the lines of what Hon Ken Travers has talked about. I understand that currently in the forests, people are sometimes charged under the Criminal Code with obstructing a public officer. That is not listed in the charges that the Attorney General has provided to us on his handout. It is a summary conviction penalty, and it is possible that the penalty could be a fine of \$18 000 and imprisonment for 18 months. Is it the Attorney General's intention to no longer use that charge? Has that charge been replaced by this criminal code amendment bill? I am told that this is used in a case when people can unlock, but they will not. Protesters who can unlock but will not are being charged with obstructing a public officer under the Criminal Code, so how will the amendments before us fit in with that?

Hon MICHAEL MISCHIN: The Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 will create offences to cover conduct that is not otherwise covered by the criminal law. The offences to which the member has referred can still be laid, depending on the conduct of the offender or accused. If someone, for example, pretends they are locked on and they are not, the offences under this bill may not be made out. But if it has taken the police time to explore that and wasted police resources to ascertain that, then, yes, they could be

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charged under section 171 of the Criminal Code for creating a false belief, and they could be required to pay the costs that have been wasted in establishing that fact—analogous to the sorts of costs that can be recovered under this bill for getting them released. If there is other conduct that involves obstructing police, that can be the subject of an offence as well. It all depends on the conduct we are looking at and what these people are doing at the time, and the discretion of the officer concerned as to the offences revealed by the conduct. We have to bear in mind also that notwithstanding a police officer may charge someone with a certain offence, those sorts of decisions are reviewed up the line by supervisors and the like. In the event that a prosecutor goes to court on it and is reviewing the brief, that may result in the withdrawal of some charges and the pursuit of others. In the event of pleas of guilty to some charges, others may be withdrawn. All sorts of things can happen. There are no hard and fast rules; it all depends on the circumstances. None of that will change with this legislation.

Hon LYNN MacLAREN: I thank the Attorney General; that is very clear. The other offence I had in my list that did not match the list provided to us was conspiracy to commit a simple offence, covered under section 600 of the Criminal Code. This relates to the clause that refers to preparing to prevent an unlawful activity.

Hon Michael Mischin: Section what?

Hon LYNN MacLAREN: Section 600.

Hon Michael Mischin: There is not a section 600.

Hon LYNN MacLAREN: It is in the Criminal Code 1913, which refers to —

... to the greatest punishment to which a person convicted of the offence ...

Does the Attorney General not have that?

Hon Michael Mischin: No.

The CHAIR: Can I just seek clarification? What section are you referring to, Hon Lynn MacLaren, and is it of the Criminal Code of Western Australia?

Hon LYNN MacLAREN: Yes.

The CHAIR: And the section?

Hon LYNN MacLAREN: I have section 600. Section 558 is conspiracy to commit an indictable offence, and section 600 is conspiracy to commit a simple offence. These two offences are related to protesting, and I just wondered whether —

The CHAIR: They would still be applicable?

Hon MICHAEL MISCHIN: Given that, as I understand it, section 600 of the Criminal Code was deleted in 2004 when the current trespass and other offences were introduced, I would have thought it is not available. But maybe another section is being referred to. Perhaps if I can have a copy of the document that the honourable member is referring to, I might be able to help her out.

Hon LYNN MacLAREN: I thank the Attorney General. I note that my offences might be a little out of date as well, so maybe my list is a bit out of date. I ask the question because there are currently several charges laid against forest protesters under the Conservation and Land Management Act and under the Criminal Code, and I think it is important that we are clear about when this amendment might be used and those other offences will not apply. That is all I have right now.

The CHAIR: Does the Attorney General want to respond to that?

Hon Michael Mischin: I think it was a comment.

Hon MARTIN PRITCHARD: I was listening to the Attorney General's response to the second reading debate quite carefully to try to understand this bill. I was very keen on the Attorney General's response on the definition of "barrier". I will not get into what constitutes a barrier because that can be done when we get to clause 4. I note that the Attorney General said as to "physical"—I think the Attorney General read out the whole dictionary entry—that the most pertinent was "of or relating to that which is material". As to "barrier", the Attorney General read out a large entry, but I think the most appropriate is "anything built or serving to bar passage", or "anything that restrains or obstructs progress, access". I will have to take that at its broadest meaning. I have a view that a barrier can be constructed; the previous debate seems to have been focused on personal locking devices, but given that that is the definition I am working towards, it can be broader than that. Is the bill as a whole contemplated or directed towards this type of scenario; that is, that the conduct of a protester

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interferes or prevents a lawful activity, but not the person that the protest is directed, so that bystanders' lawful activities are interfered with as a consequence of the protest taking place?

Hon MICHAEL MISCHIN: We are descending into clause 4 again and the specifics, but it is not aimed at any particular lawful activity. I understand that at James Price Point the progress of ambulances was prevented by lock-ons, and people going about their holidays and wanting to stay in certain places that they were lawfully entitled to stay at were also prevented from doing so because of the behaviour of some of the protesters. Yes, it is in broad terms and not at any particular person.

Hon MARTIN PRITCHARD: I raise this at this point because there are many provisions within clause 4, and before we descended into that clause I wanted to get an understanding of how that might operate for different clauses.

Sitting suspended from 6.20 to 7.30 pm

Hon MARTIN PRITCHARD: Just before our dinner break, I was trying to get some idea of the impact that this bill might have on people other than the object of the protest. If I remember correctly, the Attorney General indicated it could impact the lawful activity of others who are the subject of the protest. If that is the case, I want to ask a couple of questions, if I may. Obviously, I believe that a person needs to understand that they are about to commit a crime or an act that will be unlawful. Who would have the responsibility of informing the protester that they are impeding somebody other than the focus of their protest? Who would have the responsibility of informing the protester that they are impeding the lawful activity of a third person?

Hon MICHAEL MISCHIN: Again, when we get to clause 4 and analyse the elements of the offences, all will become clear.

Hon DARREN WEST: I pick up on the Attorney General's comments about questions asked earlier and also refer to the example put to the house during the second reading debate in which Hon Paul Brown talked about a protester on a live sheep–shipping vessel, and some members may need some clarification on this. I have thought through why someone would be found on a live sheep vessel as indicated by Hon Paul Brown. The three main reasons would be to protest, as an act of trespass, or it may well be that they were left there by a third party as some sort of prank or some sort of activity. When the police come to apprehend the person and free them from the vessel, they have to make a judgement about which legislation this person will be charged under. If the person is there under an act of trespass, laws are already in place that cover the act of trespass. Under the provisions of that law, when the police arrest that person and charge him with trespass, they would have to prove subsequently that the person was trespassing and provide evidence to the court and build a case around why that person should be charged with trespass. If they claim to have been left there by a third party who is unable to be identified, clearly the perpetrators would not be present and the police would exercise a judgement on whether they would seek to apprehend a third party to charge them with leaving this person on the vessel. That, too, would require a lot of work from the police in creating a case, finding suspects, interviewing and charging them, and then proving that they were guilty of an offence. The third option available to police would be that the person is charged under these laws. Under that option, it would be a much simpler process for the police because they do not have to prove that this person is guilty because, under these laws, they are guilty until proven innocent. I will not talk about proof, because I know we will touch on that later, but I would like some level of assurance that these laws will not be attractive to police and those making that decision, and that this legislation will not be seen as a simpler way to proceed and that they will not then be used to override other laws currently in place, which have served us perfectly well.

Hon SIMON O'BRIEN: Mr Deputy Chair —

The DEPUTY CHAIR (Hon Brian Ellis): Is this a point of order?

Hon SIMON O'BRIEN: No. I thought I might address the question that clause 1 stand as printed. I am in favour of that. If it would help the discourse, I think we are getting to the stage now of futility. I know one thing about the average Western Australian police officer and that is that that officer is at all times dedicated to doing the right thing and displaying commonsense, sometimes in very trying circumstances. When some victim of a student prank or a buck's night prank is found sticky taped or padlocked to a lamppost or a live sheep carrier with one eyebrow shaved off—it might have been Hon Stephen Dawson in his youth or Hon Darren West or whoever it might be—I think we can rely, by and large, on the police officer being able to distinguish quite easily between the situation of this unfortunate chap and someone who is deliberately trying to prevent people from going about their lawful business. The police officer could use some extremely advanced twenty-first century investigative techniques, such as asking this chap what he is doing. If the one-eyebrowed chap with the plastic, sticky thing behind his back that was chaining him to the railing said drunkenly, "Geez! My mates have tied me up because I'm getting married tomorrow", that might elicit one response from the police officer, and it

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would be a proportionate response. Indeed, if the police officer was from my local of Kensington, they would probably put it on Facebook as well! However, if the bloke said, “Get stuffed, pig; I’m here to stop this outrageous lot of capitalists from exploiting”—whatever it is—“a live sheep carrier”, the officer investigating could adjust their response accordingly. I would not think it would be beyond the wit of the average copper to come to the right conclusion.

I have faith in our police. The last time I addressed a large group of police officers was at the Joondalup Police Academy, on graduation day, when I was representing the government as a minister. It was a cold day, and I looked at all the police officers out there on parade, and they were all in shirtsleeves. I wondered what had happened to things like uniform jackets. They were all in shirtsleeves, shivering, on parade. This is all relevant to clause 1. There was a huge crowd, and the police brass were there in numbers. There was to be a decent morning tea afterwards, and they obviously knew that because they had been there before. There were all the mums and dads and partners and brothers and sisters and faithful retainers. I was about the fifteenth person to be called to the microphone, and I thought: what am I going to say? Members will know what I mean; they have been there and done it. I have not been in the police force, but I know what it is like to be standing on a parade ground forever and wishing that whoever the visitor was would shut up because we are tired of it. There was one message that I wanted to get across to the graduating officers out there. I said, “Congratulations, and thanks to everyone involved in getting to this day, and we are all here to wish you the best. You cannot look around much, but behind me you will see a very big group of people. You will not know them all, but this big group of people are of all ages and come from all walks of life. Because of the very mass of them, they are a very good, representative cross-section of our community, and they are all here, like me, to wish you all the best in embarking on a sometimes difficult and dangerous career. I want you to know that the next time you find yourself at two o’clock in the morning—and you will—with some drunken, obscenity-spitting person who is assisting you with your inquiries, as you fight for your wellbeing and possibly your life in the gutter, that you have the support of all these people and the community that they represent.”

So let us not have any more of this nonsense of alluding to police officers misusing the very limited and discrete powers that we are talking about in this bill, because that is not what this clause 1 debate is about. I have ventured to go there only in response to the comments of other members. The fact of the matter is that there is a discrete area in the police arsenal of powers that has been shown up to be deficient with some tactics that have been used in recent times. We are talking about a situation in which professional activists and protesters are quite happy to try to radicalise people like the girl who Hon Paul Brown spoke about and who Hon Darren West referred to. In that case, they were quite happy to suck that girl into a dangerous situation, where she found herself with her thumbs—I think Hon Paul Brown said—locked to a railing, in a position in which she could not sit and was exposed to the sun and the elements, and possibly to abuse from someone who was passing by, because we never know what is going to happen. She was stuck there, to her great physical, and ultimately I would think emotional, distress. She was eventually rescued by the police, because these professional activists had gone off a long time ago and had left her there. She was distressed, she had soiled herself, and she was feeling like an absolute idiot, wondering what the future holds. That is the sort of stupid behaviour that we want to stop being visited on other innocent young people, by giving the police the powers that are contained in the discrete elements that are proposed as amendments in this bill.

I want to try to balance what has been a very long time debate. I am not making the debate any longer than it otherwise would be. I want to provide some balance for the record about what motivates those of us who support these measures, and explicitly reject some of the nonsense that we are starting to see advanced as this debate on clause 1 draws on and on and on. There are some in this place who simply want to say that we agree to the question that clause 1 stand as printed—and probably should stand as printed sooner rather than later.

Hon SUE ELLERY: I thank Hon Simon O’Brien for yet another cogent expression to the chamber of his point of view. Hon Simon O’Brien raises a very important issue. The message that he gave to those young police officers was a very important one. He said to them that they need to know that we support them. Indeed, we do support them. However, in order for us to support them, we need to make sure that the tools that we give them to do their job are the very best tools that we can give them. What we have in this bill is a broken tool. We are not making it clear to police officers what we expect them to do with this legislation. The Attorney General and the Minister for Police have both said that this legislation will be applied in only the most extreme of circumstances. However, that is not what is in the clauses before us now. They have both said that this bill will apply to only a minority of events that occur in the protest world. The Attorney General said last night that this bill will apply to only a minor number of—what is the word? I wrote it down. I do not have the *Hansard*, but I think he said that it would apply to only a minor number of incidents. I am sure he will forgive me if I am paraphrasing him. That is what has been said. However, that is not what is in the clauses before us.

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I wholeheartedly support the views expressed by Hon Simon O'Brien. We need to support those officers who we ask to go out at two o'clock in the morning and put their lives on the line to protect us. However, we need to give them the best of equipment, the best of tools and the clearest of instructions about what they can do and what they cannot do. We are not doing that in these laws. That is because we are giving mixed messages. This is bad law. We are going to make it harder for those police officers to do their job properly, because we are not being clear about what laws are being introduced and how those laws will be implemented.

Hon DARREN WEST: I, too, would like to follow on from the comments made by Hon Simon O'Brien, and endorse wholeheartedly what the Leader of the Opposition has just said. Of course we all support our police. Of course we do that. The police do a job that I would be incapable of doing. I would not have what it takes to be a police officer. So, I respect and admire the police. What I am saying, as the Leader of the Opposition has pointed out, is that these laws do not give the police the clarity that they need to do their job. I think I pointed that out with the example proffered to us by Hon Paul Brown. There would be at least three situations in that scenario in which a person might be charged. I get what the Minister for Police and the Attorney General are saying about how this bill will apply in only a minority of cases. However, it is the police who will have to make that discretionary decision, in the field, on the beat, with the protesters. Hon Simon O'Brien sought to trivialise what I have said. He effectively said that if a person who may be protesting is approached by a police officer, all he should say is that he is getting married tomorrow, and then these laws will not apply to him. That is quite ridiculous.

Several members interjected.

Hon DARREN WEST: That is what he said.

The DEPUTY CHAIR: Order, members! Hon Darren West has the call.

Hon DARREN WEST: Thank you, Mr Deputy Chair. That is what I heard, and I am sure *Hansard* will reflect that. We do not seek to trivialise on this side of the house. This is a very, very poorly drafted, bad piece of legislation. Everybody outside this Parliament agrees with us.

Hon Michael Mischin: No, they don't.

Hon DARREN WEST: Yes, they do! Seventy-four groups have put up their hands and said that they think this legislation is poor. There are now 75 because another fairly significant world group, the United Nations, also agrees with us about this legislation. Why does the minister not get it? What does he not understand about the examples we put up?

Hon MICHAEL MISCHIN: This is a fascinating soliloquy and once again Hon Darren West does what he does best, which is talk without thinking and without focus to his argument. This is the Committee of the Whole. If he has a question about clause 1, I am happy to hear it, but at the moment he is making a speech about the policy of the bill.

Several members interjected.

Hon MICHAEL MISCHIN: If he can provide us with a question, I will be happy to answer it.

Several members interjected.

The DEPUTY CHAIR: Order, members!

Hon MICHAEL MISCHIN: Thank you; I thought I had the call, Hon Ken Travers.

Point of Order

Hon MICHAEL MISCHIN: My point of order on this is that we are not dealing with clause 1; we are having another second reading debate.

Hon Sue Ellery interjected.

The DEPUTY CHAIR (Hon Brian Ellis): Order, members! There is no point of order, but there has not been a question from the previous three speakers.

Hon Sue Ellery: And there doesn't need to be.

The DEPUTY CHAIR: I am just saying that there is no point of order; you are allowed to generally debate clause 1. That is the ruling.

Committee Resumed

Hon Kate Doust; Hon Michael Mischin; Hon Sue Ellery; Hon Lynn MacLaren; Hon Ken Travers; Hon Martin Pritchard; Hon Darren West; Hon Simon O'Brien; Deputy Chair; Hon Adele Farina; Hon Robin Chapple; Hon Dave Grills; Hon Rick Mazza

Hon KATE DOUST: Thank you, Mr Deputy Chair. A good point has been raised. Given that there has been substantial opposition to this legislation in the public arena, can the minister please name the stakeholders that the government engaged to discuss the development of this legislation prior to this legislation being introduced into Parliament?

Hon MICHAEL MISCHIN: The issues that were addressed by the bill were first raised by police who were dealing with these sorts of problems at James Price Point, as I have already indicated. Following this, a hiatus was found in the powers that were available to police to deal with the behaviour that has been described, which cannot be adequately dealt with by the current laws, of trespassing, breaching move-on notices and the like. Following that, there were discussions with the State Solicitor's Office about the various issues that concerned dealing with lock-on devices. Prior to any action being taken to draft the new laws, there were also discussions between the Department of State Development, WA Police, the State Solicitor's Office, the Department of Local Government and Communities, and the Departments of Land and Regional Development. Consultation also took place with police in regional areas who had been dealing with these events. It also took place with the regional operations group and other specialist areas of Western Australia Police that play a part in the process of dealing with protest incidents. There was consultation with the State Solicitor's Office on a continuous basis and the development of a submission that led to the drafting of the legislation. To scotch the point that police have somehow ended up with something that they cannot use or are incapable of using, which seems to be Hon Darren West's expert opinion on the subject, not having understood the legislation in the first place —

Several members interjected.

The DEPUTY CHAIR: Order! The Attorney General has the call.

Hon MICHAEL MISCHIN: I can assure members that the police have been very closely involved in drafting the legislation and formulating the principles that they can use to address the sorts of behaviour that are not adequately covered in other legislation.

Hon KATE DOUST: The information that the minister has just provided to us seems to be that any discussion around the development of this legislation was entirely internal across government departments, or within government ministerial offices. We have had a significant reaction from members of the public and from the 70-plus various organisations across the spectrum of community in our state, and I must say that it is very rare to see such a large and diverse group of people say that this bill is breaching their democratic rights to protest. Given that the government has been fully aware of each of these groups since we commenced this debate almost a year ago, has any effort been made by the government during this period to engage with them, or any of those organisations, to allay their concerns and clarify the matters that they have canvassed in their call for this bill to be either defeated or amended?

Hon MICHAEL MISCHIN: Yes, there has been. No, there has not been any consultation with the James Price Point protesters, or whoever represents them, to see whether it was all right to stop them from locking themselves to things. Yes, the primary impetus for this bill came from the authorities that had to try to address the interference with lawful activity and did not have the powers to deal with it adequately. Since the introduction of the legislation, there have been discussions with the Association of Mining and Exploration Companies, the Forest Industries Federation of Western Australia, the WA Farmers Federation, the Pastoralists and Graziers Association of Western Australia, Baptistcare has been spoken to, and community legal centres.

Hon KATE DOUST: I thank the minister for that. It is a shame that perhaps the consultation was not even broader with those groups before the legislation came in. Let us face it, getting back to the crux of the problem for police, it seems to be around the resourcing that they need to manage these very isolated incidents. Has the government considered the forthcoming budget to boost funding for police so that if these events were to arise, the police could actually have the numbers and the resources to go out and do the work that they need to on these very rare occasions?

Hon MICHAEL MISCHIN: The government's position is that having to provide more public money to supply police officers, and the equipment to deal with someone who has chosen to exercise the sorts of behaviour that is being addressed by this bill, is not a sensible use of public resources generally. The idea of providing police with more police officers and more money to unlock people who could be deterred by the simple passage of legislation aimed at that is just ludicrous. Resources should not be provided to address an issue that can be addressed in another way.

Hon KATE DOUST: Given that James Price Point seems to be a key issue for the government to kick this bill off, have any calculations been done about the additional costs that police bore to manage that protest?

Hon MICHAEL MISCHIN: I am informed that the number of police hours used were 42 at the lock-on incident on 8 December 2014 at Helms coupe, Nannup; 36 on 11 December 2014 at Helms coupe; 52 on

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6 January 2015 at Helms coupe; 32 on 9 February 2015 at Mowen coupe, Margaret River; 24.5 on 13 February 2015 at Mowen coupe, Margaret River; 36 on 3 March 2015, Mowen coupe, Margaret River; and 23.5 on 10 March 2015 at Helms coupe, Nannup. I do not have any figures for the James Price Point incident. I am told it was a substantial amount of time and effort. Of course, it is not only the amount of time expended by the police, but also those whose activities that people are lawfully entitled to carry out are impeded, suffer costs and sometimes substantial damage. For example, contractors who may have been engaged by the target of this action find that they cannot carry out the work, and they may lose the contracts and the like or be spending money trying to extract their vehicles from places or gain access to places to do their job, so there are flow-on effects.

Hon ADELE FARINA: When we consider a bill in committee, it is appropriate to look at the long title and the short title of the bill and any purpose provisions of the bill so we can understand the subject matter and the purpose of the bill. This is important because any amendments we propose must be relevant to the scope and subject matter of the bill. We cannot be destructive of the intent of the bill, so this is a very important aspect to get right up-front. The short and long titles of the bill are the Criminal Code Amendment (Prevention of Lawful Activity) Act 2015 and there is no specific purpose provision in the bill. In the media we have been referring to this bill as the protest laws bill. However, the bill makes no reference to protest in the short title, the long title or any of the provisions of the bill. On reading the bill one comes to the conclusion that one does not have to engage in a protest for the provisions of the bill to apply. One merely needs an intent to prevent a lawful activity that is being carried out or is about to be carried out. My question to the Attorney General is: does he agree with the statement that there is nothing in this bill in the short title, long title or the bill's provisions that indicate that this applies to protests?

Hon MICHAEL MISCHIN: That is right.

Hon ADELE FARINA: In answer to the question asked by Hon Sue Ellery yesterday, and without being able to check *Hansard* I am relying on my recollection, the Attorney General read a list of offences that have been used in protests at James Price Point, Helms coupe at Nannup and Mowen Forest. The Attorney General tabled a list of offences earlier this evening, again in reply to a question asked by Hon Sue Ellery, and I would like to ask a couple of questions about the information the Attorney General provided. The first one is: have protesters using thumb locks or other body locks been charged with failing to comply with a move-on notice and what was the outcome of that? Were they convicted of those charges?

Hon SIMON O'BRIEN: Before the minister responds, further to that very interesting question—I will listen to the response with great interest—is not a large part of the point of these new laws to prevent people from interfering with and stopping people going about their lawful activity, not to charge the culprits afterwards? Therefore, I am not sure of the relevance of what happens to people who have been locked on in the past. I thought the idea was to give some tools to the police to stop people stopping others from going about their lawful business. Unless there is a misunderstanding, perhaps the minister can advise me.

Hon MICHAEL MISCHIN: Hon Simon O'Brien is correct. I dealt yesterday with the issue that Hon Adele Farina raised.

Hon ADELE FARINA: If I missed it, I apologise but I do not have the luxury of being able to refer to the *Hansard* to refresh my memory so if it is not too much trouble for the Attorney General, given he has provided the answer once, if he could refresh my memory, that would be appreciated.

Hon MICHAEL MISCHIN: One does not need a reference to *Hansard* if one is paying attention to the debate. But I did say yesterday and I think also in the course of my second reading reply I alluded to it and during the course of the Committee of the Whole yesterday I made the point that many had been charged with failing to obey a move-on notice. The police had concerns about whether that charge could be maintained in the circumstances. However, I believe the vast majority pleaded guilty so that they could then go back to their activities rather than contest the charges and be limited by conditions of bail from going back to the site.

Hon ADELE FARINA: The Attorney General said the vast majority pleaded guilty so there were some instances in which people pleaded not guilty. What was the outcome of those situations?

Hon MICHAEL MISCHIN: It is my understanding that all those who were charged pleaded guilty to breaches of move-on notices.

Hon ADELE FARINA: In the list the Attorney General provided earlier today, I notice that regulation 72 of the Conservation and Land Management Regulations 2002 has not been included. Regulation 72 provides that an authorised officer may direct a person on CALM land to cease any behaviour that is contrary to the lawful use of the land, is causing a disturbance or annoyance to other persons or, in the opinion of the authorised officer, is disorderly or offensive or, in the opinion of the authorised officer, is dangerous. Has that provision of the

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regulations been used in relation to protesters at Mowen Forest or any other forest protest and what were the outcomes pursuant to that regulation?

Hon MICHAEL MISCHIN: It is my understanding that that is akin to a move-on power used by Department of Conservation and Land Management officers; there is no need to use it if police officers are present and doing the directing.

Hon ADELE FARINA: I do not know that it is akin to a move-on notice, but anyway. It is interesting that there are existing provisions that we are not making use of.

Regulation 44(1) of the CALM regulations reads —

If the CEO is satisfied that there is a significant and imminent threat of loss or harm to the safety or health of persons or fauna, or of damage to property or any part of the environment, the CEO may direct a named authorised officer to close as much CALM land as the officer thinks necessary to reduce or remove the threat.

Regulation 46 relates to that in that it provides that it is an offence to enter a closed area without permission, and that carries a fine of \$2 000. It seems to me that a number of these protests could have been avoided by the CEO or authorised officer simply using these provisions of the CALM regulations and declaring the area a closed area. Then they would be able to use the powers under regulation 46, which carries a fine of \$2 000. In relation to Mowen and Helms and any of the other forest blocks on CALM land, were those provisions invoked and what was the outcome?

Hon MICHAEL MISCHIN: I understand that declarations are made from time to time to close off areas to prevent camping and the like. Whether they are obeyed is another factor. Of course, I thought part of the point of being a protester is that someone pushes the law to the limit to try to disobey the instructions of those in positions of authority. The point of preventing lawful activity by some physical barrier, which is what the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 is aimed at, is something that, hopefully, will be deterred by the legislation, but if it is not there will be penalties attached to it.

Hon ADELE FARINA: For clarification purposes: the Attorney General answered in the affirmative that these provisions have been used. It is my understanding that there is a reluctance by CALM to use these regulations to close an area for the purposes of preventing or deterring a protest.

Hon Michael Mischin: I cannot comment on that. I can only tell you what I know, and I cannot comment more generally on what its policies are.

Hon ADELE FARINA: Yes, but I was just seeking confirmation. The Attorney General has stated on the record that CALM has used these regulations to close an area in an effort to prevent protests.

Hon MICHAEL MISCHIN: Yes.

Hon ROBIN CHAPPLE: In relation to the prosecutions that occurred after the events at James Price Point, were the people who did not plead guilty prevented from returning to Manari Road?

Hon MICHAEL MISCHIN: I am informed that those who were the subject of bail conditions, yes, they were prevented; however, once the charges were dealt with those bail conditions fell away and so they were free to go about their activities. That was one of the tactics of pleading guilty to these sorts of things, copping a fine and then going back to the area.

Hon Robin Chapple: There were many people who didn't.

The DEPUTY CHAIR: Order! Do you want the call?

Hon ROBIN CHAPPLE: Yes.

I am asking about the people who did not plead guilty. There were prosecutions of a number of people who did not plead guilty, and I understood that they were prohibited, after going to court, from going back to Manari Road.

Hon MICHAEL MISCHIN: Of course, if bail conditions restricted their movements, yes, that was the case, but once they go to court and the charge is dealt with, either by way of conviction after trial or through a plea of guilty, any restrictions by way of bail fall away. I do not know who ended up contesting which charges, but I am informed that the legality of the move-on notices was never tested.

Hon DARREN WEST: I will go back to the line of questioning I started earlier. I am going to rephrase it so that what I ask is perhaps a little clearer.

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I refer to the example provided by Hon Paul Brown, whereby a person was found attached to the railing on a live export shipping vessel. They entered the vessel and someone else, or they, attached them to the railing of a vessel that was anchored in the port and about to load or was loading live sheep. If that person was charged, would they be charged under these laws or trespass laws? Forget about whether there was a prank or a third party involved: if a person was found chained to the railing on that boat, would they be charged under the laws of trespass or would they be charged under the protest laws?

Hon MICHAEL MISCHIN: That depends. If Hon Darren West wants to test the elements of the offence to see whether they apply to a particular activity that Hon Darren West has in mind as a hypothetical, we can deal with that under clause 4.

Hon DARREN WEST: It is a bit of a concern. I have tried to make the example quite clear. If police are called to a person attached to the railing of a live sheep export vessel, I want to know—I think everybody wants to know; a whole lot of people want to know—whether this person would be charged under existing trespass laws or whether this person would be charged under the new protest laws.

Hon Michael Mischin: They are not protest laws.

Hon DARREN WEST: If the Attorney General does not know that, I think it will be extremely difficult for anyone else to make that determination. Which laws would they be charged under?

Hon MICHAEL MISCHIN: I have already dealt with that issue. It depends on the circumstances. I do not propose to go into analysing hypotheticals against the elements of the offence until we get to the elements of the offences in clause 4, when all will become clear.

Division

Clause put and a division taken, the Deputy Chair (Hon Brian Ellis) casting his vote with the ayes, with the following result —

Ayes (19)

| | | | |
|--------------------|--------------------|-----------------------|----------------------------------|
| Hon Ken Baston | Hon Brian Ellis | Hon Alyssa Hayden | Hon Robyn McSweeney |
| Hon Liz Behjat | Hon Donna Faragher | Hon Col Holt | Hon Michael Mischin |
| Hon Jacqui Boydell | Hon Nick Goiran | Hon Peter Katsambanis | Hon Helen Morton |
| Hon Paul Brown | Hon Dave Grills | Hon Mark Lewis | Hon Phil Edman (<i>Teller</i>) |
| Hon Peter Collier | Hon Nigel Hallett | Hon Rick Mazza | |

Noes (10)

| | | | |
|--------------------|----------------------|--------------------------|-------------------------------------|
| Hon Robin Chapple | Hon Sue Ellery | Hon Amber-Jade Sanderson | Hon Samantha Rowe (<i>Teller</i>) |
| Hon Stephen Dawson | Hon Adele Farina | Hon Ken Travers | |
| Hon Kate Doust | Hon Martin Pritchard | Hon Darren West | |

Pairs

| | |
|---------------------|--------------------|
| Hon Martin Aldridge | Hon Sally Talbot |
| Hon Jim Chown | Hon Alanna Clohesy |
| Hon Simon O'Brien | Hon Lynn MacLaren |

Clause thus passed.

Clause 2: Commencement —

Hon KEN TRAVERS: I know this is a fairly simple clause and I like the fact that the different clauses of the legislation will not come into operation at different times, other than clauses 1 and 2, but is there any time frame in which the government wants this legislation passed?

Hon MICHAEL MISCHIN: It wants it passed as soon as practicable.

Hon KEN TRAVERS: Are there particular protests for which the government wishes to have this legislation passed as soon as practicable? Are there imminent protests that the government seeks this legislation for?

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Hon MICHAEL MISCHIN: To my knowledge, it is not after any particular protest; it is to address the issue of the unlawful interference with lawful activity by the abuse of physical barriers of the character that have been described in and embraced by the bill.

Hon KEN TRAVERS: Let us not pre-empt clause 4; let us take our time. The Attorney General says that he wants it to be passed as soon as practicable, but what is the requirement for this bill to be passed as soon as practicable? What are the events that are occurring in our society that require the Attorney General to want this bill to be passed as soon as practicable?

Hon MICHAEL MISCHIN: It is because it has taken already almost a year to get it through this chamber.

Hon Ken Travers: But only because your leader wouldn't bring it on.

Hon Peter Collier: I did so!

The DEPUTY CHAIR (Hon Brian Ellis): Order! The Attorney General has the call.

Hon MICHAEL MISCHIN: Perhaps Hon Ken Travers and the Leader of the House can work it all out behind the Chair.

From the government's perspective, it had identified a particular mischief some time ago and developed legislation in order to address that problem and it introduced the bill. There has been ample debate on it in this place. It is the government's objective that it be resolved at the earliest opportunity in order to make way for other legislation to be debated. I suspect that the Minister for Police is equally anxious to move on from this to other elements of her legislative agenda as soon as possible.

Hon KEN TRAVERS: With the Supreme Court decision to rule out the environmental approvals for Roe 8, surely there is no longer an imminent need for this legislation and we can certainly take our time.

Hon MICHAEL MISCHIN: I do not want to get into a debate about this. I have already made it quite plain that there is no particular activity or foreshadowed activity that this bill is aimed at. It is aimed at addressing a problem that has been apparent in the past and requires attention.

Hon ADELE FARINA: Because this clause provides for the legislation to come into operation at different times, is there an intention that any regulations could be made as a result of this amendment to the Criminal Code, which has the capacity for a regulation-making power? I acknowledge it is not in the bill, but I just thought I would put the question.

Hon MICHAEL MISCHIN: No regulations are contemplated by the bill before the chamber. That is apparent from its terms. I am not aware of a general regulation-making power under the Criminal Code, of which it will form a part. There is a specific regulation-making power in section 721 of the Criminal Code, but that is contained within chapter LXXIII, which deals with infringement notices and is directed specifically at that subject matter. It is a bit hard to imagine just what useful regulations could be made in respect of this.

Clause put and passed.

Clause 3: Act amended —

Hon KATE DOUST: I have a question.

Hon Michael Mischin: Of course!

Hon KATE DOUST: That is the issue. The Attorney General knows that when we oppose a bill, we will ask about every aspect of it that we possibly can.

Hon Michael Mischin: What can you ask about clause 3?

Hon KATE DOUST: The Attorney General has provided us with information today about a raft of offences in other legislation that he has cited on a number of occasions that deal with move-on notices, creating a nuisance, obstructing vehicles and pedestrians, pedestrians causing obstruction, trespassing and disorderly conduct. They come under the Criminal Investigation Act, the Conservation and Land Management Act, the Road Traffic Act and the Criminal Code. If the police were so concerned about their resourcing issues and their capacity to deal with these isolated incidents, why did the government have to introduce an entirely new piece of legislation that is extremely broad? Why could it not perhaps have amended the other legislation? If the government is looking at the move-on notices for obstructing vehicles and pedestrians—it is essentially seeking to deal with those things when we get to clause 4—why were either one or more of those pieces of legislation not amended rather than the one we are dealing with now?

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Hon MICHAEL MISCHIN: Consideration was given to the appropriate place to put these offences. The Criminal Code seems to be the sensible place for them. It has analogous offences such as trespass, obstructing officers, creating false belief and disorderly conduct. The member will recall that back in 2004 under the reform legislation that was introduced at the time, a raft of offences, including some of quite some antiquity that were originally in the Police Act 1892, were taken out of that and placed into the Criminal Code by the then Attorney General. These are analogous to those sorts of offences. It does not fit with the CALM legislation because that is focused on a particular area of responsibility. It does not fit comfortably with the Criminal Investigation Act because move-on notices are a police power. If the notice is breached, it has a consequence. This does not have that first step of the issuing of a notice or anything of that nature. It is not exactly a police power; it is a more broad offence and standard of conduct.

Hon KEN TRAVERS: I had another quick question on this matter. We had a debate earlier about the fact that, based on the advice of the Minister for Police on radio this morning, the purpose of this bill, at least in part, is to reduce police costs and resources being applied to these protests. Is it not the case, though, that by making these offences as an amendment to the Criminal Code, it will become a criminal matter and the police will need to take fingerprints and go through a range of other processes for criminal charges, whereas if a person was simply charged under a number of other pieces of legislation, such as the Conservation and Land Management Act or the Road Traffic Act that the Attorney General referred to earlier in debate, that processing would not necessarily need to occur. Before this bill was introduced, we did not need a lot of police resource time. Now a lot of police time will be applied to processing people so they get put through the criminal justice system and go through all the photographing and fingerprinting that goes with that, whereas if they were left to offences under the Road Traffic Act, that would not be necessary.

Hon MICHAEL MISCHIN: Firstly, the offenders would still be dealt with by way of either arrest or summons. Secondly, if we introduce these sorts of offences into specific and specialised pieces of legislation, such as the Conservation and Land Management Act, it implies that that is the lawful activity that we are trying to protect, and of course this goes a whole lot further. This could apply to someone who has thumb locked themselves outside the office of Hon Ken Travers; it would not be covered by the Conservation and Land Management Act. It may involve public roads; it may also involve private roads, so it does not come comfortably within the road traffic legislation. The Criminal Code sets the standards of behaviour across the board and it seems to be the sensible act to incorporate these provisions in the absence of doing it by a standalone piece of legislation, and that would not seem to make much sense.

Clause put and passed.

Clause 4: Sections 68AA and 68AB inserted —

Hon ROBIN CHAPPLE: When we were dealing with the short title—I do not want to go back to the short title—I asked a number of questions, which I was then asked to refrain from asking at that time and ask them under clause 4. I have quite a lot of questions on clause 4. One of the issues that I raised was the prevention of lawful activity. One assumes that if the activity is unlawful, these provisions do not apply. If somebody protested over an unlawful activity—say, they thumb locked themselves onto something—would they be caught by this legislation for impeding activity on behalf of an individual, the government or whatever in pursuit of an unlawful activity?

Hon MICHAEL MISCHIN: I draw the member's attention to proposed section 68AA(2), which states —

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

Hence it has to be a lawful activity that is being prevented physically, and “physically” is defined in proposed subsection (1).

Hon ROBIN CHAPPLE: I refer to James Price Point, which we have been talking about a lot. It is quite interesting to note that those same protesters who were referred to identified on two occasions that the planning amendments that they were protesting about were found to be invalid and unlawful. We also know that the Environmental Protection Authority assessment of James Price Point was found to be unlawful. Later we found out that Lurujarri song trail 11, which was placed on the register by officers of the Department of Indigenous Affairs and was subsequently removed under the section 18 provision subject to the Port Hedland Yintha court case, has now been referred back and is being dealt with because it was caught by the same ruling that found out that the Yintha in the Port Hedland case was incorrect or illegal. The matters of process that the protesters and the community up there brought to the attention of government were found to be invalid on all four occasions. All of those people now have a criminal record for protesting or getting in the way of what the government said

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was legal activity when in fact on four occasions the matters were found to be invalid. I come back to the point that I was trying to raise in the very first instance: would they have been caught, as the minister has just said, by the provision that states —

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

Hon MICHAEL MISCHIN: It depends on how one particularises the activity. If the member is talking about a particular project and the like, yes, there are those arguments. However, if someone thumb locks themselves onto a vehicle to prevent its driver from driving it, that is an interference with a lawful activity—that is, the person's ability to drive their vehicle. That would be captured by this legislation in the same way as the member, in his electorate office, might be up to all sorts of things that may not be sanctioned by law, but the lawful activity of the member entering his electorate office would be protected by this. Of course we are not looking at charging people; we are looking at deterring them from getting into situations in which they can be charged.

Hon ROBIN CHAPPLE: We briefly talked about the right of entry under commonwealth workplace laws. Quite often, licences or permits have been granted to people so they can lawfully access building sites and the like to test whether provisions of the Fair Work Act 2009 are being adhered to. There have been a number of incidents in which proprietors of building sites and the like have locked the gate, or had a key to lock the gate, and have prohibited people from carrying out an act under the Fair Work Act 2009. One assumes that those people who have a key to lock the gate are providing opposition to legitimate union officers entering the site and who have a certificate under the commonwealth workplace laws. Who initiates action against them? Do police roll up and say, "Sorry, you're prohibiting a lawful activity"? How would that be dealt with?

Hon MICHAEL MISCHIN: There are specific offences under specific pieces of commonwealth legislation and they are properly within the commonwealth sphere. I would have apprehended, from comments that were made during the second reading debate, that locking the gate is something that the opposition is very keen to preserve, whether it is against presumably union officials or environmental protection officers or anyone else. After all, a gate cannot be locked only against the bits one does not like. If one is to elevate the right of landholders to lock the gate against one person with a lawful authority, they presumably ought to be entitled to do it against anyone. But we are looking at a specific set of circumstances in which there is a prevention of that lawful activity. If it were an offence against state law, there may be other ways to deal with it, such as under the occupational safety and health legislation or the environmental protection legislation, if someone is locking their gate to prevent someone inspecting their property.

Hon Robin Chapple: Impeding.

Hon MICHAEL MISCHIN: That sort of thing. Those are impediments. There are other ways to gain access. But if a person was to thumb lock themselves to the only entry to their business premises—I would have thought that would be counterproductive—in order to prevent a union official from exercising his right of entry, yes, that person could also be subject to this legislation.

Hon ROBIN CHAPPLE: We seem to be coming up with different levels of application of the provisions of this amendment to the Criminal Code. Many members have made the point that that is ill-defined. I will go back to my original question. I listened with interest to the comments made by the Attorney General, which were made more by way of conversation rather than actually answering my specific question. Would any person who impedes—that is locks the gate, uses a padlock, undoes ropes or chains, whatever—the lawful activity of entry be caught by this legislation?

Hon MICHAEL MISCHIN: I will say it again: this "prevents" activity; it does not "impede" activity. We must be careful about that. I have emphasised that throughout this debate. Secondly, whether it applies in respect of a breach of commonwealth law, where there is a right obtained there, I would have thought it was but there are questions about the field of commonwealth legislation and the like. But if the member is talking about state law, if a person is entitled to exercise a particular right and it is a lawful activity that they are engaging in but someone sets up a physical barrier within the meaning of the bill to prevent that lawful activity, yes, you can fall foul of it. It is not limited, as has been constantly suggested, to protest activity as such.

Hon ADELE FARINA: If there is a provision in legislation for lawful entry into premises for investigative purposes, whatever that might be, usually there would also be a provision in that legislation for someone preventing that lawful entry. In the event that there is, I assume that provision would be used before the provision in the Criminal Code, but I would appreciate the Attorney General's feedback on that.

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Hon MICHAEL MISCHIN: If there is a specific piece of legislation or a specific power being exercised, then the bias would be, of course, to charge under that particular piece of legislation. If, for example, someone prevents the police from executing a search warrant, then, yes, they could be charged under this, but there are also other offences that would cover that kind of behaviour—so it is a question of the circumstances.

Hon DAVE GRILLS: As a former serving police officer who trained and studied the management of public disorder, antisocial behaviour and disorderly conduct, I was hoping that some thought would be given to our police officers and the job they are duty bound to do at these types of events. Police officers have to deal with protesters who lock themselves onto equipment, trees and other objects to physically obstruct lawful activity. As we have heard, this bill will enhance the ability of police to issue move-on orders when officers suspect a person intends to commit the offence of physical prevention. It also provides a specific offence for those who successfully carry out the physical prevention of a lawful activity.

We know this is a slow, expensive and often dangerous task for all involved. Locking oneself onto an object to block lawful activity is a form of physical interference and not an act to be dismissed as simply a peaceful expression of opinion. Such physical obstructive protesting tactics risk the safety of workers, bystanders, police and protesters. They incur considerable cost and a reduction in people's lawful activities.

This bill is a practical and necessary step to help WA Police deal with the increasingly reckless and aggressive behaviour of a small but unruly minority of offenders. We need to ensure our police are equipped with the necessary authority to maintain law and order in our society, and it behoves us to consider such issues in a level-headed and rational way. However it becomes difficult when people deliberately misrepresenting the state government's intentions —

Point of Order

Hon KATE DOUST: I appreciate the Hon Dave Grills may have been absent on urgent parliamentary business for a significant part of debate —

The DEPUTY CHAIR (Hon Simon O'Brien): That is not a point of order. What is your point of order?

Hon KATE DOUST: I was about to say that I am not sure what question he is raising and that it seems he is making a second reading contribution during this clause of the bill. I wonder exactly what matter the member is raising about clause 4.

The DEPUTY CHAIR: I have been listening closely. I am sure the honourable member is about to arrive at that point, so we need a little patience and we will see where he gets to.

Several members interjected.

The DEPUTY CHAIR: Order!

Committee Resumed

Hon DAVE GRILLS: I will get to the point. There has been a lot of discussion about other people and other issues on this bill but very little of it with relevance to a discussion about police officers trying to do their job. I want to bring to this debate that it is mentioned. I will have questions at the end that the Attorney General no doubt will answer. If members could be patient, I will get to that.

I would like to say that I am disappointed with some of the inaccurate and colourful claims made in this place about this bill. It is absurd to suggest that peaceful protest is threatened by these amendments and one wonders whether those who make such claims have ever bothered to read the legislation. It is a democratic right that is regularly exercised in Western Australia. There are no laws in this state that deny people the right to protest peacefully. I can tell members that in 2011 during the Commonwealth Heads of Government Meeting, I was in one of the rapid response groups trained to deal with this. I am proud to say that the people of Western Australia did not perform in a manner that got any one of those police officers or those people involved in any action. That is what we aimed for and it did not happen. There is the opportunity to protest peacefully without having to resort to the use of force. I would say that this legislation will help police do their job, and I have every confidence that these powers will be applied correctly and in an accountable and transparent manner, pursuant to proposed section 68AA. Can the Attorney General confirm that this process will be adhered to, and what protection will be provided to officers performing this duty?

Hon MICHAEL MISCHIN: If the honourable member is referring to police officers exercising their judgement in good faith and in the course of their duties, then yes, if there is a misjudgement as to the circumstances and they lay a charge contrary to proposed section 68AA and it turns out to be unfounded, there are general

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protections available to police officers. The police service, of course, trains police officers and keeps them briefed on developments in the law so that they can properly exercise the important prosecutorial discretion that is vested in them. I am confident that they will exercise that discretion appropriately. There are some general principles that have been adopted by Western Australia Police, along with others, particularly those reflected in the training that is given to police officers on how to deal with demonstrations, protests and the like; balancing, of course, the necessity for some level of accommodation of the legitimate behaviour of people who feel strongly about an issue and wish to express it, as against breaches of the peace or injury to others. Of course, mistakes are made from time to time; that is almost inevitable in any sort of human activity. However, I am confident that WA Police has in the past and will continue to ensure that police exercise their discretion and behaviour in the face of protests and legitimate demonstrations in an appropriate way and that they will continue to do so.

Hon RICK MAZZA: Attorney General, I understand and accept that the purpose of this bill is to capture people who may enter land that they are not entitled to enter, or obstruct lawful business, whether it is a highway being built or a mining development or something like that, and people are going beyond what is reasonable as far as a peaceful protest is concerned. Can the Attorney General clarify something for me? If a person is in peaceful and legal possession of land that they are entitled to—for example, a farmer who is entitled to be on the land—and a foreclosure takes place and the bank is there in its legal capacity to take possession of that land and the farmer locks the gate or locks himself to a tractor, is it the intention of this bill to capture that landholder and subject him to up to two years' jail and a \$24 000 fine?

Hon MICHAEL MISCHIN: It is not the intention of the legislation to do that, but let us look at the realities of it. If there is a power to seize a particular item—the Sheriff or police, for example, having the power to do so—and someone within the meaning of the bill prevents that lawful activity by way of physical means within the meaning of the legislation, then, yes, they could fall foul of it. That is to be distinguished from having some lawful process such as the foreclosure of a mortgage whereby there are legal entitlements, but no-one is entitled to go on and simply seize items when they are not empowered to do so or to do so in an unlawful fashion. We are looking at a particular activity that is being conducted to see whether it is lawful. If the member is trying to suggest that somehow particular elements of society, particular people in society, ought somehow to be protected from the general law, that is not accommodated by the bill—nor could it be sensibly.

Hon RICK MAZZA: If the Attorney General is saying that it is not the intention of this bill to capture landholders like farmers when a bank forecloses, yet under the bill they can be prosecuted because of their actions, does the Attorney General concede there is the risk of unintended consequences of this bill affecting people whom the Attorney General says there is no intention of capturing under this bill?

Hon MICHAEL MISCHIN: A couple of points need to be made about that. It is not a question of unforeseen circumstances, or unexpected or unintended consequences. As a rule, police will get involved only where there is a potential or actual breach of the peace. They do not get involved in civil disputes and property disputes, or debates about rights to possession of property or the like. Yes, if there is a power for someone that they are entitled to exercise—for example, if it is a court order that a certain item of property be turned over to the Sheriff, and the Sheriff attempts to exercise that power in accordance with the court order, and someone decides that they are above the law and they are not going to listen—then potentially they can fall foul of this legislation if they take the steps that fall within the elements of the offences that are prescribed. However, there are also other means of going about that, and it may be that they are already able to be charged with an offence of interfering with the sheriff's office or a public officer in the execution of their duty, or there is a potential contempt of court or the like. But the police will not get involved in people trying to impede simple foreclosures. If the member is talking about somehow giving an exemption for certain people from the effects of the law, no, that cannot be countenanced in any legislation. I hope that makes it a little clearer.

Hon RICK MAZZA: Just one small clarification. The Attorney General is saying that if a bank forecloses and its agent is there under a court order to take possession of the farm, that is a civil matter, and yet the farmer is still restricting a lawful activity by the bank. Notwithstanding that it is a civil matter, the actions of impeding access to people looking at foreclosing could still be captured under this bill.

Hon MICHAEL MISCHIN: As I have emphasised, it is not impeding or hindering; it is preventing.

Hon Rick Mazza: It is the same thing.

Hon MICHAEL MISCHIN: No, it is not the same. It is a far more emphatic and final type of behaviour than simply hindering or obstructing; it is preventing. I have yet to see —

Hon Ken Travers: Intentionally preventing.

Hon MICHAEL MISCHIN: Well, yes, the intention of preventing.

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Hon Ken Travers: So you don't have to actually be preventing; you have to have an intent.

Hon MICHAEL MISCHIN: Read on. Proposed section 68AA(2) reads, in part —

... with the intention of preventing a lawful activity to that is being, or is about to be, carried on by another person, physically prevent that activity.

The intent must actually have that consequence. It is not simply intent to do it.

Hon DARREN WEST: It is not bad, is it? Under this bill not only could we as farmers not shut out mining companies, but also when banks move on us we cannot even dig our heels in at the front gate either; we will be picked up by these laws. It gets more appalling as we go on, Attorney General.

Hon Michael Mischin: You didn't listen to what I said, did you?

Hon DARREN WEST: I did. I listened intently, because the Attorney General would be well aware that agricultural issues are very close to my heart and are important to me. Hon Rick Mazza made some very good points, which the Attorney General has struggled to answer. If the Attorney General struggles with the detail of this bill, how will the police or anyone else in the field or the general public understand and interpret this bill correctly?

Hon Michael Mischin interjected.

Hon DARREN WEST: The point I make—I understand I have the call—is that this legislation has many grey areas. I wrote down the Attorney General's words, "There is difference between impeding or hindering than there is to preventing." Hon Ken Travers pointed out that, under this clause, intent is all that is needed. It could be said that protesters at places like James Price Point —

Hon Michael Mischin: Did you listen to the rest of what I said?

Hon DARREN WEST: I picked out that little bit, because it aroused my interest —

Hon Michael Mischin interjected.

The DEPUTY CHAIR (Hon Simon O'Brien): Order! Hon Darren West has the call and should be heard.

Hon DARREN WEST: It aroused my interest. We are debating some subtle vagaries in the legislation and, as the opposition has pointed out, there are some major problems with this legislation. The Attorney General knows that I attempted to ask this before and rather than deal with it in clause 1, he asked me to repeat the question in clause 4, which is where we are. I put the scenario that was originally put by Hon Paul Brown about the live sheep carrier moored at the port, at North Fremantle, and that may be about to be loaded or is loading or is fully loaded with livestock when an individual is discovered attached to one of the railings on the walkway down the side of the vessel. If the police are called and this person is to be charged, I want to know in that fairly clear-cut scenario—I am trying to make it as clear as I can and take out any reference to third parties or anyone who may have been involved—in which an individual is found attached to the vessel, are they to be charged with trespass or under these protest laws? Which is it, Attorney General?

Hon MICHAEL MISCHIN: Perhaps Hon Darren West can help me out here with his scenario. Firstly, is this person there voluntarily or have they been placed there by someone else and chained to this rail? Secondly, what lawful activity are they preventing? Thirdly, do they have an intention of preventing that lawful activity? If the member can help me out with those, I can tell him whether this person is charged under this provision or some other provision.

Hon DARREN WEST: I will clarify: yes, the ship is loading with livestock, so we will take out those variables. An unauthorised person is found on the ship. The unauthorised person is chained to a raceway, so the sheep cannot be loaded. Is that person charged with trespass or charged under these laws, because the consequence for them is important after the charge is laid? It is important to have at least some guidance and understanding of which law it will be. Will it be the law of trespass or of preventing lawful activity?

Hon MICHAEL MISCHIN: I take it that this person has not just been chained there involuntarily; they have chained themselves to the vessel.

Hon Darren West: Correct; we removed that scenario after Hon Simon O'Brien spoke.

Hon MICHAEL MISCHIN: We did not, but the member said "unauthorised" and someone is in the way of loading sheep on to this vessel and we are looking at no other means of loading the sheep on to this vessel.

Hon Darren West: Correct, because there is one loading ramp.

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Hon MICHAEL MISCHIN: And they have secured themselves in a fashion that does not allow for simply using bolt cutters to cut them off. They have used one of these types of means to create a physical barrier, such as using a thumb lock.

Hon Darren West: Let us say they are handcuffed.

Hon MICHAEL MISCHIN: If they are handcuffed, there are other ways of getting them off. They would probably be charged with trespass.

Hon Darren West: Probably.

Hon MICHAEL MISCHIN: However, I would have thought that we would pick the easiest offence, and that is trespass. Trespass carries the same penalty as is carried under this legislation, and is a lot easier to prove, because the onus would be on the person to establish that they are engaged in lawful activity. That is a piece of legislation that was passed by the Labor government back in 2004.

Hon DARREN WEST: The Attorney General said that trespass would be easier to prove. Is it not true that under this prevention of lawful activity bill, the police or the charging officer is not required to prove guilt? Guilt is required to be proved under the law of trespass, but not under the law of prevention of lawful activity.

Hon MICHAEL MISCHIN: No.

Hon DARREN WEST: I am now very confused.

Hon Michael Mischin: I am sure you are!

Hon DARREN WEST: My understanding of this legislation is that the onus of proof has been reversed.

Hon Michael Mischin: You are wrong. Look at section 70A of the Criminal Code and see what that says. Tell me about that section and what the onus of proof is.

Hon DARREN WEST: I have got up to only section 68B in this piece of legislation.

Hon Michael Mischin: If you have run out of sections in your version of the code —

Hon DARREN WEST: No. I have the bill in front of me.

Hon Michael Mischin: Have a look at the code.

Hon DARREN WEST: Okay. I will do that at a later point.

Hon Michael Mischin: It might be relevant now—because you are trying to compare the two offences, you ought to know what you are talking about.

Hon DARREN WEST: There is no clear answer, Attorney General. Granted, the Attorney General has one of the state's finer legal minds —

Hon Michael Mischin: Thank you

Hon DARREN WEST: — and he has advisers at the table with him. I am asking: does it come under the prevention of lawful activity bill or does it come under the trespass bill? I cannot get a clear answer to that question. The answer I get is somewhat confusing. It has in it the word “probably”. The answer is also that one charge is easier to prove, even though the onus of proof has been reversed under the other charge. I would like a bit more clarification from the Attorney General than just a no.

Hon MICHAEL MISCHIN: I will do my best to help Hon Darren West. I refer to section 70A of the Criminal Code. It has been there since 2004. If Hon Darren West has trouble finding it, we will help him. Subsection (2) states —

A person who, without lawful excuse, trespasses on a place is guilty of an offence and is liable to imprisonment for 12 months and a fine of \$12 000.

The member has been banging on about reversal of the onus of proof for one offence and not the other. Subsection (3) states —

In a prosecution for an offence under subsection (2), the accused has the onus of proving that the accused had a lawful excuse.

That is the existing law. I would have thought that it would be far easier to prove that. If a person is in a place in which he would not ordinarily be allowed to be, such as on a ship, and is interfering with the loading of sheep, I as a police officer would be inclined to charge that person with trespass. When that person went to court, it would be up to him to tell the court what lawful excuse he had for being on that ship. A lawful excuse is not, “I want to protest against live sheep transport.” The new legislation is very limited in scope. It requires the

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charging officer to have reasonable grounds for suspecting that the person that they are charging had the intention of preventing a lawful activity. That is a much higher threshold. It is only when the reasonable suspicion has already been established by the evidence—namely, the police officer is able to swear in court why they formed that reasonable suspicion, and give reasons for it—and if the court is satisfied beyond reasonable doubt of that, that the accused has to explain what they were really about and what their intention was.

Nothing has changed; nothing is difficult about this. Section 70A has been the case since at least 2004 and it is trite law; it is commonplace. Police, prosecutors and defence lawyers deal with it all the time. Under this legislation, despite all the rhetoric about reversing the onus of proof and fundamental principles of law and the like, no-one who is objecting to it has actually thought it through and compared it against the trespass provision, which is a much easier charge to prove. That is why I say that if I were a police officer faced with those circumstances, I would probably charge trespass because it is easier to prove and it requires less evidence to establish the circumstances of the offence. Let us get to so-called penalties. The penalty proposed under proposed section 68AA is exactly the same penalty as for trespass. There is nothing draconian. The only time that it is boosted up to 24 months or \$24 000—namely, double that—is in a circumstance of aggravation, namely where there is an injury or endangerment. That is when the greater sanction kicks in. In terms of penalties, the manner of proof, and the types of evidence, we would normally go for section 70A and charge trespass rather than this specialised offence. The specialised offence is unnecessary except in the specific circumstances that cannot be covered by trespass and other offences and whereby the only avenue that would be used would be to resort to this in order to hopefully deter people from taking the sorts of steps that lead to thumb locks and other extreme sorts of preventive behaviour, because there are other means of doing it. If I were a police officer and it was a matter of somebody who was not chained or secured, I would issue them with a move-on notice and tell them to hook it. Only if they did not do that in a prompt enough way would I then charge them under the Criminal Investigation Act. Nothing is remarkable about it. It happens every day; police have been doing it for ages. There is no great confusion, with respect. If one approaches these things in a logical fashion, with understanding as to how the criminal law works and how police officers discharge their function, it is all very simple.

Hon ADELE FARINA: I apologise to Hon Darren West, but the minister indicated a qualifier to the application of section 70A by saying that the trespass provision does not apply in all circumstances. I think it would help the understanding of the bill if the minister explained those circumstances in which trespass would not apply. Some concern has been raised about whether someone could be charged for trespass if they are on Department of Parks and Wildlife land and it has not been declared a closed area. If that is the case, perhaps the minister could just confirm that statement or otherwise, and indicate in what other circumstances the police would not be able to prefer the trespass offence.

Hon MICHAEL MISCHIN: The difference between the trespass offence and the ones that are proposed, and the need for the proposed offences, is that a trespass offence in its own terms deals with a situation in which someone is unlawfully in a place, as defined in the Criminal Code. It does not stop people locking themselves on in a way that requires wasted resources and technical skill to overcome and impedes lawful activity in a way that has consequences to those who are entitled to carry on with that lawful activity. Also, it does not, in its terms, deter people from bringing on these implements in order to secure themselves and prevent that lawful activity—to be trespassing and be able to be removed. The point of the proposed laws is to not only deal with it if they do get to that point but also deter them from engaging in that conduct. I hope no-one gets charged under these provisions. That would not mean they were not a success; it would just mean that they were doing their job in drawing a line around appropriate behaviour that people can engage in, in any activity, whether it be protest, demonstration or a personal commitment to wanting to interfere with other people. The legislation is important to fill that particular gap in the scheme and to allow the police to prevent targeted behaviour. It is not aimed at protests as such. It is aimed at the interference of lawful activity. It could capture a criminal who decides to interfere with someone's ability to do their business or run them out of business.

Hon ADELE FARINA: I thank the Attorney General for that explanation. It did not quite answer my question: are there circumstances in which police could not charge someone with trespass; for example, if someone was on CALM land for the purpose of protesting or stopping a lawful activity, can they be charged with trespass when it is public land? That is my question.

Hon MICHAEL MISCHIN: Hon Adele Farina has identified a significant issue. Although trespass can involve crown land and public land, the difficulty is establishing that someone is actually trespassing on public land, such as unallocated crown land, because people are entitled to access it, or there is no restriction on having access to it. In some circumstances—I understand this was part of the difficulty with the James Price Point protests—with unallocated crown land, it is difficult to establish that people are not entitled to be there because it is open to access. If it were private property, that would be easy, but because it is unallocated crown land or

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public land, to say that someone is not entitled to be there and it does not get to the threshold, let alone to the need to establish what the lawful excuse is for being there, the police generally exercise their discretion to use other means if there is a disturbance of the peace, such as the use of the move-on notices and things of that nature if possible. Once again, if someone has affixed themselves in a way that prevents lawful activity that is authorised to be done there, there is no remedy to it other than the means that the police have adopted to date that are potentially questionable.

Hon MARTIN PRITCHARD: I thank the Attorney General. I will come back to the question I asked during another clause of the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015, but the Attorney General suggested I ask it during clause 4, so I will comply. If we get back to the definition the Attorney General gave during the second reading reply, I am not trying to limit it, but I think the relevant parts were that “physical” means “of or relating to material”. The Attorney General read other parts of that definition, but that was the main part. “Barrier” was defined as “anything built or serving to bar passage” and “anything that restrains or obstructs progress, access”. Looking at the definitions of those words, could the Attorney General confirm that by the use of “physical barrier” the Attorney General is only trying to capture and only mean in this bill a person using a locking device that is not easy to release?

Hon MICHAEL MISCHIN: Yes. The first step along the reasoning process is that proposed new section 68AA(2) reads —

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

“Physically” is defined in subsection (1), which reads, “in relation to the prevention of lawful activity”, so it is specific to the operation of the proposed offence under proposed new section 68AA(2). “Physically” means —

- (a) by physical force; or
- (b) by the threat of immediate physical force, or
- (c) by the creation or maintenance of —
 - (i) a physical barrier to carrying on the lawful activity; or
 - (ii) a risk of injury to a person (including the offender) or of damage to property as a direct consequence of carrying on the lawful activity.

My resort to dictionary definitions of “physical” was simply to highlight the corporeal nature of the activity that is concerned—physically preventing that activity; not simply waving a banner, not simply shouting at someone, but actual physical prevention.

Hon Ken Travers: But if you stand in front of someone with a banner that stops them driving the truck through, which is the lawful activity, you’re physically preventing them from doing that.

Hon MICHAEL MISCHIN: No, the person is hindering them from doing it or may be obstructing them from doing it, and there are other means by which the police can overcome that particular impediment. What is being focused on here is the prevention. That has been one of the difficulties the police have faced. If someone is charged with simply hindering or obstructing a lawful activity—if there were an offence of that—that is a very broad offence indeed. If the offence were simply hindering or obstructing a lawful activity and someone stands in someone else’s way in order to buttonhole them on their way into Parliament House, they would be in breach of that provision—hence the focus on prevention when there is no way of getting around it other than a means that can put the offender at risk or a delay of an unreasonable period of time that goes beyond a simple obstruction. As to deciding where the threshold is, those issues are dealt with by courts all the time; where the line is drawn and where the threshold is reached. There would have to be a barrier or physical prevention of some extreme type in order to satisfy a court beyond a reasonable doubt that the activity was being prevented rather than simply impeded.

Hon KATE DOUST: I want to pursue the matter that the Attorney General has just talked about and go through a couple of examples so that I am clear in my mind what falls into other areas and what falls into this area. The example I am thinking about is an industrial dispute. Imagine that a union official is standing at a particular location and delivery trucks are turning up to unload and, if the load has been put out and the individual then reloads the vehicle, but the union official says that they cannot do that and tells them to go on their way and then does that repeatedly during the dispute to prevent goods going into that store, would that be a hindrance or would it be picked up under these provisions if this bill is passed?

Hon MICHAEL MISCHIN: I would have thought that the charge that would be laid if it was on private property would be trespass, in which case the accused might have to establish their lawful excuse and behaviour

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about why they were there; otherwise, if it falls within the scope of section 27 of the Criminal Investigation Act, they would be issued with a move-on notice and, if that is ignored, they could be charged with a breach of that move-on direction and, if that is ignored, they would be carried off after being arrested and so would be removed from the scene. That is the sort of thing that happens now in those sorts of circumstances if the police have to intervene. Nothing much has changed there. I would have thought that people would have to go to some extreme lengths of the types that I have already indicated before they would fall foul of a physical prevention of that lawful activity.

Hon MARTIN PRITCHARD: It might help me understand better if the Attorney General could give me an example of a physical barrier that is not a locking device that would prevent an activity as opposed to impede an activity.

Hon MICHAEL MISCHIN: One example that springs to mind is the photograph I tabled of the protester up the pole outside an office. There is no locking device on that, but they put themselves in peril, because there is no way of getting them down easily, and they affixed the arrangements such that they would fall and be harmed if there were any interference with it. That could amount to a physical prevention of a lawful activity, which is to gain access to premises that a person is entitled to gain access to.

I suppose one can contemplate other things such as abandoning a vehicle in front of the entry way to premises in such a way that the vehicle cannot be moved without an enormous expenditure of time, effort and the like, although, in most cases, if people could go around an obstacle, it would not meet these requirements because it would not be a prevention as opposed to a hindrance or an obstruction. It could be setting fire to something that prevented access to premises so that it could not be easily put out, but other offences may emerge from that as well, such as arson and the like. There are possibilities of other than simply locking devices, but they would have to be of that sort of ilk I would have thought.

Hon ROBIN CHAPPLE: I have a question that relates to the point that the Attorney General has just made. In debate on the short title, I was canvassing the idea that when the Attorney General identified tree lock-ons that most of those situations are what are referred to as tree sits; that is, a person takes themselves up a tree—they are usually skilled in doing so—and camps out in the tree. Does that fall within this definition? They are not locking themselves on. They are certainly up the tree intending to impede legal activity. I have some further questions on that point.

Hon MICHAEL MISCHIN: Yes, it could meet the criteria with reference to proposed section 68AA(1)(c)(ii) under the definition of “physically”. But of course we have to identify the lawful activity and whether that simply involves someone chaining themselves up a tree that no-one has much interest in. I suppose as far as the authorities are concerned, they could sit there forever. If the intention is that that tree be cut down as part of a lawful activity, yes, it potentially constitutes an offence.

Hon ROBIN CHAPPLE: Following on from that, proposed section 68AA(1)(c)(ii) states —

the risk of injury to a person (including the offender) or of damage to property as a direct consequence ...

Who determines the risk of injury to that person, including the offender? Only somebody, in essence, going up the tree to try to take the person down, who is unskilled in climbing trees, might be putting themselves at risk, whereas the person up the tree might be at no risk whatsoever. I am trying to work out how we determine the risk of injury to the offender.

Hon MICHAEL MISCHIN: It is a risk of injury should the lawful activity be carried out. If one chooses to climb a tree that is liable to be cut down and someone is exercising their power to undertake that lawful activity of cutting the tree down, yes, there is risk of injury to the person in it, no matter how good they are at hanging onto it. That falls within the meaning of “physically” as being by the creation or maintenance of a risk of injury et cetera.

Progress reported and leave granted to sit again, on motion by Hon Michael Mischin (Attorney General).