CRIMINAL ORGANISATIONS CONTROL BILL 2011

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

Resumed from an earlier stage of the sitting.

HON GIZ WATSON (North Metropolitan) [8.11 pm]: I wanted to explain my motion and seek the support of the house to refer the Criminal Organisations Control Bill 2011 to the Standing Committee on Legislation. I think this is a particularly significant piece of legislation for a number of reasons. It will impose significant restrictions on the civil liberties of a number of Western Australians. The Greens (WA) argue that this bill has not had sufficient scrutiny for a bill of such consequence, particularly in light of the fact that two similar bills in two other states of Australia were subject to High Court challenges. Parliament has a responsibility to do everything to interrogate a bill that has any risk of drawing a High Court challenge, not the least of which is because of the expense that a High Court challenge incurs.

This Legislative Council has a very fine record of interrogating a number of criminal bills. In the past the Standing Committee on Legislation has done excellent work to provide advice to the Legislative Council in terms of evidence-based reports that, in some cases, have actually led to a change of position relating to substantial pieces of legislation such as the so-called stop-and-search legislation. It is extraordinary that the house does not choose to use the resource by way of the Standing Committee on Legislation to not only provide good advice to Parliament, but also to undertake hearings and enable procedures of the standing committee to draw evidence from expert witnesses in other states.

As members know, we can debate this bill through this place tonight or over the next day or two. Members have gathered whatever information they think they need to debate this bill. I could tell the house about dozens of pieces of legislation of a similar nature to this measure on which the Standing Committee on Legislation would choose to talk to people in New South Wales about how they attempted to achieve these aims, why they went the way they did and how it did not work—similarly with people from South Australia. We will be doing a very inadequate job on serious legislation if we do not allow the full value of the Legislative Council as a house of review to be extended. The Standing Committee on Legislation has no work before it at the moment, so a number of members of this Council are being paid very handsomely to be committee members but have no work in front of them. Perhaps they might like to support this referral so they can do the job that the Standing Committee on Legislation is meant to do.

Hon Alison Xamon: Hear, hear!

Hon GIZ WATSON: There is one key member here who is ready to start tomorrow!

Seriously, it does a disservice to not only the Parliament, but also the people of Western Australia if we have novel pieces of legislation. Nobody is saying that far-reaching and extraordinary powers will not be created by this legislation. If we do not provide the opportunity for organisations such as the Law Society, and academic experts in this area, to provide detailed advice on the bill and not just broadbrush comments in the media, we run the risk of passing legislation through this Parliament that will end up in the High Court. As parliamentarians, we can accept or reject the standing committee's report when it comes back. As we know, we do not have to adopt the recommendations, but there are precedents, not the least recent precedents, in which the view of Parliament has been changed on the basis of an inquiry carried out into a similar area of criminal law with significant consequences for the citizens of Western Australia. I would argue this bill is in exactly the same category. It has the same weight of consequences, and therefore this house should ensure this legislation is thoroughly scrutinised by the resources of the Legislative Council.

For those reasons, I have moved that the bill be referred to the Standing Committee on Legislation. The report-back date is to allow sufficient time for a proper inquiry to take place. The report-back date is immediately after the end of the winter recess. I do not think any dire consequences flow from this bill not being dealt with tonight and from our pausing long enough to consider it thoroughly. I do not think there is a case for urgency. For those reasons, I have moved a report-back date in August. I ask that the house support this referral motion.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [8.20 pm]: The government will not support this motion. As I understand it, it is said that Parliament has not had sufficient time, or the community has not had sufficient time, to consider the implications of the Criminal Organisations Control Bill 2011. That cannot be right. The government has been considering this legislation since the challenge to the South Australian legislation and subsequently the New South Welsh version of this legislation, and has been informed by the High Court's decisions in both cases in the crafting of this bill. The Criminal Organisations Control Bill 2011 was introduced in the other place on 23 November 2011. It is common knowledge amongst members of the community that it is underway and within the Parliament. It was debated exhaustively in the other place, and one

need only look at *Hansard* to see the depth of inquiry that was conducted into the particulars of the bill in that place.

It has come to this place, and the opposition supports the policy of the bill. It has its reservations about one aspect of it in particular, which is that of the constitutionality of the bill and whether it will fall foul of a challenge. The opposition has put forward an amendment to address that concern, but otherwise it supports the policy of the bill, and, as I understand it, the manner in which the bill has been drafted—the scheme of the bill. There is nothing to be served by having, yet again, an exhaustive examination of the policy.

What it does serve is the interests of certain groups that will be directly affected by these provisions, and other friends of crime who see an advantage in delaying the progress of this bill. In fact, recently—I think it was yesterday evening—there was a meeting at which one civil liberties group suggested that a referral to a committee of the house would be a great idea because it would delay the progress of the bill in order that those who were opponents of it could "educate the public" about the dangers of the bill. It serves the purposes of those who do not want to see criminal organisations brought to book and the power of those organisations hampered or indeed destroyed.

Having this bill examined by a parliamentary committee will not help determine its constitutionality; in fact, as I understand it, Hon Giz Watson considers that there are so many fundamental problems with this bill that it is in breach of various civil liberties and it ought be declared unconstitutional, or at least not passed, because the policy behind it is offensive. So what will an examination of the policy go to serve, other than to delay the bill even further? Nothing that the committee comes up with is going to help make it more constitutional. Indeed, the Greens (WA) would seem to hope that it would be rendered unconstitutional so that it would fail at some stage. At the end of the day the only way the constitutionality of the bill will be tested as a matter of law is if it is passed and someone challenges it and takes that challenge to the High Court. Nothing the committee decides is going to help that aspect at all. All that is going to happen is that this exercise is going to be delayed unnecessarily. The government will not support the motion, and the particular complaints that have been raised about aspects of the bill can be canvassed during the Committee of the Whole stage.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [8.22 pm]: The opposition will not be supporting the referral motion. I agree with several of the points made by Hon Giz Watson—inquiries are important. It is disappointing that, effectively, the numbers are such that hardly any—in fact is it one or two?—pieces of legislation have been referred to the Standing Committee on Legislation. And it is disappointing that taxpayers' money —

Hon Michael Mischin: Three.

Hon SUE ELLERY: Since May 2009 the committee has considered three pieces of legislation. It is disappointing that taxpayers' money is being used to pay members to participate in the committee that, since May 2009, has only considered three pieces of legislation.

Hon Michael Mischin: The question is quality rather than quantity, is it not?

Hon SUE ELLERY: Hon Michael Mischin may make that point; others might say that that is not a useful expenditure of taxpayers' money. I think that is what the majority of the community would think.

Hon Michael Mischin: Oh no, 10 months on the stop-and-search one; I think I earned my pay there.

Hon SUE ELLERY: This is a serious bill, though, with serious powers, as I said in my contribution to the second reading debate, but I think the parliamentary secretary touched on one of the elements as to why we do not think the Parliament's time is best served in an inquiry, particularly into the policy of the bill, when we as an opposition support the policy of the bill. I know that makes my friend Hon Giz Watson unhappy, but that is the case—we do. The experience with this type of legislation in other jurisdictions and the public debate from those opposing this bill, I think, indicates that whatever the form of the final legislation that comes out of this place, it will be tested somewhere else. That is where, I think, arguments will be put as to whether it is constitutionally sound or not, or whatever other reasons people might try to find to knock it off.

Those organisations that could put material before a committee inquiry have also had, with due respect to them, ample opportunity to put that material before us since the bill was first introduced. I, like many other members, have received numerous very short emails, I have to say, particularly in the past couple of weeks. Those sorts of people may well make submissions to such an inquiry, but organisations like the Law Society of WA, for example, have had ample opportunity to put detailed material before us, as it has put detailed material before us previously, and come to see us and answered questions that we may have had about the material it put before us. I have to say that to date—I will probably regret saying this because I will probably get an onslaught of it

tomorrow—in the debate on this bill I have not had that material directed to me. So I do not accept that organisations have not had ample opportunity to put the arguments to us.

Paragraph (2) of the motion states —

> That the committee has the power to consider the policy of the bill.

The opposition's position on the policy of the bill has already been put; we support it. We deliberated on that seriously because there are serious powers within this bill, which, if abused, will cause serious issues for people.

The bill has been through debate in the other place and amendments were made there, and indeed there are further government amendments to be put before us when we go into Committee of the Whole. For all those reasons, we will not be supporting the referral. But as to, I guess, the threshold remarks from Hon Giz Watson about what the legislation committee has and has not been doing and whether or not that is an appropriate use of taxpayers' money, I concur wholeheartedly with them.

HON WENDY DUNCAN (Mining and Pastoral — Parliamentary Secretary) [8.27 pm]: I am not the National Party's main speaker on the Criminal Organisations Control Bill 2011, but I will speak on the referral proposed by Hon Giz Watson and inform the house that the Nationals also do not support the referral of this bill to the committee. We are in support of the policy of this bill, and given the debate that has taken place in other states and the testing of the legislation in the High Court, we believe that this bill is well drafted and will actually, if necessary, have the scrutiny it needs at a later date. The bill has been out in the community for a long time and we have received quite a few submissions from constituents through emails, which we have answered. Many of those questions have been satisfactorily responded to from our point of view, and in fact some people who have written to us about the bill and then heard our response have actually thanked us for helping to clarify some of the issues. I inform the house that the Nationals will not be supporting the referral of this bill.

HON NICK GOIRAN (South Metropolitan) [8.28 pm]: I will make a few remarks in relation to the motion of Hon Giz Watson, but, subject to indicating otherwise, I do not propose to make my contribution about the substance of the Criminal Organisations Control Bill 2011 until the conclusion of this particular motion. I will direct my remarks specifically to the proposal to refer the matter to the Standing Committee on Legislation.

I have made no secret of my support for bills going to committees, and I think that there is a time and a place when that should happen. I think that Hon Giz Watson's motion deserves due consideration by members of this place, and we have obviously heard the contributions of members this evening. In this instance, I do not think this matter needs to go to a committee, but I will outline to Hon Giz Watson —

Hon Kate Doust: But today you complained that bills weren't going off to committees—when we were doing the workers' compensation bill you complained that bills were not going to committees—so you'd better make your mind up where you stand on the issue.

Hon NICK GOIRAN: I welcome Hon Kate Doust to the house and thank her for the contribution she has just made!

Hon Kate Doust: I have been in the house all afternoon.

Hon NICK GOIRAN: If Hon Kate Doust just takes one deep breath for a moment, she might actually hear the rest of my contribution and understand why in this instance I agree with the honourable member sitting immediately to her right.

As I said, in this instance I do not believe the bill needs to go to a committee. In fairness to Hon Giz Watson, I hold that view because this matter has had the benefit of a blueprint outlined by the High Court. I want to refer the member specifically to the New South Wales case—I will give it a crack at pronouncing the name—of Wainohu v New South Wales [2011] High Court of Australia. I refer to the decision on 23 June 2011, in particular paragraph 108, which reads —

> Another course readily available in the present case would be to cast s 13(2) in a form which, at least with respect to declarations under s 9 and revocations under s 12, required as well as permitted the provision of grounds or reasons. As indicated earlier in these reasons with reference to what was said in *Gypsy Jokers*, in the preparation of reasons for decisions under s 9 and s 12 of the Act, steps could be taken to maintain the confidentiality of material properly classified as "criminal intelligence" within the meaning of s 3(1) of the Act.

The judgement continues later in paragraph 109 to say —

> The effect of Pt 2 is to utilise confidence in impartial, reasoned and public decision-making of eligible Judges in the daily performance of their offices as members of the Supreme Court to support inscrutable decision-making under s 9 and s 12 …

The relevance of that is that clause 14 of the bill before us requires that the designated authority gives reasons for its decision. I am saying that we have had the benefit of the High Court's consideration of this type of legislation. The High Court set out a blueprint in the New South Wales case. It outlined to the parties that, rather than do this, they could have done that. That is exactly what our Attorney General has done. I understand the keenness to refer the matter to the committee because it is an important and serious piece of legislation, and I do not think anyone is denying that. I have yet to make my contribution to the bill as a whole. I will do that at a later stage; however, I do not think this bill needs to go to a committee because I do not think the committee will be in any better place to consider the legislation than is the High Court. I hold the view that this matter will inevitably end up in the High Court, so I do not think we will be better served by sending it to the committee.

I will conclude my remarks on this point by saying that this matter was subjected to intense scrutiny in the Legislative Assembly. I understand from members of this place who have been here for a lot longer than I that that is a fairly rare thing. Be that as it may, I have had the opportunity to read the interesting dialogue between the Attorney General and his learned friend the shadow Attorney General. Anyone who reads that has to appreciate that the two gentlemen in question have given the matter an intense amount of thought and scrutiny. They are both very experienced legal practitioners who know a thing or two about this area of law, so as a member of this place I am comforted by the fact that the Assembly and those two gentlemen took the time to do that. In that regard, I note the comments of the member for Victoria Park in the third reading of the bill on 22 March 2012. I will quote from the only document I have in front of me, which is the uncorrected proof, which reads —

> To his credit, the Attorney General did take on some of the amendments suggested by the shadow Attorney General. The Attorney General should be commended for being so reasonable … I commend the Attorney General in that regard …

They are not my words; they are the words of the member for Victoria Park. Why should I disagree with him? For those reasons, on this occasion I will not support the motion moved by Hon Giz Watson.

Question put and a division taken with the following result —

Ayes (3)

Hon Lynn MacLaren	Hon Giz Watson	Hon Alison Xamon *(Teller)*

Noes (27)

Hon Matt Benson-Lidholm	Hon Phil Edman	Hon Alyssa Hayden	Hon Ljiljanna Ravlich
Hon Helen Bullock	Hon Sue Ellery	Hon Col Holt	Hon Linda Savage
Hon Jim Chown	Hon Brian Ellis	Hon Robyn McSweeney	Hon Sally Talbot
Hon Mia Davies	Hon Donna Faragher	Hon Michael Mischin	Hon Ken Travers
Hon Ed Dermer	Hon Philip Gardiner	Hon Norman Moore	Hon Max Trenorden
Hon Kate Doust	Hon Nick Goiran	Hon Helen Morton	Hon Ken Baston *(Teller)*
Hon Wendy Duncan	Hon Nigel Hallett	Hon Simon O'Brien	

Pair

Hon Robin Chapple	Hon Peter Collier

Question thus negatived.

Second Reading Resumed

HON COL HOLT (South West) [8.40 pm]: I stand on behalf of the Nationals to say that we support the Criminal Organisations Control Bill 2011. My parliamentary colleagues and I have had a lengthy and detailed consideration of the bill. Of course, we have our concerns, which really centre around the appropriate checks and balances to ensure that the powers contained within the bill—we have heard that they are substantial powers—are used in the way that was intended and do not impinge on the activities of the vast majority of law-abiding Western Australians. I think we all want the bill to work but not to have unforeseen consequences.

The parliamentary secretary pointed out in his second reading speech that he wants to —

> … assure the Parliament and the people of Western Australia that this legislation is aimed at organisations that harbour and encourage criminal activities. It is not aimed at people who enjoy riding

> motorcycles as a group, organisations that show off their skills with firearms at competitive meetings, or organisations and clubs that like to distinguish themselves by wearing badges and other regalia.

The aim of the bill is fairly clear. Again, the second reading speech states —

> … it is to directly disrupt the activities of organisations that harbour and encourage crime by providing increased monitoring of, placing restrictions upon and providing for the incapacitation of members.

The ultimate aim of the bill is to reduce the criminal activity of organised criminal groups and, as a consequence, to improve the safety of the Western Australian community. All legislation that has that aim should be supported.

Let us come back to the assurances that the process will not affect people, individuals or groups that should not be targeted by the aims of the bill. The bill clearly lays out the process for a declaration or control order. My opinion, and the opinion of the Nationals, is that one of the most important considerations is that the declaration will be made by a designated authority, and that designated authority is clearly spelt out in the bill as one or more judges or retired judges. I note the comments made by Hon Giz Watson about that, but it also needs to be noted that the judge or retired judge must consent to being a designated authority. We cannot just grab any retired judge off the street to fulfil this task; the judge has to provide written consent that they are happy to partake.

It is also important to note that only two people can make an application for a declaration—the Commissioner of Police and the Corruption and Crime Commissioner. It is important to note that a minister of the government cannot make an application; only the heads of the organisations directly involved in combating criminal activities can make an application. We are heartened by the fact that that process is placed outside any government process.

We also believe that the process of the declaration will allow for a clear process of hearings for an application. The application must be advertised in a public notice, and submissions can be made in relation to the application at the hearing. I note Hon Giz Watson's comments about advertising in a public space. As time has passed, communication processes have improved. It would be good to hear from the parliamentary secretary about the effectiveness of placing a notice in the newspaper and in the *Government Gazette* to inform the community that an application has been made. Perhaps there are other means in the bill that I have not read.

Hon Nick Goiran mentioned the ability to make a protected submission if required, which again is an important safeguard in the process, so that people can make a submission without the potential threat of repercussion. I also note that there will be an appeal process. Perhaps the parliamentary secretary can clarify the appeal process for me. I understand that there can be an appeal process for the hearings process and that there can be an appeal process around a declaration and a control order. I believe that a declared organisation can make an application for the revocation of the declaration at any time. But some clarification on that also would be welcomed. Control orders will be made by a court, and from then on it will go through a court process, which will allow the appeal process to happen through the court process.

As is done with most legislation of this sort that is brought before this house, the Nationals welcome the fact that there will be a statutory review of the legislation after five years. The Parliament should look forward to and welcome the results of that review to see how the legislation has delivered the aims as stated in the second reading speech and the aim of curbing the criminal activity of organised groups. With those few words, the Nationals support the bill.

HON LINDA SAVAGE (East Metropolitan) [8.46 pm]: I also rise to speak on the Criminal Organisations Control Bill 2011, which the opposition supports. It is an extremely significant piece of legislation. The purposes of the bill, which I, like everyone else, hope will be achieved, are laid out in clause 4. The purposes of the bill are to disrupt and restrict the activities of organisations involved in serious criminal activity, their members and associates so as to reduce their capacity to carry out activities that may facilitate serious criminal activity, and to protect members of the public from violence associated with those organisations and other persons who engage in serious criminal activity.

The Attorney General, Mr Porter, has been quoted in an editorial in *The West Australian* of 15 November 2011 as saying that he predicted that this bill, with its far-reaching nature, would be the most important legislation he would draft. I considered that, and so it was that I wanted to try to understand, although I say immediately that I remember very little of the criminal law I studied at university many years ago and have never practised in that area. I hope that that is taken into account if some of the points I raise or questions I put seem obvious to someone who practises in this area.

I note that during debate on the referral motion, the parliamentary secretary made the point that the bill was not aimed at any particular group. Although the bill makes no specific reference to bikie gangs or to the word "motorcycle", the second reading speech refers on a number of occasions to bikie gangs and outlaw motorcycle gangs. I think it is fair to say that although the bill is not restricted to bikies, the debate and media coverage, such as the editorial in *The West Australian* of 15 November headed "Government must act fairly with bikie laws", reflect the fact that that is how many people perceive this. Given some of the behaviour of and blatant disregard for the law by outlaw bikie gangs, I hope that bikie gangs will be very much the focus of this legislation.

I think that legislation such as this reflects the growing frustration that traditional policing and criminal law enforcers feel when dealing with certain groups that are, frankly, openly dismissive and scornful of legislation and the law. Clearly one focus has been on certain groups of bikies. I should qualify that by saying that there are plenty of motorcycle groups that certainly are not those that the media focuses on and are not those referred to in the second reading speech, the first paragraph of which states —

> Police figures provided to *The Sunday Times* last year show that in the two years prior, some 135 patched members of outlaw motorcycle gangs (OMGs) had been charged with over 600 offences, many of a serious nature such as extortion, drug dealing and abduction. Those same police sources revealed that almost half of WA's outlaw bikie gang community and members had faced serious criminal charges in the previous two years.

Naturally one's attention would be drawn to that particular group. It is because of that that I spoke to the Parliamentary Library and asked whether they could provide me with any research they had about that particular group. It has been said in the other place that they are sometimes known as the "one percenters". I was really interested in knowing who those people are who are referred to in the second reading speech and why they became members of what we would describe as "outlaw motorbike gangs". Apparently there has not been much work done in this area but I was provided with a research brief by Nicolee Dixon from the Queensland Parliamentary Library, which was prepared in 2009 and is called "Regulating Bikie Gangs". I would like to read some of that report into the record. As I said, this is very serious legislation and this is one particular group that is clearly front and centre of who the legislation is aiming to affect. Page 3 of the brief states —

> Many bikie gangs in the US were formed by World War II returned servicemen looking for the sort of camaraderie they had experienced in the services. The legacies of this origin are bikie gangs' hierarchical structures, their constitutions and their rules. It is said that these aspects not only make police investigations problematic but also attract large criminal organisations, which apparently use 'massive illicit resources' to buy votes to elect gang leaders and, eventually, to control the clubs themselves.

At that time, the Australian Crime Commission estimated that there were 39 active bikie gangs around Australia in 2009.

One person who has done some research that is quite often referred to in this report is Dr Arthur Veno of Monash University. The brief quotes his research —

> He said that many are victims of child abuse or come from dysfunctional families who are drawn to such clubs with their clear sets of rules and rapid punishment for breaking them. He said that, while these people might not respect society's authority, they do respond to peer authority.
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> …
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> It appears to be a part of the ethos of many bikie gangs that to become a member of a bikie gang, a person has to be invited to do so by existing members. The person then becomes a 'nominee' … After a time, a vote is held and the person becomes a 'patched' member of the club.
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> …
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> Major aspects of bikie gang culture appear to be obedience to hierarchy, rules and rituals in return for the sense of belonging provided through uniforms and dress codes, initiations and exclusions. Club patches or 'colours' bearing the gang insignia are a highly prized aspect of the culture. Some bikie gangs have a trademark over their name and such trademarks have come under threat of seizure by authorities from time to time.

There is a strict code of conduct and members pay a fee to assist with maintenance, rent and to help other members in financial hardship. Members can face penalties ranging from fines to demotions, including physical assault.

Interestingly, in regard to patching, I read just the other day in the paper, I think in response to the number of serious incidents involving bikies in the eastern states, that a move is being considered to legislate so that people

cannot wear their patches. Dr Veno said that in his opinion legislation that would confiscate patches and the uniform would go some way towards undermining the reasons that people wish to become a part of a club and then feel a sense of loyalty to it.

Obviously there is no denying that there should be real concern about members of bikie gangs who seem absolutely oblivious of the legal consequences of their actions. The brawl and murder at Sydney Airport between members of the Hells Angels and the Comancheros in broad daylight, with numerous witnesses, was a particularly brazen example of how little concern they have for the law and its consequences. The result of that was that the president of the Comancheros, Mahmoud Hawi, was sentenced in April this year for a maximum of 28 years for the murder of Anthony Zervas, the brother of a Hells Angel member. Many members will have seen some of the footage taken at Sydney Airport that day and many people would have been shocked at the completely brazen way that that assault and subsequent death was played out in front of all of us.

If members are interested in the bikie culture, and therefore in the purpose, in part, of the laws and what it is expected they will do to that group, they will be interested in reading this report. Page 10 of the report states —

> The Queensland's Crime and Misconduct Commission's (CMC's) director of intelligence, Christopher Keen, recently told the media that importing and manufacturing illicit drugs, particularly ecstasy, provides a primary source of income for Queensland's bikie gangs. It is reported that around one fifth of criminal proceeds restrained by the CMC in recent years has been linked to bikie gangs and as much as 90% of the gang-related money is connected to illicit drugs. Mr Keen said that the '*illicit drug trade is an incredibly lucrative area that can be very easy pickings*'.

Having read that report and this legislation, I think that if we wish to find a number of approaches, which I expect we will need, to deal with the type of crime we are concerned about, undermining the business model of bikie gangs would be an essential part of bringing their activities under control. Obviously, how we would undermine their business model is a matter for debate at another time.

Finally, this paper includes a brief analysis of approaches in other countries, including the outlawing of gangs like this and the use of control orders. I must say that it does not make very encouraging reading because it seems that as similar laws were introduced in Canada, the bikie groups found new ways to evade the courts; including evidence that, as well as regrouping under different names and again resuming business, they were driven further underground making it even harder for police to access information. Having said that, I acknowledge the enormous challenge that it is to fashion legislation to deal with this type of crime. For some, the financial or personal rewards of being part of a gang obviously are far greater than any current sanctions. The question that occurs to me is: how do we legislate against something that is akin to being a member of a cult or an extremist religious group or political party in which it is completely unacceptable to question the rules and there are tests both to show and to test loyalty? In that context, it seems to me that a person will not necessarily change their behaviour—if that is where they have come from—because they are subject to a control order. But I expect that it will perhaps be the breaching of the control order that will provide the police with the basis for an arrest and imprisonment and that the mandatory sentences and doubling of sentences will perhaps be the part that influences behaviour. Members who read this report and read about the motivation, the beliefs and the culture, will find it hard to imagine that these people will be more affected by this legislation than they have by some of the laws we have previously put in place. Obviously I hope that that is not the outcome, but it is a concern.

I have said, as have others, that this is far reaching and very significant legislation. I was able to attend part of a briefing provided by the department and I thank departmental staff for their assistance. I have also had some assistance from people who have not only worked in this area as criminal lawyers, but served as judges. I said earlier that I have no expertise in criminal law and am therefore hoping that the parliamentary secretary, a criminal lawyer, will keep that in mind!

In his second reading speech, in reference to part 9 of the bill, the parliamentary secretary stated —

> … it is clear that this is unprecedented legislation, which I am sure some will say restricts the basic rights of a group of people.

I assume this was said because of the very fine line between laws like this which aim to protect members of the public and the erosion of basic rights that restrict freedom of assembly and make a person guilty by association without a person actually being charged with any particular wrongdoing.

I have said that the opposition will support the bill, but it would be remiss of me not to place on the record some of the concerns that have been raised directly with me. I do that because firstly people have come to me to raise concerns and secondly it will, I hope, give the government the opportunity to provide assurances that these concerns are not ones people need have. Hon Giz Watson has already referred to the strong comments made by

the then president of the Law Society of Western Australia, Mr Hylton Quail. I will not read those comments into the record again, but will add a comment from Mr Quail's final president's report in which, according to my notes, he stated —

> When I read the bill the mechanics of it, albeit not its purpose, reminded me of the reviled Internal Security Act of 1982.

I understand that is a reference to a piece of South African legislation in the context of apartheid. I think the point that Mr Quail was making was that this legislation is obviously being brought in relying on the integrity of everyone in a position of power—that is, the limited group that will be making the decisions—and that is absolutely relied upon. Mr Quail was obviously referring to a situation in which there clearly were concerns about integrity. I think the reason it is very important—I am sure the parliamentary secretary will want to provide those assurances—and to put it on the record is that whenever we move to introduce a law such as this, it is not unreasonable in a society such as ours that values its freedoms for people to naturally want to hear those reassurances; and not for any trivial reason, but because it is a bit too easy to suggest that these concerns come only from people who are "the friends of crime" or who are, as I note has been said, criminal lawyers with a vested interest. The reality is that we all have a vested interest in being sure that the laws that we are supporting have adequate safeguards and that the concerns that are raised are put on the record.

Some of the issues that I want to talk about, I can talk about during the Committee of the Whole. Some of the things that I will raise will be more by way of seeking to have things clarified either because they have been raised with me by other people or simply for my own benefit. As I said at the beginning of my contribution, the Attorney General is quoted as saying that this may be the most important piece of legislation that he drafts. I would consider it amongst the most important pieces of legislation, if not the most important piece of legislation that I will have the opportunity to comment on. That is why I have spent some time looking at this bill.

As I understand the process, the Commissioner of the Corruption and Crime Commission and the Commissioner of Police are, under clause 1, "the applicants". They are the people who can seek the declaration. Whether the declaration is made is decided by the "designated authority" but I will not go into that because I note that some points have already been made about that and that there is an amendment on the notice paper. The applicants—I have mentioned the two—submit criminal intelligence information and other information including protected submissions.

The respondent can attend and give evidence; and clause 10(2) states —

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

Presumably when they do that, the respondents may not have access to the protected submissions and protected information before them when making their submissions. Correct me if I am wrong, but I think it is the case that when respondents are making submissions, they will not have access to the protected submission or to other criminal intelligence information. As a practical matter—although perhaps obvious, it is not to me—can the respondent have legal representation when the application is being heard?

Hon Michael Mischin: This is for the declaration?

Hon LINDA SAVAGE: Yes.

Hon Michael Mischin: Clause (9)(3).

Hon LINDA SAVAGE: Perhaps the parliamentary secretary could point me to that. What was that clause?

Hon Michael Mischin: Clause (9)(3) —

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

Hon LINDA SAVAGE: Thank you very much for that.

Presumably their counsel will not have the protected submissions and the criminal intelligence information. Perhaps the parliamentary secretary could confirm during Committee of the Whole that representing counsel will not have access to that information.

Following on from that, the clause states —

> Any member of the respondent, and any other person who may be directly affected (whether or not adversely) by the outcome of the application, may, with the leave of the designated authority, be present and make submissions in relation to the application … subject to subsection (4).

Again, just going to the mechanics of the bill, who is recognised as the respondent? I assume that it is the organisation, because it is an organisation against whom the declaration is going to be made. The clause reads "any member of the respondent". Perhaps the parliamentary secretary would be able to explain how someone is identified as "any member of the respondent". I note it says "any other person who may be directly affected". I see that as a practical matter, because it could mean a very large number of people would be appearing. Perhaps the parliamentary secretary could talk me through how this is going to work in practice.

That leads me to the definition of an "organisation". Page 6 of the bill states—

> **organisation** means any incorporated body or unincorporated group (however structured), whether the body or group —
>
> (a) is based in this State or elsewhere; or
>
> (b) consists of persons ordinarily resident in this State or elsewhere; or
>
> (c) is part of, or affiliated with, another organisation, …

Can the parliamentary secretary explain for my benefit, because I notice the Canadian legislation, or perhaps it is New South Wales legislation, states that three or more people make up an organisation; is an organisation two people or is it three people? Perhaps the parliamentary secretary could put his mind to that for me. I wonder whether that is something, in the interest of this bill not being challenged on minor matters, that might be worth having on the record.

I am interested to know how we work out the name of an organisation. When we think of motorcycle bikie gangs, we might think of the Comancheros or the Finks. However, when we talk in a more general way about organised crime, I expect there is quite a bit of organised crime activity that does not really have an organisation. The point was made that this legislation is not just aimed at bikies, although, as I said, I am hoping, given their blatant disregard and some of their shocking behaviour, that they are very much in the sights of this legislation. What are we going to do when we talk about other people involved in organised crime who are not an organisation per se. Could the parliamentary secretary name two or three individuals and say they are an organisation? I will leave that with the parliamentary secretary, because I can think of the names of some people who are sometimes referred to in terms of organised crime or well-known criminal identity who meet with people. I would be interested to know where they would fit into it.

I would like some explanation in regard to some specific clauses. Perhaps first I will make a few more general points. I think members have already mentioned putting a notice in the *Government Gazette* or *The West Australian*—or in a newspaper; I am assuming it is *The West Australian*—with the time, date and place that the application will be heard. I understand that it has to be published as soon as practicable but not later than five working days after the application is lodged. When it goes in the newspaper, which I assume is *The West Australian*, that has the advantage that all members could read it. I think Hon Col Holt asked whether in this day and age it was really a way of informing people. I just wondered whether this may not lead to counsel for a respondent raising the point that it is perhaps a slightly feeble way of trying to serve a notice on an organisation. What consideration was given to attempting to serve a notice on the premises or on any one individual on behalf of the organisation? I ask that in case it might come up. The designated authority might consider whether it had been reasonably served and whether that could be a problem. Some of this, as I said, I will raise during the committee stage.

I would like to make a few general comments about juveniles, because I know it was discussed in detail in the other place and some amendments were put. I want to put on record, because it was raised with me, that we know from research that the teenage brain is really a work in progress, and this really is the period when adolescents exhibit their greatest risk-taking behaviour. We have previously talked about that. Their neural capacity to make judgements and control their behaviour up until the age of 25 but certainly up until 18 is proven to not be what we expect of an adult. I notice that 16 to 18-year-olds are included as people against whom control orders can be made. I can understand that is a real concern that juveniles would be used as agents. I assume that is why it is in the bill. The reason they are included is that, if they were not, they would be used to do things that the person under the control order could not or, I suppose, they would be used as an intermediary between people who cannot get together. I wonder if that has led to any consideration of the possibilities of displacement. If a bikie or someone subject to a control order cannot get a 16-year-old to act, perhaps they would have no qualms about recruiting a 15-year-old instead. The parliamentary secretary has said that there has been an enormous amount of consideration of this bill. I wonder whether that has gone through his mind and whether it is of concern that that group would now be targeted, if the 16 to 18-year-old group is included.

It was raised with me that there are a whole lot of vulnerable groups that could be affected by this legislation. As I said, we are supporting bill, but I think it is important that, given the gravity of the bill, I raise these concerns

and make sure that they are put on the record so that the parliamentary secretary can provide some assurances. There may be cases in which young men, 16 to 18-year-olds or perhaps even older, who perhaps have known little else than a circumstance around crime or someone who is very vulnerable will find themselves caught up in this. Potentially, if they find themselves on the register, they will be marked for life with the stigma of it. Let us say they get involved for a short time with a group and subsequently that group becomes an outlaw motorcycle gang and people ask, "Weren't you involved with them; I seem to remember you were associated with that." I am talking particularly about 16 to 18-year-olds because that is the age group that has been raised with me. There is concern that something that was initially short term—given we are talking about the internet—may be there forever. I have looked at the bill in a bit of detail and I wonder whether any consideration has been given, and, if so, presumably for good reasons decided against, to the idea that a controlled person who procures a juvenile to communicate with another controlled person—as I said earlier, as a go between—commits an offence himself.

Hon Michael Mischin: That would be section 7 accomplices, or people aiding and abetting, counsels or procurers under the Criminal Code, so they would be guilty of whatever offence is committed, yes.

Hon LINDA SAVAGE: I suppose I am looking for a way to find a real disincentive for the idea that they would prey on young people, and I am throwing it in as a suggestion. As I said, the parliamentary secretary may well have thought about it. I am talking about situations referred to in this report around very powerful, controlling figures. I am talking about the type who behaved as they did at the Sydney airport. Has consideration been given to providing a serious disincentive perhaps by making that a separate offence that is punished even more harshly?

Hon Michael Mischin: I am not trying to interfere with the flow of your argument, but if you are talking, essentially, about the Fagan situation, which is a classic example of a gang run by an adult, and the adult is organising the juveniles and children under his control to commit crimes, Fagan was as guilty as those who committed the actual pick-pocketing, burglary and the like. If a person is forbidden to communicate with another controlled person in light of the penalties and offences under the bill, and does so through an intermediary, he is still guilty of that offence. That would be the disincentive.

Hon LINDA SAVAGE: Would it not also mean that the 15-year-old who found himself caught up in it, as we will discuss in committee under clause 181 —

Hon Michael Mischin: If I can develop that further, I may be answering your question here. If the juvenile is not aware that he or she is being used as the intermediary as an innocent agent, no they would not be guilty of an offence because no crime would be committed by them. If they are aware they are being used as an agent; they are not an innocent agent, yes they may be committing an offence themselves. Unless they are a controlled person, they would be sentenced on the basis of the usual juvenile justice principles, depending on their age. If they are willingly and knowingly themselves controlled persons and they still do the bidding of their principal, yes they will be subject to the penalties under the act. Those are the disincentives and I would think that any sensible court would regard the principle that if an adult is exercising authority over someone younger than them, he ought to be punished more seriously, accordingly. One would hope so.

Hon LINDA SAVAGE: I also put on the record another group that has been raised with me by a retired judge, based on experience, about a group that may have less innocent associations with people who are members of the declared organisation and/or are subject to a control order but maybe too fearful to stand up to them or give them away, and they are the wives and girlfriends who find it really hard to get away from their partners. Even if they do, they will have been involved and will find that their name is on the register. Again, they are a group who, even if they are not on the register, are likely to be used as agents by people who are on the register. I understand that some of the brutality that can be meted out to wives and girlfriends undermines any choice they have. I am putting this on the record because I think they are genuine concerns. We are moving into a new area. We are yet to see how it works and it may be that these are not concerns that are proved in the long term.

Some of the other issues are clearly related to particular clauses. I notice that I do not have too much longer so I will wait to deal with it in committee, including the designated authority. I note in closing—although I will not speak about the constitutional issues—that a High Court challenge is considered likely; in fact, almost inevitable. I understand it is also believed, with the benefit of the High Court decisions following appeals against legislation with similar policy aims from South Australia and New South Wales, that this bill has overcome the issues that resulted in the legislation in those states being struck down. That is a positive outcome. Going to the High Court will be a very expensive exercise for the state.

While I remember, I will raise one other issue during committee. When these control orders are issued I wonder how the government anticipates the level of surveillance I assume it will need to ensure that people do not associate with the people they are not meant to be with. How will we monitor and enforce what I assume would

need to be 24-hour surveillance? Perhaps the parliamentary secretary can provide me with some information about what resources are intended to be available to provide the monitoring that would be needed to make sure people are not breaching their control orders, particularly things such as association.

On reading the report about some of the people in bikie gangs, it occurs to me that for some of the people subject to this level of control, the bikie gang culture is their life; it is their cult, their type of religion, their extreme belief and extreme commitment to it in the face of the rest of society. I am wondering, therefore, how some of the people subject to these control orders might respond. That is something that I would feel a little fearful about. Again, I assume the issue of what we do with someone who is a law unto themselves and only obeys their bikie gang and how they will respond when they are told that they cannot associate has been thought through. As I said earlier, my feeling is that I find it hard to believe that that will necessarily be something that they will respond to, and it will be in the breach of it and the consequences of the breach that the legislation will have the greatest effect. I will leave the specific issues I have in regard to some of the clauses until during Committee of the Whole.

HON NICK GOIRAN (South Metropolitan) [9.30 pm]: I rise to make a contribution to the second reading debate on the Criminal Organisations Control Bill 2011. In doing so, I start where I believe all members of this place should start; that is, the consideration of freedom of association. After all, that is one of the fundamental human rights because human beings are naturally social animals. We live and function in communities, we associate with each other for a variety of purposes, including, of course, for family, for recreation, for work and for commerce. In considering this important bill that has attracted a lot of attention, I have had cause to consider the International Covenant on Civil and Political Rights, which gives expression, I believe, to this natural human right in article 22, which states —

> 1. Everyone shall have the right to freedom of association with others …

Of course, in saying that, we need to recognise that some human beings can also associate for less savoury purposes, such as engaging in criminal activities. Some organisations or associations, in my view, exist primarily for this purpose. The question we have to ask ourselves is: do we need to respect the right of freedom of association for the purpose of engaging in crime? It is instructive that the second paragraph of article 22 of the international covenant I referred to earlier contains what I think is a commonsense provision, which I quote for the benefit of members; it states —

> No restrictions may be placed on the exercise of this right —

That is, of course, the right to freedom of association. The paragraph goes on to state —

> other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety …

As members of this place, we have to consider whether this bill meets with that exemption in the article.

As I understand it—I quote from clause 4(1)(a)—this bill is designed solely —

> to disrupt and restrict the activities of organisations involved in serious criminal activity, their members and associates so as to reduce their capacity to carry out activities that may facilitate serious criminal activity; …

Therefore, this aim of disrupting the activities of criminal organisations is for the purpose of protecting members of the public from violence associated with those organisations.

Like, I am sure, a number of other members of this place, I have received a number of, shall I say, constituent inquiries about this bill. Regrettably, most of those people did not identify whether they are constituents of the South Metropolitan Region, which has, I have to say, been unhelpful. I have received these various pieces of correspondence from people allegedly living in Western Australia. I received one of them from someone who specifically identified that he lived within the South Metropolitan Region, and I have, accordingly, responded.

I have to say that I appreciate the sincerity of those organisations and people who have raised concerns about this bill. They have done so saying that it is an attack on the right of freedom of association. I understand that and I respect their view; however, I urge them to understand this bill and all of its provisions in light of its purpose. It is, in my view, a legitimate exercise of this Parliament to pass a law to protect members of the public from violence perpetrated by organisations involved in serious criminal activity.

We had a discussion earlier this evening about the issue of High Court challenges. It not in the least bit surprising that well-resourced motorcycle gangs have challenged similar legislation passed by the Parliaments of South Australia and New South Wales and succeeded in obtaining favourable judgements from the High Court of Australia that elements of each of the respective acts were constitutionally invalid. As I mentioned in my

contribution to the motion moved by Hon Giz Watson, Western Australia has had the benefit of taking these judgements into account in drafting legislation that will be as effective as possible in disrupting the activity of criminal organisations while respecting the requirements in chapter 3 of the Australian Constitution on the nature of the judicial function. I earlier referred to some of those judgements, and this bill does not contain the specific feature that the High Court found the South Australian and New South Wales acts to be invalid for.

I turn to the New South Wales case, and I note that, unlike the New South Wales Crimes (Criminal Organisations Control) Act 2009, the bill before us requires the designated authority, which is a judge or a retired judge of the Supreme Court appointed by the Governor for this purpose, to give reasons for the making of a declaration that an organisation is a criminal organisation. We have the benefit of that particular judgement, which, if I remember correctly—I do not have my notes that I had earlier—was a judgement from June 2011, so it is a recent judgement, and this bill ought not to fall foul for the reasons that the New South Wales legislation did.

I turn now to the South Australian legislation, and I note that, unlike the Serious and Organised Crime (Control) Act 2008, the bill before us does not enlist the courts to simply put into effect a decision made administratively by the Attorney General. Rather, it requires the courts to consider various matters before making a control order about a particular person who is a member of a declared organisation. At this point I want to take the opportunity to make some contribution to the brief dialogue I had with the Leader of the Opposition in this house during her contribution to the second reading debate. I would be interested in the thoughts of other members on this point, because it will be relevant when we consider the amendment put forward by the Leader of the Opposition when we move to the Committee of the Whole stage.

The proposition is that the Corruption and Crime Commission be substituted as the organisation that will make a declaration. I have a concern that by doing so, we will do exactly the thing that we do not want to do; that is, we do not want the High Court to rule this legislation to be invalid, and I think that that will happen if the honourable member's proposed amendment is accepted. I say that because it seems to me that the Corruption and Crime Commission can best be described as an organisation within the executive arm of government.

Hon Sue Ellery: Do you accept that they are an independent agency and they do not report to, nor can be directed by, a minister?

Hon NICK GOIRAN: I do, which is why I think it is an interesting discussion to have. Let us consider the three arms of government: Parliament makes the law—the Corruption and Crime Commission does not make the law; the judiciary interprets the law—the Corruption and Crime Commission does not do that. The executive's role is to administer the law and it seems to me that that is the arm of government that best fits that description, albeit I accept that the Corruption and Crime Commission can table reports directly in Parliament.

Hon Sue Ellery: It reports to Parliament, not to a minister.

Hon NICK GOIRAN: That is right. It can table reports directly to Parliament, so it has a natural linkage to the Parliament, but I do not think we could say that it is a lawmaker. It seems to me that it best fits under the executive arm, but that is no doubt a discussion that we will have when we get to that amendment. But I draw it to members' attention because if the view I hold is correct, we will find ourselves in a difficult situation as I imagine the High Court will invalidate this legislation, which none of the members in this place would want to see.

I will move on to consider the impact of this bill in Western Australia. No doubt there are criminal organisations in Western Australia that feel that their criminal activities and the financial gain they hope to accrue from these activities will be threatened by this bill, so they will seek to challenge its provisions. Of course, this does not prove there is anything wrong with this legislation, rather it suggests it is potentially a very effective tool in disrupting the activities of criminal organisations and therefore should be pursued and defended vigorously. Ordinarily the criminal law punishes individuals for the commission of crimes; however, it also penalises the attempt to commit or the planning of certain serious crimes, as well as conspiracy to commit crimes. This bill goes one step further in relation to criminal organisations, and rather than waiting for the next episode of violent rivalry between criminal gangs to erupt in our neighbourhoods and affect ordinary citizens going about their lawful business, it seeks to tackle criminal organisations head on by disrupting their ability to recruit new members and to plan and carry out criminal activities.

I conclude by noting that in my view the first duty of government is to ensure the safety of the public. This bill aptly targets improving public safety. It does impinge on the right of freedom of association, and I do not think we should shy away from that. However, it does so in an entirely appropriate and careful way that is correctly aimed at disrupting the activities of criminal gangs. It has sufficient procedural checks to ensure that it is not

used inappropriately to curtail the right to freedom of association, except for the express purpose of disrupting the activities of a criminal organisation. With those comments, I support the bill and commend it to the house.

Debate adjourned, on motion by **Hon Norman Moore (Leader of the House)**.