BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Dr Steve Thomas) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Committee was interrupted after the clause had been partly considered.

Hon SUE ELLERY: In respect of the status of implementation of this measure in other jurisdictions, New South Wales developed its schemes in advance of the Council of Australian Governments' decision, and the legislative effect of that commenced in June 2017. South Australia enacted the Statutes Amendment (Terror Suspect Detention) Act 2017, which commenced operation in February 2018. In Victoria, some parts of the Justice Legislation Amendment (Terrorism) Act 2018 commenced on 30 November 2018. Provisions for a presumption against bail and parole are yet to come into effect. These provisions may be proclaimed or will become operational by 1 May 2019. In Tasmania, the provisions of the Terrorism (Restrictions on Bail and Parole) Act 2018 commenced on the date fixed by proclamation—14 December 2018. In Queensland, the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 is still before the Queensland Parliament. The bill was referred to the Legal Affairs and Community Safety Committee, which tabled its report on 7 March 2019, recommending that the bill be passed. The commonwealth introduced the Counter-Terrorism Legislation Amendment Bill 2019 into the Australian Parliament on 20 February 2019.

In respect of the specific question about whether other jurisdictions have introduced protections for the confidentiality of terrorist intelligence, South Australia, Victoria and Tasmania have specifically legislated to protect terrorist intelligence. In South Australia, it is in section 74B(3) of the Police Act. A judicial officer must take steps to protect the confidentiality of information classified by the Commissioner of Police as terrorism intelligence. Victoria provides a general protection of counterterrorism intelligence in legal proceedings in section 23 of its Terrorism (Community Protection) Act 2003, as amended by the Justice Legislation Amendment (Terrorism) Act 2018. The amendments to the Bail Act provide a process for a court to receive terrorism information and determined that an accused is a terrorism risk. In respect of Tasmania, there is provision for a closed court hearing, exclusion of certain parties from proceedings, and prohibition on publication and disclosure information referred to in proceedings.

Hon MICHAEL MISCHIN: Thank you for that, minister. Just to confirm, in each of those pieces of legislation, is a similar presumption against bail put into effect in relation to what may be unconnected offences that are the subject of the bail application, or does there have to be some kind of similarity or logical or empirical connection to the earlier terrorist conviction or the conduct that is being controlled by the control order?

Hon SUE ELLERY: It is the former.

Hon MICHAEL MISCHIN: In respect of the consultation that gave rise to this bill in Western Australia, the minister mentioned that there were two rounds of limited consultation through a working group involving, as I recall, the Director of Public Prosecutions, Western Australia Police Force, the State Solicitor's Office, I think, and the Department of Corrective Services. Am I right about that?

Hon SUE ELLERY: The working group comprised advisers from the State Solicitor's Office, and senior officers from the Department of the Premier and Cabinet, Western Australia Police Force and the Department of Justice. The working group includes members with experience in legal policy and counterterrorism policy and operations.

Hon MICHAEL MISCHIN: Was there consultation or liaison with the Criminal Lawyers' Association, the Law Society of Western Australia, or any other external group?

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: Is there any reason for that?

Hon SUE ELLERY: I am advised that a decision was made that the group needed to focus on the best way to implement the principles agreed to at the national level, and so no external consultation was done.

Hon MICHAEL MISCHIN: I could keep this to the later clause that actually deals with this, but it also has a bearing on the general scheme of the bill. The minister mentioned in her second reading reply that what is proposed here by way of a presumption is not unknown to the Bail Act. It is there in respect of charges of murder or second serious offences and—what was the other one—breaches of violence restraining orders?

Hon Sue Ellery: Dangerous sex offenders.

Hon MICHAEL MISCHIN: Dangerous sex offenders. However, leaving aside the unique case of murder, for second serious offences, there is a presumption against bail for a person charged with a serious offence when on bail for an earlier serious offence. Is that right?

Hon SUE ELLERY: That is correct.

Hon MICHAEL MISCHIN: However, if a person is no longer on bail for that first serious offence—if they have completed their term of imprisonment and served their debt to society, and have been discharged from any further liability in respect of that—is that taken into account in the same manner as these terrorist links are taken into account in respect of a presumption against bail for a serious offence for which they are now charged?

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: Are there any other instances in the Bail Act in which someone who has completed a sentence for an offence has a presumption of bail against them for a subsequent charge that is yet to be proved?

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: The Leader of the House did tell us, and I accept entirely, that she is working with someone else's bill and that she is having to deal with advisers and things can be lost —

Hon Sue Ellery: Very difficult advisers!

Hon MICHAEL MISCHIN: Very difficult, yes.

The DEPUTY CHAIR (Hon Dr Steve Thomas): Order, members! It is not parliamentary to refer to advisers; thank you.

Hon MICHAEL MISCHIN: Too true! What advisers?

The Leader of the House is having to take advice, is perhaps the way I should have put it, on a bill that is not hers, and she was not privy to the Council of Australian Governments discussions, but is she able to help us out with the reasoning that results in someone who has committed a terrorist-connected offence at some time in their past—whether an attempt, part of a conspiracy or actually a terrorist offence within the broad definition—becoming a greater threat in the future when they are charged with any offence that brings them within the operation of this provision? Can she help us out with how the risk is assessed that a presumption of bail is necessary?

Hon SUE ELLERY: While the non-existent advisers are providing me with some advice, I make this point: it goes to the policy of the bill, already set by the house, which is making a judgement about the seriousness of a particular set of offences relating to terrorism. A distinction has been made. The member can accept or not accept that terrorism in itself warrants a particular treatment. I am also advised that the application of the exceptional reasons test is a proportionate response to the severity of the terrorism links. The nationally consistent approach to countering terrorism, including a comprehensive, cooperative and nationally coherent counterterrorism legislative framework, underpins Australia's security in a complex and evolving threat environment. It is important that Western Australia meets its obligations in the national implementation of the COAG agreement.

Hon MICHAEL MISCHIN: Okay. Technically, this could come under a later clause, but it may be convenient to deal with it now. The Leader of the House mentioned in her reply to the second reading debate that there had been failings by the prosecution in the Monis case in not drawing certain matters to the magistrate's attention and in giving the magistrate bad advice by not alerting the magistrate to the fact that these sorts of exceptional circumstances needed to be established in that case. It was a failure of communicating relevant information to the magistrate at that time —

Hon Sue Ellery: If you'll take an interjection, that is one part of what went wrong, yes.

Hon MICHAEL MISCHIN: Yes. Would the sort of information and intelligence that we are dealing with here not ordinarily be provided to a judicial officer who is having to consider bail for an offence anyway; and, if not, why not?

Hon SUE ELLERY: I guess I would say this: ordinarily, yes, the member might be right. In this set of circumstances, it was critical to—"encourage" is the wrong word—facilitate the sharing of intelligence information across agency, jurisdictional or geographical boundaries to ensure that there was capacity to protect information. That was the policy objective. We did not want to create a situation in which other agencies might feel the need to second-guess whether they should provide that information because they could not be sure that a provision was in place to protect it.

Hon ALISON XAMON: I just want to ask a quick question. We have talked about how this bill has competing tensions in trying to strike a balance. The question I have is about the issue of the options available to the judiciary. I want to understand whether it will be the case under this bill that when someone is on trial for an actual terrorism charge, the court will have available to it more options than are currently available to people trying to apply for bail for non-terrorism charges. That is in relation to being able to have access to evidence and all the provisions of

the rule of law that are effectively undermined within the scope of this bill as it is currently drafted. Will it be the case that when someone is on trial facing actual terrorism charges, even if they are only making application for bail for non-terrorism charges, they will be afforded more rights than this bill would otherwise provide?

Hon SUE ELLERY: I make this point: this is about bail. The provisions before us have nothing to do with anything else about how a matter might be dealt with in a court. The Bail Act changes in the bill before us will have no impact on the progress of a usual criminal trial.

Hon ALISON XAMON: I am trying to ascertain, for the record, that there will be fewer rights afforded to a defendant under this bill than would be available to them if they were to go through ordinary trial proceedings.

Hon SUE ELLERY: That is the member's way of characterising it. I make the point that the policy of the bill, which has been set, has already determined that terrorism-linked matters in respect of bail will be treated differently, or will have the capacity to be treated differently, under the changes proposed in the bill before us. If the member chooses to interpret that in the language she just used, I will leave it to her to draw that conclusion. There is a difference, and the difference is that we are dealing with terrorism.

Hon ALISON XAMON: I want to get this clearly on the record because I am aware that, when we talk about application for bail, the provisions of this bill can also cover people who are facing non–terrorism related charges. I make this point because the minister has confirmed my concern that we have a potentially greater denial of procedural fairness, if you like, for someone facing bail on non-terrorism charges than for someone who is facing trial for actual terrorism-related charges.

Clause put and passed.

Clause 2: Commencement —

Hon MICHAEL MISCHIN: Again, the commencement clause provides that the formal parts of the bill will come into effect —

> … on the day on which this Act receives the Royal Assent;
>
> (b) the rest of the Act—on a day fixed by proclamation.

Can the minister explain to us why and when the rest of the legislation is expected to come into effect?

Hon SUE ELLERY: We are anticipating that it will take about six months to do the required administrative arrangements, including updating WA Police Force's information technology, establishing new court procedures and providing training on the new processes.

Hon MICHAEL MISCHIN: Given that we are coming into this at a fairly late stage, six months to deal with a risk that is said to be so high that if a person who had terrorist links at some time in the past and is charged with an offence now, whatever that offence might be, has to have a presumption of bail against them, seems an extraordinary length of time. What sort of preparation needs to be done to the police database? Do they not have some liaison with Australian Federal Police and others regarding people who are arrested here? Would they not be able to check whether they have a terrorist history? Issues might need to be addressed more urgently than that.

Hon SUE ELLERY: I can advise the member that it is anticipated that it could be six months; it might be less. WA police are certainly aware of people with links to terrorism because that information, as the honourable member alluded to, is already shared between the respective jurisdictional law enforcement and intelligence agencies. It is about collating the information for the purposes of creating a new flag, if you like, on the WA police IT system so that frontline officers, when checking on a person's information, will be informed and can check whether a person has links to terrorism. The lead time will enable police officers to be trained as well. Internal court procedures will be developed to ensure that the court complies with the new confidentiality requirements. It is anticipated that it could be up to six months, but it might be less.

Hon MICHAEL MISCHIN: Can the minister let us know what sort of training police officers need to look up whether someone has a criminal offence for a terrorism-linked matter sometime in the past?

Hon SUE ELLERY: I am not able to give the honourable member any more information than I have just given.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 3 amended —

Hon MICHAEL MISCHIN: My question concerns the definition of "person linked to terrorism", which means a person who —

> (a) is charged with, or has been convicted of, a terrorism offence; or

(b) is the subject of an interim control order or confirmed control order, or has been the subject of a confirmed control order within the last 10 years;

Can the minister give us an idea of what a control order, whether interim or confirmed, involves? Who imposes it? What is the usual length of time that they last?

Hon SUE ELLERY: A control order is an order made under provision 104.5(3) of the commonwealth Criminal Code, which allows obligations, prohibitions and restrictions to be imposed on a person for the purpose of protecting the public from a terrorist act. Control orders must be issued by a court. The Australian Federal Police can apply to the court to issue a control order against someone. The AFP must have the consent of the Minister for Home Affairs of Australia to apply for a control order. In deciding whether to issue a control order, a court must consider the impact of each control order condition on the person's circumstances. That includes their financial and personal circumstances.

Control orders are either interim or confirmed. Interim control orders involve an ex parte application. The issue in court must be satisfied on the balance of probabilities that the order would substantively assist in protecting the public from a terrorist attack. An interim control order must specify a day on which the person to whom the order applies must attend the court for the court to decide whether to confirm the order, with or without variation, so that it becomes a confirmed control order; declare the interim control order to be void; or revoke the interim control order. If it is of assistance to the honourable member, because I do like to be helpful, I can advise that the commonwealth Parliamentary Joint Committee on Intelligence and Security tabled its review of police stop, search and seizure powers, the control order regime and the preventive detention order regime on 1 March 2018 and advised that six control orders had been made since the introduction of that regime in 2005.

Hon MICHAEL MISCHIN: Can the minister say whether any of those six control orders involve citizens of Western Australia?

Hon Sue Ellery: No, I cannot say that.

Hon MICHAEL MISCHIN: The minister cannot say because she cannot say —

Hon Sue Ellery: I would have to kill you!

Hon MICHAEL MISCHIN: Oh, it is secret; all right.

Hon SUE ELLERY: No, I cannot have that go on the record. Deputy Chair, I had better correct the record. I cannot give the honourable member the answer to that question because I do not have that information.

Hon MICHAEL MISCHIN: What are the normal conditions in a control order and how long does it last?

Hon SUE ELLERY: The restrictions, obligations and prohibitions could be contained in a control order. An issuing court that makes a control order must specify the obligations, prohibitions and restrictions to be imposed. That is set out in section 104.5(3) of the commonwealth Criminal Code, which states —

> The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:
>
> (a) a prohibition or restriction on the person being at specified areas or places;
>
> (b) a prohibition or restriction on the person leaving Australia;
>
> (c) a requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours;
>
> (d) a requirement that the person wear a tracking device;
>
> (e) a prohibition or restriction on the person communicating or associating with specified individuals;
>
> (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
>
> (g) a prohibition or restriction on the person possessing or using specified articles or substances;
>
> (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
>
> (i) a requirement that the person report to specified persons at specified times and places;
>
> (j) a requirement that the person allow himself or herself to be photographed;
>
> (k) a requirement that the person allow impressions of his or her fingerprints to be taken;
>
> (l) a requirement that the person participate in specified counselling or education.

In addition, the court may impose a requirement that the person wear a tracking device. I am advised that under the commonwealth Criminal Code, the order must specify the period during which the confirmed control order is

to be enforced, which must not end more than 12 months after the day on which the interim control order is made. That is with respect to confirmed control. It must not end more than 12 months after the day on which the interim control order is made.

Hon Michael Mischin: So it will last up to 12 months?

Hon SUE ELLERY: Correct.

Hon MICHAEL MISCHIN: In those respects, the control orders seem to be similar to prohibited behaviour orders, to a certain degree anyway; I do not have the full details before me of conditions that can be imposed in those cases. I take it that these control orders do not go so far as to prohibit a person from committing any offences in the same way as there may be a condition of bail that no offences be committed and the like during a period of bail.

Hon Sue Ellery: By interjection, you are correct. They do not go to that.

Hon MICHAEL MISCHIN: What is the consequence of a breach of a control order? How is a control order enforced in that regard?

Hon SUE ELLERY: Sections 104.27 and 104.27A of the commonwealth Criminal Code identify relevant offences for contravention of control orders and tracking requirements. A person commits an offence if the person contravenes the order. The penalty is imprisonment for five years. An offence also relates to tracking, and that penalty is for five years as well.

Hon MICHAEL MISCHIN: Unless anyone has any questions to deal with that element, I want to move on to the definition of "terrorism offence". In particular, I refer to the framing of proposed paragraph (h). It states that a terrorism offence means —

> an offence under a written law or a law of the Commonwealth, another State, a Territory or another country, that substantially corresponds to an offence in paragraphs (a) to (e) and (g); or

I take it that means "an offence under a written law" is to be read disjunctively to "a law of the Commonwealth, another State", or is it under a written law or generally a law of the commonwealth et cetera? Is "written law" a term of art for Western Australia under our Interpretation Act? Is it to be interpreted in the light of the definition in our Interpretation Act?

Hon SUE ELLERY: The latter is the answer. The reference to written law is a reference to Western Australia's law. The term is defined in section 5 of the Interpretation Act —

> ***written law*** means all Acts for the time being in force and all subsidiary legislation for the time being in force;

Clause put and passed.

Clauses 5 to 7 put and passed.

Clause 8: Section 16B inserted —

Hon MICHAEL MISCHIN: Proposed section 16B, "Person linked to terrorism" is one of the operative, central provisions of the bill. Proposed subsection (1) provides —

> This section applies if a person linked to terrorism —

That casts us back to the definitions in clause 4 —

> is in custody —
>
> (a) awaiting an appearance in court before conviction for an offence; or
>
> (b) waiting to be sentenced or otherwise dealt with for an offence of which the person has been convicted.

How broad is the scope of "offence" in this case? Plainly, it has to be someone who is in custody. Perhaps we will deal with that first. Would custody include surrendering to the court for an appearance pursuant to a summons?

Hon SUE ELLERY: Ever keen to be helpful to the honourable member, let me be specific about what he is seeking, because proposed section 16B is quite clear. The person is in custody, not waiting to be served with something. I just need to check —

Hon MICHAEL MISCHIN: Perhaps I could assist. Let us say that the police charge someone by way of a summons—they are not arrested—requiring them to turn up to court on a particular day. In answer to that summons, the person turns up to court. Their name is called and they come up to the dock at the Magistrates Court. Are they in custody for the purposes of this legislation and for consideration of bail?

Hon SUE ELLERY: No.

Hon MICHAEL MISCHIN: What is the scope of offence for the purposes of bringing them within the operation of this legislation?

Hon SUE ELLERY: Perhaps we will start in a different way. If we use the Criminal Investigation Act as a guide, it identifies the range of options for dealing with an arrested person. That section is not impacted by the amendments proposed by this bill. Accordingly, persons charged with a simple offence, being a non-indictable offence, will continue to have a qualified right to unconditional release and to be dealt with by a court hearing notice with the effect that they are not required to appear at court and can be convicted in their absence. Persons charged with an indictable offence that is not a serious offence will have the option of being issued with a summons to attend court or being subject to a bail decision, in which case the provisions of the presumption against bail apply. Bail must be applied to persons charged with a serious offence, being an indictable offence with a penalty of imprisonment of five years or more. The presumption against bail will always apply in those cases.

In the case of persons attending court by summons or a court hearing notice, existing section 4A of the Bail Act operates so that an accused must not be detained in custody unless ordered by the judicial officer, so the issue of bail does not arise for those accused unless and until the judicial officer makes a positive decision to retain the accused in custody. If the judicial officer orders that that an accused is to be detained, section 7 of the Bail Act will be engaged. There is a duty on the judicial officer to consider bail. At that point, the presumption against bail for persons linked to terrorism will apply to the exercise of the power to grant bail.

Hon MICHAEL MISCHIN: We were just dealing with the operation of section 4A. Let us say that the accused person is summonsed before the court and the judicial officer adjourns proceedings. The judicial officer then orders that the accused be detained in custody. That alone suddenly triggers the operation of a process that requires the accused to establish exceptional reasons and so forth to justify bail.

Hon Sue Ellery: If I can interrupt you. That is only if the judicial officer has made a decision.

Hon MICHAEL MISCHIN: What criteria will the judicial officer exercise to make that sort of decision, or is it entirely at the judicial officer's discretion?

Hon SUE ELLERY: It is the latter. It is at the discretion of the judicial officer.

Hon MICHAEL MISCHIN: For no better reason than simply someone turning up and the judicial officer thinking that they did not answer their name in a timely enough manner, the judicial officer can say that they will detain the accused person in custody and will consider bail. Ordinarily, the judicial officer would release this person on bail, but instead says, "You were half an hour late to court; I'll make sure that doesn't happen again." All of a sudden, this person has the presumption of bail against them. Is that the way it could work?

Hon SUE ELLERY: If a person is brought in by summons, there is an automatic assumption that they will not be detained.

Hon MICHAEL MISCHIN: Where will I find that provision?

Hon SUE ELLERY: It is in section 4A of the Bail Act.

Hon MICHAEL MISCHIN: That is what I am driving at. Section 4A states —

> (1) Where —
>
> (a) an accused has appeared in court for an offence pursuant to a summons or court hearing notice issued under the *Criminal Procedure Act 2004*; and
>
> (b) a judicial officer adjourns the proceedings, the accused is not to be detained in custody to further appear before the court for that offence unless the judicial officer so orders.

The judicial officer decides a person has turned up late and/or they are drunk. They do not want it to happen again so the judicial officer detains this person in custody and considers bail for the next appearance. Is the minister telling me that that action is open for the judicial officer?

Hon SUE ELLERY: There are no changes to the usual arrangements that apply to the provisions that the member just read out. In the circumstance in which a judicial officer may make a decision that a person needs to be detained and they meet the definitions in proposed section 16B, "Person linked to terrorism", of this bill, the provisions in this bill as they relate to bail may apply. But the member is effectively asking about a discretionary element, and I do not know whether I can take it much further, given we are talking about a power judicial officers have now, which is not a new power. We are not giving judicial officers extra discretion; they have that discretion now. I am not sure that I can take it much further than to say that in particular circumstances when a judicial officer makes a decision to detain and when that person meets the criteria set out in the "Person linked to terrorism" definition in this bill, it could occur.

Hon MICHAEL MISCHIN: I thank the minister for that answer. What I am driving at here is a question of proportionality. Let us say we have someone who has an awful history of being a thug and starting fights, and is a drug dealer to boot, with a criminal history to that effect. This person has completed their time and they are no longer on parole; they have served their debt to society. This person is charged with, say, a driving offence that brings them within the definition of offence within this legislation. They are summonsed, so they turn up at court late having had a few drinks. The magistrate does not smile at this behaviour, thinks it is pretty serious, and says, "This is unacceptable to me. I'm detaining you in custody and I will consider the question of bail, because I want to make sure you turn up on time in the future." Ordinarily, because there is no reason to suspect flight or the commission of any further offence or any of the other considerations that a magistrate will need to take into account as to suitability for bail, the magistrate grants bail with or without surety. However, if the magistrate is informed that a person accused of that very same offence 10 years previously had a control order against them that expired nine years previously, all of a sudden that person is public enemy number one for the purposes of the Bail Act. There is a presumption against bail for that person and they have to show exceptional reasons and suitability for bail in other circumstances. Otherwise, this person has a much better record, in terms of convictions and history and character, apart from that incident of being linked to terrorism many, many years before, than the thug in scenario A. It just seems a bit strange. I am trying to work out whether that is the intention of the legislation.

Hon SUE ELLERY: The key words the member used are "apart from that incident" and "proportionality". The policy for this legislation was set in the second reading vote. The policy of the legislation is that when it comes to people who are linked with terrorism, and we define that as being the person in the member's example who has been the subject of a confirmed control order within the last 10 years, we say, yes, the presumption against bail does apply because that is how seriously we take that issue. Whether a person turns up to court drunk or late is irrelevant. If a person has been the subject of a confirmed control order within the last 10 years, that is the trigger.

Hon MICHAEL MISCHIN: Yet if a person has a history of violence and is a recidivist and the like, there is no presumption of bail one way or the other against them. Is the government going to look at tightening up bail generally for community protection in respect of other forms of crime, such as public assault and that sort of thing, to ensure some consistency? I personally would be more afraid of someone like the thug than someone who had a control order 10 years before that the authorities never thought fit to renew. Is the government looking at tightening up the bail provisions in order to protect us from violence in the community?

Hon SUE ELLERY: I think we are going around in a circle here. In an earlier part of the debate, I identified the other offences that generate a variation on the standard bail provisions. As to what the government might consider in the future in respect of other offences, that is speculation. It is not my area of responsibility and I am not in a position to provide an answer.

The DEPUTY CHAIR (Hon Dr Steve Thomas): It is not in the scope of clause 8.

Hon SUE ELLERY: Indeed.

Hon MICHAEL MISCHIN: To confirm, an "offence" is defined as —

> … any act, omission or conduct which renders the person doing the act, making the omission or engaging in the conduct liable to any punishment, and includes an alleged offence; but nothing in this definition shall limit the operation of subsection (4);

The definition of "offence" is pretty broad. Does it include the possession of a small quantity of cannabis or the use of cannabis?

Hon SUE ELLERY: Let us go back to clause 8. Proposed section 16B will apply "if a person linked to terrorism is in custody". I referred to the Criminal Investigation Act and gave the house a series of gradings.

Sitting suspended from 6.00 to 7.30 pm

Hon MICHAEL MISCHIN: I understand what the minister is saying about the policy of the bill having been agreed and the like, but just so that everyone is clear upon its operation, "offence" has a very wide operation and is a very broad term that covers any act or omission that makes someone liable for punishment. It can range, if I understand it correctly, from its lowest level, which could be a parking offence, through to murder, and certainly possession of a drug that would not otherwise warrant being held in custody and the like. But, of course, those lower level infringement offences would not make a person liable to be held in custody ordinarily, but the term is a very broad one. Ordinarily, when one is charged with, say, possession of a small quantity of cannabis, one would not expect to be remanded in custody. If, however, one were to be arrested for it and had a control order that expired some decade or nine years before, one would have a presumption against being released on bail. Otherwise, I have no further questions relating to clause 8.

Clause put and passed.

Clauses 9 and 10 put and passed.

Clause 11: Section 66C inserted —

Hon ALISON XAMON: I draw members' attention to the amendment on the supplementary notice paper, so that we can begin discussion. I would like to move the amendment standing in my name. I move —

Page 8, line 3 — To delete the line.

This amendment seeks to mandate the judicial officer disclosing terrorist intelligence information to the Attorney General. Currently, the way the bill is drafted, the judicial officer will have discretion to give this information to the Attorney General, but it will not be mandated. The aim of this amendment is to ensure that the Attorney General has the full information of the content of terrorist intelligence information that is attracting the secrecy provision so that they can consider the use to which that provision is being put. It will not specifically require the judicial officer to also advise what, if any, opportunity defence has had to challenge or to contextualise the information, but it is a flag that enables the Attorney General to ask questions, if needed.

This is a particularly important amendment to contemplate. We are talking about removing judicial discretion and the capacity for defendants to have the full benefits of the rule of law in court proceedings. I would have thought at the very least that it would be important to enable the person who is effectively our most senior legal person in this state, the Attorney General, to have the bare minimum of information to know when these provisions are being exercised. I will be talking about the next amendment in a moment, to point out that it is not unusual for this sort of information to be provided to the Attorney General; it would absolutely not interfere with the conduct of the courts. What will interfere with the conduct of courts is this bill, which seeks to remove judicial discretion.

Although I have made it quite clear that I have concerns about the bill as a whole, in trying to mitigate some of the worst excesses, this amendment is a useful mechanism to at least ensure that there is some capacity for people to be aware of how it will be exercised and what is occurring.

Hon SUE ELLERY: The government will not be supporting this amendment nor indeed 2/11, which would seek to insert some words to replace those that amendment 1/11 deletes. The effect of this is to remove the discretion for the judicial officer to reveal information to the Attorney General and to, in effect, mandate. Clause 11 of the bill, as it is now before us, will insert proposed section 66 and provide a procedure for the court to hear argument and make orders for the protection of terrorist intelligence information in bail proceedings. When section 66 is in operation, subsection (3) will provide that the judicial officer may disclose the terrorist intelligence information or withdrawn information to the Attorney General, a court and/or to a person to whom the prosecutor authorises. The disclosures under that subsection are primarily to ensure that the court will not be inhibited from disclosing information to other judicial officers for the purpose of a future bail hearing or an appeal. The judicial officer may also disclose the information to a person to whom the prosecutor authorises. The discretion to disclose the information to the Attorney General is to ensure that the protections do not unintentionally prevent the Attorney General from receiving information on those matters when appropriate and necessary.

Hon Alison Xamon's amendments on the supplementary notice paper seek to delete the reference to the Attorney General in proposed subsection (3)(c) and to insert into the bill proposed subsection (4) to require—so, remove the discretion and mandate—a judicial officer to disclose to the Attorney General terrorist intelligence information or withdrawn information. It appears that the intent is to ensure that an Attorney General is always made aware of when proposed section 66C is engaged and the type of information that has been subject to the protections or withdrawn from bail proceedings. It is the government's view that this is not an appropriate mechanism for overseeing the operation and effectiveness of proposed section 66C. It contemplates a form of executive oversight of the court proceedings that is not supported. The courts operate independently of the executive and are currently not compelled to provide to the Attorney General information that is protected in court proceedings. The current drafting affords discretion for the courts to share that information when it is considered necessary and appropriate, and this will be determined on a case-by-case basis. For those reasons, we will not be supporting amendments 1/11 and 2/11.

Hon MICHAEL MISCHIN: As I indicated earlier, I have some sympathy for the objectives that Hon Alison Xamon is attempting to achieve. I have not quite made up my mind about whether what she is proposing is reasonable or unreasonable. The reason for that is, as it presently stands, we are looking at an offence charged under Western Australian law that is coming up for a consideration of bail. It is not a commonwealth offence. The prosecutor within the meaning of the Bail Act is either the police or the state of Western Australia; that is the "prosecutor" by definition under the Bail Act. The state of Western Australia plainly is being represented by someone who would be the Director of Public Prosecutions in the normal course of events or the Attorney General as first law officer. The prosecutor—that is, the state of Western Australia—already has the information because that is the source, I would have thought, of the information going to the judicial officer. If I am wrong about that process, please let me know. But somehow the court is getting that information so it is already in the possession, presumably, of the state of Western Australia in some fashion. All that is being required here is that those acting on behalf of the state of Western Australia, representing the state of Western Australia, also provide that

information to the first law officer of the state of Western Australia, the elected representative. The minister said that the mechanism is inappropriate because it requires the court to make that available, but I would be surprised if there were no other requirements that a court, in receipt of information, would not ordinarily transmit to the state if it were party to the proceedings. I am a little unclear as to why it is thought that it is an improper mandating of disclosure to the executive. The executive—the state—represented by the Attorney General, is a party to the proceedings, is it not? If it is thought that the court ought not be directed to provide information that the state has given to the court back to the state's representative when required to do so, is there another means by which this objective can be achieved; for example, by requiring the Director of Public Prosecutions or the prosecutor, within the meaning of the Bail Act, to provide the report or the information to the Attorney General as a matter of course?

Hon SUE ELLERY: I am not contemplating preparing an alternative. If the honourable member wants to do that, he knows how to do it. The Solicitor-General did consider the proposed amendment. It is not normally the case that this type of information is disclosed to the Attorney General. The Solicitor-General is of the view that the proposed amendment is not appropriate because it requires a judicial officer to disclose information provided as evidence for a court process to a member of the executive. He advised that this risks compromising the independence and integrity of the courts.

Hon ALISON XAMON: Of course, that argument would hold more water if this bill was not attempting to interfere with the activities of the judiciary to such an extent. I remind members that this bill will actually remove judicial discretion. When judicial discretion is removed, it is expected that we understand its implications. Clearly, what has been contemplated in the original drafting of the bill is that there are circumstances in which it will be considered advantageous for the Attorney General to know what has gone on. I have more to say, but my first question is: can the minister please outline those circumstances that were contemplated in which it is potentially in the interests of the Attorney General to know what is happening in the proceedings of this court because, clearly, that has been considered?

Hon SUE ELLERY: I am not in a position to give an exact example and I will not go down the path of contemplating hypotheticals. The purpose of having the language drafted in the way that it is drafted is to give the court discretion if the judicial officer is of the view that the matter that has been revealed is of serious concern or a national security issue that the Attorney General, the state, the executive and the government of the day needs to know about. This gives discretion to the court to reveal that information to the Attorney General. With the greatest of respect to the honourable member's amendment, I am not in a position to go down the path of trying to imagine hypothetical cases in which the court might exercise this.

Hon ALISON XAMON: The reason I ask the question is that, clearly, it has been contemplated that there is potentially a role for the Attorney General to be privy to this information. It is not beyond the realms of possibility to consider that perhaps there are situations in which it is downright desirable to make the Attorney General aware. The advantage of the amendment that I have proposed is that it would ensure that the Attorney General is given the opportunity to see the broad scope by which this particular provision may be applied.

It could be the case that any one individual court would rarely deal with these sorts of matters, but this ensures that our senior law officer at least has some idea of how this is being employed more broadly. It is the case that we do not have other mechanisms by which the government can be made aware of the way in which this imposed change to the courts' proceedings is being implemented in practice. I am quite comfortable with what I have drafted, so I do not feel the need to contemplate any other measures, although I note the reluctance from government to look at other ways in which this could be accomplished. As such, I think it is a really important safeguard to ensure that someone, somewhere is able to have at least the broadest of overviews as to how these particular provisions are being employed. I think it is of keen public importance. I, for one, would like to be assured that there are some mechanisms by which oversight is being achieved.

Hon SUE ELLERY: I will just take us back to where this all sits in the context of this piece of legislation. At a national level, in the context of heightened terrorist-related activity, a decision was made that said: "Here are a set of principles that we think each jurisdiction should adopt to amend their bail arrangements such that we reverse the onus of proof." Contemplation is given to the courts to determine that bail ought not be considered in particular circumstances—that is, for someone for whom a determination has already been made, except for someone who is on a charge, that they ought to be the subject of an interim or final control order in respect to their links to terrorist activity. In forming those principles, the jurisdictions determined that in order to give each jurisdiction and each respective intelligence-related agency confidence that they could share information knowing that it would not be unduly exposed, the bill was drafted in this way to say that this information should not be shared as a matter of course with the political office holder—that is, the member of the executive—but if the judicial officer considers it appropriate, they have the power to do that. It is for those reasons. We are dealing with an elevated area of sensitivity and concern. There are serious national security issues. For that reason, we do not think it is appropriate to mandate that the court must share that information with the political officer; that is, the Attorney General. But, if

the circumstances are appropriate, the court has the discretion to do that. Again, for those reasons, the government will not be supporting the amendment.

Hon MICHAEL MISCHIN: Is the minister able to assure us that there is no other provision to be found in the statute book that mandates a judicial officer disclosing certain matters to the first law officer of the state? The minister keeps referring to them as the political officer or the political personage, but, constitutionally, the Attorney General, like other ministers, is a representative of the Crown and a representative of the state of Western Australia. It is true that it is a political position as well—that is how they get to that position—but they play an important constitutional role. The only one that springs to mind—I cannot recall whether it provides for this—is the Criminal Organisations Control Act, which provides for hearings to be held in confidence and the like. I do not recall whether there is any mandated provision of information in that legislation. Is the minister able to say that what is proposed by Hon Alison Xamon as a matter of principle—that is, requiring a court to disclose certain evidence or make that evidence accessible to the government or a minister of the state—is simply unheard of?

Hon SUE ELLERY: On the advice that is available to me, without the officers at the table going through every statute to provide an answer to the honourable member, I cannot give him a definitive answer. What I can tell him is that this particular piece of legislation is for a very specific and unfortunate set of circumstances, which requires us to put in place extraordinary measures. These are measures that we do not, as a matter of course, put in place for other offences, but we are doing so here because of the nature of what we are dealing with and the fact that it goes to the very heart of our national security. Whether there are provisions like this in any other legislation, I cannot give that answer without somebody going and doing that check, and that is not possible now. But I can say that this is a very specific and narrow set of circumstances that all of us wish we were not in. They are exceptional circumstances that require an exceptional response. That is what has been determined should flow out of the principles that were agreed at a national level.

Hon MICHAEL MISCHIN: Perhaps we can do it this way: is there an equivalent provision in other legislation passed by other jurisdictions that deals with the question of bail that permits the relevant judicial officer to disclose this sort of information, at discretion, to the Attorney General or Minister for Justice, if that is their equivalent, or to another court or another person to whom the prosecutor, being the state of Western Australia or the commonwealth, or the person named on a police complaint authorises?

Hon SUE ELLERY: I have no information available to me now to do that comparison.

Hon MICHAEL MISCHIN: So the minister cannot say whether this is modelled on provisions that have been passed in other jurisdictions?

Hon SUE ELLERY: I have answered the question, but I have also said that a set of principles was agreed at a national level and that each state was to go away and configure their own bail arrangements to reflect those principles. This is how Western Australia has done it. But to the extent that the point is being made that this is an exceptional provision, the answer to that is yes, it is, because it is a piece of legislation designed to deal with extraordinary and exceptional circumstances.

Hon MICHAEL MISCHIN: I find it disappointing that the minister cannot tell us whether this provision is peculiar to Western Australia. There do not seem to be any principles that the minister has mentioned that enable a disclosure in the first place, let alone restrict the disclosure in this fashion. The minister cannot tell us whether it is reflected by any provisions in the legislation of other jurisdictions, which have also gone away and crafted legislation to meet the commitments to COAG. On balance, I am prepared to give the government the benefit of the doubt in this particular case. Knowing that we are going to wind up proceedings shortly in respect of this bill and move on to other business, I would appreciate it if, perhaps next time we sit and deal with this bill, we could be given that information. If the minister is prepared to do that, I would appreciate that. As I say, I will give the benefit of the doubt to the government on this occasion. It is unfortunate that some alternative could not have been formulated that might have met Hon Alison Xamon's objective, but in a way that was palatable to the government and did not put national security at risk. In the circumstances, we will support the government's position on this and reject Hon Alison Xamon's amendment.

Amendment put and negatived.

Progress reported and leave granted to sit again, on motion by Hon Sue Ellery (Leader of the House).