CRIMINAL ORGANISATIONS CONTROL BILL 2011

Consideration in Detail

Resumed from 29 February.

Clause 84: Dealing with things surrendered or seized: firearms and weapons —

Debate was adjourned after the clause had been partly considered.

Mr J.R. QUIGLEY: We were up to clause 84. I was the lead speaker on this bill, of course, as the shadow Attorney General, but on the last occasion that the bill was before the chamber, the member for Gosnells raised a very interesting point on the retention and return of firearms. I welcome a further contribution from the member for Gosnells in that regard.

Mr C.J. TALLENTIRE: Clause 84 has been drafted in a way that allows us to return firearms to people who have been found to be members of criminal organisations—they have had an order served upon them, they have a degree of criminality in their past, and yet in this bill we have included a clause that is designed to return firearms to them. This clause is designed for the safekeeping of the firearm or firearms. It means that the state is put in the position of having to keep in a safe place firearms and ensure that they are properly registered in some sort of inventory system, I imagine. A whole lot of complicated processes will have to be put in place so that we can eventually return a firearm to someone who has been the subject of an order and is a member of a criminal organisation. To me, that sounds quite at odds with what I think the Western Australian public would expect us in this place to design legislation for. I do not believe that the Western Australian community has an appetite for returning firearms to people who have been members of criminal organisations—to people who have had orders served upon them. Therefore, I believe that really we should look to delete clause 84, "Dealing with things surrendered or seized: firearms and weapons". Of course firearms should definitely be seized from people who are the subject of a control order or are a member of a criminal organisation. But firearms should not be returned to those people automatically. It is possible that with the passage of time, people who have been the subject of a control order or have been a member of a criminal organisation may be able to prove themselves to be citizens who are worthy of the privilege of holding a firearm licence. I think it would be reasonable to allow those people at a later date to start afresh and apply again and let the process determine whether they are eligible for a firearm licence. But it seems to me to be completely wrong to assume in this legislation that once a person's control order has terminated, the firearm should be returned to the person automatically.

We are now left with the problem of how to amend the legislation that is before us. My suggestion that we delete clause 84 sounds simple enough. But it seems that parliamentary counsel, in their wisdom, have referred to firearm licences again in clause 85, so we will need to make some amendments to that clause as well. I do need to foreshadow that. I realise that the Attorney General has considered this issue and probably taken other advice, and I am very keen to hear from the Attorney General what amendments he proposes. I think that between us we will be able to reach a sensible outcome on this legislation.

Mr C.C. PORTER: The argument that the member for Gosnells has made is very rational and fair, and on balance I would tend to agree. However, I would also agree, having considered this matter, not extensively since the last time we spoke, but recently, that any amending of this clause will not be a simple task. What I propose is that I give the member an undertaking, on the part of the government, that we will move amendments in the upper house to effect what the member has suggested. That will allow time to draft those amendments, and they will be moved by my parliamentary secretary, Hon Michael Mischin, in the upper house. I will be very happy to show those amendments to the member prior to them being moved to ensure that he is satisfied with them. I just am not in a position on the floor of the house to move the amendments myself—I lack the drafting skills, and I will be taken to task by parliamentary counsel. So I suggest that we proceed in that manner, and the member has my, and the government's, undertaking that the clause will be so amended in the upper house.

Mr J.R. QUIGLEY: I commend that course of action to my friend the member for Gosnells. The Attorney has on previous occasions given those sorts of undertakings and has always come through with them. The only question that I would raise about this clause—the member for Gosnells might take this on board—is whether this also covers an interim control order. An interim control order might have been sought ex parte but was never confirmed because all the criteria had not been met; in other words, the police might have obtained an interim control order, but it was granted on the wrong basis, and the judge ultimately did not confirm it as a control order. In such a situation, should the person not get his gear back? Does the member for Gosnells see what I mean? I have been sitting here trying to pick apart clauses 84 and 85 to see how such an amendment could work.

Mr C.C. PORTER: It seems to me that if an interim control order has been granted, the firearm would be deposited with the police, as is the case under a permanent control order, and the person would receive it back at the expiration of the control order. I think that is how it works at the moment. The principle that the member has

espoused is that once a final control order has been levied against a person, the firearm that the person has deposited with the police pursuant to that final control order should be lost to the person permanently. A person might have an interim control order levied against him, and that might happen ex parte, and it might be that there is not sufficient evidence to support a final control order, so the police determine not to apply for a final control order. If the person has only an interim control order levied against him, should that person lose his firearm permanently? I think the standard should be lower for an interim control order. In my view, the amendments that the member has suggested would best be drafted to apply to permanent control orders only, and that is the basis on which I would undertake to draft the amendments.

Mr C.J. TALLENTIRE: I thank the Attorney General and the member for Mindarie for those comments. I think that the way to proceed is the one that has just been outlined; namely, that if an interim control order has been granted, there should not be permanent confiscation of the firearm. But once we move beyond the interim phase, clearly the individual who is the subject of a control order should no longer be allowed to retain that firearm in his name.

The ACTING SPEAKER (Ms A.R. Mitchell): Members, given the information that has been raised by the member for Gosnells and the member for Mindarie, and the response from the Attorney General, I still now need to move that clause 84 stand as printed.

Clause put and passed.

The ACTING SPEAKER: The member for Gosnells also foreshadowed an amendment to clause 85. Can I now assume that that information stands for clause 85 as well?

Mr C.J. TALLENTIRE: Yes.

Clauses 85 to 98 put and passed.

Clause 99: Association between controlled persons an offence —

Mr J.R. QUIGLEY: Subclause (3) states —

> A controlled person who, at any time within a period of 3 months, associates with another controlled person on 3 or more occasions commits an offence.

I am wondering how this relates to subclause (1), which states —

> A controlled person who associates with another controlled person commits an offence.

Under subclause (1), the penalty for a first offence is imprisonment for two years. Subclause (3) appears to stipulate that there must be three associations within a three-month period. That is the first question I have about clause 99.

Mr C.C. PORTER: My reading of that is that the offences under subclause (1) and subclause (3) are different, with different penalty structures. Subclause (1) states —

> A controlled person who associates with another controlled person commits an offence.

That is a one-association penalty, and the penalty can be either two years summary or five years on indictment.

Mr J.R. Quigley: Then what is the purpose of subclause (3)?

Mr C.C. PORTER: Subclause (3) refers to three associations in three months. That offence would need to be dealt with, I would think, on indictment—there is no summary penalty for that—and the penalty is imprisonment for three years.

Mr J.R. Quigley: It seems to be inconsistent.

Mr C.C. PORTER: My reading of that has always been that it provides for a level of flexibility in the charging. I do agree that it looks at first blush somewhat clumsy. But my understanding is that that is to allow for flexibility in the charging.

Mr J.R. QUIGLEY: This piece of legislation will have significant consequences for controlled individuals. I therefore have a problem with the response from the Attorney General, because it will allow for which-way charging—that is, this-way or that-way charging. I think that the legislation ought to be definitive, because otherwise the law could be brought into disaffection or disrepute. For example, a controlled person who associated with another controlled person on one occasion could be charged on indictment, with a maximum penalty of five years. Another person could continue an association on several occasions and be charged only with an offence carrying three years' imprisonment, whilst individual A, if there were three associations, could receive three charges with a possible cumulative penalty of 15 years' imprisonment. I believe the government should consider withdrawing subclause (3). We are not taking away any penalty; we are in fact confirming that the person, if he is a controlled individual mixing with another controlled individual, should be liable to a penalty of five years' imprisonment. If he does it three times, he has three offences.

Mr C.C. PORTER: Perhaps I will expand on my understanding of the provision in terms of how it provides flexibility. Clause 99(1) states —

> A controlled person who associates with another controlled person commits an offence.

That is obviously one association rather than three strikes. The penalty for a first offence is two years' imprisonment; for a second or subsequent offence, it is five years. If a person has associated once and is convicted for that one association, the penalty is two years' imprisonment. If they then, having suffered that conviction and are still subject to the control order, associate again and are again convicted, they face the higher indictable penalty of five years' imprisonment. The rationale for that is that a person has suffered a conviction, they have not learnt from that conviction that they are not to associate and they continue to associate on a subsequent occasion. That person comes back, is convicted and faces the higher penalty. Clause 99(3) takes into account a slightly different situation in which it may be a matter of police surveillance of someone associated in rapid succession, over the period of a day, three or more times.

Mr J.R. Quigley: Or three months.

Mr C.C. PORTER: Or three months, yes. That could easily happen on one day. But it might not allow for the process of a separate charge, conviction and, subsequent to the conviction, another association. It may be that someone is charged with an association, a breach of a control order, and, whilst subject to that charge, associates again for a second or third time. It is meant to provide a higher penalty for the situation in which a person associates multiple times. I consider that it takes into account significantly different situations and tries to adjust the penalty structure accordingly. Does that expand upon the answer?

Mr J.R. QUIGLEY: I understand the Attorney General's explanation. We disagree with the necessity for subclause (3) but we will not move an amendment or take it to a vote. We have expressed our disagreement. We will not take up the chamber's time any longer on that.

Dr A.D. BUTI: In the Attorney General's explanation, I think he talked about three associations in one day under subclause (3). If, say, there is a party and one person stays all day with an associate, I presume that is associating only once. But if, at that same party, they go out for an hour and come back, is that a second occasion? And, if they go out again, is that a third occasion? If they go out of the room or go away for an hour and come back, would that be considered another association?

Mr C.C. PORTER: That scenario often arises in criminal law. The extent to which an association ends and a new association begins within a short period is a matter of degree. In the first of the definitions in clause 3(1), it is stated —

> ***associate***, with another person —
>
> (a) means —
>
> (i) to be in company with the other person; or
>
> (ii) to communicate with the other person by any means (including by post, facsimile, telephone, email or any other form of electronic communication);

It may be that separate telephone calls or emails would count, arguably, as separate associations. I would say that the situation in which someone at a party is associated with someone and then goes to the toilet and returns would be somewhat more difficult to argue as a separate association punctuated in time by a toilet break. It would be a question of fact and degree for the prosecutor to successfully establish that there were separate associations. I would have thought, like many criminal law situations, trying to define separate instances in one transaction of events is not always simple, but that would be a matter for the prosecutor to convince the court of.

Clause put and passed.

Clause 100: Defences to charges under section 99 —

Mr J.R. QUIGLEY: Clause 100(1) states —

> For the purposes of the application of section 99(1) and (3) —

Obviously, they are the two offences we have been discussing —

> to an accused to whom an interim control order relates, the forms of association set out in section 101 are to be disregarded if the accused proves that the association was reasonable in the circumstances.

That is if the other controlled person was in one of those categories—is that a reasonably shorthand way to say it?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: Those categories are laid out in subparagraphs (a) to (h). I think I know the answer, but just to get it clear: for an offence charged under clause 99(3), would it be incumbent upon the prosecution to prove that on each of those three occasions, not one of them was a permitted association? In other words, there cannot be two permitted associations with a controlled person and one impermissible one; it has to be all three impermissible.

Mr C.C. Porter: I would agree with that, yes.

Mr J.R. QUIGLEY: That was the only matter I had in relation to clause 100.

Clause put and passed.

Clause 101: Certain associations to be disregarded for interim control orders —

Mr J.R. QUIGLEY: Subparagraphs (a) to (h) were just referred to as being the categories of association that do not attract sanction under the bill. "Associations between close family members" is not exactly defined. Do we take that to be immediate family, or does it extend to cousins? I do not know what the definition of "close family member" is. If I go back to subclause (3), I do not see "close family member".

Mr C.C. Porter: It is in clause 3(2).

Mr J.R. QUIGLEY: "Close family member" is defined, is it?

Mr C.C. Porter: I will find it for you. It states —

> For the purposes of this Act, a person (***person A***) —

Mr J.R. QUIGLEY: I am sorry; can the Attorney General take me to the page?

Mr C.C. Porter: I am on page 8, just before clause 4.

Mr J.R. QUIGLEY: Yes. Thank you. That answers the question.

I will cut to the chase now. Clause 101(h) states —

> other associations of a kind prescribed by the regulations.

The Attorney General can make those other associations up from time to time. I am concerned about two sorts of associations. I do not specifically see them referred to in the bill, although one was obliquely referred to in Wainohu's case. The first is associations in the course of legitimate political meetings. Wainohu's case, as I recall, said that it does not specifically ban that so we are not going to say that that is against an implied freedom of association, and dismissed that part of the plaintiff's claim. Please tell me if I am babbling on here and it is covered elsewhere? The first association that concerns me is association during legitimate political activity, such as the demonstrations we get at the front of this building. The other association I am concerned about is associations occurring during legitimate industrial activity. When I say "legitimate industrial activity", I do not mean activity sanctioned under Fair Work Australia but action taken for the furtherance of industrial dispute, whether or not sanctioned by Fair Work Australia. I am mindful that in some occupations, such as heavy construction and heavy labour jobs, we could find people who could fall within the category. I am concerned only about those two areas.

Mr C.C. PORTER: The allowance for other associations that are prescribed by regulation sits to the potential advantage of persons who are subject to the interim control order. That process would not allow the Attorney General to foreclose, by regulation, existing association categories that can lawfully occur under clause 101. The process of regulations is designed to pick up any circumstance that was unforeseen but it would be unfair not to allow the person to associate. It sits with the ability of the Attorney General to draft regulations to the advantage of a person subject to a control order. My reading of clause 101(b)—"associations occurring in the course of a lawful occupation or business"—is that the word "business" is not meant to be limited to, and I think generally is not taken to be limited to, trade or commerce or anything of that nature. It is used more widely and would encompass situations of legitimate industrial action, legitimate political protests or things of that nature. That is the one that I have considered that drafting is meant to apply to.

Mr J.R. QUIGLEY: My concern is that in the hearing of clause 99(1) or (3) offences, and without in any way meaning to be disparaging of courts of summary jurisdiction, these are spread far and wide from the metropolitan area, and the presiding judge or legal aid lawyer might not drill down so deep into the 300 pages of this debate or something like this to find the Attorney General's intent, clearly expressed as it just was. Would the Attorney General contemplate an amendment to protect those two areas that are at the cornerstone of our democracy?

Mr C.C. Porter: If there's any lack of clarity, I would accept an amendment that would insert after the word "business" the words "or lawful political protest or lawful industrial action".

Mr J.R. QUIGLEY: I move —

Page 76, line 26 — To insert after "business" —

or lawful political protest or lawful industrial action

I have moved that amendment because that is the very point that the High Court sought to address in Wainohu but said that although it did not specifically protect it, it did not seek to outlaw it.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 102 put and passed.

Clause 103: Other contravention of interim control order or control order —

Mr J.R. QUIGLEY: This is the clause I have had a little mind wrestle with on my walks, specifically clause 103(1)(b), which states "to omit to do an act". Normally in the prosecution of a criminal offence we talk about the actus reus, and there must be the mens rea and the actus reus. Here we have a person who simply is charged for an omission. I am wondering what was in the Attorney General's mind. I can understand that a person contravening a control order "does an act" but the omission to do an act runs contrary to what I have been saying.

Mr C.C. Porter: My reading of that is that it is meant to take into account the situation in which person A and person B are subject to control orders. Person A is sitting in a room. Person B comes into that room and sits down next to person A. It is quite arguable that the person by their mere presence is not acting but their omission would be their failure to leave the room. That is the scenario that is meant to bring offence.

Mr J.R. QUIGLEY: We could almost say that the offence is complete as soon as the person sits next to him, or receives an SMS.

Mr C.C. Porter: You could argue that potentially, but by structuring the conduct by way of act or omission, it allows the person to leave the room. In that case, they have not breached the control order by an omission to act. In that sense, it establishes a responsibility on the person to leave the room.

Mr J.R. QUIGLEY: I go back to the definitions, not to test the Attorney General but to test the proposition against the definition of "association". I suppose that does cover "to be in company with another person". The person would not be in his company if the person sat down and he left the room.

Mr C.C. Porter: I think it would be hard to argue that the person had ever been in the person's company if they had to get up and leave the room.

Mr J.R. QUIGLEY: That is why I am wondering why we have paragraph (b).

Mr C.C. Porter: Because if they fail to leave the room—so they omit to leave the room—there is a potential argument, I think, to suggest that they have not acted, because they have been perfectly passive in the circumstances. So it is to cover that situation. Another possible situation might be when a control order requires something to be done, which is not inconceivable—for instance, to hand in a weapon or a licence or something of that nature—and there is an omission to abide by that part of the control order.

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

Clause put and passed.

Clauses 104 and 105 put and passed.

Clause 106: Recruiting members for declared criminal organisation an offence —

Dr A.D. BUTI: This is probably more a matter of my wanting clarification from the Attorney General and his advisers. We have a penalty for an individual vis-a-vis the body corporate. As we all know, there is the issue about whether someone is acting in an individual capacity or acting in the capacity of the corporation. How will we distinguish that? Say, for instance, this organisation is, in effect, an employment organisation, and the director of the organisation directs one of the employees to go and recruit another person to join that criminal organisation. Is the person who does the recruiting considered to be an individual or is that person acting as part of the body corporate, or both?

Mr C.C. PORTER: That is a fair question. Very often, some of these outlaw motorcycle gangs are set up as bodies corporate or proprietary limited companies. This provision contemplates a situation in which, for instance, there is some evidence of the legal entity—the body corporate—recruiting through emails or whatever it might be. Of course, the only thing we can do with a body corporate is fine; we cannot imprison. But there may also be circumstances in which an individual was a party to the initial recruitment of the primary offender,

being the corporation, and we might be able to prove that. In that case, we would be able to apply for the provision against the individual as well. But it may be that there are circumstances in which the proof that attaches the individuals being parties to the corporation's recruitment just is not there or is unobtainable; indeed, the entire structure of recruitment may have been set up to try to divorce individuals from the provability as parties, in which case we are just left with the option to try to punish the corporation, if that is the only evidence that is available. So it is to take into account the either/or situation.

Dr A.D. Buti: In clarification, I understand that, but, of course, the idea is to try as much as possible to get to the individual; however, everyone else will stand behind the shield, right?

Mr C.C. PORTER: Absolutely. Nevertheless, it can be a helpful thing, if it is a corporation and it has been done so carefully that the recruitment through the corporate structure does not lead to an evidence trail to individuals, to fine the corporation.

Clause put and passed.

Clause 107: Permitting premises to be habitually used as place of resort by members of declared criminal organisation —

Mr J.R. QUIGLEY: This clause introduces both offences and penalties for people who are not members of controlled organisations or criminal organisations, but those who permit members of those organisations to resort at their premises. The term "resort" is not used. I do not think it is defined. I notice that the Deputy State Solicitor is indicating something. I do not know whether he is indicating the answer to this.

Mr C.C. Porter: It is just that the words "place of resort" appear in clause 107(2). It uses the words "as a place of resort by members of a declared criminal organisation".

Mr J.R. QUIGLEY: Yes, but without defining "resort", and that is what I want to come to for a moment. I am not quite sure whether the Naval Base Hotel was a regular drinking hole for the Rebels or another organisation, but I can remember that they used to have a tattoo festival there annually and that it was advertised in the entertainment pages of *The West Australian*. What does "resort" entail? There was another hotel in Herdsman where another group would regularly drink in one of the saloon bars. What is the legislation striking at there? Is it a place where people go to sleep? I used to like visiting a place called the Parkerville Tavern and having a bit of fish under the weeping willow tree there. However, bikies used to go there from time to time. Does that then become a place of resort for them? I am just trying to clarify that term.

Mr C.C. PORTER: It would very much depend on all the facts and circumstances, and the argument would have to be made, and accepted by the judicial officer in question, that members of a declared organisation were resorting. It is not a term of legal art. I suggest to the member that it is not at all inconceivable, if someone was an owner, as defined in clause 107(1)(a) and (b), of a premises, and that premises was a pub that was very regularly used by members of an organisation that had been previously declared a criminal organisation, that an argument could be mounted, which may or may not be accepted by the judicial officer, that they were resorting. So it contemplates that sort of situation, but I think it would be a question of fact and degree.

Mr J.R. QUIGLEY: It is a rather imprecise term, and what worries me is how the imposition is compounded for the otherwise law-abiding citizen who owns a hotel. Subclause (4) states —

> … used as a place of resort by members of a declared criminal organisation … to knowingly permit those premises to be habitually used as a place of resort by members of that declared criminal organisation.

The owner of a hotel might not even know, unless these people wear patches. Many of these places have a sign "No patches permitted". I am now thinking of —

Mr C.C. Porter: By way of interjection, there are two things. The subclause says that a person must not "knowingly permit those premises to be habitually used as a place of resort". I think some clarity is given to the notion of "resort" and the test that would be applied by courts by the preface words "habitually used". Of course, the person must "knowingly permit", so they would have to know that the people are members of a declared organisation, they must know that the organisation has been declared, and there must be habitual use. So a group of bikies who are members of a declared organisation and who happened across a roadhouse and went in for a beer on a hot day, even if they were members of a declared organisation, would not fit into that scenario.

Mr J.R. QUIGLEY: There is a reversing of the onus of proof in subclause (5), which states that unless the contrary is shown, the management is knowingly concerned in that. Is my understanding right? There is a reversal of the onus for the management then to show. I am now thinking of nightclubs in Northbridge that these people attend without patches. Subclause (5) states —

> … as a place of resort by members of a declared criminal organisation and is a member of that declared criminal organisation is presumed, unless the contrary is shown, to be knowingly concerned in the management of those premises.

It says "unless the contrary is shown".

Mr C.C. Porter: It is only the member who is in the management of the organisation who is presumed to know that the other members are members.

Mr J.R. QUIGLEY: So it is only the member —

Mr C.C. Porter: By way of interjection, the member will see that clause 107(5) states —

> In proceedings for an offence under subsection (3), a person who is concerned in the management of any premises habitually used as a place of resort by members of a declared criminal organisation and is a member —

Mr J.R. QUIGLEY: "And is a member". I am sorry; I missed the conjunctive. Thank you, Madam Acting Speaker, and I thank the Attorney for that clarification.

Mr C.J. TALLENTIRE: The Attorney General might point me to clause 107(5) as well, but I want to raise a concern I have about clause 107(2), particularly in the context of rural properties that often have magnificent bushland. These properties often have remote shacks that are frequented by people who could be members of criminal organisations. In rural communities people are tipped off; landholders may be asked by a neighbour whether they know a bikie gang is going onto the back of their property and hanging out there. But more likely than bikie gang members—criminal organisation people—being on a private property is the possibility of them being in a nature reserve or a national park. I am thinking of a place near the Avon River, not far from Paruna wildlife sanctuary, where I have heard bikie gangs are inclined to frequent. Not only is it a place to which they resort, but also they are involved in illegal activities such as growing cannabis. People get a tip-off and become aware of them, so that it could be said that they are knowingly permitting someone to frequent a place.

I have given the example of a private landholder who could be said to be knowingly aware of that frequentation. With the other example, which was of the activity in a conservation estate, the tip-off might have gone to the state, so that it might well be that the Director General of the Department of Environment and Conservation has on file a letter stating that bikies are meeting and camping in a part of bushland. What responsibility does that put on either a private landholder or the director general of an agency with responsibility for the management of the conservation estate?

Mr C.C. PORTER: The short answer is that the word "permit" has been the subject, over the years, of a great deal of judicial consideration. My best view would be that in the context of this legislation, to permit something there would have to be the knowledge that it was happening, the capacity to stop it and a willing failure to stop it. So, if bikies were encroaching on somebody's land and they had heard about it or had come by knowledge of it and they were reasonably unable to stop it from happening, it would not be a "permit" situation. I think the way the language is structured, and given what sits behind those words, if somebody was unhappy, basically, about the entry onto their land by members of a declared organisation and it was without their will, they would not fall under the auspices of that subclause.

Clause put and passed.

Clauses 108 and 109 put and passed.

Clause 110: Protection of criminal intelligence information in proceedings for declaration —

Mr J.R. QUIGLEY: The answer to the queries I will raise in clause 110 may be in part answered by clause 111, but not very clearly, if answered at all. Clause 110 prohibits the publication of criminal intelligence. Furthermore, the designated person hearing the application for declaration must determine whether that which is claimed to be police intelligence in fact is. If the designated person then determines that some of the material is not police intelligence, under clause 110(3) the designated person is still prohibited from publication of evidence relating to that information. Are these prohibitions on publication applicable only to proceedings for declarations and controlled persons? This act will create several indictable offences, on the prosecution of which the director has a responsibility to disclose all information, be it inculpatory or exculpatory. The High Court of Australia in Mallard, I suppose, and in Grey's case, which preceded Mallard, cast upon the director and the Commissioner of Police a very serious burden of disclosure. In the prosecution of the criminal offence, what takes precedence? Do they not still have to disclose the criminal intelligence if it is the prosecution of a criminal offence?

Mr C.C. PORTER: Just as a preliminary point, the decisions in Totani, Wainohu and K-Generation have set out reasonably clearly, I think, the reasonable steps to be taken to maintain the confidence of criminal intelligence.

Whether or not something is or is not criminal intelligence is a matter for the designated authority. The member asked what that process applies to. Clause 110(1) states —

> (1) This section applies to the following proceedings —
>
> (a) an application for a declaration under Part 2, and the hearing of the application;
>
> (b) an application for the renewal or revocation of a declaration under Part 2, and the hearing of the application;
>
> (c) an application under section 128 for or the cancellation of the registration of an interstate declaration …

Mr J.R. Quigley: Line drawn?

Mr C.C. PORTER: That is it. I put to the member that down the track, in proving one of the stand-alone criminal offences in this bill, the prosecution will have to present evidence to prove the offences set out in this act beyond a reasonable doubt. If they would prefer not to present some of the evidence because it is criminal intelligence, they face two choices, one of which is to not present that evidence. Of course, they are still subject to the normal rules of court and disclosure, and there is some existing capacity under the normal run of a criminal trial to have certain evidence presented to a judge without the defence seeing it. The member is aware that there are certain existing capacities to do that. I recall being in a situation as a prosecutor when the existence or otherwise of a witness was a matter that was presented to the judge, and the Chief Judge of the District Court kept the information in a locked box in her office, and it was exempt from disclosure to the defence. So, exemptions from disclosure presently exist. The prosecution could argue that, and it may fail or succeed; nothing in this bill provides any additional benefit to the prosecution in keeping from the defence matters that would otherwise be disclosed to the defence.

Mr J.R. Quigley: Thank you.

Clause put and passed.

Clause 111: Protection of criminal intelligence information in court proceedings under this Act —

Mr J.R. QUIGLEY: I will save that until part 8, which relates to the parliamentary commissioner's review; that is more appropriate. I think the member for Armadale has the next question to be raised, so I have nothing to raise before clause 113.

Clause put and passed.

Clause 112 put and passed.

Clause 113: Commissioner of Police to keep register —

Mr C.J. TALLENTIRE: Clause 113 raises some issues. I want to raise a fairly generic concern at this stage. I am very aware of the difficulty that the Commissioner of Police is having in maintaining a register. Members may think that I have a thing about guns at the moment, but it is clear that the Commissioner of Police has a serious problem when it comes to maintaining a decent gun register. We have really serious problems there. I wonder about the capacity of the agency and the funding that will be required to maintain this register. We need to hear the level of resourcing to be made available, because any such registers, if left to fall into a state of disrepair, become very difficult to manage and cause all kinds of problems for the community. Will the Attorney General give some assurance as to the amount of resourcing that would be put into the maintenance of this register?

Mr C.C. PORTER: Minimal resourcing will be put into it because it is going to be a very small register. Although I was acting for the police minister and dealing with some matters pertaining to gun licences and it not being an area that I am expert in, I can say there are a lot of Western Australians who have applied for and who now hold gun licences. In fact, I recall one figure that was put to me; I apologise in advance if I am wrong, but there were in excess of 2 000 individuals with more than 10 licences for firearms. Individuals who have fewer than 10 licences —

Ms M.M. Quirk: It may or may not be accurate, Attorney.

Mr C.C. PORTER: It is a number in the thousands. The reason it is difficult to maintain accuracy for those types of registers is that there are thousands and thousands of applicants. Over the first several years of operation of this act, if one or two organisations were declared, that would be roughly what I would expect, and the type of membership that would be affected by the declaration could be counted on the fingers on a couple of hands. Therefore, they will be very small amounts of data—literally the register would be a pen and quill–type situation. It could probably be done on a computer, but we are talking about several pages.

Mr J.R. Quigley: It has to be accessible to the public, though; is that not right?

Mr C.C. PORTER: Yes, it is required to be on the website.

Mr J.R. Quigley: It was just that the Attorney was talking about quill and paper. I suppose it could be scanned.

Mr C.C. PORTER: It could be done using a quill and paper as it will be so brief a document.

Mr C.J. TALLENTIRE: I recall, though, that when we touched on the issue of the transient nature of people who were likely to have their names on the register, we acknowledged that an effort would be required to keep addresses up to date, and that that would take some resourcing. I am sure the Attorney is right; there will not be a lot of names on this list, but following and tracking those people, the whereabouts of individuals and organisations, will take the effort and the resourcing.

Mr C.C. PORTER: There is no doubt there are already significant resources devoted to the types of individuals who will be targeted under this legislation—that is, trying to work out where they are, where they are travelling to, where they are going et cetera. They exist; it is just that those same resources will now be applied to the process of making sure that the information is accurate for the purpose of the register. The member is quite right: a lot of resourcing is required of police in trying to work out who these people are and what organisation they are members of. Having had the benefit of criminal intelligence briefings, I can tell members that those resources are large. The type of information police get is quite astounding at times—albeit imperfect—but those resources most certainly exist.

Clause put and passed.

Clause 114: Publication of information on register —

Dr A.D. BUTI: I raise more a point of clarification, Attorney General. I assume I am correct, unless there is an all-catching exemption somewhere in the legislation, but if by chance the Commissioner of Police puts someone on the register and makes information public and it is actually an incorrect name on that register, the Commissioner of Police is liable for defamation. If the Commissioner of Police is liable for defamation, does that make the state liable? Is it the old separation of powers?

Mr C.C. PORTER: Clause 169 provides for protection from liability for wrongdoing. It is fairly standard in its terms, but it is not unusual for such clauses to be included.

Clause put and passed.

Clauses 115 and 116 put and passed.

Clause 117: Overview of this Part —

Mr J.R. QUIGLEY: I suppose this is more of a second reading comment than a prospective question of the Attorney. It is to do with the interstate control orders. As set out in clause 117(2) —

> An interstate declaration can be registered by a registrar of the Supreme Court without a hearing, and notice of the registration 11 of the declaration must then be published in the *Gazette* and in at least one newspaper …

I am right, am I not, Attorney, that someone does not have to prove the facts behind the interstate control order? I am sorry; it is declarations and orders, so it can be both that can be registered.

Mr C.C. Porter: That is correct.

Mr J.R. QUIGLEY: That was my concern. They are defined as to what a corresponding law is. The only state that has a law that has not been to the High Court at the moment is Queensland, I believe.

Mr C.C. PORTER: Queensland has legislation. New South Wales has provisions in one of who would deem not to be severable, so that legislation is now unconstitutional and has been redrafted. In South Australia, there were several clauses, so they do have some legislation.

Mr J.R. Quigley: But not legislation that could get them to a control order.

Mr C.C. PORTER: No, not the declaratory part, because that was the part the Attorney General found to be in control.

Mr J.R. QUIGLEY: This is a problem, is it not, because when the High Court refers to legislation that may impugn the institutional integrity of the Western Australian Supreme Court, under this scheme of interstate registrations, if the Attorney General is right that our declarations are kosher, nonetheless this whole legislative scheme ultimately depends upon jurisdictions that have not yet passed laws passing laws that will pass muster in the High Court? If jurisdictions pass laws that offend the Kable principle—who knows what Victoria will do?—

it could undermine the whole legislative effect of what we are doing in Western Australia; that is, it would open the door for declarations that were not made constitutionally to become part of the regime in Western Australia.

Perhaps it is for this very reason that Premier Barry O'Farrell, who is Premier of the most populous state in Australia, New South Wales, with arguably the most serious criminal organisation groupings in Australia—historically, it is arguable that Sydney has the worst—recently said that the proper approach to these sorts of laws, given the history of things in the High Court, is by national legislation perhaps through the Standing Council of Law and Justice, formerly the Standing Committee of Attorneys-General. Because there is the capacity; that is what Mr O'Farrell said. Mr Smith, the Attorney General of New South Wales, said in the same article that the New South Wales government was now in the process of trying to redraft the laws to take care of the objections of the High Court of Australia in the Wainohu case. In the same article the Premier of New South Wales, Mr O'Farrell, said, and this is something that the Western Australian opposition would agree with 100 per cent, that there should be national, uniform laws, because the passing in one jurisdiction of objectionable laws, although I do not know that the High Court would go on to potentiality —

Dr A.D. BUTI: I am very interested in what the member for Mindarie is saying; can I hear a bit more please?

Mr J.R. QUIGLEY: The passing in one jurisdiction of objectionable laws by reason of part 7 might bring down the whole legislative scheme of this legislation, because it would open the way and facilitate unconstitutional declarations being registered in the Supreme Court of Western Australia without there being any capacity for the court in Western Australia to initiate any inquiry as to the propitiousness of the declaration made in another jurisdiction under legislation that could be unconstitutional. That is not such a far-out hypothetical statement; because it has already been found that the declarations of two states would have been unconstitutional.

I know that the Attorney General will not wear a substantial amendment to this clause, because he has the scheme of his legislation. But we, as the opposition, wish to point out that legislating for a provision that adopts in an unquestioning manner—beyond question actually; it specifically prohibits questioning of the original declaration—the foundation for a control order in this state has to be repugnant. Moreover, I will move an amendment, which we will come to later and which I have already addressed in my contribution to the second reading debate, to proposed section 221E, which provides a new offence for a person who acts for the purposes of enhancing the ability of a criminal organisation to commit an offence, and we can either prove that that organisation was in fact a criminal organisation or, as I have said before, that element of the offence could be discharged to the requisite standard by the tendering of a declaration. Bizarrely, that declaration does not even have to be a Western Australian declaration; it can be made under a law that would be constitutional and unconstitutional in another jurisdiction. Therefore, to prove an offence under proposed section 221E, the registration needs only to be registered in Western Australia and tendered in a court as proof beyond reasonable doubt of an element of the offence. They are the objections we have to the registration of interstate declarations without questioning, and we seek an explanation from the government about why a court in this state, which is charged with the responsibility of trying indictable offences, an element of which has already been predetermined by declaration, should have its hands so tied by another jurisdiction. This clause will facilitate this to happen in jurisdictions that have flagged they will pass laws, but we do not even know what those laws entail. Therefore, we are blind and deaf to the circumstances under which these declarations might be made in another jurisdiction—whether they might be made constitutionally or unconstitutionally or legally or illegally—but are registered in Western Australia.

For the first time ever I have taken on board what the Attorney General said about us deeming facts to exist in legislation, as in the Weapons Act, which was the subject of discussion in today's matter of public interest debate. Under section 8 of the Weapons Act it is an offence to carry a weapon in a public place with intent. If the intent is pleaded, the defendant has the intent unless he proves on the balance of probabilities that he did not. In this bill there is no presumption that can be rebutted. The declaration is the declaration; the element of the offence is proved and signed off on by a designated person, or whomever, in another jurisdiction in circumstances of which our Supreme Court is ignorant. Therefore, we have a fundamental objection with that scheme.

Mr C.C. PORTER: There is an explanation, and if it is sought, it will certainly be received. I just say that before that one of my advisers has to depart. I seek permission from the Acting Speaker (Mr P.B. Watson) for Mr Mitchell to leave the table.

Mr J.R. Quigley: Is one withdrawing?

Mr C.C. PORTER: Yes, one adviser is withdrawing.

Mr J.R. Quigley: I am sorry I have bored him, chewed his ear and all that, and driven him from your side!

The ACTING SPEAKER: The member has done it to us for years!

Mr C.C. PORTER: He is withdrawing for matters completely irrelevant to the member for Mindarie!

The explanation is firstly as a matter of principle and secondly as a matter of legal procedure. As for the matter of principle, the member is putting the argument that given the fact that there have been constitutional challenges, and indeed successful ones, this, as Premier O'Farrell has indicated, should be a project that is national and consistent, and through which all the states introduce one law. I must say that I am not quite sure that is what Premier O'Farrell said, although my memory of the article—I have read it too—was that he indicated an inclination to a fair degree of consistency and model laws, but based on the comments in that article I am not sure exactly how far he meant for that to go. My view is that this is a perfect example of why it is a wonderful thing to have different pieces of state legislation. This is legislative hothouse federalism at work, because we have had states with various models: the model of Attorney General making the declaration and the model of persona designata with no reasons. We are now at a point at which we have a reasonably clear set of guidelines that we can read into High Court decisions based on the multiplicity of models that have arisen in other states. Had one model law been adopted by all the states and then challenged successfully, another model law would have had to be adopted by all the states and that may have been challenged successfully. I think that process is a slower and more cumbersome one than the wonderful process of different states having slightly different legislation that is attuned to their needs and that is the subject of High Court appeal and High Court comment. Naturally, I would put to the member that there will be a convergence of all of this legislation over time. Indeed, New South Wales has a bill before its Parliament that is largely similar to what is being suggested in this place.

Mr J.R. Quigley: Can I interrupt? Is that with a 221E offence as well?

Mr C.C. PORTER: The member is testing my knowledge there.

Mr J.R. Quigley: That is okay; I do not want to. Proposed section 221E was that new offence of a person facilitating —

Mr C.C. PORTER: I am not sure that the New South Wales legislation includes that offence. There are some salient differences but the basic mechanics of the NSW bill are very similar to this bill and indeed very similar —

Mr J.R. Quigley: At least the declaration and control part.

Mr C.C. PORTER: Indeed, and it is very similar to the old New South Wales bill, except with the provision of reasons that the High Court found the lack thereof to be objectionable. I think there will be a consolidation and a similarity as the legislation develops in each of the states, but the process we have had has been a good one. The second point is a matter of legal procedure, and I take the point the member for Mindarie made. Clause 118 states —

> ***corresponding law*** means a provision of a law of another State or Territory that is prescribed under section 170 to be a corresponding law;

Of course, that will involve the government, through the Attorney General, making a decision that the law in place by which a body is declared in another state is sufficiently similar to this process to warrant the registration of that declaration here. The member's point is a sound one—namely, that if a declaration made in New South Wales is found to be unconstitutional and is subject to a successful High Court challenge, no doubt the end effect is that if that declaration were registered here, the registration falls away. It is no longer a valid registration. However, I do not know quite why that is any different from the situation in which a judgement that compels the paying of money is given in the Supreme Court of New South Wales and registered, as it very often is, in other states such as Western Australia, later comes to be the subject of a successful High Court appeal and the registration of the judgement in WA is just null and void; it falls away. That risk is always run, but what is lost? If we do not register interstate declarations, we have no benefit to even lose. Therefore, I am not sure that the potential for a successful challenge to the declaratory process in another state also, quite correctly, means the potential for a registration made pursuant to that other state's process to fall away is any great disadvantage to the state.

Mr J.R. QUIGLEY: If the registration process and the executive order made under proposed section 170 come to pass, might it not be that the legislation imports the pox, so to speak? In other words, this legislation could possibly fail because part of it would impugn the integrity of the Supreme Court by forcing it to adopt declarations that were not properly made in another state.

Mr C.C. PORTER: I do not think so because the declaratory process under this regime could only be declared unconstitutional by a declaration under this act being successfully appealed to the High Court. If the member has a look at what happened in Totani, indeed, parts of the act were severable from that part of the act that was found to be unconstitutional, and that was inside the same act. My legal view is that if New South Wales had a declaratory process that was found to be unconstitutional and one of its declarations was registered here, the only

consequence of that would be the several making null and void of that registration. That would not infect or, to use the member's language, poison this act. That would not stop, if the declaratory regimes to this act were similar to those successfully being declared in New South Wales, a separate challenge being made to a separate declaration in WA, but it would not make this act unconstitutional.

Clause put and passed.

Clauses 118 to 171 put and passed.

Clause 172: *Bail Act 1982* amended —

Mr J.R. QUIGLEY: This gets back to that bit of a hoary question that I raised earlier during the second reading debate. There was some discourse between the Attorney General and I at that point but I want to formally raise it now during consideration in detail and that is, of course, this new offence. Clause 173 amends the Criminal Code by including proposed section 221E, "Participating in activities of criminal organisation". Of course, the language would be a lot clearer if it stated "a person who, for the purpose of enhancing the ability of a declared organisation". The first question I have for the Attorney General about the proposed amendment to the Criminal Code is: why does it stipulate the "ability of a criminal organisation to facilitate or commit an indictable offence" rather than a declared organisation?

Mr C.C. PORTER: It is not meant to apply exclusively to an organisation that has previously been declared. The idea behind this provision, which is a provision that is adopted from similar provisions in Canadian legislation that have from time to time been successfully applied, is to allow for the separate provable offence of proposed section 221E(1), which states —

> A person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence, by act or omission, participates in or contributes to any activity of the criminal organisation …

The criminal organisation, based on the definition, may be an organisation that has previously been declared or it may be an organisation that the prosecutor in the prosecution for that separate offence 221E establishes is a criminal organisation pursuant to the definition that is contained there. Therefore, it may be that a scenario arises in which the very serious offence 221E can be prosecuted and previously the process of a declaring and control ordering has not occurred or it is considered that this offence is a better way to target the organisation. It allows for flexibility and it is a provision that has been used successfully elsewhere.

Mr J.R. QUIGLEY: At the risk of being seen to be too pernickety, the Attorney General said that this targets the criminal organisation whether it is declared or not, but this does not provide an offence for the criminal organisation; this targets a person.

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: Proposed section 221E(3) sets the bar fairly low in terms of what the prosecution would have to prove about the knowledge of the accused. It does not have to prove that the criminal organisation actually facilitated or committed any indictable offence —

Mr C.C. Porter: Similar to a conspiracy.

Mr J.R. QUIGLEY: Correct. The prosecution does not have to prove the participation or the contribution of the accused actually enhanced the ability of the criminal organisation.

Mr C.C. Porter: Again, similar to a conspiracy—yes.

Mr J.R. QUIGLEY: The prosecution does not have to prove that the accused knew the specific nature of any indictable offence. That will get the same response; it is similar to a conspiracy to commit an indictable offence without having to prove the actual indictable offence.

Mr C.C. Porter: You have to know something about it, but not the specific nature. Of course, as you know, there is a lot case law about that.

Mr J.R. QUIGLEY: Yes. Proposed section 221E(3)(d) states that the prosecution does not have to prove that —

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

Therefore, the accused does not have to know anyone in the criminal organisation or what offence the criminal organisation intended to commit, regardless of whether an offence was actually facilitated by the criminal organisation, yet the prosecution can go around, in that proposed section, as it stands printed, leading evidence to prove that set out in proposed section 13(2) of the bill, which provides for having an organisation declared. The court can have regard to a link that exists between the organisation and serious criminal activity, any criminal convictions of current members, persons who associate with the organisation—all those matters set out in

clause 13(2) of the bill. Those matters might not necessarily be known to the accused. The prosecution does not have to prove that the accused knew that he was a member of a criminal organisation. It is a further step removed to assume that the accused actually knew the things that are set out in clause 13(2)(b) to (f). This is the sort of clause that has the potential for danger, because the words that are used are "criminal organisation", not "declared organisation". The accused person does not know any of the people in the organisation, and he does not know the offence that the organisation was going to commit. The accused might not even know that it was a criminal organisation, because of the matters in clause 13(2). Where is the requirement that the accused must know that it was a criminal organisation vis-a-vis clause 13(2)? What we are arguing here is not the protection of criminals. What we are arguing here is the limit of the stretch and reach of this very serious offence, an element of which can be proved by a piece of paper.

Mr C.C. PORTER: Much of what the member says is correct. Proposed section 221E(1) states —

> A person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence, by act or omission, participates in or contributes to any activity of the criminal organisation is guilty of a crime …

So, the person has to be shown to be participating with a criminal organisation to facilitate or commit an indictable offence. If an organisation is proved to be a criminal organisation by wont of a previous declaration, that is one method. The other method is to prove the existence of the criminal organisation as part of this particular prosecution. What the defence needs to do is elevate the offence of facilitating or committing an indictable offence in conjunction with a criminal organisation. It creates an offence where the organisation meets certain criteria, even if the person does not know that the organisation is meeting those criteria.

Dr A.D. Buti: But that is an absolute liability.

Mr C.C. PORTER: No, it is not an absolute liability. But, again, that is not very different from the offence of conspiracy, because what the person in a conspiracy knows is the offence, within very broad parameters, that the person is conspiring with a group to achieve or commit. All that is required to prove conspiracy is some kind of meeting of the minds to commit an offence that is generally known to one of the conspirators—without that person having any deep knowledge of the identities, the background, the history and the extent or nature of the group with which he is conspiring. So I am not sure that this is particularly novel.

Dr A.D. BUTI: Under proposed section 221E(1), the person knows that he is participating in an activity. The activity may not be criminal, and the person may not know that the organisation is criminal, but the person is still liable. Surely that is different from conspiracy, where the person knows that he is engaged in some sort of criminal act, or some act that leads to criminality?

Mr C.C. Porter: But it is criminality here by virtue of the words "to facilitate or commit an indictable offence" in 221E(1).

Dr A.D. BUTI: But what about the activity? For instance, the bikies have the annual Santa Claus toy ride. I know they are not bikie gangs. But let us say one of the bikie gangs decided to do the annual Santa Claus toy ride. That is an activity that is definitely not criminal.

Mr C.C. Porter: How would a person, in donating a toy to the bikies on their ride, even if they were a declared organisation, be committing an offence?

Dr A.D. BUTI: What if the person went on the ride with them?

Mr C.C. Porter: How would a person, by virtue of going on the ride, be enhancing the ability of a criminal organisation to facilitate or commit an indictable offence?

Dr A.D. BUTI: The person would not be doing that. But proposed section 221E(1) talks about participating in the activities of a criminal organisation. It then goes on to deal with indictable offences.

Mr C.C. PORTER: Yes. The member needs to read the whole of that proposed section. It states, "A person who, for the purpose of enhancing the ability of a criminal organisation". So a person is being prosecuted for doing a thing, which has the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence. The core of the point that the member for Mindarie is making—fairly—is that there may be fairly limited knowledge on the part of the person who is facilitating a criminal organisation to commit an indictable offence as to the nature, extent, depth, powerfulness and membership —

Mr J.R. Quigley: Or even as to whether it is a criminal organisation.

Mr C.C. PORTER: The person would have to be doing it for the purpose of enhancing the ability of a criminal organisation. I think that imports some degree of knowledge—a bit like possession in drug law—on the part of

the person being prosecuted. But that knowledge may not be required, and I do not think is required, to extend as far as the fact that the organisation has previously been declared under this act.

Mr J.R. Quigley: That would be reasonable if it has previously been declared.

Mr C.C. PORTER: I think the member for Mindarie is right. I do not think that this offence extends as far as to require knowledge on the part of the person that the organisation that the person is assisting—that is, to facilitate or commit an indictable offence—is a declared organisation, even if what is being relied on to prove that it is a criminal organisation is the previous declaration. With that much I would agree. But if we are not relying on the previous declaration, and we are arguing that the person has assisted a criminal organisation, the elements of the offence are that it must be proved that the person has acted for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence. There is some basic importation of knowledge into the structure of that language, I would argue.

Mr J.R. QUIGLEY: I would like to get away from teddy bear Christmas rides for a moment and come to an accountant who is approached by a person to set up a trust within which to hide the proceeds of crime, and who does so without knowing that the person is the member of a criminal organisation. That catches the accountant—and the Attorney General would probably say that is a good thing, too. The accountant does not need to know that it is a criminal organisation. It does not need to be proved to the jury that the accountant knew that it was a criminal organisation.

Mr C.C. Porter: You have to prove the person's purpose, though.

Mr J.R. QUIGLEY: He was acting to help hide the proceeds of crime in a trust. I think the Attorney General and I would know that that happens far too often.

Mr C.C. Porter: Indeed.

Mr J.R. QUIGLEY: But he does not know that that person has a wider network behind him which constitutes a criminal organisation.

Mr C.C. PORTER: Under the member's scenario, I do not see how the person would be convicted. Person A comes to person B. Person B is an accountant. Person B has some knowledge that what he is doing with respect to person A is facilitating an offence. But person B does not have knowledge that person A, for whom he is facilitating the offence, is part of a wider organisation. If person B has absolutely no knowledge that person A is a member of a criminal organisation I cannot see how the prosecution will be able to successfully argue that person B acted for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence. The purpose imports knowledge, just as possession imports knowledge in those circumstances.

Mr J.R. QUIGLEY: That is a question, as my friend the member for Armadale was saying, of strict liability. If person B, the accountant, is facilitating person A, and it just so happens that person A, beyond the knowledge of person B, is doing this for a group of people, then person B is captured.

Mr C.C. Porter: I disagree, based on the construction of the words. The elements would be —

> A person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence, by act or omission, participates in or contributes to any activity of the criminal organisation …

They must participate in the activity of the criminal organisation for the purpose of enhancing the ability of a criminal organisation. If a person does not know about the existence of a criminal organisation, it could not rationally be argued that they have done something, an act or omission, to contribute to the ability of the criminal organisation to commit an offence. I do not think that could be rationally argued.

Mr J.R. Quigley: I am testing that against subsection (3); that is, what does not have to be proved. It does not have to be proved that the act —

Mr C.C. PORTER: These are the standard conspiratorial-type provisions. It does not have to be proved that the act or omission actually facilitated an indictable offence. It does not have to be proved that the participation or contribution of the accused enhanced the ability of the criminal organisation or that the accused knew the specific nature of any indictable offence. It does not have to be proved that the accused knew the identity of the person as a member of a criminal organisation. It would clearly have to be shown that the person knew that their act or omission facilitated the commission of an indictable offence by enhancing the ability of a criminal organisation.

Mr J.R. Quigley: So they would have to know it was a criminal organisation?

Mr C.C. PORTER: Yes, that is right. The scenario in which person A comes to person B—person B is the accountant and only considers they are dealing in a nefarious way with person A as an individual—that offence could not be successfully prosecuted.

Mr J.R. Quigley: If we just call it an "organisation" and get away from "bikies"—that misleads us to a certain degree because we think of motorbikes, we think of patches and we think of crime—is the Attorney General saying that accountant B has to be cognisant? He is not assisted by patches walking into his office but he has to be cognisant of those things in clause 13(2)?

Mr C.C. PORTER: No. Again, the prosecution would have to prove that he acted for the purpose of enhancing the ability of a criminal organisation to facilitate an offence. I cannot see how one could successfully conduct such a prosecution if the defence was that the person knew he was facilitating an offence but he had no idea it was for a criminal organisation. If there is simply no evidence of that knowledge, one could not be successful. The purpose of offences such as this, based on the way they have been used—albeit used in a limited fashion in Canadian provinces—is if a person is charged with a conspiracy, they are liable for the penalty of the offence they conspired to commit even if that person does not have specific knowledge of that offence. In the case of conspiracy to murder, a person faces the offence of murder. It may be that the offence a person facilitates a criminal organisation to commit is quite a minor offence, but the gravitas of the offence here is that what is being facilitated is the commission of an offence, perhaps by a criminal organisation. A person would definitely have to have knowledge. It would have to be proved that it was a criminal organisation.

Mr J.R. QUIGLEY: If I could just take the Attorney General up on that last sentence; that is, it would have to be proved that it was a criminal organisation —

Mr C.C. Porter: Exactly.

Mr J.R. QUIGLEY: And proved beyond reasonable doubt.

Mr C.C. Porter: Exactly.

Mr J.R. QUIGLEY: Because it is an element of the offence.

Mr C.C. Porter: Yes. There are two ways to prove it —

Mr J.R. QUIGLEY: I was coming to that. But if the prosecution felt they could not prove that beyond reasonable doubt, they could produce a declaration, if one exists.

Mr C.C. Porter: Yes, if one existed. If the organisation had been previously declared, they could produce that. That stands as evidence that it is a criminal organisation.

Mr J.R. QUIGLEY: The basis for that declaration would be a designated person being satisfied on the balance of probabilities.

Mr C.C. Porter: That is right.

Mr J.R. QUIGLEY: That element of the offence is then proved to the civil standard.

Mr C.C. Porter: Yes, that is correct. If there has been a previous designated authority's decision to declare an organisation to the civil standard, that part of the offence becomes enlivened to the civil standard, whereas if that —

Mr J.R. QUIGLEY: That element of the offence?

Mr C.C. Porter: That is right; whereas if no such previous declaration exists and it has to be proved in the context of the offence proper, it is to the standard of beyond reasonable doubt.

Mr J.R. QUIGLEY: If we take the former—that is proving it is a criminal organisation by reference to a pre-existing declaration by the prosecutor tendering it to the judge and/or jury—that is on a certificate arrived at on the balance of probabilities, but here it is not a rebuttable presumption. That is signed, sealed and delivered, as the song says.

Mr C.C. Porter: That is right.

Mr J.R. QUIGLEY: An element of the offence has been locked down beyond reasonable doubt on the balance of probabilities.

Mr C.C. Porter: That is right.

Mr J.R. QUIGLEY: Can the Attorney General think of anywhere else in the law that that happens; that is, a person is convicted on an element of the offence which has only ever been proved on the balance of probabilities?

Mr C.C. Porter: It happens in the Restraining Orders Act, it happens with fisheries act offences and it happens with environmental act offences.

Mr J.R. QUIGLEY: It does not happen on the trial of the issue. The judge still has to be satisfied beyond reasonable doubt overall of the commission of the offence.

Mr C.C. PORTER: In fact I would argue there is a range of circumstances in which the original fact that goes to make up an element of the offence has not only been previously established on the balance of probabilities—there are many circumstances; fisheries act offences is one—but also one of the facts of the element of an offence relied on is just the stroke of a minister's pen.

Mr J.R. Quigley: I cannot think of any.

Mr C.C. PORTER: Is someone fishing in or out of a designated zone? This is a designated zone because the minister has designated it.

Mr J.R. Quigley: That is a question of law.

Mr C.C. PORTER: No; it is a question of fact. Whether or not the person is fishing in or out of a designated zone is a question of fact. The fact is proven by an administrative action. In this case one of the facts is potentially proven by a previous persona designata's action on the balance of probabilities. I understand exactly the point the member is making, but I do not think it is as unusual as he conceives it to be.

Mr J.R. QUIGLEY: This is only argumentative and will be touched upon yet again during the third reading. Clause 172 of course goes beyond the Criminal Code and touches upon confiscation legislation, the Bail Act and the Sentencing Act. We disagree that an element of all those matters can be a simple declaration arrived at on the balance of probabilities in a hearing, if there is to be a hearing, which can be conducted partly in camera without there being any disclosure to the defence. This is highlighted by the amendments to the Evidence Act which says—I am jumping ahead of myself. I will wait and let clause 172 go through.

Clause put and passed.

Clauses 173 to 176 put and passed.

Clause 177: *Evidence Act 1906* amended —

Mr J.R. QUIGLEY: I will save that for my third reading speech. It is really a wrap-up of a number of things in part 10, including what is contained in clause 177. As I raised clause 177, without going into detail: a lot of this is predicated upon a declaration having been made persona designata and those hearings to be held partly in camera. When dealing with clause 177 and those around it, the Attorney General has said this is really a vibrant example of a federation at work in which different jurisdictions attempt to do different things to the one common good end, if it was that—the control of criminal organisations. The Attorney General went on to say that his colleague the Attorney General of New South Wales—also a former experienced prosecutor—is in the process of redrafting the New South Wales legislation. We were informed in this chamber this afternoon and of course as reported in the media —

Mr C.C. Porter: It is before Parliament.

Mr J.R. QUIGLEY: We are now informed it is before Parliament.

Sitting suspended from 6.00 to 7.00 pm

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