PROHIBITED BEHAVIOUR ORDERS BILL 2010

Consideration in Detail

Resumed from 19 August.

Clause 4: Constrained persons to be natural persons —

Debate was adjourned after clause 3, as amended, had been agreed to.

The SPEAKER: Members, before I give the call to the member for Mindarie, I have had a discussion with the member this morning about this particular consideration in detail stage. The member will indicate to me whether he wants the call by raising his hand. I know that is not the standard procedure of this place—a member would usually stand and seek and call—but the member for Mindarie and I have had a conversation this morning. We understand each other. I believe that the Attorney General now understands the circumstances, and likewise those members who are presently in this place. However, that particular exemption applies only to the member for Mindarie to whom I now give the call.

Mr J.R. QUIGLEY: Thank you, Mr Speaker. I have no comment on clause 4.

Clause put and passed.

Clause 5: Application for PBO —

Mr J.R. QUIGLEY: Attorney General, in relation to clause 5, we did have some discourse on the last occasion as to the meaning of the words "criminal proceeding". I still cannot find those words defined in any other relevant legislation. At that time and having a look at *Hansard*, the Attorney General said that a criminal proceeding could be identified by whether or not the resulting conviction appears on a criminal record. I am referring to the Attorney General's comments in the Assembly on Thursday, 19 August. There are firm rules about what does or does not appear on a criminal record. I am happy to provide those in due course. Does the Attorney General have those rules now?

Mr C.C. PORTER: Yes. I can give the member those rules in one simple sentence. The rule for what appears on a criminal record is the result of a criminal prosecution in a criminal jurisdiction. It may take some while to provide the member with a more substantive summary of that position. In fact, that comment I made on the last occasion was quite correct, and I will explain why I believe that to be the case. The proposition the member was raising related to the definition of "prosecutor" in this bill, which appears in both clauses 3 and 5. In clause 5, the member will see "prosecutor in criminal proceedings" is the phrase used, and in the definition section, which we have already discussed, "prosecutor" is defined by reference to the —

Mr J.R. Quigley: To the Criminal Procedure Act.

Mr C.C. PORTER: Indeed. To summarise section 80 of the Criminal Procedure Act, it provides that in serious or indictable matters the prosecutor can be the Attorney General, the Solicitor General, the State Solicitor, the Director of Public Prosecutions, or a person appointed under section 182 to prosecute who is acting in accordance with the terms of the appointment. It therefore appears that we have no disagreement about the types of people who can prosecute a serious matter, and indeed what those matters are. That much is clear. As the member for Mindarie rightly pointed out, there is also a reference to section 20, which refers to who can commence a prosecution, and which reads —

> ***authorised person*** in relation to an offence, means —
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> (a) if under another written law a person or class of person is authorised to commence a prosecution for the offence, that person or a person of that class; or
>
> (b) in any other case, a person —
>
> (i) who is a public authority or an employee of a public authority; or
>
> (ii) who is authorised in writing by a public authority to commence a prosecution for the offence.

The point the member sought quite validly to make was whether that was not a very expansive situation in that there are a number of acts that authorise a number of people to prosecute offences—if I can summarise it in that way. I put to the member that there would be restrictions on the sorts of offences that could mark out themselves as trigger offences under this legislation. I sought to draw the member's attention to the definition in clause 5 of the bill of a prosecutor in criminal proceedings, which is one of the limiting factors. Of course, the member quite properly asked: what is a criminal proceeding? That is easily and best answered by saying that definitely a criminal proceeding will be evidenced by a conviction that is recorded as part of a criminal record, which in turn requires it to have been a prosecution that was undertaken in criminal proceedings.

Mr J.R. Quigley: That is circular.

Mr C.C. PORTER: It is circular to the extent that I can show the member what is regarded generally speaking as criminal proceedings and what is not regarded as criminal proceedings by looking at the matter that ends up on a criminal record; that is, the matter that is prosecuted in a criminal jurisdiction. The point here is that, as the member points out, "a criminal proceeding" is not a term of legal art that is specifically defined in any piece of legislation in this jurisdiction. We have a general understanding as to what a criminal proceeding is: it is litigation in a criminal court where there is a sanction to enforce a public wrong. Such a proceeding would also contain particular features such as a presumption of innocence and a corollary that the prosecution has the burden of proof, more often than not on the beyond reasonable doubt standard. The requirement is for that standard of proof, although it can be modified in some instances.

I draw the member's attention then to the point that was raised by the Western Australian Law Reform Commission in its very large 1999 report titled "Review of the Criminal and Civil Justice System". It made this comment about this issue about criminal proceedings —

> The line between criminal and civil disputes is not always clear. For example, some may think matters are 'criminal' because of the damage or potential damage certain acts inflict on the broader community and that this results in prosecution of these acts by the State. However, breaches of corporations law or environmental standards are not always treated as criminal acts even though these have serious economic and health consequences for significant numbers of people. Ultimately, it is only how the law treats a dispute which determines what is recognised as a criminal dispute. If a dispute falls within the 'jurisdiction' or province of the criminal courts it is a 'crime' in the legal sense; otherwise it is not.

I think the point being made by the Law Reform Commission is the same point I made the last time we dealt with this legislation.

Mr J.R. QUIGLEY: I wonder if I could hear a little more from the Attorney General on this point, please, Mr Speaker.

Mr C.C. PORTER: I thank the member for Mindarie. There will be offences that can be prosecuted by an authorised person under an act that is not the Criminal Code, the Police Act or other acts of that nature. It might, for example, be the Rottnest Island Authority Act or any number of other acts—the Environment Protection Act and so on and so forth. Not every one of those prosecutions is going to be a prosecution for a criminal offence. I cannot give an exhaustive answer to the member as to which ones are and which are not, or provide him with a list, because that is a matter, as the Law Reform Commission points out, that is treated on a case-by-case basis.

To give some examples, there was an incident recently in which a house was demolished in Claremont. Someone was prosecuted for an offence by a local government authority; I understand that the offence was demolishing in breach of having the requisite certificate or approval to demolish. There may be argument as to whether that is a criminal or civil prosecution, but ultimately the test is whether or not it is prosecuted in the criminal courts and treated as a criminal matter, where the conviction is recorded on a criminal record. The member's concern is that a range of things could be included that look more like civil offences because they are prosecuted by prosecuting authorities under another act, but it is the words in the legislation, "prosecutor in criminal proceedings", that limits it down to the sorts of offences that we see on criminal records, because they are the sorts of offences that have been prosecuted in the criminal courts.

I add at this point that the other matter to consider is the term "offence", which is referred to in sections 67 and 72 of the Interpretation Act. Section 67 talks about indictable offences and simple offences, and section 72 is headed "Statutory penalties". Section 72(1) states that where in an act a penalty —

> (c) is specified at the foot of a section of the Act and expressed to apply to a specified subsection or specified subsections of the section,
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> then, unless the contrary is expressly provided, a contravention of the section or subsection, or, as the case may be, of any of the subsections, is an offence the penalty on conviction for which is the penalty specified.

An offence may be indictable as summary; an offence is something for which a penalty is specified, but not every instance of an offence where a penalty is specified is going to be a criminal offence insofar as it is prosecuted by whatever authority in criminal proceedings. I can only give the member the answer that the Law Reform Commission gave, which is that that line is not always clear, but there is an accepted body of offences that are prosecuted in the criminal courts, are not prosecuted in that way and do not end up on criminal records. If there are offences that the member is concerned about being too expansively included by virtue of this form of drafting, I would be interested to know what they are. I will add another point to this debate, which is that when we look at section 16 of the Criminal Procedure Act, it talks about modified penalties. If the modified penalty

stated in an infringement notice is paid within the period in section 9(1)(f), or any extension of it, and the notice is not withdrawn, the bringing of proceedings and the imposition of sentences are prevented to the same extent as they would be if the alleged offender had been convicted by a court of, and punished for, the alleged offence. Where it is the case that a matter that might otherwise have been traditionally prosecuted in the criminal jurisdiction as a criminal matter is subject to a modified penalty in the nature of a fine, then that matter is not considered to be a criminal conviction or criminal proceedings for the purposes of this act and not recorded on a criminal record. With the bringing of the legislation that the police minister is tabling today, there are a range of offending circumstances that would traditionally have been caught up in the concept of criminal proceedings but will now no longer be. This is even more restrictive than I think the member understands it to be.

I would make two points. Not every prosecution by a prosecuting authority authorised by an act for an offence is a prosecution; the things that are the things that are seen on criminal records. Secondly, even some things that previously appeared on criminal records no longer will because of the legislation referred to.

Mr J.R. QUIGLEY: The opposition's concern is that, couched as it is, it is going to be difficult for the courts to determine whether that which has been adjudicated has been adjudicated within a criminal proceeding without even the need to go to the Commissioner of Police to ascertain how he is going to treat the conviction. I think we are allowed to refer to the briefing in the course of this debate; I do not want to breach any confidences. In the briefing I raised the spectre of the Dog Act. The Dog Act, for example, in section 32(4) provides that if a dog is at any time in any place in contravention of subsection (1), every person liable for control of the dog at that time commits an offence against that subsection unless he establishes a defence under section 33B. The penalty, when the dog is a dangerous dog, is $4 000; otherwise, it is $1 000. There is a fairly significant penalty, a presumption of innocence, and a standard of proof, which is the criminal standard. The opinion of my advisers—which is not binding here, of course—is that that would be captured. I do not know whether the Attorney General would agree with that or not.

Mr C.C. PORTER: There are some offences under the Dog Act that I think certainly more likely than not would be captured. I would point to section 33D, which deals with dog attacks. There is a penalty of $10 000. The provision that the member has read refers to contravention of subsection (1), which refers to a dog, not being a greyhound, being in an area specified as outside a dog area. That may be a criminal offence; I would doubt it, but that argument would, of course, have to be had. Indeed, to achieve that as one of the trigger offences, the prosecution would have to successfully argue that that is a criminal prosecution; and that is, as the Law Reform Commission says, not always clear. I cannot give the member a perfect answer. There are some provisions in the Dog Act for which the argument that they are criminal proceedings would be far more easily sustained than in others. I think that section 33D could sustain the argument that one is involved in criminal proceedings. I am far less certain about section 32, but again, that is another matter that the prosecution would be required to prove to the court's satisfaction, and these things occur with some regularity.

Mr J.R. Quigley interjected.

Mr C.C. PORTER: I am not sure that that would even be the case.

Mr J.R. Quigley: By way of interjection, the substantive offence of permitting the attack or failing to control the dangerous animal would require proof beyond reasonable doubt.

Mr C.C. PORTER: Indeed, and that is one of the indicators of a matter that is a criminal offence prosecuted criminally, but that is not always decisive. Indeed, neither is the extent of the penalty, because there may be prosecutions under the EPA or under other local government regulations, building regulations or the Health Act where there are very substantial penalties in the tens of thousands of dollars, but those are generally not treated by the courts as an exercise of their criminal jurisdiction, even if they have large penalties and even if there is a requirement of proof beyond reasonable doubt. If the member for Mindarie says that that is a problem, it is a problem that has always existed, as the Law Reform Commission has pointed out. That problem is that the defining line between a criminal prosecution and a non-criminal prosecution for some or other offence is one that is argued in proceedings themselves. Many things might flow from that. The reason that it is sometimes argued is the fact that the former appears on a person's criminal record. It may have implications for a person's natural ability to travel and get a visa and so forth. These matters, as the member for Mindarie is aware, are matters that are sometimes argued in the courts. It is another hurdle that the prosecution has to face before the other hurdles come into play. I understand the point the member is making. However, I cannot provide him with a definitive list of every single offence in all the Western Australian statutes and tell him what would result in a criminal proceeding and what would result in a non-criminal proceeding, because no-one has the answer.

Mr J.R. QUIGLEY: With a view to providing certainty to the judges, would it not be preferable to say "anyone convicted of an offence against any of the following", without drilling down to specific offences? It could be

anyone convicted of an offence under the Criminal Code, the Police Act, the Misuse of Drugs Act and the Road Traffic Act.

Mr C.C. PORTER: That would be one way of approaching the problem. The other way of approaching the problem is to leave the court's discretion at large in determining what is a criminal proceeding and what is an antisocial behaviour offence. Simply trawling through all the offences in Western Australia might not provide a list that is adequately inclusive of the sort of offences.

Mr J.R. Quigley: I was not going through each of the offences, but the legislation.

Mr C.C. PORTER: But the problem with that is that if we say any offence under the Dog Act is a criminal offence for the purposes of this, the net will be cast too wide.

Mr J.R. Quigley: I agree. I don't think the Dog Act should be in there.

Mr C.C. PORTER: There are some very serious offences in the Dog Act. I will provide the following fair example. Under the Rottnest Island Authority Act, regulation 69 refers to the damage of property while regulation 70 refers to assault and other offensive behaviour. Those offences are prosecuted by Rottnest Island Authority rangers. That is a fair description of them.

Mr J.R. QUIGLEY: I would like to hear more from the Attorney General.

Mr C.C. PORTER: It seems to me that that is an offence that is likely to be prosecuted by a prosecutor in criminal proceedings. It is likely, although we have not determined to put it in the schedule, that a court will consider that as an antisocial behaviour offence. It is also precisely the sort of behaviour that this legislation is meant to pick up.

Mr J.R. Quigley: You could put it in the Rottnest Island Authority Act.

Mr C.C. PORTER: We could, but then the more minor offences in that act would also be deemed to be criminal proceedings. That approach is far less safe than the approach of leaving it to the discretion of the courts to determine what is being prosecuted in criminal proceedings and what is an antisocial behaviour offence.

Mr J.R. QUIGLEY: I made some inquiries after this matter was last before the Assembly. I understand that the police keep two sets of records—a person's traffic record and a person's criminal record. People can apply for either. If people went for a clearance certificate, as they have to do if they want to work with kiddies, they might get a clearance because their record shows no convictions, whereas they could have a traffic record. As I understand it, it is the government's intention that reckless driving with the aggravated circumstances collectively known as hoon offences will be within the catchment of the bill currently before the chamber. Does that relate to all traffic offences, because that is a traffic offence, although it is a serious traffic offence? Is it only that traffic offence or is it other offences? We can look at this from both sides of the spectrum. We can look at section 61 or 62—I cannot remember which; it has been a while—which refers to careless driving and driving without due care and attention. That is at the lower end. We can also look at the offences that are above hoon offences, such as dangerous driving causing bodily harm or dangerous driving causing death. How do we derive what is caught in the scheme of this legislation, if I can put it that way?

Mr C.C. PORTER: The ultimate answer to that question is that the courts determine that. It is a fair point. Yes, the police administratively keep two records—a criminal record and a traffic record, if people have them. That is not to say that there are not some offences in the Road Traffic Act that will appear on a person's criminal record—some do with regularity. I refer to dangerous driving and reckless driving, which appear on a person's record. Others will never appear on a person's criminal record. My point is that it is highly indicative that not every prosecution under the Road Traffic Act is likely to fall under the concept of a criminal proceeding. A good indicator of the things that fall under that concept is those that appear on a person's criminal record. Those that appear on a person's traffic record will be indicative of things that do not fall within the ambit of criminal proceedings. As the member for Mindarie pointed out, some very serious matters, some midrange matters and some far less serious matters can be prosecuted as offences under the Road Traffic Act. Sitting underneath that are matters that will be dealt with by infringements. They will never be included in this process. As I have indicated, the schedule will provide some offences that we presume to be antisocial behaviour offences. I refer to section 59, "Dangerous driving causing death, injury etc."; section 59A, "Dangerous driving causing bodily harm"; section 60, "Reckless driving"; section 61, "Dangerous driving"' section 62, "Careless driving"; and section 62A, "Causing excess noise, smoke", which are the hooning offences. It is not inconceivable that some offences that sit slightly underneath that stratum of offences could be considered by a court to be prosecuted by a prosecutor in criminal proceedings and of an antisocial behaviour nature, so they could form the basis of a trigger offence. That, of course, itself is not a sufficient condition, but that is a possibility. In the world of criminal and civil law, where there is a grey area in the difference between a criminal prosecution and a prosecution that is for an offence and a penalty that is not criminal, the court will be required upon application of

the prosecutor to be satisfied of what was occurring before it was a prosecution for a criminal proceeding. There is no question that not everything in the Road Traffic Act would meet that requirement.

Mr J.R. QUIGLEY: I am not comfortable leaving it to a court to work out. I am having difficulty trying to fathom how a court will make that determination without asking the commissioner or his representative how he will record the conviction within the system.

Mr C.C. PORTER: First of all, on many occasions the member for Mindarie has rather unkindly criticised me for not having trust in the judiciary. In this example we have proposed enormous trust in the judiciary to make sensible decisions based on law. It is often the case that courts will be asked because it is pivotal to an outcome to determine what is a question of fact and what is a question of law and whether it is a criminal proceeding or a non-criminal proceeding, notwithstanding that it is a prosecution for an offence. I have no difficulty in allowing the courts to make those assessments, as they do on a daily basis already. The reason that they are sometimes required to do that as things presently stand is that things flow from that distinction.

Mr J.R. Quigley: Whether it is a criminal proceeding will be determined within a PBO proceedings itself. It will be on the balance of probabilities whether it is a criminal proceeding.

Mr C.C. PORTER: That is probably a fair assessment, because the elements of the offence must be proved beyond reasonable doubt, but with the jurisdiction, if I can put it that way, the court has to be satisfied on a 50 plus one per cent balance.

Mr J.R. QUIGLEY: The following matter is whether appellate proceedings are criminal proceedings, because they are not normally considered as criminal proceedings.

Mr C.C. PORTER: Why does the member say that?

Mr J.R. QUIGLEY: Under the rules of court, are District Court appeals criminal proceedings? I am thinking about when there might be an appeal by a prosecutor or an appeal by a person against an order being made.

Mr C.C. PORTER: If there is a matter of an appeal of the conviction of a person in the Supreme Court on a murder charge, that is clearly a criminal proceeding. I do not think that there would be any argument about that. The appeal, I would also say, is a criminal proceeding, albeit different rules apply procedurally to the appeal from the rules that applied at the trial. However, in any event that is somewhat irrelevant because of the fact that the criminal proceedings that we are talking about, whereby the prosecutor makes the application, are the proceedings for conviction.

Mr J.R. Quigley: Unless he has been acquitted and they appeal and a conviction is imposed.

Mr C.C. PORTER: Indeed, and in those circumstances it seems to me that the way the bill is drafted is that if someone is found not guilty after an appeal and the trigger offence was the offence successfully appealed against, the prohibited behaviour order falls way.

Mr J.R. QUIGLEY: I was thinking about the other way round with a prosecution appeal in that they did not get a PBO so they have gone on appeal.

Mr C.C. PORTER: Yes, in those circumstances the member is talking about the appeal of an acquittal —

Mr J.R. Quigley: Or a refusal to make the PBO at the first instance, such as the magistrate or judge has had the application after conviction but prior to sentence and has declined to make the order and it goes on appeal.

Mr C.C. PORTER: I understand what the member is saying. The criminal proceedings referred to are the proceedings associated with the offence; therefore, that is the starting point for the PBO process.

Mr J.R. Quigley: Those are all the matters that I have arising from clause 5.

Ms M.M. QUIRK: I note in clause 5 that the prosecutor makes the application for a prohibited behaviour order or that the court can do so on its own motion. The prosecutor is either a police officer in a court of summary jurisdiction or a Director of Public Prosecutions officer elsewhere. Obviously, the material before the court in relation to a PBO is much broader and that is dealt with in clause 9. However, I think it is relevant to clause 5 in that it would need to be prepared. This material is broader than that contained in a brief for prosecution of the substantive criminal offence, and clause 9 sets out what matters can in fact be considered in making a PBO. Therefore—I am rather rambling—my questions are: Who is responsible for having that information compiled, prepared and ready to go? Has there been any assessment of the additional resources that that effectively imposes on someone or other, I presume it is the police—the Attorney General can clarify that—to have that other information on the off-chance that the court, for example, orders a PBO of its own volition or if there is an intention to apply for an order by the prosecution itself?

Mr C.C. PORTER: I understand that the member's questions are about resourcing. I start by saying that of course one of the first things that I did in drafting this legislation was liaise very closely on an ongoing basis with

the police about what sort of resourcing needs they might require. The member might have found from her own experience as a minister that the police are never demure or modest in seeking resources when there is any form of legislative change. The government can make a small change to legislation and there will be an Economic and Expenditure Reform Committee proposal for $X million to ensure that that legislation is properly resourced! I can say hand on heart that in none of my dealings with the police when they saw the form of legislation did they request extra resourcing. I do not find that surprising in the sense that I do not consider that they will need substantive extra resourcing. That might be somewhat surprising given their track record in arguing heavily for resourcing based on legislative change. However, I think the reason that it is unlikely to require a substantive increase in resourcing, for instance, in the police prosecution division, at this point is by virtue of a number of factors. The first is that when we considered how many of these types of applications might be made and granted, we looked at offending data per capita in the United Kingdom for the population of the United Kingdom, the system of criminal-based orders that existed there, and, keeping in mind that the UK system is not a two-strike system, that criminal anti-social behaviour orders in the UK based on criminal conviction require only one criminal conviction for an offence. Therefore, we extrapolated from that broad data how many applications we might expect to receive in a year and how many applications might be made. We think that perhaps 70-odd applications a year will be successful. We considered that, obviously, more applications will be made than are successful. However, in the bill we ensured that the evidence that needs to be presented is of the nature of things that are easily obtainable and compiled. We have ensured that the evidentiary provisions will not be onerous on the police.

The member pointed out that the matters to be considered by a court are detailed in clause 9. Clause 9 states that a court must have regard to the general matters of the desirability of protecting other persons and property and the degree of hardship that may be caused to a person if the PBO is made. The individual matters that a court can have attention to, but they are not exclusive, are: other current legal proceedings involving the person, which should not be difficult for the police to access; the person's criminal record; any sentence to which the person is subject; any order made under a written law; any previous behaviour similar to that the PBO is sought for; the extent to which the person complied with any previous PBO; and other matters the court considers relevant. Given that this is happening at the time of conviction, police prosecutors will likely have this sort of information before them for the purposes of sentencing in any event. It may require some extra work in compilation of the application and the brief, but the other thing to keep in mind is that the evidentiary provisions in clause 26 are relatively generous to the prosecutor in terms of progressing the matter. Clause 26(3) provides that without limiting the evidence, one can admit as evidence any record as defined in the Criminal Procedure Act and evidence given in the related prosecution; therefore, the transcript would be sufficient in those circumstances. The person's criminal record can also be admitted as evidence. These are all relatively standard provisions, which I think are also used heavily in the Restraining Orders Act, that state that transcripts, criminal records, statements of material facts and so forth are proof of the matters alleged within them, so there is an elegance to the way in which the evidence is presented. Therefore, I cannot conclusively say that it will not involve some extra work for the police prosecutors and, indeed, DPP prosecutors, but there was no request from the police for extra resourcing, which to me is the strongest single indicator that they think that they can do it within the existing budget.

Ms M.M. QUIRK: The Attorney General would certainly concede that this information is not necessarily all at hand and that it will require some level of coordination to get all this evidence. It is not necessarily all there at the police's disposal; it will require making phone calls, writing letters, and requests and so on to gather all this material. Therefore, additional work will be generated. I wonder whether the Attorney can see the irony in that the government moved the second reading of a bill today that is supposed to clear police of the need to do pesky paperwork, yet here it is creating a situation whereby it is in fact expanding the police role.

Mr C.C. PORTER: In the criminal penalty infringement notices legislation, the types of police who are obviated of the need to undertake paperwork are police who are particularly at the point of arrest at the incident. Yes, we will require extra paperwork of police prosecutors but paperwork is their job; that is what they do. Therefore, I think that that distinction can be drawn. Let me also say that having potentially gone down the track of providing police prosecutions with an additional budget to undertake these orders, that can have the effect of ratcheting up the number of orders made that are not successful at a higher clip. By having this system work within budget, the police prosecutors will be targeting their applications at those people for whom the police feel there is a very strong, if not overwhelming, case that all the requirements in this bill, which in my view are relatively onerous, are met. Not giving additional resources will provide a more targeted and sensible response for the number of applications. The worst thing would be that a number of applications were compiled with the effort that the member quite rightly pointed out would be required and they successively failed. At least in the first instance the police will be targeting applications with a very high likelihood of success.

The final point I make about the argument the member raised, which certainly is a fair one, is that by trying something different with the cohort of offenders whom we are trying to curtail and potentially have a sanction against if they breach the order, it will obviously be at the police's absolute discretion as to whom the police issue a criminal penalty infringement notice, and that discretion gets read down once someone has been convicted of a disorderly conduct offence, for example, on a number of occasions. By the time the CPIN system runs contemporaneously with this provision in the bill and a person has ratcheted up a large number of disorderly conducts or whatever they may be, he will be given not only cautions and be potentially dealt with by juvenile justice teams, but also CPINs when those matters would not in themselves appear on the offender's criminal record and be the basis of a strike. Indeed, they could not be used under those evidentiary provisions. Sometimes resourcing is also a limit to the administering agency to target its behaviour and resources at the persons that the legislation seeks to target.

Mr J.R. QUIGLEY: On the question of resources, which was raised by the member for Girrawheen, looking at it in a practical sense, when an offender is brought before the court and convicted—this will come up again in consideration of clause 10—the sentencing then includes a range of options for constraining the person's conduct in the future. I am thinking of conditional release orders, community-based orders and intensive supervision orders et cetera. The matter can be disposed of then and there with the same constraints that will be imposed under this legislation, apart from the naming and shaming provision. Why would it be preferable for a prosecutor to say that he may now make an application pursuant to proposed section 5(1), as opposed to seeking a similar restraint under a CRO, CBO, ISO or other provisions? It would not have to go off to another hearing date and no notices would have to be served. I will not go through each of the provisions, but they are examples. Where is the driver to go for a prohibited behaviour order, as opposed to any other order?

Mr C.C. PORTER: Again, that is a point that the member raised previously. I put the view previously that in a number of ways these orders are quite different from the orders that the member mentioned. Indeed, the differences will provide an incentive for the police prosecutor or the Director of Public Prosecutions prosecutor to apply for them. I am happy to go through each of those other types of orders and raise the distinctions. I am also happy to table the matters that we have found on the internet with respect to similar orders that have existed in the United Kingdom. I will give the member an example from the first page of the matters that we have printed. An individual is prohibited from deliberately touching any motor vehicle not owned by him without the permission of the owner. I have never seen such an order in our court system.

Mr J.R. Quigley: Is that a CRASBO or ASBO?

Mr C.C. PORTER: That is an anti-social behaviour order.

Mr J.R. Quigley: That is not conviction based.

Mr C.C. PORTER: No, but that prohibition exists in some of the criminal anti-social behaviour orders as well. It is a prohibition that is used quite regularly in the United Kingdom in ASBOs and CRASBOs. I have never seen an order like that in the Western Australian court system. That is not to say that conceivably it could not be sustained, although I very much doubt it. The member may or may not agree with me that if a magistrate or judge said that he would give an offender a conditional suspended imprisonment with conditions, one of which was that the offender could not deliberately touch any motor vehicle not owned by the offender without the permission of the owner, the first thing a good defence counsel would do is say, "Your Honour, I have never heard of such an order. On what legislative or statutory basis do you impose such a restriction on this person's civil liberties?" No doubt that is what the member for Mindarie would say if he were a defence counsel.

Mr J.R. Quigley: I wouldn't, because you would go straight to the Sentencing Act and you would be a fool to say that any order —

Mr C.C. PORTER: Tell me which part of the Sentencing Act.

Mr J.R. Quigley: Certainly. I will come to that in a moment.

Mr C.C. PORTER: What the member would probably say—if I can cut his search short—is that a conditional release order can include directions to offenders that the court considers reasonably necessary to secure the offender's good behaviour. The absolute high point of the argument is that a provision like that and the many others that have been generated in the United Kingdom system is reasonably necessary to secure the offender's good behaviour. Please do not tell me that the member for Mindarie would not argue in favour of his client not having such a condition imposed on him because that condition is not supported by that form of words. However, it is clearly, as a matter of practice in the United Kingdom, supported by the words that we have borrowed from the UK legislation; that is, anything considered reasonably necessary to reduce the likelihood of a person committing a relevant offence. That is a quite different form of words.

Mr J.R. Quigley: By way of interjection, so you can compare those two forms of words, under section 47(a) the words are very similar. There are reasonable grounds for expecting that an offender will not reoffend during the term of the CRO and the offender does not need the CCO.

Mr C.C. PORTER: That is not the basis for making the direction to the offender, is it?

Mr J.R. Quigley: No.

Mr C.C. PORTER: These are quite different forms of words. I argue that the words that have been used in this legislation are deliberately designed on the UK judicial precedent to support a range of restrictions that would be legitimately argued against if any court ever attempted to give those arguments here.

Mr J.R. Quigley: I don't think you can legitimately argue against those. I don't think the courts have really tested the limits of that legislation in any way.

Mr C.C. PORTER: I believe that the reason we have never seen such an order and that it has never been tested is that there is an acceptance that the words that are used in conditional release orders and so forth would not support those types of orders. This is only one part of four different parts of why the prohibited behaviour order system is very different from a CRO or a conditional suspended imprisonment. Consideration must be given, firstly, to the circumstances in which the orders can be made; secondly, to the constraints that can be imposed, which we have just spoken about; thirdly, to the manner in which the orders are policed; and, fourthly, the penalties for breaching the orders. If I stick with the example of a conditional release order and there is a sentencing disposition, it can be imposed only when there are reasonable grounds for supposing that a person will not reoffend. This is almost the complete opposite of a PBO, which is issued when a court considers that an offender is likely to continue to offend in a certain way. The bases upon which the provisions would be able to be enlivened are very different.

Mr J.R. QUIGLEY: However, section 47(b) of the Sentencing Act states—there are two parts there—that a magistrate issues a CRO only if there is a likelihood that the offender will not reoffend, otherwise a community correction order will be issued; that is, if there is not a likelihood or an expectation that the offender may reoffend under section 47(b), there is the possibility of issuing a CCO with some supervision. The problem I have with the prohibited behaviour orders is that there is no supervision or surety requirement. I understand the distinction that the Attorney General is making that an offender would be issued with a CRO only if there was an expectation that the offender would not reoffend. Nonetheless, if an offender breached the CRO and came back to the court, he may be released again with or without sureties regarding his future good conduct. No surety is required under a PBO, so there is less grip on the offender.

Mr C.C. PORTER: Let me give this example of the words in CROs—I should not refer to them as conditional release orders, because they are not short for anything—"reasonably necessary to secure good behaviour". They do not, as the member has pointed out, appear to have been the subject of direct appellate consideration. Perhaps the member could give some consideration to this: the limits on the curfew requirements for an ISO, which the member might argue are at least as onerous as the CRO requirements, were considered in a matter called Windsor v Stewart, which was single judge appeal 1094 of 1997. In that matter an offender, who was sentenced for offences involving assaulting a taxidriver, ripping out his radio from the dashboard and choking him with the cord, successfully appealed against an ISO curfew that required him to remain at home on weekends. This is what Her Honour Justice Wheeler said —

> Nothing in the circumstances of the offence or in the pre-sentence report suggests that there was a high risk of the appellant offending at weekends particularly, so that there would appear to have been no justification for making such an order pursuant to s75(1)(a) of the Sentencing Act. In that case the order could have been justified only pursuant to s75(1)(b), which would allow the making of such a requirement in order to subject the offender to short periods of detention at the place where he lived or at some other specified place. However, having regard to the circumstances of the damage offence, although it was for the reasons I have mentioned a relatively serious matter, it is not apparent on the face of it that it would justify a detention in addition to other requirements of the intensive supervision order.

That is an example in which the legislative response and the provisions were not able to support an order of the type that I think, based on the English precedent, would clearly be supported here.

MR J.R. QUIGLEY: Is it right that the sort of restraint that the Attorney General is talking about there was one of weekend detention? I am just looking at the sorts of restraints here, and it does not appear in clause 10 that that sort of restraint would be, by way of weekend detention, available anyway under a PBO, so that this case is not to point really.

Mr C.C. PORTER: No, it is to point, because what this case shows is that there are limits on the curfew provisions as they exist at the moment—real, clear and definable limits. PBOs are not about curfews, but clearly the limit to curfews extends to the sorts of orders that would be found under PBOs, which are "do not go to a shopping centre; do not be out at this time". A curfew can place a person in a position for a period of time, but a curfew cannot stop that person from doing certain things while he is outside his curfew time.

Mr J.R. Quigley: This was to stay home on the weekends, which is weekend home detention. That is what it amounts to. The point I am making here is that under that, an order could still be made that he not go near taxis.

Mr C.C. PORTER: Under what—an ISO?

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: How?

Mr J.R. Quigley: Why not? I will just go to —

Mr C.C. PORTER: I will let the member go to something, but let us have a look at an ISO, and something very similar, which is an intensive youth supervision order. They are community-based sentencing dispositions. They are generally imposed for quite serious offences. So there is the first difference. Someone would have to have committed a very serious offence to get one of those orders, whereas the trigger here will be a less serious offence for a PBO. They can be made only when a pre-sentence report has been conducted. They can include directions that the court considers reasonably necessary to secure the behaviour. Again, that is a very different form of words and will have very different limits from the form of words that has been used in our legislation. They can also include a curfew requirement. That has to require an offender to remain in a specific place for a specific period and submit to monitoring or check-up from community corrections officers. We would say, first of all, that the circumstances in which an ISO can be obtained are different from that of a PBO. The circumstances are more restrictive. The circumstances for getting a PBO are broader. Secondly, the form of words that allows a person to have a non-curfew restriction is very different from that under a PBO and would support different types of behaviour. Thirdly, there is the manner in which they are policed. We will go into publication in a moment. Fourthly, of course, what happens when there is a breach of an ISO? The breach is policed by a fine of up to $1 000, and potentially re-sentencing for the original offence. Again, there is no system that sets up a separate —

MR J.R. QUIGLEY: Could I hear some more from the Attorney General on this subject?

Mr C.C. PORTER: On the fourth measure of how they are different, which is how the breaches are policed and how the offenders are punished, there is a completely different situation. For instance, if we go back to CROs, they are sentencing dispositions and they are imposed where there are reasonable grounds for supposing that a person will not reoffend, which is completely different from the basis on which a PBO can be given. They can include directions to offenders if the courts consider, again, that it is reasonably necessary to secure the offender's good behaviour. There will be very different limits there from the formulation in this bill, which is reasonably necessary —

Mr J.R. Quigley: You could tell him not to go near a taxi, couldn't you?

Mr C.C. PORTER: Is that right, though?

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: That would be highly unlikely.

Mr J.R. Quigley: It is completely different from ordering someone to detention for a weekend.

Mr C.C. PORTER: How could it be argued that it was reasonably necessary, to secure a person's good behaviour, that he not touch or go near a taxi? What if he is catching taxis to his appointments with his Department of Corrective Services counsellor? If a condition of his offending has something to do with taxis, and it was argued successfully that it was reasonably necessary to reduce the likelihood of that, there would be no arguments that could be mounted under the existing system that would allow that sort of prohibition; but that is exactly what is contemplated by the term "reasonably necessary to reduce the likelihood of a person committing a relevant offence". Finally, if we look at a CRO again, if a CRO is breached, it results in re-sentencing for the original offence and possibly the imposition of an additional fine for the breach, rather than a separate sentencing process and a prospect of imprisonment. So again, for a CRO, which is dealing with the lower levels, the prospect of imprisonment for the breach of a CRO is virtually non-existent, whereas the prospect of the breach of a PBO resulting in imprisonment is going to be much higher. So there are substantially different things.

MR J.R. QUIGLEY: I understand that the Attorney General's measure is that the prospect of imprisonment is much higher for the breach of a PBO than it is for a CRO perhaps, but he cannot forecast that because he does not know whether the offender will be given a non-custodial term. But surely the Attorney General would agree that for securing behaviour into the future, the CRO has more capacity on the re-sentencing, as he has just read out, with or without a surety. The member for Scarborough, in her second reading contribution, said that it is about time the families took responsibility for and exercised some family authority over these youths who catch the bus down Scarborough Beach Road to Scarborough Beach. That is exactly what would happen, is it not, when a person was released on a CRO with a surety, because the surety has to vouchsafe the further good conduct or lose the sum of the surety?

Mr C.C. PORTER: I am not contending that CROs are without some merit, and that may be one of the merits of CROs, but when we identify that cohort of offenders, both adults and juveniles, who repeatedly offend at this low level to quite remarkable levels, what we can conclude for that cohort is that the parents' fear of losing the surety, which they may or may not have entered into under a CRO, is not sufficient to stop these people from offending. I am not criticising necessarily the efficacy of CROs in some instances, or some of the other orders, but this presents—we may differ on this—a PBO as a very different regime. The triggers for it are very different. The types of orders that we can and will see under this system are very different. The types of responses in policing will be different, and the types of responses for a breach will again be very different. It is meant to target a group of offenders for whom we know that CROs, CBOs, ISOs, IYSOs, conditional suspended imprisonment and VROs are not working to properly contain behaviour because they statistically exist. We know that they exist and we know that these things are not properly containing their behaviour. I am not pretending that PBOs will be a silver bullet in respect of their behaviour, but why is it not reasonable to try a system targeted at those people if we find that the existing system is not curtailing their behaviour?

Mr J.R. Quigley: I would say two things in response to that. I think it was a rhetorical question.

Mr C.C. PORTER: I do not think there is such a thing with the member for Mindarie!

Mr J.R. QUIGLEY: However, I would go along with that and say: yes, why not experiment with that if it did not include the further experiment of naming and shaming. When the Attorney General says the current regime of non-custodial orders is not working because of the number of offences, my experience in the courts is that it is rare; it is not usual at low-end offending for these orders to be used or for prosecutors to seek the orders. I used to go to court with a bundle of minor offences. The prosecution would never stand and seek an order. I cannot think of the last occasion a prosecutor stood to say, "I want a conditional release order on this person to contain his future behaviour." Occasionally the bench, when looking for a disposition, would initiate a low level order, a CRO. I say "low level" in comparison with an order involving an element of supervision. That is the first comment. When the Attorney General says it is clear that these orders are not working to stem the tide, is that a point of argument or is that based on evidence? I do not see evidence of breaches of these orders or even that sufficient numbers of those orders are being imposed.

Mr C.C. PORTER: That might be a bit of a circular argument, but I see the point the member is making. I assert that the evidence that this suite of existing orders is not working, particularly orders such as CROs that are directed at lower level offending, is the existence of the people who our actuarial analysis has identified are engaged in multiple low-level offending without any imprisonment at the end of the day. By way of counterargument the member says, "Is that not simply a measure of the systemic problems that police are not asking for these orders?"

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: The member may have slightly different experiences from me. I recall CROs being sought and given.

Mr J.R. Quigley: Probably in indictable matters.

Mr C.C. PORTER: Again, I recall them being sought and given in a range of matters. A matter might be indictable but nevertheless at the lower level of seriousness. I recall CROs being sought and received for summary matters. It may be that all the best laid plans of legislative mice and men are such that the people who are on the ground—the police prosecutors regularly sentencing the individuals we have identified—have themselves determined as a matter of practice that a CRO is appropriate for a prolific low-level offender. The recourse for a breach of a CRO is yet another fine rather than a separate sentencing or the prospect of a return to prison, keeping in mind that many of these offences in and of themselves do not allow for a term of imprisonment, so one could not be sought at re-sentencing. It may be that the phenomenon the member is identifying, if it exists, is a recognition from the people who deal with these matters day by day in the Magistrates Court that CROs are not an order of great efficacy for this cohort of offenders we are dealing with. In those circumstances the government proposes to try a more robust type of order. One part that makes it more

robust relates to publication. I know the member for Mindarie's objection to that. When we no doubt debate that clause we will look at all the circumstances required for publication and the safeguards that I argue are inherent in the system of publication. I believe we have to have publication in this system to make it operative. One thing that makes a difference is the ability to involve the community in its own protection by identifying the people who are the subject of the order, and breaches can be reported to police. If we are to have such a system, the one we have devised is moderate and cautious with plenty of safety valves built in through the legislative process.

Mr P. PAPALIA: I have listened with interest to the Attorney General's last comments. How does the Attorney General answer the question, perhaps even criticism, that the reason he has introduced the legislation in this manner is to reduce resources that are required to restrict poor behaviour and enforce good behaviour? What the Attorney General proposes calls upon the public to get engaged in this process, but, by doing so, he is effectively taking responsibility away from community corrections officers by way of other orders and not providing government resources to the process, other than a website. How does the Attorney General counter the criticism that this may just be an attempt to be seen to be doing something but without actually doing anything—without providing new resources to the task of inhibiting poor behaviour?

Mr C.C. PORTER: The resources that might be used in the system of prohibited behaviour orders effectively occur in two parts of the police force. One part is the police prosecution division. I had a discussion with the member for Girrawheen about how evidentiary proceedings mean there will be extra work, but at this stage police have not identified the need for extra resources. There is not a resource loss there. The other resource is police on the ground. Whether police are patrolling an area or being called out by members of the public with respect to any behaviour considered worthy of contacting police to seek their assistance, those resources exist. We propose an extra legislative tool to existing resources. When an offender is found to have reached a certain standard of criminal misbehaviour and is no longer able to be diverted from the system, we are equipping the police and the community with an extra tool to potentially take that person out of circulation. Either he or she abides by the order, or he or she does not and is caught and faces the potential of incarceration by virtue of the breach.

I use the example of the order I read out earlier about someone not able to touch or approach a vehicle he does not own. It might be the case that someone had multiple offences of stealing a motor vehicle, had not yet received a term of imprisonment, had met all the requirements of this legislation and was subject to a PBO that restrained him in that way, and a member of the public at a shopping centre saw that person's picture and saw him approaching the vehicle and rang the police and the police attended. That situation is certainly not beyond the realms of possibility. Without the PBO the police cannot do anything. With the PBO, the person can be charged with a breach of the PBO and potentially face serious punishment. That does not detract from the existence of policing resources, which are policing in any event. It gives existing policing resources an additional tool to charge a person who engages in behaviour that the courts have determined is predictive of further offending. In that way it gives more legislative scope to existing resources.

Mr P. PAPALIA: I do not think the Attorney General and I will end up agreeing on this. I suggest that the prime objective of the Attorney General is to be seen to be doing something. I understand the observation made by the Home Office in the UK that effectively the only real outcome of anti-social behaviour orders is that the government is seen to be doing something. That seems to be what we are focused on here. If the government felt the legislation currently available to police and other agencies to inhibit this type of behaviour was inadequate, a response could be to increase the resources, particularly of people who are responsible for supervising people who are already under other orders. We are giving responsibility to the public and relying upon that sequence of events that could conceivably occur but may not very likely occur on very many occasions, or may in fact occur more frequently than the Attorney General anticipates through members of the public either misidentifying or inappropriately reporting people that they assume to be on PBOs. I think, eventually, that the Attorney General will achieve his objective of trying to be seen to be doing something, but whether there will be a better outcome is another thing entirely. That was just an observation; the Attorney General does not have to jump up and respond.

Mr C.C. PORTER: I will give the member a counter-observation. We will have to agree to disagree on the contention that the sort of scenario I have just described is unlikely or does not play out that often. The whole point of the Prohibited Behaviour Orders Bill 2010 is that it plays out regularly in the criminal records of the individuals we are seeking to target, whether it be motor vehicle theft, property damage or graffiti, or the damage of a business. Communities have a feeling of disempowerment in that if they actually know who is doing this to their businesses, vehicles, homes or local schools, they feel a sense of powerlessness to be able to stop it. I think it does occur with some regularity and it is an existent problem.

Mr P. Papalia: I was not contesting the likelihood of it occurring; I was questioning the likelihood of all those other events occurring that would result in the offender being nabbed by the police and subsequently charged.

Mr C.C. PORTER: Indeed, and I will turn to that. That goes to the criticism that the member and others have raised about the anti-social behaviour order system being the purely civil variant of the United Kingdom system; some have levelled the criticism that it was for no other purpose than to make people feel better or make the government look as though it was doing something.

Mr P. Papalia: I thought that was a Home Office observation.

Mr C.C. PORTER: No; that was a Home Office observation about the nature of some of the criticisms about the system. I do not agree with those criticisms; I think there were positives and negatives about the ASBO system. As to the situation that I described arising, this system is predicated on criminal conviction, and my contribution to the second reading debate contained a quote from a District Court judge in the United Kingdom who stated that —

> The one truly positive addition to the sentencer's armoury was an amendment which became known as a Crasbo. This was an Asbo made as part of the sentence for a crime. It was easier, quicker and cheaper to obtain, relying mainly on the present offence and previous convictions.
>
> It worked or failed to work in the same way as the civil Asbo, but seemed to carry almost the same weight as a suspended sentence might.
>
> But, just like a suspended sentence, it is a threat which the courts must be prepared to carry through. There has to be the will and the resources to enforce the order. Persistent offenders, who commit no major single offence, but who over a period imprison their neighbours in their own homes, have to have it spelled out that they risk a custodial sentence for the next offence, no matter how minor.

That is my point about a conditional release order—simply putting some condition or another on someone, where the response is to have them re-sentenced for an offence that may not carry a sentence of imprisonment, is not upping the ante enough, in my view—the member might disagree—to provide a very strong response to a very poorly behaved cohort of offenders who are causing real damage in the community.

As for the member's final point about resourcing; we are not taking away resources that the Department of Corrective Services might otherwise use in youth justice.

Mr P. Papalia: I did not mean that the government was taking them away, but that it is not providing them, and it is using this bill as a means to be seen to be doing something.

Mr C.C. PORTER: We are using this to try to target a group of offenders who cause massive amounts of cost, angst and disruption to the community. We can positively say, by the existence of these people and their criminal records, that the existing punitive and rehabilitative measures have not had a particularly good effect. These people have gone through juvenile justice team systems and caution systems and have built up a record.

THE ACTING SPEAKER (Mr P.B. Watson): I am sure the member for Ocean Reef is not reading a newspaper in the chamber.

Mr A.P. Jacob: No; I wasn't.

The ACTING SPEAKER: Are you not? Okay then, thank you.

Mr P. Papalia: To place it on the record—it is not a question—I would agree with the Attorney General about that cohort of people who need to be dealt with in a more effective manner, but I disagree that this legislation is the way to achieve it. I have other ideas as to how to achieve a better outcome, but the Attorney General is obviously going to pursue this, and we will obviously disagree with you.

Mr J.R. QUIGLEY: In response to an earlier question, the Attorney General said that publication is an integral part of a prohibited behaviour order for this scheme to work. Why, then, is it not an integral part of all other orders? I do not accept that it is integral for the scheme to work, other than to shame people. Does the Attorney General regard other orders as less effective because they are not published?

Mr C.C. PORTER: I preface this example of the CRO by saying that, even now, member for Mindarie, looking through the criminal records with sentencing dispositions for that cohort of offenders I have identified, I find a lot of CROs—these people receive orders that have been sought and applied. I say that publication is part of the potential effectiveness of this system in that, comparing it with a CRO, if an individual has some or other restraint placed on him or her of the type that can be sustained by statutory wording that underpins a CRO, which I argue will be a narrower type of restraint than the wording available under a PBO, and if that person is restrained and breaches that restraint, it will be far, far harder under a CRO to, in effect, catch that person breaching any type of restriction that might be placed on him or her. If that restriction is breached, the person may be fined, although I would argue that, for the cohort of offenders that we have identified, fines are not a particularly effective means of effectively curtailing their behaviour. Finally, the person may be re-sentenced for an offence that may, in itself, not carry a term of imprisonment. Even if any of those things could flow—those

responses to a breach of a CRO—the PBO provides firmer and more conclusive responses to a breach, but also a mechanism for the community and the police to be better equipped to determine whether a breach has occurred and catch someone in the breach. That is just a fundamentally different system. The member asked me why CROs have not included publication; it is because they were never meant to be a system designed with publication as part of them.

Mr J.R. QUIGLEY: If sex offenders commit two offences in three years, do they receive PBOs? In other words, there has been a resistance to the public naming and identifying—by publishing their addresses and images—or the publishing of the register of sex offenders or register of assaulters, apart from the publishing of the court report of offenders. Without making a pejorative comment, will this legislation not provide a whole new regime whereby, potentially, all criminals—housebreakers, robbers, sex offenders, the lot—who have obtained more than two convictions within a three-year period will now be identified on the internet?

Mr C.C. PORTER: It is not inconceivable that a sex offender could be the subject of a prohibited behaviour order. I will give the member an example of an order that was given in the United Kingdom, which was that a gentleman was prohibited from entering, or attempting to enter, any female toilet, changing area or shower area whatsoever in England and Wales. One can guess that this person has a predilection to do that, with criminal offences being the result. It is certainly possible that such an order could be sought and received and publication of that person's identity could occur on a website or in a local government area near a toilet block where the person had previously determined to spend time. The very serious sex offenders that the member is talking about —

Mr J.R. Quigley: Any sex offender.

Mr C.C. PORTER: — are people who, clearly, are out in the community. Yes, it could apply to, potentially, any sex offender, but subject to all of the safety valves we have spoken about.

Mr J.R. Quigley: We have not gotten to those yet.

Mr C.C. PORTER: Indeed; and when it comes to publication—as we will come to—the court will have the ability to take other matters into consideration in determining whether or not to publish. What the member is getting at with respect to sex offender registers where there is publication attached is not a court decision; that is a decision made, in effect, by the executive through legislation.

Mr J.R. Quigley: I am sorry—where the publication is what?

Mr C.C. PORTER: A system of publication that relates to a public sector vendor register of some or other type that allows also for publication of the names of people on that register is not a decision determined by a court. That is a decision determined by executive government. This is a different situation. Certainly, it is not inconceivable, indeed I would expect that if a sex offender received a PBO and there was a concern that some or other form of action, which on the part of the community was going to be unhelpful, the court would have the ability to order that there not be publication, or indeed to withdraw the ability to publish at the first sign of any trouble or an application by either the person or the prosecutor; so that there would be safety valves built into this system. The other point is that —

Mr J.R. Quigley: If I could just get away from sex offenders, everyone on an indictable offence with two convictions within three years could be subject to the application, could they not? There will be masses of them.

Mr C.C. PORTER: I know what the member wants me to say, but all I can say is that it will depend upon the individual who would have to —

Mr J.R. Quigley: I do not know what you mean when you say, "I know what the member wants me to say." I am not trying to make you say anything. I am only saying under this legislation that is a possibility and that we could have a situation tantamount to the publication —

Mr C.C. PORTER: No; it is not, because any number of people might have been committed and convicted of two offences even if they were antisocial behaviour offences, but for who the rest of their accompanying behaviour over the recorded period was not of the type that would allow the court to make an assessment that that person was likely to reoffend. Therefore, the answer to the member's question is no. The two convictions within a space of time are not a sufficient condition; that is, there must be two convictions during a period of three years and the court has to determine at its discretion that unless otherwise constrained the person is likely to commit another offence, and that it is appropriate, keeping in mind the degree of hardship to the person as well as the desirability of protecting the community. Therefore, I think my answer to the member's question is no.

Clause put and passed.

Clause 6: Court may make PBO after sentencing —

Mr J.R. QUIGLEY: As I recall, clause 17 of this legislation refers to part 7, divisions 2, 3 and 4 of the Young Offenders Act. Clause 6(2) of this legislation states that subject to subclause (4) and clause 17, the application can be made prior to sentencing on an application by the prosecutor under clause 5. It was the experience in the United Kingdom, was it not, that applications for CRASBOs or conviction-based orders, were seen to exert downward pressure on the sentence struck for the substantive offence—and that was one of the criticisms that came out in the review; that is, that the sentencing person, knowing that he is also being asked—required, if one likes—to make a PBO, will strike a more mild head sentence knowing that an order will follow. That was one of the matters, referred to in the 2004 Home Office review, I believe. It was cause for public concern that there would be downward pressure on sentencing for the substantive offence because the sentencing person knew before striking the sentence that he would be asked for a PBO—which pressure is therefore a consequence of the PBO. Does the Attorney General not agree that there has at least been criticism in the United Kingdom that an application for a PBO would exert downward pressure on the head sentence?

Mr C.C. PORTER: Let me start by saying that the member cites, as the basis for his contention, the 2004 review —

Mr J.R. Quigley: That is my recollection.

Mr C.C. PORTER: That review was put in place before there was such a thing as a CRASBO, so I doubt that that is the case. I am uncertain as to whether there was any view about how that affected ASBOs. I am certainly aware that people have put that argument—I might say speculation—but I am not aware that there is any kind of statistical analysis showing that to be the case. I am certainly not aware, the way this is drafted, of any legal rule or modification to the sentencing process that, as a matter of law, would mean that that would be the case. Whether judges might be inclined to do that as a matter—for want of a better word—of the psychology of the process, is open to argument, but let me make this final point. The individuals we are seeking to target are not getting terms of imprisonment. There is no term of imprisonment head sentence, which is contemporaneously being given, to depress, because for the top 20 people we have identified going through the court system, the whole point of this legislation is to provide an extra recourse in sentencing by way of a civil order for people who are not in any substantive way getting terms of imprisonment in any event. That is not to say that there will not be people who contemporaneously get a term of imprisonment and also get a PBO, but overwhelmingly the people we are seeking to identify are not going to prison.

Mr J.R. QUIGLEY: That is what I was going to come to. Does not that argument collide with clause 11(b)? That is, if a PBO is issued when there is a term of imprisonment, it will commence after the term of expiration of the term of imprisonment. Part of the targeted group are those people who it is contemplated will in fact receive a term of imprisonment and that there might be downward pressure on the person striking the term of imprisonment because he knows the person is also going to be subject to an ongoing PBO.

Mr C.C. PORTER: I understand the argument. The member is quite right. Clause 11(b) contemplates the situation that someone might simultaneously at sentencing be convicted and receive a term of imprisonment and a PBO, which will start to run from the date of release. Therefore, someone might get a six-month term of imprisonment and upon release be subject to a PBO that has preventive provisions such as not going to a place or not touching a car or whatever that might be. However, I would suggest that is likely to be granted in the minority of cases. Also, there is no evidence—although the member speculates—that the simultaneous granting of the PBO with the term of imprisonment will likely lower the term of imprisonment. Again, the member can make that argument, but there is no evidence of that. Lastly, the point I will make, is that the overwhelming number of applications, based on our analysis, that will be made and be successful are with respect to people who are committing offence after offence and not getting a term of imprisonment. On that point, when we looked at the 10 most prolific adult offenders in our system at the moment over the three-year period that we analysed, for those 10 most prolific offenders there were 519 sentencing events. That is not sentences for individual charges but simply sentencing events for which multiple charges might have been the subject of the sentence.

Mr J.R. Quigley: This is the 10—what?

Mr C.C. PORTER: The 10 most prolific offenders had a grand total of —

Mr J.R. Quigley: Sorry, I am not trying to water down the Attorney's argument but I am trying to understand it. Does that include juveniles?

Mr C.C. PORTER: Only adults. The 10 most prolific by volume —

Mr J.R. Quigley: Adults?

Mr C.C. PORTER: Yes, adults in our system from 2007 to the end of 2009; a three-year period. There were 519 sentencing events for the 10 most prolific offenders and the breakdown of dispositions for those 519 is: monetary penalties, 449; imprisonment, 18—a very low number of the prolific offenders end up with a term of imprisonment when sentenced; no punishment under section 46 of the Sentencing Act, 18; community-based order under section 62 of the Sentencing Act, 15; suspended imprisonment orders under section 76 of the act, 10; conditional release orders under section 47, eight; and intensive supervision orders under section 69, one.

Mr J.R. Quigley interjected.

Mr C.C. PORTER: Let us deal with one problem at a time. The member asserts, which I disagree with, that the problem will have a downward impact on sentencing. He is talking about 18 of 519 dispositions. In any event, there is no evidence of that downward impact on sentencing.

Mr J.R. Quigley: You are talking about minor offending there, though. For fine repetition, for that many offences, we are not talking about indictable offences.

Mr C.C. PORTER: These are criminal-type offences in the Magistrates Court.

Mr J.R. Quigley: Yes.

Mr C.C. PORTER: This is precisely the point. What we are saying as a government about this legislation is that monetary penalties are not working for this cohort of offenders. Sections 46, 47, 62, 69 and 76 do not appear to be working. Efforts at rehabilitation and cautioning over a decade or more by both persuasions of government have not worked. This cohort of offenders is doing enormous damage in the community. What do we try to do with this cohort of offenders? In an unapologetic way we are lifting the ante for this group of offenders by saying that, in addition to their sentence, they will be restricted in their behaviour; that if they breach that restriction, there is a good chance they will get caught; and that if they are caught, there is a good chance they will face a term of imprisonment.

Mr J.R. QUIGLEY: I am here only to ask the questions, not give policy, but I would say in response that we would need to know more about that cohort. How many of those would fall into the bracket of the mentally troubled? I will give an example. I am not talking about the murder conviction that Andrew Mallard suffered, but prior to that there was a series of offences—not a sackful but a number—such as receiving a chalice stolen from Iona Presentation College and taking his mate's leather coat. This was a mentally infirm person who committed a number of offences over a relatively short period of time because of his mental infirmity, which then led him into being viewed by the police as a more serious offender. But when we are talking about that sort of cohort, we need to drill down a bit deeper than saying we need to deal with these people by imposing prohibited behaviour orders. What will we do with the mentally infirm? The Attorney General is perhaps a bit young to recall, but I refer to the Victoria Park screamer. I do not know whether the Attorney General remembers him.

Mr C.C. Porter: Not your colleague?

Several members interjected.

Mr J.R. QUIGLEY: Gee! Government members swing around a lot. One minute they say he is the leader in waiting and the next they say he is the Vic Park screamer. I do not know! The Vic Park screamer was a mentally troubled person. He used to get around in bare feet and on a pushbike. He would ride across the Causeway and sneak up behind people in St Georges Terrace and scream in their earholes.

Mr A.J. Simpson interjected.

Mr J.R. QUIGLEY: Does the member for Darling Range remember him? A couple of backbenchers in the government also remember him.

However, this guy with a mad head of hair was a serial pest in that he would scare the living daylights out of people by coming up behind them and making a guttural roar in their ear. Then he would ride off. People used to suffer him in silence, but he could have been done for disorderly conduct three times a day. He would have been a prime candidate for a PBO. I am worried about this cohort that the Attorney General is referring to. How many of these people are like Andrew Mallard and the Vic Park screamer, who were low-grade offenders who got only repetitive fines? They will now have a high likelihood of being put on the tram line to imprisonment.

Mr C.C. PORTER: I accept the member's point that inside this cohort of prolific offenders will be people who fall into the category of possessing some type of mental disorder or the category of just failing to have empathy and respect for their fellow citizens. Both those types of people will be involved in this cohort; there is no doubt about that. I would say two things about that. We are giving out monetary penalties, community-based orders and suspended terms of imprisonment. Having observed this process both in court and now as a minister, I can say that we are well aware of that group that the member has determined, and we are well aware of the other group that does not fall into the category of mental infirmity. The legislation is certainly directed more at the

latter and less at the former, but it is a matter of the court exercising its discretion in taking into account such issues as the mental state of a person, just as it does in sentencing. The member will see from the way we have drafted this legislation that there are very live issues to be considered in the process of being granted, upon application, a PBO. I think both of us have a degree of respect for the court's cautious use of its discretion. I would argue that this legislation has been drafted in such a way that if there are examples of people such as the Vic Park screamer, they would be far less likely amongst that cohort to be the successful subject of an application than would someone who does not have those sorts of mental issues.

Clause put and passed.

Clause 7: Hearing of PBO proceedings —

Mr J.R. QUIGLEY: This is where we get down to the issue raised by the member for Girrawheen. I refer to subclause (1). When a conviction follows a plea of guilty in a pleas list, any application will almost inevitably have to be adjourned to a hearing unless it is consented to by the offender. The Attorney General would agree with that, but the courts will not have time for that.

Mr C.C. PORTER: I am not certain about that. It would be a matter for the court to make the decision whether to hear argument and determine it at the point of sentencing or to adjourn the matter. This is a decision that courts make all the time. But of course reasonable notice would be given to the person who is the subject of the application and that person would no doubt have received legal advice about whether to oppose it. That is a matter that is routinely communicated between counsel.

Mr J.R. QUIGLEY: But that is the same as, for example, the situation with the summary of material facts. If, at the time of sentencing, counsel challenges any of the summary of material facts, the court has to say, "That is an issue of fact that I have to sentence on and I will have to adjourn it to another day. I've got 100 people sitting outside court 37 this morning."

Mr C.C. Porter: Courts are adversarial places. There will be argument, contention and adversarial proceedings.

Mr J.R. QUIGLEY: Of course, but I am referring to the resources of the courts, because if the proceedings are adjourned, they will be immediately adjourned.

The ACTING SPEAKER (Mr P.B. Watson): If members want to have a meeting, go outside!

Mr J.R. QUIGLEY: Proceedings are regularly adjourned. Will this not require extra resources for our already overburdened courts, especially the Magistrates Court?

Mr C.C. PORTER: There are a lot of points there. I am not sure that I would describe the courts yet as being overburdened. Time to trial key performance indicators improved under the previous government and have continued to improve under ours. On the other hand, a system of criminal penalty infringement notices is being introduced, which will take a lot of work away from the courts. Of course, there is more work when a matter is adjourned as it creates, in essence, another hearing. This is an argument that is raised every time legislation such as the violence restraining orders act or whatever comes into play.

The ACTING SPEAKER: Members!

Mr C.C. PORTER: They are matters for the court to deal with. They are matters to be monitored. Much depends on how many of them are heard at the point of conviction and sentence. Based on the United Kingdom experience, it appears that a good deal of them are. We will continue to monitor that situation.

Mr J.R. QUIGLEY: Subclause (2) reads —

> If PBO proceedings in relation to a person are adjourned to a hearing under subsection (1)(b), a registrar must give a hearing notice to each party to the PBO proceedings.

The Attorney General flagged an amendment that comes, I think, after firearm constraints. Is that part 3?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: It is clause 33.

Mr C.C. PORTER: I think I have the answer for the member for Mindarie. I did flag the possibility of an amendment. I do not know whether that will be necessary now that it has been explained more fully to me. If the member goes to clause 6(4)(d)(ii) —

The ACTING SPEAKER: Members, there is a minister on his feet and I want to hear what he is saying.

Mr J.R. Quigley: I am sorry, Attorney, is it clause 6?

Mr C.C. PORTER: That envisages that where PBO proceedings are applied for, a person must be personally served. We then go to clause 33(2) which, as the member pointed out, provides for service by post. It is also the

case in clause 7(2) that the registrar must give hearing notice to each of the parties. What is meant to occur there is that if it is the first hearing, the person is serviced personally. There is also an option that if either party wants to vary it, there is another hearing before the hearing is adjourned.

Debate interrupted, pursuant to standing orders.

[Continued on page 6166.]