BAIL AMENDMENT (PERSONS LINKED TO TERRORISM) BILL 2018

Second Reading

Resumed from 13 March.

HON MICHAEL MISCHIN (North Metropolitan — Deputy Leader of the Opposition) [2.48 pm]: I rise to complete my remarks regarding this bill. As I indicated on the last occasion, the opposition supports this bill, although it has some questions regarding it.

There is more than a little irony that we are debating a bill entitled the Bail Amendment (Persons Linked to Terrorism) Bill 2018 at a time after the tragic and deplorable events of last Friday in Christchurch. One thing about the Bail Amendment (Persons Linked to Terrorism) Bill 2018 cannot escape our attention, however, and that is that it would not have made any difference in similar circumstances had it been the law in New Zealand or had that event occurred in Western Australia. This bill operates on the basis of a past history of a certain type of offending or conduct being used as a basis for deciding whether bail ought to be allowed for someone who is charged with offences in the future. It provides a presumption against bail, which I will come to very shortly. It would not have made a difference because that particular offender—I will not honour him by using his name—had no history of violence, let alone any material links to terrorism of the type that would be embraced by the terms of this bill; nor had he, until he committed the murders in New Zealand, been charged with any offences.

As I mentioned on the last occasion, this bill has been prompted by decisions at a first minister level at the Council of Australian Governments to provide additional safeguards for the community to protect it against acts of terrorism. It draws in particular on two cases that have become notorious in Australia, and it would seem that neither of those would have been addressed by this bill, either. One of the areas we need to explore a little more is the relevance of those cases to grounding this proposed law, and how it would operate.

I should say, just as an aside, that what I mentioned on the last occasion about the propaganda of the deed is what we witnessed in New Zealand last Friday. Part of the purpose of that exercise is for someone who may be socially inadequate, certainly morally moribund, and otherwise intellectually deficient to commit an act of violence that will gain them notoriety and some level of recognition that they would never otherwise have achieved in their life. I wonder sometimes whether the categorising of those acts as acts of terrorism—rather than what they essentially are, which is acts of premeditated murder—encourages that sort of behaviour and gives it a certain notoriety that would not otherwise be present. The killing of unarmed men, women and children is simply murder—mass murder, in this case. For those who seek such recognition because they cannot get their names in the paper or their photos on the front page or their kindergarten opinions broadcast to the world, that level of notoriety provides a platform.

It is a great tension for our society, and I made reference to that on the last occasion. We had only to see the opinion piece by Mr Paul Murray, for whom I have a great deal of respect, but I could not help wondering that the article showed nine newspaper front pages with a picture of this unknown, who should remain unknown and whose name should be lost to history, featuring on every one of them. That is what encourages some of this behaviour. It advertises it and provides leverage for people to sow discord and terror. To my mind, the fact that these people were of a particular religion, or that he may have been, or that he was of a particular political point of view, is irrelevant. What actually causes discord is to side with one or another side. If we just treat him as a murderer, a common murderer, and give him the respect due to common murderers—or the lack of respect due to common murderers—it would go a long way towards sending the correct messages out there: that doing this sort of stuff is not a pathway to fame. Even calling him evil elevates him; it is not a moral judgement, it is simply a sign of moral bankruptcy, intellectual feebleness and social inadequacy for anyone to turn to this, whether they justify their actions by way of politics, religion or otherwise.

Indeed, I suppose it is a question of whether it would have fitted within the definition of "terrorism" as it is commonly used. Was it intended to influence a particular group of people or a government? I am not sure one could say that it was intended to influence a government; it was simply an act of premeditated murder and anger.

Be that as it may, the legislation we are dealing with is meant to go some way towards preventing these sorts of things from happening in our jurisdiction, and I would like to speak some more about that. I also touched on some of the comments made in the other place. I mentioned that certain members had groped towards a particular conclusion but then tended to shy away from it—that is, the perhaps over-restriction on bail more generally. Over the years, we have seen a trend that whenever someone has committed an offence while on bail for another offence, we immediately look to changing the law to make it more difficult generally to release people on bail. There has to be a point at which that is counterproductive. The whole point of bail is to do two things. Firstly, it is to recognise the presumption of innocence for the offence charged. It is not meant to be a punishment for other behaviour and it is not meant to be a security measure.

Bail is a release from custody on licence. People are brought into custody by way of arrest. Under our system, they are brought before a judicial officer at the earliest opportunity to determine whether, having regard to the presumption

of innocence, they should be released on a licence called bail. The decision to release is provided for by a number of specific conditions in our Bail Act; they tend to be longstanding considerations that were present in the common law beforehand, although they have now been codified. But, essentially, the licence, on bail, to be out in the community—pending the determination of a charge or sentence, but we are talking about charges at the moment—is to recognise the presumption of innocence and to relieve the burden on the prison system that comes about as a result of denying people their liberty for periods that may be extended because of the demands on the court system and the need to prepare cases and find an appropriate date for trial when witnesses might be available. That is to be balanced against suitable conditions to ensure that the accused person is brought before the court and will appear before the court and will stay out of trouble in the meanwhile. There is a security and community safety element to it.

With all the relevant information at their disposal, judicial officers should be able sensibly to make those decisions by balancing those considerations. As I have mentioned over time, in order to deal with particular extreme cases, we have tended to try to prescribe every particular circumstance by restricting the means by which judicial officers can release people on bail, and this is another example of a presumption against bail except in exceptional circumstances.

We have to be careful that we do not go too far with all this. Basically, with public opinion as the driver and a desire to cover every eventuality and to err on the side of public safety against realistic risk assessments, we may have presumptions against bail generally; it is certainly going that way. In the Monis case in New South Wales, I would have thought that with all the relevant information at his or her disposal, a judicial officer dealing with someone on charges of sexual assault and attempted murder ought not to have released that defendant on bail or ought to have released them on bail on far more stringent conditions. We need to examine this legislation in that light as well. Some of the bill is predicated upon the police providing certain information to judicial officers. I would appreciate some advice on whether our prosecuting and police authorities provide that sort of information to judicial officers for their consideration as a matter of course; and, if not, why not? Why do we need to prescribe this sort of stuff for this type of case? Ought not the information also be available for assessing anyone who is charged with an offence and has a history of violence—never mind links to terrorism—and capricious, unpredictable behaviour that might cause a threat to the community? In that way, a judicial officer can decide whether this offence, whether it is a violent offence or something completely different, is one for which the community is best protected by a grant of bail, and on what conditions, while having due regard to the presumption of innocence and the desirability of having people at large, rather than in custody, pending trial. Some guidance on that would be useful.

I have noticed that Hon Alison Xamon has proposed a variety of amendments to the bill. The amendments address a spread of categories. Unless I am wrong, we are still on supplementary notice paper 112, issue 1; is that right? If the member would interject, I would be grateful.

Hon Alison Xamon: Yes, I believe so.

Hon MICHAEL MISCHIN: I will leave it to the member to move the amendments in due course, if she so desires, and to explain them more fully. Just in short form, a judicial officer has a discretion to disclose certain information to prosecutors, police and the like, in cases before that judicial officer when considering bail within the operation of the proposed bill. I understand that Hon Alison Xamon, as a check and balance, because the information could be kept confidential, seeks to have that information disclosed to the Attorney General of the day. As I said, she will no doubt develop the argument in support of this in due course. I see some merit in there being a further check on the way the courts are dealing with these sorts of cases, given that they can be held in camera and given that there is information that may not otherwise be available to the defence upon which a court is making a decision that touches on a person's liberty, not only for the offence that is before them, but also because of a previous link that may or may not be relevant to the merit of the charge, or their behaviour in respect of it, or the risk that they pose for the charge before the court. There is some merit in having a further check and balance in that respect and I have some sympathy for what Hon Alison Xamon proposes.

I note that she is not cavilling at the idea that hearings may be heard in camera. There are security considerations, and I quite understand and support that there are occasions when that may be necessary. We had similar arguments about the Criminal Organisations Control Bill 2012. Likewise, criminal intelligence and intelligence of a national security nature ought to be jealously guarded, but there needs to be some oversight, at least by elected members of the community who have the responsibility through their office, such as being first law officer of the state, for oversight of our judicial system. I have some sympathy for that. I will let her develop that argument and also hear what the government has to say about that. If the government does not necessarily support the terms of what she proposes, I wonder whether the government can suggest some improvements and refinements.

Another area that the member is touching on is reporting about the applications that fall within the operation of the act and that the annual report produced by the accountable authority, which I presume in this case would be the Department of Justice, in accordance with the Financial Management Act, report on the act on regular occasions. Again, she has proposed a limit on that. She is not requiring that evidence or detail be disclosed, but simply the number of applications and the character of them so that, again, there is accountability for how often

this legislation is being used and how it is being used. Another proposed amendment concerns the review of the operation and effectiveness of the amendments that this bill proposes. Once again, there is an attraction to that. Given the peculiar nature of the legislation concerned and the manner in which it is meant to operate and the principles by which it operates, ideally—although it may be too difficult to engineer at this stage—we would think that with the raft of terrorism-related legislation in Western Australia of various forms, including extended police powers and the like, the review of the operation of all those disparate pieces of legislation ought to occur at the same time and holistically so that we can see whether any gaps need to be filled, whether there are any dissonances between the acts and whether there are ways in which that regime can be improved. At the moment, we have a variety of separate amendments and legislation operating that touch on the subject of terrorism in one form or another. It would be handy if they all came up for review about the same time. It is probably not practical in this case, although perhaps the government might like to audit or assess which pieces of legislation they may be and, if there are review provisions in respect of each of them that fall at different times, amend the legislation so that the review takes place at the same time by the same authorities and provide a comprehensive report on how those strategies are working. As I said, I have some sympathy for what Hon Alison Xamon proposes. Otherwise, there is already a requirement in the legislation to have regard to the peculiar considerations of the Young Offenders Act 1994 and the treatment of children and young people who fall within the operation of that act, and I think that she proposes to extend those considerations to this act. One of those considerations has already been covered in section 6(d), but Hon Alison Xamon proposes to extend it further. Her proposed amendment prescribes that the "safety of the community" is an "overriding principle", reflecting the security of the community as the paramount consideration. I find the words "overriding principle" to be a bit unusual. I am not sure why they have been used as opposed to, say, "paramount consideration", which is the usual form of words. Perhaps the minister can explain that as well. I know it is in the Young Offenders Act at the moment, and so be it, but having just looked at it with fresh eyes, it seems to be an unusual choice of words.

On that note, will I conclude my remarks. I indicate again our support for the bill in principle and in the manner in which it is drafted, although we seek some further information from the government and an explanation of the amendments proposed by Hon Alison Xamon in due course, as well as the government's response to them. Otherwise, we seek further advice on how the bill is intended to operate in fact and what we can expect from it. Hopefully, it will never arise for use, but the principles underlying it do need some careful consideration and we must always be conscious of the risk of overreach in order to deal with particular situations in which, under any sensible risk analysis, they ought not arise and be a problem, but warp our criminal justice system in ways that may be undesirable in the long term.

HON ALISON XAMON (North Metropolitan) [3.12 pm]: I rise on behalf of the Greens as the lead speaker to make several comments on the Bail Amendment (Persons Linked to Terrorism) Bill 2018. As has been indicated, I have proposed a number of amendments, which are sitting on the supplementary notice paper. This bill, of course, will apply to both adults and children. It makes three changes to our bail laws. Notwithstanding the title of the bill, the first change is a broad application. It applies to all accused who have been granted bail on any offence, regardless of whether it is related to terrorism. Section 54 of the Bail Act 1982 sets out the circumstances under which the prosecutor or the police can bring a person back to court and apply for their bail to be varied or revoked. At the moment, those circumstances are: a breach or likely breach of bail or home detention conditions; loss of surety; the security has become insufficient; or the accused was granted bail for appeal purposes but has subsequently discontinued or failed to diligently prosecute the appeal. The bill will now make an addition to this list to include if new facts have been discovered or new circumstances have arisen, or circumstances have changed since bail was granted. In theory, that includes new information or a change relating to terrorism, but in practice almost always will not.

The second change applies to any bail proceedings in which "terrorist intelligence information", as defined, is given. The judicial officer must take all reasonable steps to maintain the confidentiality of that information, including taking secret evidence, prohibiting publication or reference to the information and ordering that certain documents be provided in a redacted form. In addition, no record of a bail decision and reasons for it can include terrorist intelligence information, as defined. If the judicial officer considers that the information is not terrorist intelligence information as defined, they must allow the prosecutor to withdraw information and, if it is withdrawn, prohibit publication or reference to it. However, the judicial officer may still disclose terrorist intelligence information or the withdrawn information to the Attorney General, a court, or a person who has been authorised by the prosecutor.

The third change that this bill contemplates relates to bail for a "person linked to terrorism", as defined. That applies whatever the charge. Bail in these cases can be exercised only by a court that has been constituted by a judicial officer other than a justice of the peace. In this instance, the court must refuse bail unless there are exceptional reasons that the accused should not be kept in custody. Bail can be properly granted having regard to the usual relevant provisions of the act. This includes overcoming any other presumption against bail that may apply under those provisions, such as if the accused is charged with a serious offence committed while on bail or

early release for another serious offence, is charged with murder, or is charged with contravening a supervision order under the Dangerous Sexual Offenders Act. In deciding whether there are exceptional reasons, the court must consider: the nature and seriousness of the offence or the offences; any other pending charges; the probable method of dealing with the accused in the event of a conviction; the accused's conduct, whether the charge is related to terrorism or not, since being charged or convicted of a terrorism offence or subjected to a control order; and whether bail should be refused and instead a hospital order made under the Criminal Law (Mentally Impaired Accused) Act. Again, I call for that act to be amended as soon as possible, please. The court also needs to potentially consider section 6(d) of the Young Offenders Act if the accused is a child, which is the objective of enhancing and reinforcing the roles of responsible adults, families and communities in making sure that we minimise the incidences of juvenile crime and ensuring we maintain our focus towards punishing, managing and rehabilitating young offenders. The safety of the community is the overriding objective. There is also a bit of a catch-all provision in which the court can take into account any other matters as appropriate.

As I have already said, this bill applies equally to adults and children. The case law relating to the commonwealth equivalent suggests that youth on its own does not amount to an exceptional reason that the accused should not be kept in custody. It is a relevant factor but it is not sufficient on its own. The same goes for matters that are relevant to the child's youth, for example whether that child has been a victim of grooming by adults or been an alleged perpetrator. To date, most children have not succeeded in rebutting the presumption. Since 2004, of the eight children who have been prosecuted or who are currently being prosecuted under the commonwealth act, seven applied for bail—all in NSW—and all were refused bail at first instance by the NSW Children's Court. Two of them were subsequently granted bail by the NSW Supreme Court. The source of that information is page 14 of a June 2018 joint submission to the Independent National Security Legislation Monitor for its "Review of the prosecution and sentencing of children for Commonwealth terrorist offences" by the Department of Home Affairs, the commonwealth Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation. Submissions made to that review by the Bar Association of Queensland, NSW Legal Aid, the Law Council of Australia—whose constituent bodies include the Law Society of Western Australia and the Western Australian Bar Association—the Australian Human Rights Commission, and Victoria's Commissioner for Children and Young People called for section 15AA to be amended so it would not apply to children.

Under this bill, if bail is refused, it need not be reconsidered on subsequent court dates unless the accused satisfies the court that either new facts have been discovered, new circumstances have arisen, or circumstances have changed, or the accused failed to adequately present their case for bail. If bail is granted, at subsequent appearances, a court can order it to continue. I ask the minister to confirm my understanding that in practice if bail is granted, it will continue unless the prosecution applies for it to be reconsidered, in which case the defence will again have to establish that exceptional reasons apply to rebut the presumption. The court must record its bail decision and reasons, but, as noted, it must not include any terrorist intelligence information in the record.

If the charge, or the conviction in the case of a bail pending sentence, is of a terrorism offence—that is, a terrorism offence as defined in section 3(1) of the commonwealth Crimes Act 1914—then section 15AA of that act applies. I have already mentioned section 15AA in the context of the legislation's likely effect on children accused of terrorism offences. Section 15AA says that bail must not be granted unless exceptional circumstances exist. Unlike this bill, section 15AA does not set out the factors the court must consider in deciding whether exceptional circumstances exist for the purposes of that act. I ask the minister to confirm my understanding of the way the commonwealth act and this legislation are to be read together. If section 15AA of the commonwealth act applies, bail will be determined under that act, with exceptional circumstances meaning and being assessed in accordance with that act; that is, the court will not have to consider the specific factors listed in this bill at proposed clause 3E of schedule 1, part C. If section 15AA of the commonwealth act does not apply, bail will be determined as this bill sets out, with exceptional reasons meaning and being assessed in accordance with this bill; that is, the court will have to consider the specific factors listed in this bill at proposed clause 3E of schedule 1, part C.

In the bill's current form, the presumption against bail applies not only to people committing or trying to commit terrorist offences; it is broader than that. Regarding the offences to which the bill applies, it imposes a presumption against bail for a certain category of accused for all offences when proceedings commenced with the accused's arrest rather than a summons. This will include offences that have nothing to do with terrorism, and that, even if proved, would not result in a sentence so long as the accused would be remanded in custody without bail pending trial. Australian Bureau of Statistics figures show that Australia-wide in the September 2018 quarter, 14 053 or 33 per cent of prisoners were unsentenced. The Department of Justice's 2017 annual report does not show how many unsentenced adult prisoners there are, but it does show that almost half of the young people in detention are unsentenced. A 2018 article in the *Criminal Law Journal* titled "Bail, Risk and Law Reform: A Review of Bail Legislation across Australia" refers to Victorian research from 2010, indicating that 40 per cent of remandees in that state were either acquitted or received a sentence less than or equal to the prison time they served on remand, while New South Wales research from 2012 puts the figure in that state at 55 per cent.

Regarding the accused to whom the bill applies, the legislation will impose a presumption against bail for people who in the past have had links to terrorism, regardless of how long ago and how they have behaved since. Under the legislation, if a person is convicted of a terrorism offence, for the rest of their life, if they are arrested for any offence ever again—no matter what that is—the presumption against bail will also apply. Under the legislation, the presumption will also apply to a person who has been under a confirmed control order at any time within the last 10 years. I note that the bill has a mechanism to overcome this presumption, but the accused will face difficulty in overcoming it, because exceptional means exactly that, it is a very high bar. Would these factors under proposed clause 3E of schedule 1, part C be regarded by the court as extraordinary or would they be regarded as merely ordinary and therefore insufficient to overcome the presumption? When the charge is not related to terrorism, even if the accused is convicted of the charge, the maximum penalty would be less than the time they would have spent in custody without bail pending trial, and the person had not been associated with terrorism since the conviction or control order that triggered the presumption.

This raises concerns. Bail hearings happen very early in the proceedings, and this, of course, is exactly as it should be, because, without bail, a person is deprived of their liberty on a charge of an offence that they may not have committed. But it means that the accused has very little time to get a lawyer. Overcoming that presumption will be even more difficult for an accused who has not been able to access a lawyer. Even if the accused does manage to get a lawyer, there is little time in which they can fully instruct that lawyer, especially if they are in a custodial facility. On top of this, the accused, and their lawyer if they have one, will be denied access to any evidence that is classed as terrorist intelligence information. Secret evidence clearly will hinder their presentation of a case against the presumption applying. The bill says that the decision made at the initial bail hearing will not be recognised, except in limited circumstances, although one of those circumstances is that the accused failed to adequately present their case for bail. If the cause of that failure to present that initial case for bail was because secret evidence was not made available and was effectively unknown to the defence, this cannot be remedied by reconsidering bail because there is no mechanism whereby the defence can access that evidence, effectively, unless the prosecution agrees to it.

We are trying to achieve a difficult balance with this legislation. The Greens are concerned about whether we have the balance right in having a presumption against bail also apply to non-terrorism charges against people who are not alleged to be currently involved in terrorism and who might subsequently be acquitted of the current charge. That is not about keeping our community safe from terrorism. I am concerned that it could be never-ending retribution for conduct that may have taken place decades ago, when someone was a minor and perhaps had been heavily groomed by the adults around them.

I am concerned that the bill potentially could be counterproductive if it ends up undoing any rehabilitation that an accused person may have achieved. The accused's subsequent conduct is one of the factors that will be taken into account by the court, but, again, the presumption is rebutted only by exceptional reasons, and that is a really high bar. At what point is rehabilitation sufficiently exceptional to overturn that presumption against bail? If the presumption is not successfully overturned, what rehabilitation gains will be lost by remanding to custody a person who has not even been charged with a terrorism-related offence? The bill will be counterproductive if it dissuades a potential informer from speaking out. I am concerned that a consequence may be that it is perceived as getting the balance wrong—that it is unjust—and that would be a bad outcome for the community. The Greens strongly prefer that the courts decide whether to refuse or grant bail based on all the circumstances made available, unfettered by the proposed presumption—retaining judicial discretion. Courts are in a position now to consider all the circumstances on a case-by-case basis—the sorts of circumstances that, quite frankly, we in this place as legislators cannot consider. We cannot predict every circumstance that will potentially arise in the future. I accept that courts are not infallible—we know this—but nobody is, and I still maintain that the courts are more equipped than we are to deliver justice on an individual basis.

In relation to the protection of terrorist intelligence information, once again the Greens are concerned that we may not have the balance right. I fully acknowledge that we are trying to achieve a very difficult balance between two competing needs. On the one hand there is the need to protect national security and our citizens, and on the other hand there is the need for the accused to still have a fair hearing. The accused needs to know the evidence against him or her and should have an opportunity to challenge or at least to contextualise it. The preferable balance is to use protections for national security that have the least adverse outcome for the defendant. The bill ties the court's hands by mandating maximum restrictions in all cases involving terrorist intelligence information. We are talking about secret evidence that no-one but the court and the prosecutor are privy to, unless the prosecutor consents. I think this is extreme. It enables the evidence to come before the court, which otherwise might not happen, but secret evidence is the most adverse outcome possible for the accused, who is denied a fair bail hearing on top of the presumption against bail. Our justice system relies on an adversarial mechanism to get to the truth, but this mechanism cannot work if there is secret evidence that the defendant does not know about and therefore cannot challenge or provide context to. It is not clear from the bill whether the defendant is even to be informed of the fact that secret evidence is being given against them. Secret evidence will not be a problem for just the

defendant. If the evidence is unreliable and too much weight is given to it, it will be a problem for the administration of justice generally. I am concerned that that means that it may bring the administration of justice into disrepute.

I now refer to the 2004 Australian Law Reform Commission's ninety-eighth report, called "Keeping Secrets: The Protection of Classified and Security Sensitive Information". It is noted at paragraph 10.4 of that report —

> Apart from its inherent unfairness to a party, the use of secret evidence presents dangers for the administration of justice insofar as it may encourage less rigorous investigations and prosecutions, and may encourage an environment where corrupt or improper practices can flourish and escape detection.

That same report goes on to give an example of one case in which the source of secret evidence against a party was their ex-spouse, who had made numerous false accusations in the course of a custody battle over their child. Rumour and innuendo, and double and triple hearsay collected by investigators can run the risk of being given too much weight when it comes to secret evidence if there is no process to challenge or contextualise it. The report considered the matter carefully and stated in recommendation 11–40 —

> An accused person and his or her legal representatives should have access to all evidence tendered against him or her.

After being weighed up, it was found that we need to do the opposite of what this legislation proposes. The ALRC gave its reasons at paragraph 11.203 when it stated —

> As a matter of principle, the leading of secret evidence against an accused, for the purpose of protecting classified or security sensitive information in a criminal prosecution, should not be allowed. To sanction such a process would be in breach of the protections provided for in Article 14 of the International Covenant on Civil and Political Rights for an accused to be tried in his or her presence and to have the opportunity to examine, or have examined any adverse witnesses. Where such evidence is central to the indictment, to sanction such a process would breach basic principles of a fair trial, and could constitute an abuse of process.
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> … the ALRC remains of the view that secret evidence should never be lead against an accused person in criminal proceedings. No submission or consultation has caused the ALRC to alter its views.

If members do not accept this argument and see the need for exceptions, I point out that the bill does not even give the court discretion to consider any alternatives that may be more proportionate. For example, one alternative is the defendant's lawyer, or alternatively special counsel who may have been appointed to represent the defendant's interests, being privy to that evidence, subject to the lawyer being either security cleared or giving a confidentiality undertaking to the court. That would be one mechanism to try to achieve more of a balance. That does not deliver a fair hearing, as we understand it, because the defendant is still not fully aware of the content of the evidence against him or her, but it would at least be more fair than what the bill in front of us proposes. The bill does not provide for that to happen without the prosecutor's consent. I am talking about the consent of the opposing party to the case. The court is deprived of discretion to decide the most appropriate measures to take.

An important point is that the ALRC report also considered whether secret evidence is in fact unconstitutional. Under the separation of powers that divides Australian governance into legislative, executive and judicial branches, judicial power is vested in courts. Laws that require, and also perhaps laws that even permit, a process that is inconsistent with the judicial process are not constitutional. Paragraph 11.202 of the report states, in part —

> As discussed in Chapter 10, apart from general principles of fairness, any legislation that would *require* a court to hear classified and security sensitive evidence in the absence of an accused would probably infringe Chapter III of the *Australian Constitution*. Even legislation which permits a court to do so runs a risk of offending Chapter III as it would be authorising a process not in accordance with judicial process.

The question I have is whether the secret evidence protections in this bill actually cross that line. I understand that legal advice from the Solicitor-General to the Attorney General—which of course I have not had the opportunity to see—has said no, but I am not quite as certain as that. If this bill were passed, perhaps we might be put in a situation in which that will be tested and I suppose we will find out whether indeed it is unconstitutional.

Another reason that the bill's secret evidence provisions get the balance wrong, in my opinion—I ask the minister to confirm this—is that although these mandatory secret evidence provisions will apply to bail applications for charges that are completely unrelated to terrorism, during trial on an actual terrorism charge the court does have discretion to consider more proportionate measures to balance the accused's right to a fair trial with national security protected. I am also concerned that the bill does not contain any provision about oversight to the extent to which proposed section 66C will be used. Proposed section 66C(3) permits the court to disclose the information to the Attorney General but does not compel it. Oversight of such an extreme provision—it is extreme—should be mandatory. We need to have oversight so that we can ensure that the administration of justice is not brought into disrepute. If the bill is passed, it is vital that the Attorney General knows how often, and under what circumstances,

secret evidence is being used in our criminal courts. Therefore, I have placed on the supplementary notice paper a proposed amendment that would facilitate that information being provided to the Attorney General. Parliament needs to be able to receive at least some annual statistical information about that issue. Information about the use of surveillance devices and assumed identities is already tabled in this place. That information does not give us a great amount of detail, and therefore the oversight is quite minimal, but it gives this Parliament an indication about how these laws are being used.

I also believe that a review clause is appropriate to monitor the impact of this bill. Therefore, I have put on the supplementary notice paper a proposed amendment for a review clause. I have been led to believe behind the Chair that the government is contemplating its own review clause. That amendment has not yet been presented, but if that is a better review clause than the one I have proposed, I will be prepared to withdraw my amendment for contemplation. The amendments I propose are minimal, but they are important amendments to try to mitigate some of my most serious concerns about how this bill might work in practice.

Terrorism is a very real issue. We have reflected in this place today on the terrible terrorist act that occurred to our close neighbour, New Zealand, a few days ago. We are talking about 50 people who have not yet even been buried, so this is very raw for us. It does not matter where a terrorism threat comes from. We as a community are very much alive to the risk of terrorism. That is why we contemplate what would otherwise be very extreme measures to provide our police agencies with exceptional power to respond to that risk. The challenge we face is trying to strike a balance. Sometimes the law gets it wrong. If people are denied the opportunity to have their day in court in a fair way, justice will not be served.

I now want to make some comments about how children and young people may be impacted by this bill. As I have said, this bill applies equally to adults and children. I am not so naive as to believe that children can never pose a risk, and we have certainly seen that occur in Australia, so I understand that. However, we need to understand that children may be exceptionally vulnerable to grooming by extremists. Children may also grow up and become acutely aware that they have been manipulated. A child may have been associated with terrorist activity and 20 years later has managed to get their life back on track. However, they may find themselves accused—not even found guilty—of a crime, perhaps even a relatively minor crime from which they are subsequently exonerated, and be denied bail, regardless of their personal situation and whether they have dependants et cetera. That is a genuine concern. This bill will effectively throw out the provisions that would normally apply under the Young Offenders Act, which recognises that children need to be treated differently under the law and be given the fullest opportunity to be rehabilitated and live meaningful lives. I have serious misgivings about how this bill will play out in practice, and I am not sure that it has got the balance right. Therefore, I have placed on the supplementary notice paper some proposed amendments to deal with that issue, and I will discuss those in more detail when we go into committee.

With those comments, and in the hope that I will get a response from the minister about the questions I asked in the course of the second reading debate, I will leave it at that.

HON RICK MAZZA (Agricultural) [3.46 pm]: I rise to make a brief contribution to the debate on the Bail Amendment (Persons Linked to Terrorism) Bill 2018. The long title of the bill is —

> **An Act to amend the *Bail Act 1982* to provide for a presumption against bail being granted to persons linked to terrorism.**

That captures the reason for this bill. It is important in these times, when terrorism has raised its ugly head, that people who are connected to terrorism are identified and denied bail. I have not had much experience with the bail process, because fortunately I have never been on bail, but I would have thought that the primary objective in determining whether to grant bail is public safety. If a person is a danger to the community, without doubt bail should be denied.

This bill seeks to implement the 2017 Council of Australian Governments agreement for presumption against bail being granted to persons linked with terrorism. Clause 4 provides the following definition —

> ***terrorist act*** has the meaning given in the *Terrorism (Commonwealth Powers) Act 2002* section 3;

The Terrorism (Commonwealth Powers) Act 2002 states —

> ***terrorist act*** means an action or threat of action where:
>
> (a) the action falls within subsection (2) and does not fall within subsection (3); and
>
> (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
>
> (c) the action is done or the threat is made with the intention of:
>
> (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

It goes on to state —

> Action falls within this subsection if it:
>
> (a) causes serious harm that is physical harm to a person; or
>
> (b) causes serious damage to property; or
>
> (c) causes a person's death; or
>
> (d) endangers a person's life, other than the life of the person taking the action; or
>
> (e) creates a serious risk to the health or safety of the public or a section of the public; or …

These are very serious issues with anyone who is connected with terrorism. It would certainly be unwise to allow a person who has been convicted of a terrorism offence in the past or has a current charge of terrorism against them to go back into the community until the charges have been resolved.

As far as the sensitive information or secret evidence is concerned, methods of combating terrorism obviously involve surveillance. As I mentioned earlier, authorities have been able to identify and shut down a number of terrorist attacks prior to them going any further than that. Providing secret evidence is a very important tool for law enforcement officers and the courts to be able to make sure that the information is retained and used to its best advantage, so I certainly do not have any issue with the secret evidence side of things.

I have had a look at the amendments proposed by Hon Alison Xamon. I do not think they are necessary, and I do not think I will be supporting them, should they be moved in the Committee of the Whole House. Overall, this is a very important bill, particularly in light of recent occurrences around the world, so I will be supporting it.

HON AARON STONEHOUSE (South Metropolitan) [3.51 pm]: I would like to share some of my thoughts and concerns about the Bail Amendment (Persons Linked to Terrorism) Bill 2018, which seeks to introduce a presumption against bail for persons linked to terrorism. "Someone with links to terrorism" may include someone convicted of a terrorism offence or someone merely charged with a terrorism offence. This presumption against bail is similar to that applying to a schedule 2 offender—someone on bail for a serious offence, as defined by the Bail Act, who is alleged to have committed another serious offence while on bail for the first serious offence. In those circumstances, there is a presumption against bail much the same as that proposed in the bill we are now debating, unless there are exceptional circumstances, which, as I understand, may include things such as a terminal illness.

What concerns me here, aside from just the broadness of these measures, is the direction of the debate around terrorism, and the broadness of the way in which this label is thrown around. We debated a motion earlier this afternoon about terrorism and the events in Christchurch, but, if we go back a few weeks, we had some debates in this place around vegan activism—vegan activists trespassing on private property and harassing farmers. It was rightly condemned by all members of this house, but some interesting things were said during that debate. In the *Hansard* of 21 February, Hon Colin de Grussa provided an interesting example of statutes in other jurisdictions that deal with terrorism. He said —

> An example from the United States that is worth considering is the Animal Enterprise Terrorism Act. That is a federal law that criminalises certain types of demonstrations or acts on behalf of animals, and classifies these demonstrations as acts of terrorism. The act makes it a crime, designated as terrorism, to damage or interfere with animal enterprises by intentionally damaging property. I am not suggesting that this is the way we need to go.

Hon Darren West interjected, "That's good." Hon Colin de Grussa went on to say that there may be some merit in parts of that legislation, but urged caution in going down that path. Later in that debate, Hon Rick Mazza gave the *Oxford Dictionary* definition of terrorism as —

> The unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims.

He continued —

> I think that describes very well what has been going on with a number of our farmers who have been harassed and attacked. It is domestic terrorism, and we, as a Parliament, should move to protect food producers and farmers from that.

I have a lot of respect for Hon Rick Mazza, but I disagree with his assessment there. Later in the debate, he said —

> I hope that the government moves towards implementing stronger penalties for these domestic terrorists who are harassing food producers.

There were a few interjections, and he continued —

> That is what they are. They are harassing food producers. They are identifying farms.

Hon Alison Xamon interjected, "You've got to be kidding!" When Hon Alison Xamon rose to her feet, she said —

> Wow! I rise to make some comments on the motion. I must say that some of the things that the two previous speakers said were reasonable and I concur with them, but a fair degree of licence was taken in some of their comments. I have to say at the outset that I become really, really concerned when members throw terms like "terrorist" around so loosely in the chamber. I think it is deeply irresponsible. I remind members that we will be debating legislation very shortly that provides for how we deal with terrorism.

I believe she was alluding to this very bill. She went on to say —

> It is a serious matter and when people are so cavalier with that term, I become very, very concerned.

Hon Alison Xamon: Wise words!

Hon AARON STONEHOUSE: Wise words indeed. Moves by some folks, perhaps on the right side of politics, to condemn their political opponents as terrorists are, I think, very unwise, especially when we are debating how terrorists should be dealt with in bail proceedings.

I will read from a debate on the Terrorism (Extraordinary Powers) Amendment Bill 2018, which, if we believe the government, gives police and law enforcement the power to shoot to kill suspected terrorists during declared terrorist incidents. We heard some interesting comments in that debate as well. I will read from the *Hansard* of 28 June 2018. During debate on that bill, Hon Alison Xamon said —

> I want to make some general comments about the definition of "terrorism" because that is often contested. I am concerned that the way we now talk about terrorism within Australia is almost exclusively within the framework of Islamic terrorism. I am concerned because I think we need to be thinking a little more broadly than that. I want to make some comments particularly about how disturbed I am about the rise of the Incel movement. Incel is a recent example of a phenomenon that, in my opinion, has many hallmarks of terrorism. For those people who are fortunate enough not to have been exposed to the sheer horror of what is Incel, the name is the conflation of two words—involuntary celibate. It is already being used as a catchcry by people, including the Californian man who, in 2014, killed six students from the University of California, Santa Barbara, and injured 14 others … I am wondering whether that would be terrorism as defined in this bill. Incel has been characterised as mass murder that is attributable to poor or inadequate male role modelling …
>
> I would also like to draw attention to my deep concerns about the rise of the Nazi movement within Perth. More and more, we are seeing that people who overtly call themselves Nazis feel quite comfortable in being able to come out and publicly protest on our streets. I would like to remind people that at the heart of being a Nazi is that they condone genocide. I wonder whether we will be talking about these people who are predominantly white, or whether we will really continue to talk about terrorism as it pertains to Muslim people.

It is interesting that it almost sounds as though, now on the left, we have people categorising groups that they do not like as terrorists again. The acts there described by Hon Alison Xamon—I believe she was alluding to Elliot Rodger—were those of a man who committed mass murder seemingly fuelled by his social inadequacies.

Hon Alison Xamon interjected.

Hon AARON STONEHOUSE: Sure, but again we see an eagerness to condemn political opponents or people in an outgroup as terrorists. It is not exclusive to those on the right side of politics, it seems. There are plenty of people on the left who like to throw around the label of terrorist. Certainly, some people who describe themselves as incels have committed acts of violence. Many more people may be lonely, pathetic losers on the internet, to whom that tag might apply, but are certainly not terrorists. Certain nationalist groups who perhaps do not have the racial component of different fascist movements may have similar characteristics, but otherwise do not engage in acts of terrorism. We need to be very careful about how we throw around that label.

Hon Michael Mischin: We could say that the suffragettes were terrorists. They were into firebombing.

Hon AARON STONEHOUSE: Suffragettes—absolutely. We need to be very careful about how we throw around this label. All acts of political violence should of course be condemned—I said as much in the motion we debated earlier this afternoon—but the eagerness to throw around the label "terrorist" at groups that we disapprove of or find distasteful should be resisted.

Hon Alison Xamon: There is a difference between mass murder and trespassing.

Hon AARON STONEHOUSE: Absolutely; I agree. But that label should be used very carefully, especially when we now have on the statutes shoot-to-kill powers for declared terrorist acts. Surely, some folks on the right do not

want the police shooting to kill vegan activists. Surely, some folks on the left do not want the police out there, shooting to kill lonely, dejected losers on Reddit. This is not the kind of society we want. We need to be very careful about how we grant these powers and what checks and balances are in place when they are exercised.

At the heart of this, the presumption against bail concerns me because at the time someone is having a bail proceeding, there is still a presumption of innocence; the guilt has not yet been proven, regardless of how serious the charges are. As I pointed out earlier, there are circumstances in which there is a presumption against bail for schedule 2 offenders, but that is for serious offences. We are debating the ability to hold someone in remand and to have a presumption against bail for what may not be a serious charge and may be a rather minor charge—perhaps drug possession or something of that nature—merely because that person has been charged with a terrorist offence at some time in their past. Again, they do not need to have been convicted of a terrorism-related act or a terrorism-related offence for these powers to come into play. They may have been charged with a terrorism-related offence in the past, had their day in court and had their innocence proven. Fast-forward a few years, and they are arrested on some unrelated charge. Again, their guilt has not yet been proven but there can be a presumption against bail implemented against them unless they can prove exceptional circumstances, which is very hard to prove. It sets a very high bar for people to clear.

It may be that these people are perhaps terrorists, but in our justice system it is incumbent upon a prosecution to prove someone's guilt and it ought to be incumbent on the arrester to prove why bail should not be granted in the first place. If this person truly is a risk to the public or to our national security, the arrester should prove that to the court and to the judicial officer and not have legislators applying broad powers and blanket rules against bail, in this instance.

The inclusion of provisions to allow for secret evidence to be heard during bail proceedings is also of concern. It was pointed out in a previous contribution that we have an adversarial justice system that relies on people being able to answer charges brought against them. Denying an accused the opportunity to respond to evidence used against them during a bail proceeding undermines that. How can someone possibly counter accusations or evidence being levelled against them if they do not even know whether that evidence exists? There may be a need to keep some evidence secret or private for the purposes of preserving the integrity of an investigation or protecting the safety of a witness or informant, but surely there are better ways to go about it without including a presumption against bail.

The ability to detain people on remand, potentially for months, and to hear secret evidence during their bail proceedings is something akin to what would happen in North Korea, not in a free and liberal society such as ours. Again and again, when we see terrorist acts carried out, we see legislators moving quickly to undermine and chip away at our civil liberties. We hear that being characterised by some people as being just what the terrorists want. I do not know whether that is true—I do not pretend to know what the intentions of terrorists are in their various acts—but removing the civil liberties of all citizens because of the acts of the radicalised few is, I think, a very bad path to go down. There may be a need for some changes here and there, but broadly applied blanket restrictions such as the presumption against bail for anyone merely charged with a terrorism-related offence strikes me as an act that will limit our freedoms but give us perhaps very little security or safety in return.

I note that there are several amendments on the supplementary notice paper and I look forward to going through them and considering them in detail when we go into Committee of the Whole. But at this point, I am yet to be convinced of the need for this. I am still firmly of the opinion that it should be incumbent upon the arrester to prove to a judicial officer why bail should not be granted, rather than a blanket assumption that bail should not be granted for charges that are unrelated to a previous charge or conviction of terrorism.

HON SUE ELLERY (South Metropolitan — Leader of the House) [4.04 pm] — in reply: I thank members for their contributions to the debate on the Bail Amendment (Persons Linked to Terrorism) Bill 2018. I will begin by addressing some of the issues raised by Hon Michael Mischin. I make the point that the terrorist activities in Sydney and later in Brighton set the context, if you like, for discussions that were going on at the Council of Australian Governments about this kind of legislation. It needs to be said that this legislation does not seek to address the specific issues that resulted from the New South Wales event and the circumstances around the bail of the perpetrator.

When COAG agreed to a presumption against bail and parole for persons with links to terrorism, it was announced within the context of leaders recognising that the terrorist threat in Australia remained elevated. Leaders sought to implement a range of measures to support national consistency and interoperability, and to enhance the effectiveness of security and law enforcement. The COAG decision was announced in the immediate aftermath of the terrorist siege in Brighton, Victoria, on 5 June 2017. The offender in that case had been released on parole. He had a long history of violence and known links to terrorism. The COAG decision was also influenced by reforms that had already been implemented by the New South Wales government. The Bail Amendment Act 2015 introduced amendments in response to the Lindt Café siege with the aim of making it difficult for people to be granted bail if they had been charged with, or convicted of, a terrorism offence or had been subject to a terrorism control order. COAG sought to achieve baseline consistency across the Australian jurisdictions for presumptions against bail and parole in the case of persons who have demonstrated support for, or have links to, terrorist activity, and this bill is part of the nationally consistent response.

It was asked how this bill might, if at all, overcome the sorts of issues that arose in the Monis case and how it is intended to enhance the safety of the community. The New South Wales inquest into the deaths arising from the Lindt Café siege identified a number of significant failings in the approach of the prosecution to the Monis bail application. These included failure to present adequate submissions to the court to oppose bail. Additionally, the prosecution erroneously advised the court that Monis did not have to show exceptional circumstances for a grant of bail in relation to some very serious charges that included sex offences and accessory to murder.

The Lindt Café siege was part of the overall context that led —

Hon Michael Mischin: Will you take an interjection to just clarify? Monis was already subject to an exceptional circumstances test.

Hon SUE ELLERY: The member might want to ask me that again when I have the advisers sitting around me.

Hon Michael Mischin: I certainly don't want to interrupt your flow!

Hon SUE ELLERY: As I am reading the advice given to me for my reply, I think that is the case, but why does the member not ask me that again when I have the advisers sitting next to me?

The Lindt Café siege was part of the overall context that led to the COAG decision, but this bill does not seek to fix the particulars of the New South Wales conditions at the time that the Lindt Café siege occurred. In accordance with the COAG agreement, the presumption against bail introduced by this bill is intended to enhance public safety by applying the exceptional reasons test to individuals who have demonstrated support for, or have links to, terrorist activities.

I will take members back to the proposed definitions in the bill before us. We are talking about a person who —

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

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

If we put aside the first category—that is, someone who has been charged with a terrorism offence—in each of the other categories, a determination has already been made that there is a link to terrorism, albeit there is a difference between an interim control order and a confirmed control order. Being charged with, or convicted of, a terrorism offence or being subject to a relevant commonwealth control order is a very serious matter and signifies that a person poses a potentially serious threat to the safety of the community. The presumption against bail seeks to address this risk. The fact that a person has been charged with another offence that may be completely unrelated to the terrorism offence is suggestive of renewed criminal activity on their part that ought to be subject to greater scrutiny by a court, as achieved by the application of the exceptional reasons test. The presumption would complement other measures in our national counterterrorism legislative framework, such as the terrorism offence control orders, preventive detention orders and response powers.

Hon Michael Mischin asked some questions about the role of the joint counterterrorism teams, known as JCTTs. These teams are established in each state and territory and comprise Australian Federal Police, state or territory law enforcement, as the respective cases may be, and the Australian Security Intelligence Organisation and other government agencies as per each jurisdiction's arrangements. The WA Police Force is the main state agency represented on the Western Australian JCTT. In accordance with the Council of Australian Governments' decision in October 2017, work is underway to integrate security-cleared staff from the corrective services division of the WA Department of Justice with the JCTT to improve information sharing. JCTTs conduct threat-based preventive investigations with a view to utilising a variety of measures to minimise threat and risk and/or bring criminal prosecutions for breaches of terrorism legislation. Comprehensive governance arrangements for the operation of the JCTTs are in place to ensure that there is a coordinated approach to terrorism within and across jurisdictions in accordance with the national counterterrorism plan. The bill before us includes provisions to ensure that classified terrorism intelligence information that may relate to the investigative decisions and risk assessments of JCTTs is appropriately protected in bail proceedings. Hon Alison Xamon referred to that area as secret information.

Hon Michael Mischin also raised the issue of the common law presumption of innocence. Of course, he is quite right. However, the right to bail is not absolute. The bail legislation currently operates to balance the right of an accused to be at liberty with an assessment of the risks that an accused, if not kept in custody, may fail to appear; commit an offence; endanger the safety, welfare or property of any person; or interfere with witnesses to otherwise obstruct the course of justice. Additionally, the exceptional reasons test is not a new feature of bail legislation. The Bail Act identifies a presumption against bail in the case of murder, a second serious offence or the breach of a dangerous sexual offender order. These presumptions apply at both the pre and post–conviction stages and operate to make it more difficult for an accused to demonstrate their suitability for a grant of bail. In the case of those who are linked to terrorism, the government accepts that due to certain previous terrorist activities, along with the alleged criminal conduct that is the subject of the actual bail proceedings, the person represents such a risk that only in exceptional circumstances should that person be granted bail.

I refer to the questions asked by Hon Alison Xamon. She raised a question about the relationship between the commonwealth bail legislation and the bill that is before us. Persons accused of having committed an offence against a commonwealth law are subject to state and territory bail laws and procedures by virtue of sections 68(1), 79 and 80 of the commonwealth Judiciary Act 1903. This has the effect that, generally speaking, state bail laws and procedures apply to persons who appear in state courts but are charged with commonwealth offences. An example of a procedural matter that will apply to persons who appear in WA courts charged with commonwealth offences is the amendment introduced by the WA bill that seeks to modify the procedural steps so that persons charged with a commonwealth terrorism offence must be brought before a court constituted by a judicial officer and not a justice of the peace. However, section 15AA of the commonwealth Crimes Act 1914 creates a presumption against bail for persons charged with specified commonwealth offences, which includes terrorism offences, unless exceptional circumstances exist. This is a carve-out to the general position that I spoke of a minute ago. The effect of section 15AA is that the exceptional circumstances test will apply to a person accused of a commonwealth terrorism offence who appears in a state court. However, state laws addressing bail-related matters that are not specifically addressed by section 15AA, such as procedures and processes for hearing bail applications, will continue to apply. Put simply, specific bail conditions provided for by commonwealth laws will apply to a person accused of a commonwealth offence being dealt with in any Western Australian court. However, any matter concerning bail that is not specifically provided for by a commonwealth law will instead fall to be determined by reference to WA bail laws and procedures.

Hon Alison Xamon asked whether bail is considered on every occasion if it has been granted. Proposed clause 3E(6) provides —

> Where an accused is granted bail under subclause (2), —

In accordance with the exceptional reasons test —

> on any subsequent appearance in the same case a judicial officer may order that bail is to continue on the same terms and conditions.

The judicial officer is not required to reapply the test on every occasion. The prosecution may also apply to the court for the accused to show cause about why bail should not be varied or revoked. Clause 10 of the bill amends section 54 of the Bail Act with the effect that this procedure may be used when the prosecution demonstrates —

> (iv) new facts have been discovered, new circumstances have arisen or the circumstances have changed since bail was granted …

Hon Alison Xamon also raised some issues around what she described as the secret evidence provisions and whether they are constitutionally valid. The existing provisions of the Bail Act create a positive duty of disclosure. Section 8 requires that an accused be given information in an approved form that is designed to disclose all information relevant to the bail decision. Section 24 requires that when a police report is requested that verifies certain information and that addresses the bail considerations mentioned in part C, schedule 1 of the act, a copy is to be provided to the accused. Section 24A provides that a report prepared by a community corrections officer that addresses the bail considerations and proposed conditions of bail may, at the discretion of the judicial officer, be provided to the accused. Section 26 provides for the provision of a record of decision and reasons to the accused. These requirements to disclose information to the accused will be subject to the new protections to terrorism intelligence information. The court, applying new section 66C, will retain its discretion to attribute such weight to terrorism intelligence as is considered appropriate and having regard to the requirements for disclosure under the Bail Act. The protections will be applied to the extent only that disclosure of the information could reasonably be expected to prejudice national security, endanger a person's life or physical safety, reveal intelligence-gathering methodologies or prejudice an investigation. In most cases, a person will be informed of the general nature of the investigations. In very exceptional circumstances, any reference to the information may be protected from disclosure.

The Solicitor-General has considered the effect of the protections to terrorism intelligence information on bail proceedings and is of the view that the protections do not require a judicial officer to act inconsistently with chapter III of the commonwealth Constitution and would therefore withstand constitutional challenge.

Hon Alison Xamon also asked whether what she referred to as the secret evidence provisions alter the evidence considered at trial. The proposed new provisions of the Bail Act in this bill do not alter or limit the usual Evidence Act provisions or the court's discretion at the substantive criminal trial.

I thank Hon Rick Mazza for his support. He did not raise any questions that required me to respond. I thank Hon Aaron Stonehouse as well for his support. He made the point that the presumption against bail proposed in the bill would apply when the offender was merely charged in the past with a terrorism offence, even if found not guilty. Just to clarify: the only time the charge triggers a presumption is when it is a current terrorism charge that is yet to be determined, or where there has been a conviction.

I think that covers each of the questions that have been raised in the second reading debate. I note that there is a supplementary notice paper. We will have a discussion about that when we get to it. I thank members for their contribution and support and I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Adele Farina) in the chair; Hon Sue Ellery (Leader of the House) in charge of the bill.

Clause 1: Short title —

Hon MICHAEL MISCHIN: I have a couple of general questions about the operation of the legislation, but before I get to that, I think I asked why it had taken this long to draft this particular piece of legislation and introduce it. I understand that other jurisdictions have already enacted their complementary laws, but it has taken quite a while for this one to get underway.

Hon SUE ELLERY: The honourable member is quite right: he did raise that issue. The development of the legislative proposals commenced shortly after 7 November 2017, which is when the Australia–New Zealand Counter-Terrorism Committee endorsed the nationally consistent principles. It has been coordinated by the Department of Justice through a Western Australian interagency working group comprising advisers from the State Solicitor's Office, the Department of Justice and the Department of the Premier and Cabinet, and senior officers from WA Police Force. The working group took great care to strike a balance between the maintenance of requirements for procedural fairness and natural justice, developing a proposal that complemented WA's existing bail legislation and met the requirements of the Council of Australian Governments agreement. The department undertook two rounds of targeted consultation with the judicial heads of jurisdiction and the Western Australian Director of Public Prosecutions, first on the draft proposal and second on the provisions of the draft bill, and that occurred in July and then in October through to November 2018. The WA Solicitor-General also considered the provisions of the draft bill and advised that in his view the amendments to the Bail Act would withstand constitutional challenge. That takes us through to the end of 2018.

Hon MICHAEL MISCHIN: Which are the constitutionally suspect—that is probably putting it a little too high—or the constitutional concerns that surround this bill? Are they in the secrecy provisions regarding the confidential hearing of bail applications without disclosure to the defence, or was it something more than that? If they are in the secrecy provisions, is that not a problem that would also be faced by other jurisdictions that have enacted like legislation? Would it not have been possible to gain some assistance from legal opinion of relevant law officers in those other jurisdictions? I am still at a loss to understand why it is so difficult to get this particular bill through. Was it just a matter of lack of resources of parliamentary counsel?

Hon SUE ELLERY: The Solicitor-General considered two areas to the constitutional validity of the amendments. The first was the general principle of reversing the onus of proof. The second was around proposed section 66C, those provisions that go to a judicial officer receiving and having regard to confidential terrorist intelligence information with the effect that a party to bail proceedings may not know all the information, and that being the basis for denying bail. It was those two areas.

Hon ALISON XAMON: I am really struggling to hear the minister's responses. I am not sure whether the microphone is working fully. I would really like to be able to hear the responses.

The DEPUTY CHAIR: I will make the comment—maybe the telecommunications room will hear—that we need to ensure that the minister's microphone is on when she is answering the questions. Hopefully, that will be addressed.

I also take this opportunity to point out to members that supplementary notice paper 112, issue 3, is currently being distributed around the chamber. If members are following the debate, can they please ensure that they get a copy.

Hon MICHAEL MISCHIN: Perhaps in time for issue 4 when it comes out, I point out that there should be some italics in the name "Financial Management Act 2006" in Hon Alison Xamon's amendment, at the bottom of the page. Perhaps that can be fixed for issues 4, 5 and 6.

The DEPUTY CHAIR: Duly noted. Thank you.

Hon MICHAEL MISCHIN: We have advice that the government is comfortable that those confidentiality and lack-of-disclosure provisions are constitutionally sound. Is the minister able to tell us whether similar provisions are available in other legislation of a similar nature that is in operation in other jurisdictions, and whether all jurisdictions have now introduced bills to this effect?

Hon SUE ELLERY: Can the member specifically identify the question? Maybe we will have to sort this out during question time. Which comparative bit of the question goes to the two provisions that we were just talking about?

Hon MICHAEL MISCHIN: Are there confidentiality provisions like these, or akin to these, in the legislation of other states and territories? I went through a variety of bills that had been either introduced or enacted in other jurisdictions. I wanted an update about whether we are the only jurisdiction that is yet to enact or introduce these laws.

Committee interrupted, pursuant to standing orders.

[Continued on page 1366.]