SUBCOMMITTEE OF THE STANDING COMMITTEE ON LEGISLATION

ROAD TRAFFIC AMENDMENT (DANGEROUS DRIVING) BILL 2004

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON THURSDAY, 14 OCTOBER 2004

Members

Hon Giz Watson (Convenor)
Hon George Cash (Substitute for Hon Bill Stretch)
Hon Ken Travers (Substitute for Hon Jon Ford)

Committee met at 2.25 pm

PRIOR, MR JOHN
Treasurer and Spokesperson, Criminal Lawyers Association of Western Australia,
10th Floor, 12 St Georges Terrace,
Perth, examined:

Hon GIZ WATSON: On behalf of the committee, I would like to welcome you to the meeting. You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

Mr Prior: Yes, I have, thank you.

Hon GIZ WATSON: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them.

I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing.

Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

I believe that yesterday you received some questions from the committee. We might perhaps start by addressing those questions.

Mr Prior: At the outset, I apologise on behalf of Hylton Quail, the president of the association. He is not here for good reason; that is, the genesis, if you like, of this Bill comes from the tragic circumstances surrounding the death of Jess Meehan and the person who was charged with a number of offences related to that. As of last week, Hylton Quail was instructed to act for that person; therefore, he considered it inappropriate to attend today, and I think everyone would understand his reasons. Until now, many of the submissions we may have made would have been under his hand as president. The public comments about the Bill and the tragic circumstances have also been made by him on behalf of the association. I have come in late, so I apologise. Last night, I finished a trial at Bunbury and got home at 10 o'clock. I have seen some of these questions for only a short period, but I do not think they will cause me considerable difficulty in answering them on short notice.

Hon GIZ WATSON: I will read out the questions and then you can give your response. The subcommittee notes your submission that the Road Traffic Amendment (Dangerous Driving) Bill 2004 reverses the onus of proof requiring that an accused prove innocence. The subcommittee asked Mr George Tannin, SC, the instructing officer, about this issue in relation to the Bill, and he provided the response in a document titled "Attachment A". In light of his response, would you comment further on this issue for the subcommittee? The subcommittee is particularly interested in your view about how the amendments reverse the onus of proof.

Mr Prior: I suppose we can be legally technical about what is the onus of proof. Certainly, if someone were charged under this new legislation, we would start with the fact that the prosecution, whether the police or the representative of the Director of Public Prosecutions, is obliged to prove the charge. However, we are particularly concerned about the deeming provision that deems that if a driver's blood alcohol reading is 0.15 per cent, firstly, the driver was incapable of controlling the motor vehicle, and, secondly and more importantly, the driver caused the incident. In relation to that, whether you call it presumed liability, reversing the onus of proof or a deeming provision, the practical effect for an accused person is if his blood alcohol limit is over 0.15, the significant part of the trial, if he defends the matter, will be that he has to provide evidence to prove he is innocent of causing the incident - let us call it an accident. I say that for the following reasons. Yes, the prosecution will have to prove that the accused is the driver, which is usually quite simple in most cases. There will be cases in which there will be identity problems, but in most cases it will probably be admitted by the accused. Yes, the prosecution will have to prove there was an accident, which will probably not be as difficult if other parties were involved than it would be if other parties were injured. Next is the causation issue, which is really what this Bill focuses on, and the causation to the extent that people injured, whether they be in the accused person's car, in other vehicles, standing on the side of the road or whatever, have to prove that the driver caused that accident. At the moment, the provisions under sections 59A and 59 of the Road Traffic Act work by the police collecting the evidence and the police or the Director of Public Prosecutions prosecuting the matter. One must remember this: we are dealing with the might of the State against the individual, and taking him into the criminal courts. Firstly, when someone dies in an accident or is significantly injured - that is, suffering grievous bodily harm or significant bodily harm, generally speaking - especially in the Perth metropolitan area, the major accident squad police will attend. They are highly trained and highly responsible police. Generally, the legal profession would say that they are probably one of the best branches of the police department across the board and do a difficult job.
[2.35 pm]

What this Bill says in terms of the deeming provision is that if the person is over 0.15, there is very little incentive for them to do much. They get a breathalyser reading - there is a provision if a person refuses and, understandably, the provisions for a police officer to ask someone to have a breathalyser test have been strengthened in circumstances such as this. Once they have been able to establish, first, that a person was the driver; second, that there was an accident; and, third, that the person was over .15, they might as well stop doing their job because the driver, by the sheer fact that he or she is .15 or above, will then have to prove their innocence. Under the deeming provision people will say that if there is evidence, fine they should be acquitted. Let us understand practically what we are dealing with here. We are dealing with someone who, by definition, has a reading of 0.15. We are dealing with someone who has had an accident and, by law, you are saying that the onus is on them to collect the evidence because if they do not do it at the time, it will be difficult to do it later. That person will not be a trained person. If they happen to be wealthy, they might, in about a week's time, get some legal advice and instruct a lawyer, who then instructs a traffic engineer to reconstruct the accident and so on. Given these are traffic offences, a significant amount of them will be dealt with in the Court of Petty Sessions. People will not have legal aid. People who have financial backing and capital will be able to pay for lawyers, engineers and so on to get the relevant evidence to rebut the deeming provision. The other thing that should be indicated is this: let us think of the practical circumstances of trying to collect evidence when you are the accused person and, as I say, over .15 and possibly at the scene because you are advised of the change of the law. Someone, a young child or an adult, steps out immediately in front of you when you are driving a car. That person is the only witness. That person dies or is seriously injured and you are the only person in the car. You are then in a position in which you have to try to find evidence to rebut that presumption. Another way of putting it is this: I am in a vehicle and I have a reading of 0.15 -

Hon GEORGE CASH: Which presumption are you referring to?

Mr Prior: The deeming provision. You have to rebut that. Whether we use deeming provision, onus of proof or rebuttable presumption in a practical sense it will be the same thing. I will give another example. Two people are facing each other at a stop sign. I am in the vehicle, I am the accused person and I am 0.15. The person in the other vehicle - their partner is in the passenger seat - turns right in front me. I take off and collide with that car and kill the driver. In this legislation, given that I am over 0.15 - assuming that is proved easily because I do a breathalyser test and have a blood test - I will have to approach the deceased person's partner and say "Can I have your contact details, can I take a statement from you or can I ring you next week?" Think about the practical consequences of doing that, as opposed to people such as trained police officers doing it. The problem is that it is one thing to say that if a person is 0.15, they are so over the limit that they cannot drive a motor vehicle properly. That is fine, but there will still be cases in which they have not caused an accident. The problem is the deeming provision. In practical consequences it puts the onus of proof on you to show your innocence.

Hon GEORGE CASH: Can you distinguish between two areas? At the moment we appear to be talking about proposed section 59B. Proposed section 59B(5) is a deeming clause with respect to a person's BAL exceeding 0.15 per cent. If a person has more than 0.15 per cent they are deemed to have been under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle at the time of the alleged offence. That is similar - in fact it is the same - as section 63(5) of the Road Traffic Act where a deeming provision is already in existence.

Mr Prior: If you look at section 63 the words of the statute refer to driving under the influence and the deeming provision provides for that. Arguably, in time, we might have words like that in section 64 instead of 08.

Hon GEORGE CASH: I am not disagreeing with the proposition you put forward. I want to separate two issues - namely, the deeming clause that we have referred to with respect to 0.15 per cent and the other issue you talked about, the causation. It is the causation issue that I want you to talk more about, because at the moment - if I understand the issue correctly - the wording of the Act states that when a person causes grievous bodily harm to another person and that other person receives surgical or medical treatment and death results either from the harm or the treatment, he is deemed to have caused the death of that other person. That is the current law. It is proposed to delete that and insert -

> when an incident occasions grievous bodily harm to a person and that person receives surgical or medical treatment, and death results either from the harm or the treatment, the incident is deemed to have occasioned the death of that person

It seems that you appear to be putting the argument that, at the moment, the prosecution has to prove the causal link between the actions of "the person" in causing the grievous bodily harm and the new proposed arrangement, which relies purely on an incident that occasions grievous bodily harm.

[2.40 pm]

Mr Prior: Another way of looking at it - the way I look at it - is that proposed sections 59(1)(a) and 59A(1)(a), which refer to "while under the influence of alcohol, drugs, or alcohol and drugs", are the new legislation. That, in itself, is unnecessary anyway because of the existing paragraph (b). There are cases regularly before the courts in which people are under the influence of alcohol - they have a blood alcohol or breathalyser reading - and that is part of the evidence. It is accepted as admissible and there is evidence that that level of alcohol consumption would have contributed to the reaction time or whatever. People do get convicted. You would probably be aware that the categories of that sort of driving makes it almost axiomatic that people go to jail. That has probably been widened a bit in the past two years because even if people are sleep deprived and they know it, they will probably go to jail as well. We say that the existing section 59(1)(b) and the existing

section 59A(1)(b) are sufficient for the purpose. What is continually said about this is that people have difficulty proving causation. We ask where is the evidence of that, because we regularly see people in the courts being convicted of offences of dangerous driving causing grievous bodily harm or death in which alcohol consumption principally, and occasionally drugs, is considered a major factor in the causation. The police are capable of running cases on that basis. It is unfortunate for the family of the deceased young lady. A footnote to this is that you are probably aware that the driver has now been charged under the existing legislation. At the time, my association said that it could not see any problem with the existing legislation; if the evidence is there, there should be a prosecution. As I said from the outset, I make it quite clear that the major accident section of the Police Force has an extremely difficult job to do. The tragedy of the circumstances of this case is that, one year down the track, they now charge someone under the existing legislation. That raises the question of what is wrong with the existing legislation. To go back to the original question - I know I have not answered the question yet - we say that the suggestion that there are problems with proving causation is something with which we do not agree. With respect, we say that what is being attempted here is to try to reverse the onus of proof by using a deeming provision.

Deeming provisions are very powerful evidential tools. Under section 11 of the Misuse of Drugs Act, in which a person is deemed to supply if he has a certain amount of illicit drugs, in my experience - I have been practising for 19 years - it is very rare that people are acquitted when that deeming provision applies. It is difficult for juries to understand that because a judge will direct a jury and an accused will say that he has X amount of drugs for his own use and, therefore, is not a supplier or seller. In reality, I think that juries think that a person must prove his innocence. The proof of the pudding is the number of convictions. I am not criticising that deeming provision because it is there for a good reason: it is very difficult to convict sellers or suppliers of drugs.

This is a different circumstance. We do not accept that there is a fundamental problem with the existing law in proving causation. This tragic case of last year was clearly the starting point for this. If a remedy - I use the word loosely - is required, it has now been provided by the man being charged with dangerous driving causing death. I would urge the committee, if it has not already thought about it, to obtain the transcript of when the man came before the Joondalup Court of Petty Sessions in the first instance. The reason I say that is because there was factually incorrect media reporting of what was before the presiding magistrate. She was dealing with someone charged with driving under the influence, not causing the death of someone. Although it is hearsay, my understanding is that she may not even have been aware that someone was injured, let alone that a child was killed. If we go back to the history of the case, yes, the police were obviously aware of it. If they thought it appropriate to charge that man with dangerous driving causing death or something else such as motor manslaughter, they would have. Obviously, they have now reconsidered and charged the man. I know I have taken a long time to answer the question. We do not accept that there is a problem in proving causation.

I will use Mr Tannin's response. I assume that members have a copy of his notes in response - attachment "A". I refer to the second paragraph -

> First, however, the prosecution would need to establish that an offence of dangerous driving occasioning death, grievous bodily harm or bodily harm has been committed.

In other words, he is saying that is not right - the onus of proof has not been changed. I say yes, I agree with that. He then states -

> Therefore, the prosecution must establish that, first, the vehicle was involved in an incident -

In this legislation the definition of "incident" is very wide -

> resulting in death, grievous bodily harm or bodily harm.

I say as a prosecutor - I prosecute from time to time for the DPP - that it is usually as easy as pie to prove those matters. He continues -

> Secondly, that the driver of the vehicle was drunk or intoxicated to such an extent -

Hon GEORGE CASH: Can we just go back a moment? You said "as easy as pie". The words of Mr Tannin are -

> First, however, the prosecution would need to establish that an offence of dangerous driving occasioning death . . . has been committed.

Mr Prior: Yes.

Hon GEORGE CASH: Are you saying that to prove dangerous driving occasioning death is a relatively easy matter?

Mr Prior: Yes. The definition of "dangerous driving", whether it involves bodily harm or grievous bodily harm, is an objective test. I regularly have people in my office who think they were driving okay. I tell them that it is an objective test. I ask them to think of it as God looking down. It is an objective test so it is what a reasonable road user would do. It is not that hard to get a conviction. Perhaps a practical manifestation of that is that you often see lawyers speaking to prosecutors or police officers saying that if the charge is dropped to careless driving, the accused will plead guilty. That is because lawyers realise that there is a real risk that, on the objective test, people can be convicted. This probably answers the question: yes, we still have to prove dangerous driving but, under the old test and new test, that is there. We say that the deeming provision states that once a person is at a level of 0.15, if he is in car No 5 in the chain of cars that has a collision when everyone is driving home from work, on face value, that person has caused the pile up. I have used that example and people will say I am being silly. However, a person has to prove his innocence; that is a problem. People are in the criminal courts and, at the time, they were over the limit. Therefore, their faculties as an evidence-gathering person were probably not there.

To return to Mr Tannin's response -

> Secondly, that the driver of the vehicle was drunk or intoxicated to such an extent as to be incapable of having proper control of the vehicle . . .

What are the powers under the Road Traffic Act to breathalyse a person or demand a blood test? They are very powerful. I am not criticising that one bit; they should be. Historically, over the past 20 years, whenever a loophole is found, generally speaking and, quite understandably, Parliament will close the loophole. So it is not that hard to get someone to do a breathalyser, or make him do a breathalyser, if you like. To the first two parts I would say as a prosecutor that the only bit there where I can see that occasionally there will be a problem - and this probably does not relate to this type of offence - is if there is an issue about the identity of the driver. What would happen then is if the driver is over 0.15, and once you have ticked those boxes - which to use my expression are as easy as pie from a prosecution perspective - then it would be over to you, Mr Accused, who is probably in a Court of Petty Sessions, who might not be able to afford a lawyer, and who probably did not understand the law at the time the accident occurred and who has now been advised by some lawyer or someone two months later that he needs to collect evidence. The best examples - and I have used both of them - are chains of accidents, or, bizarre as it might sound, almost suicide attempts.

[2.50 pm]

Hon GEORGE CASH: Could you give us an example of your chain of vehicles?

Mr Prior: The one I think of is this. Simply, on face value, you have 10 cars driving along Kwinana Freeway and crossing over the Narrows Bridge and heading south of Perth at five o'clock. Driver number five has had some drinks after work - obviously miles too many if he is 0.15 - and an accident occurs. That sort of accident is usually caused when someone slows down, and the tenth car hits the ninth car and there is a chain reaction. Generally speaking, when we are looking at who caused the accident, it is usually the tenth car. However, if the driver of that car is over 0.15 and the

police come on the scene - everyone has to stay there, because it is peak hour - at 0.15 it would not be that hard to pick up that he may be under the influence, because he is probably going to show some physical signs, such as smelling of alcohol, so the police would say to the driver of car number five that they want him to have a breathalyser. Therefore, all of a sudden, on the definition of incident and how wide it is under this Bill, the driver of car number five theoretically is deemed to be incapable of driving a vehicle and is deemed to have caused the incident - that pile-up.

Hon KEN TRAVERS: Deemed to have attributed to the incident, not to have caused it. In your example you were complaining about the police not investigating. The police would still investigate that situation because they might want to charge a number of the other drivers involved. It will not be only one driver who is charged, will it?

Mr Prior: With respect, I agree with you, but there are a couple of points about that. The first - if I can use the last comment first - is that yes, the police might want to fully investigate. We need to be practical about police. Police are under-resourced. All of a sudden, legislation like this exists. If you get a police officer who is under pressure time or resource-wise, well, if one guy is over the limit, he will say, "It is his problem. He can come along to court and he can run the case, so to speak, in terms of collecting the evidence. I have got enough here. I have got who was driving the car. I have got one person who was over 0.15." That might sound cynical of the police, but that is a possibility if you have a slack police officer. Secondly, the definition of incident under proposed section 59B as drafted in this Bill is extremely wide. It could be, as you have said, a contributor to the incident. That is what worries me. We have some concern about proposed section 59B, because it says "the circumstances in which a motor vehicle is involved in an incident", and then it says that it can include paragraphs (a) through to (g). Why define that? Why put it in there? I would think all three of you would have a problem in thinking of factual circumstances that do not meet paragraphs (a) to (g), and of course lawyers will try to play legal gymnastics by saying that their client does not fit into that definition. The way I read that drafting is that it is not an exclusive definition in any event. That begs the question: why have it? Why not let the court decide what an incident is?

Hon GEORGE CASH: Yes, and that is something we will have to look at.

Mr Prior: I have read Mr Tannin's comments on proposed section 59B. I am a bit miffed about why it is in there.

Hon GEORGE CASH: It seemed to me when you were referring to the driver of car number five that the proposed law does not deem him to have contributed to the death. It actually deems him to have occasioned the death of the person in absolute terms.

Mr Prior: Yes. I agree with that.

Hon GEORGE CASH: The question of causation, where the prosecution does not have to show that there is a causal link between the activities of the driver and the death of the person, is an area that I am very interested in exploring. I have to say to you that I accept without reservation the fact that if someone is over 0.15 he is deemed to be incapable of controlling a vehicle. That is the current law. That is not being changed. You have continually used the 0.15, or more, example. However, proposed section 59B(2) provides that where an incident occasions GBH and a death results, the incident is deemed to have occasioned the death of that person. That would obviously apply also to someone with less than 0.15 BAL so long as it can be shown that the person was not in proper control of the vehicle.

Mr Prior: Yes. To use my example, it is almost like the existing legislation. Under the existing legislation you would call evidence from, say, a chemist. A chemist who regularly comes along - I think he is retired now - is Associate Professor Joyce from the University of Western Australia. The Director of Public Prosecutions uses him a lot. He is a very convincing witness - a very learned man. He will say the blood alcohol level means you have consumed this much, and this is what

your reaction time is. My experience is that juries find that quite plausible. What you have said, Mr Cash, is correct. The person could be 0.05. Perhaps another way of looking at it, if you go the other way, is that a person could be 0.02 but he is a probationary driver, and you get some evidence about inexperienced drivers.

Hon GEORGE CASH: So long as they can prove that you are incapable of having proper control.

Mr Prior: Yes.

Hon GEORGE CASH: I do not think the percentage matters. If that can be proved, then that is the fact.

Mr Prior: Yes, the point being that "they" can prove - "they" being the State, which is prosecuting the individual, at taxpayers' expense - as opposed to the individual who is trying to prove that he is innocent, or that the deeming provision should not arise.

Hon GEORGE CASH: You have made the point pretty clearly that the individual defendant will have a monumental task in trying to out-do the resources of the State. You have explained that chain of cars incident. There was another example that you were going to talk about - the suicide.

Mr Prior: Yes. The suicide or the absolute tragic accident, where someone is driving along a road and a young child, or an adult who wants to commit suicide, literally steps out in front of the car and there is just no possibility that the person, whether sober or not, can stop. There is not even a skid mark. If the driver is 0.15, then under this legislation he has to prove that he did not cause the accident.

Hon GEORGE CASH: No. The driver has to prove that he has not occasioned the death.

Mr Prior: Yes, occasioned the death. We note that there are provisions in it such as if they went for some radical surgery to save the person's life and that failed, that would excuse not even you any more. I must say I am struggling to think of cases in which people have tried that, but it is obviously available under the existing legislation. Therefore, in that circumstance you may be the lone driver and the deceased may be the lone person at the scene, because it is three o'clock in the morning; and I can think off the top of my head, as can probably the members of this committee, of cases in which that has happened, unfortunately. Death by suicide is a good example. Another one is where the pedestrian is perhaps even more drunk than the driver, but there are no eyewitnesses. To prove what has caused an accident is not an easy thing. The police officers in the major accident squad are highly trained and continually trained.

Hon GIZ WATSON: I could also envisage a situation in which a child runs onto the road between two parked cars, not intending to commit suicide, but the same scenario applies, because the driver would have no opportunity to avoid the child regardless of whether he had been drinking or not.

[3.00 pm]

Mr Prior: There is one that I am aware of factually that happened last year. It is every parent's nightmare that his or her child will run in front of a school bus and people collecting children. If it happens that the next person driving along the road, whether he or she is a parent going to the school, is over 0.15, we say that, in practical terms - forgetting about what term you want to use - that driver has the onus of proof. As I say, at face value, you might think that might be easy to disprove, but the driver still has the onus of proof to prove his or her innocence because of the effect of the deeming provision.

Hon GEORGE CASH: Mr Prior, are you saying that there is a need for the prosecution to be able to prove that causal link?

Mr Prior: Yes. On behalf of the association I say: take the Jess Meehan case out of the equation and take the emotion out of it. We do not think there is anything problematic with the existing system. The sad irony is that even the system seems to have accepted that now, given that the driver - granted he has not been convicted - has been charged.

Hon KEN TRAVERS: That presumes that the Jess Meehan case is the only example that has not been brought to court as the result of deficiencies in the legislation. There have been other cases. The McIlveen case in Rockingham has been noted in Parliament, in which the driver had a 0.171 alcohol level while driving down a dark street late at night. The police or the DPP was not able to prosecute. We will hear only about the cases which are close to being able to be proved or for which there is a reasonable belief that there is a chance of conviction in a court. If you talk to the police, you will find that there are plenty of other examples that never make it to court.

Mr Prior: The answer to that is that we would like to see that evidence and not anecdotal evidence, with respect. We can show you plenty of cases in which people have been charged and convicted under the existing legislation. I am not for one minute suggesting that that case or other cases do not exist. However, we say that in some cases in the existing system the police have obviously come to the conclusion that there is not enough prima-facie evidence to charge. That might have been the initial view on the Jess Meehan case, for example. That is part of the system. They are the checks and balances. It is not a case of saying that every time there is drink-driving, it is axiomatic that there should be a charge if there is an injury and therefore we move from there. There are cases in which experienced police officers will say that, on the totality, there might be only one appropriate charge of DUI. One thing I would like to stress is this: I would be surprised if anyone in Parliament or anyone who appears before this committee disagrees that drink-driving is a serious matter and that perhaps stronger measures should be imposed. The crux of the argument is whether we are deterring people from driving under the influence by looking at the tragic consequences if they do drive under the influence. Perhaps a better way of looking at it is this: maybe circumstances of aggravation should apply to 0.08, DUI and 0.05 offences. For example, if people are involved in an incident and they are DUI, it is a circumstance of aggravation; if someone is injured, it is another circumstance of aggravation; and if someone is killed, it is another circumstance of aggravation. The penalties are graduated. That seems to have occurred lately with a lot of Bills that have gone through Parliament, and we would all be aware of plenty of examples of that. The interesting thing about this Bill is that one has to go back to the fundamental, and it is something that Hon Cash alluded to earlier. When defending dangerous driving, the focus is on the quality of driving. It is when there are unfortunate consequences and someone is injured, dies or suffers grievous bodily harm that the penalty provisions come into it. If I drive along the road dangerously and am convicted of that, I will get a $200 fine and six demerit points. If I hit someone and that person gets a cut lip and a black eye, I will receive a mandatory 12-month suspension and probably a $500 fine. What Parliament is saying is that I will get a more significant punishment because of the consequences of my driving. However, the focus primarily in terms of culpability should always be on the quality of the driving. The unfortunate reality of this is that no matter what people do when there are tragic circumstances and people die or become paraplegics, and no matter what the penalties, people will always walk out of court and say, "My son died and that person lost his licence for three years and he has gone to jail for three years; that is not enough." The focus should always first and foremost be on the quality of the driving.

Hon KEN TRAVERS: People should accept that it is a privilege to have a licence and they should exercise that privilege with absolute care. By getting into a motor vehicle when they are over 0.15, they have already ignored that care and have already acted dangerously by getting into that vehicle. I agree with you. I do not think anyone would disagree that 0.15 is dangerous. To me that is what this law is saying. If a person has a 0.15 level of alcohol in him, he is driving dangerously. If he is then involved in an incident, he contributed to that incident, and if someone died, he contributed to the death. The penalty should appropriately reflect that.

Mr Prior: To paraphrase that, because people have said that to me, the person is a weapon on the road because he is 0.15. No-one would argue that that person is capable. Clients who were over 0.15 have come into my office and asked me to say that they did not think they were over the limit. I tell them that I am not prepared to say that to a magistrate because that is just logically not correct.

It would be different if the person was maybe 0.081 and is of large build. I agree with what you have said about that. However, in answer to your comment about it being a privilege to have a licence, that is correct. The answer may be a graduated penalty for aggravated circumstances. Think outside the square a bit. Perhaps not only could the disqualification be increased, but also people's cars could be taken from them. Legislation to that effect has been passed in another style, and that might be the answer.

Hon GEORGE CASH: I have learnt from what you said in answer to Hon Ken Travers' question. However, I am concerned about distinguishing between a person - meaning the driver - and an incident.

Mr Prior: Yes.

Hon GEORGE CASH: I understand the comment you made about the chain of cars in the collision to which you referred, and it is determined that the fifth car is "the incident" that occasioned the GBH and is deemed to have occasioned the death. How would you change the existing Bill to require the Crown to still have to prove that the driver did something sufficient to have caused the death? To use your example of the 10-car collision on the Narrows Bridge, at the moment if someone on a motorbike drives at 100 kilometres an hour, with the intention of killing himself, into a person's stationary vehicle while that person is waiting for the traffic lights to change and succeeds in killing himself, the way this legislation is written will mean that an incident has occurred and that incident has occasioned the death of that person.

Mr Prior: I have not thought about that in detail, but perhaps the answer may be, first, to remove the deeming provision for the people who are 0.15. Secondly -

Hon GEORGE CASH: With respect Mr Prior, I do not think the deeming provision for 0.15 will advance us.

Mr Prior: Yes; all right.

Hon GEORGE CASH: That exists in the current law and the fact is that whether or not a person is 0.15, if it is shown that he has either alcohol or drugs or alcohol and drugs in his body to such an extent as to be incapable of having proper control of the vehicle, he is presumed to have -

Mr Prior: The next thing I was going to say is what I might call the superfluous nature of proposed section 59B. Take out the whole proposed section. Then we go to what is the crux of proposed sections 59 and 59A. Proposed section 59A(1)(a) refers to a person driving while under the influence of alcohol or drugs. If that were left in the Bill, it would become almost a parliamentary statement of intent; that is, next time the magistrate looks at this, he must make sure that he does not forget about the fact that alcohol and/or drugs are significant criteria. However, I say that proposed paragraph (b) would cover it anyway and also what you have said about the deeming provisions under the Road Traffic Act. I have difficulty in answering your question because I do not particularly understand the answer of Mr Tannin about why the legislation has changed from a person to an incident and what the necessity is there. I know what he said. He believes it is because of causation problems. That goes back to my threshold submission, which is: what are they? I heard what Hon Ken Travers said earlier about the case that we talked about, which has been given all the publicity. I readily accept that that is not the only case of its type. However, I would like to see some statistics to show that this type of case had involved 100 prosecutions that resulted in 50 convictions and that 20 acquittals could have resulted in convictions. I would like to see also statistics showing that it was not worth charging anyone in 1 000 other similar cases that could not even be considered under the existing legislation because of the problem of causation. I have a problem of what is considered to be the magic of changing the wording of this statute from "a person" to "an incident".
[3.10 pm]

Hon GEORGE CASH: Would you be good enough to look at the fourth paragraph of attachment "C", which refers to the new regime removing the requirement -

Mr Prior: I have a big question mark written next to that. With the greatest respect, I cannot understand that. Mr Tannin is a very learned man - I know him well - but I cannot understand what the problem is. In any event, when a submission of that type is made, we ask to see some empirical evidence about why that is said and ask what is the problem the police have had.

Hon GEORGE CASH: With respect, it will not be difficult to prove a link between the incident and the death.

Mr Prior: I agree.

Hon GEORGE CASH: In fact, as one of our colleagues has suggested, it is almost a case that this is all about the vehicle that causes the death, irrespective of any actions of the driver. As long as a person was the driver in the vehicle involved in an incident, the driver will be deemed to have occasioned the death.

Mr Prior: It is almost like working backwards. Consider a driver of a vehicle that collides with another vehicle, causing the death of the second driver. It is almost reverse logic that therefore the driver of the first vehicle caused the death of the second vehicle. Under the proposed legislation one must go backwards in time and work out what the first driver was doing to get to that position. The driver of the first vehicle was the last driver in control of a vehicle that made a direct impact on either the vehicle in which the person who died was travelling or directly on a pedestrian, for example.

Hon GEORGE CASH: If it can be shown that the driver did not have proper control of the vehicle, he will be deemed to have occasioned the death of the person.

Mr Prior: Yes. That is why the deeming provision is extremely powerful.

I have dealt with attachment "A". I want to paraphrase some comments about attachment "B" regarding the defence. At the end of the day, the deeming provision might be tough, but there is still a defence. In particular, the second paragraph states that it is an offence to adduce etc. Firstly, it is expensive for people to defend themselves. Secondly, as I said, it is difficult to collect evidence. In my experience the best evidence that can be collected is from the scene of the incident at the time of the incident. Thirdly, there is a problem regarding legal representation. As time goes by, more and more matters are dealt with in the Court of Petty Sessions. For instance, aggravated burglaries by way of burglary in company are now dealt with in the Court of Petty Sessions. More and more unrepresented people appear in Petty Sessions charged with serious offences. The consequences of being penalised when convicted are quite serious, and so they should be because people have been seriously injured or died and because it is a privilege to have a licence. Even the consequences of a person's licence being disqualified are serious. Primarily I need my car to get to and from work and to travel to the courts or prisons etc. However a significant number of people rely on their licences for their livelihood. Even the mandatory disqualification penalty has a significant impact on people. They are the three comments I wanted to make on that.

Hon GEORGE CASH: I refer to proposed paragraphs 59B(6)(a) and (b), which state -

> (a) to the fact that the person charged was under the influence of alcohol, drugs or alcohol and drugs; or
>
> (b) to the manner (which expression includes speed) in which the motor vehicle was driven.

The word "or" between paragraphs (a) and (b) indicates that it is disjunctive. Do you believe it should be disjunctive?

Mr Prior: Yes. However, in reality everyone will rely on paragraph (b) as a defence because they will argue that the incident was not in any way attributable to the manner in which the motor

vehicle was driven. I am trying to think of how people could rely on paragraph (a) as a defence. I agree with the member that it is disjunctive.

Hon GEORGE CASH: I am interested in your comments about why it should be disjunctive. Why does it not read and/or, because it separates the two paragraphs as if to say that paragraphs (a) and (b) can apply singularly, but it is not a defence to have a little bit of each:

Mr Prior: That is a fair comment. Given the power of the deeming provision, it is better for it to read "and/or" so there is that possibility. As I said, I do not consider paragraph (a) as a real defence. It would be difficult to prove that a person with a blood alcohol level of more than 0.15 who was charged with being under the influence of alcohol must have had an unbelievable metabolism and that despite having a BAL of 0.16 he still had control of the car. From the little I know about the effect of alcohol on people's bodies, there may be trouble defending a person under that paragraph, on my reading of it. Drugs might be a different story, depending on the type of drugs a person took; for example whether it was prescribed medication and so on. In answer to the member's question, it is probably more appropriate for the legislation to read "and/or". The more defences there are, the better when legislation includes a deeming provision.

In answer to other questions that have been raised by this committee, effectively, Mr Tannin says that the defences under chapter 5 of the Criminal Code are written out by the provision of the Bill. Unfortunately, I tend to agree with him. He bases that assessment on section 266 of the Criminal Code, which essentially says that in cases like this a vehicle is a dangerous weapon. People must live with the consequences of their actions; therefore, it is not possible to rely on accident defences, but on the specific statute defence.

Hon GIZ WATSON: I will ask you to comment on the last paragraph of attachment B, in which Mr Tannin says -

> Therefore, in reference to the example given, if it could be proven that a person deliberately walked in front of a vehicle, if it could be is established, on the basis of this evidence, that the ensuing death was in no way attributable to the drugs, alcohol or manner of driving, it would be open to negative causation.

Do you agree with that?

Mr Prior: I agree with that. He is saying that is an example whereby if the deeming provision applied, a person could rely on that defence. If a driver collided with a person who stepped in front of the car - the deceased - at 3.00 am and the driver and the deceased were the only people who witnessed the incident, it would be difficult to defend the driver. If I were prosecuting that person, I would argue that his BAL was 0.15; therefore, what credibility does he have? Secondly, there are no independent witnesses because, tragically, the other witness is dead. Thirdly, there might not be any skid marks. Some people might ask whether that implies that the deceased just stepped out in front of the vehicle and therefore it was the deceased's fault. The deceased might even have been trying to commit suicide. My answer to that would be that the driver's BAL was 0.15 and that he was probably not watching what he was doing. I agree with what Mr Tannin says about that. However, practically, I see some difficulty with it. Once again, if there were skid marks, an examination would have to be conducted into the way the car hit the person. The defence and prosecution might look at the autopsy for information about the injuries sustained by the deceased, which involves the use of experts. If I were advising the accused, I would recommend involving a traffic engineer and perhaps a forensic pathologist to examine the deceased's body to see whether the deceased had consumed alcohol, drugs or whatever to determine what effect that might have had on the deceased. Yes, I agree with what he says, but the practicalities are the real issue.

[3.20 pm]

Hon KEN TRAVERS: Conversely, how easy is that to prove a case in which a person drives down a darkened street and is doing nothing else wrong, but is drunk, and has an accident and kills

someone? We all agree that the person was driving dangerously by having a blood alcohol level of 0.15 while in a vehicle. Do you require other evidence to take it to the next stage of convicting the person under the existing legislation? If there are no witnesses, that person would walk away, even though it would be known he was driving dangerously because he was drunk and someone was killed as a result of that state. However, as there were no witness -

Mr Prior: I do not necessarily agree that such a person would walk away. A lot of prosecutions in such accidents, and, ultimately, the convictions, are based on forensic evidence obtained from the scene by the police. The dead person is there and cannot testify. The driver is the accused and does not have to testify. That does not stop experienced police officers collecting evidence. The same logic applies to wilful murder. The classic case with wilful murder, unfortunately, is through domestic violence. Two people are involved - the deceased and the accused. Plenty of convictions are made in those circumstances because of the powers of forensic evidence. Admittedly, sometimes DNA or whatever is involved in evidence in such cases. Evidence from the major accident squad is sophisticated. They look at the skid marks, the angles, the impact on the body, the damage to the car, the blood alcohol reading of the driver and the state of repair of the car involved. In totality, we say that he drove dangerously. It is not as simple as saying that two people were involved and neither of them can be forced to make a statement. There is still a possibility that the person could be charged. It is harder to do so without witnesses - I grant you that. The more witnesses there are the more successful the cases tend to be, although the opposite end of the extreme can arise; that is, there are so many witnesses saying so many different things that you cannot work out what happened.

Hon GEORGE CASH: Based on your experience as a criminal lawyer of long standing, can you give me advice? If a driver were accused of occasioning the death of a pedestrian at 3.00 am, and there were no witnesses, but it was shown in due course that the pedestrian had a blood alcohol level of 0.17 per cent, what sort of scenario would that present to a prosecution? Under the proposed legislation, such a driver would be deemed to have occasioned the death of that person. What would happen if the deceased person had a greater amount of alcohol in his body than did the driver - that is, a very substantial amount?

Mr Prior: You would then have competing experts, ultimately, at the trial. The deeming provision would apply to the driver. The lawyer would advise: "You'll need to get the autopsy result of the deceased's blood alcohol level. You can't rely on the police continually saying we will get an expert's report as a matter of course regarding the alcohol level of the deceased person. You'll have to do that. It's not cheap. If you want to defend yourself properly, you need to do that." Strictly speaking, it may not be the case of raw competing figures, such as the driver having a blood alcohol level of 0.15 per cent and the pedestrian at 0.16 per cent; therefore, the drunker person caused the accident. All the other issues come into play with body weight, size and what people had been eating. You might want an autopsy to see whether any food was digested in the stomach. Also, the general factual scenario of where the accident occurred will come into play. Was there any lighting? Was it a preventable accident, notwithstanding that the person was under the influence of alcohol? Was it inevitable? Perhaps the factor of the pedestrian's alcohol intake may have been a significant contributing factor. Police usually get as much information together as possible, calling experts and so on.

Hon GEORGE CASH: Is that because they are required to prove the causal link?

Mr Prior: Exactly. The police, the State - will take the accused to the criminal court. They will collect the evidence and they will prove everything. They do not assume anything. They do not assume that the person will put up his hand and say he was the driver. They start on the assumption that they have to prove every element. I said earlier - I was not trying to be disrespectful to the police - that in the unfortunate situation in today's society in which the police are under-resourced, a deeming provision provides good reason for police to cut corners. If a person is found in

possession of 2.3 grams of heroin, it is considered that that person is a deemed dealer. Do the police need to search the house for deal bags, money, scales and drug paraphernalia? They have a deeming provision. Therefore, as the police have too much work to do as it is, they will do something else. The deeming provision will be relied upon.

Hon KEN TRAVERS: You stated earlier on that point that the Misuse of Drugs Act contains deeming provisions for good reasons. What are those good reasons?

Mr Prior: The problem with the illicit drug industry is that it is almost impossible to get the next link up the scale. You catch someone with an amount of illicit drugs above the general usage level. Questions are asked, such as, "What were you doing? Were you dealing for someone else? Who sold it to you?" You never get that information. The simple possessor will not tell you who supplied the drugs. You need the artificial way of saying that X amount is too much for someone's own use; therefore, if he has that much, he is deemed to be dealing. In this day and age, with the sophistication of phone taps and other surveillance, you get that evidence occasionally.

Other deeming provisions I am aware of are in the Water Corporation and electricity commission legislation relating to people who interfere with their water and electricity supply. My firm does a lot of prosecutions for Western Power. If a piece of copper wire is found in the electricity meter to stop it spinning around to cut the bills, commonsense suggests that it must have been the householder who did it. However, to gather evidence to show that the householder or tenant put that wire in place would need 24-hour surveillance. That legislation has a deeming provision: there is a piece of copper wire in your meter; therefore, you are deemed to have offended and you must prove the contrary. That person may call evidence to say that he has lived in the house for 20 years or whatever.

Hon KEN TRAVERS: With the Water Corporation measure, the person is deemed to have stolen water.

Mr Prior: Yes. That is correct. I have not done any Water Corporation prosecutions, but a few have taken place. The other one discussed is section 63 of the Road Traffic Act and the relevant provision concerning driving under the influence. If there is a 0.15 BAL, it is deemed that you caused the accident.

Hon GEORGE CASH: Can I put it to you, Mr Prior, that because of the number of accidents and injuries resulting from accidents as a result of use of drugs and alcohol, the community is now totally opposed to people driving with alcohol or drugs in their body? I suggest that when someone reaches the stage of having so much alcohol or drugs or alcohol and drugs in his body to not have proper control of the vehicle, the community would say that it is necessary to impose a substantial burden - I am not talking about a fine - on that person to show that the alcohol and drugs in the body were responsible for causing the GBH to or the death of another person. What do you say about the fundamental principle that comes through in the Bill? It is now being said that the community has had enough. If someone has so much drugs and alcohol in him as to be incapable of maintaining proper control of a vehicle, he should suffer the consequences. If that means amending or changing the principle of the onus of proof, so be it.

[3.30 pm]

Mr Prior: To colloquially describe it, I would say that is the thin end of the wedge. Once you do that in a situation like this with causation, we will be back here in two years because there will be a Bill to amend the legislation to say if you speed over X number of kilometres you are deemed to have caused the accident. Then, to be ridiculous about it, if you have not been to sleep for more than eight hours, you are deemed to have caused the accident. However, the community concern I accept, and personally I accept that too. What everyone in the community hopefully understands now and accepts is that drink-driving in particular, and to a lesser extent driving under the influence of drugs, crosspollinates the whole community. It is not something that people who are

unemployed do more than people who are employed. In fact, it is very difficult, I would expect - I do not profess to be an expert on this - to find a specific dynamic as to who does it. Everyone does it, unfortunately. Perhaps the answer to the question, as I said, because it is a real problem and this is part of the genesis of this Bill, is to have drink-driving offences and circumstances of aggravation. Why should it just be an accident? Why should it not be, to use the figure in the Bill, if you are driving in excess of 40 kilometres an hour and you are DUI, you get twice the normal penalty for driving under the influence? The other thing that I should say is I actually believe the penalties for drink-driving are low. I say that because I do not think they have been amended substantially for some time. The only significant amendment was a graduated scale that was imposed, as opposed to five or six years ago when people at 0.08 or 0.14 who got a liberal magistrate in sentencing potentially could get the same sentence. Now the discretion has gone. That is not a bad thing in terms of taking away judicial discretion and things like that because at the end of the day it is almost a regulatory offence to be over X limit and so on. Three months off the road for 0.08 is not much. I say that because if you get 12 demerit points you are off the road for three months. You only need to go through a Multanova at excessive speed on a long weekend twice - once driving down south and once driving back - and you have 12 demerit points. I believe the community thinks speeding is a serious thing. However, with speeding in those circumstances you can be in the classic situation of going from a 100 zone to a 110 zone and back to 100 and you do not know it - that is, not driving through a country town. However, I think people fundamentally accept that it is a pretty serious thing to be over 0.08 or DUI. In fact, I have heard magistrates say in open court that they consider things like shoplifting, possession of cannabis and so on far less serious than drink-driving. Some people would probably agree with that; some may not. However, I think people being hurt when drink-driving is involved is a concern, but I think the bigger concern is why people are continually drink-driving, irrespective of whether there is an accident; and are the penalties for it deterring people from doing it? Some people may argue that we should abolish section 76 of the Road Traffic Act and never have extraordinary drivers' licences or you cannot get them if you are convicted of a drink-driving offence. You would probably lose a lot of work, but that is probably another issue.

Hon GIZ WATSON: Is there any other point in particular that you want to elaborate on? We have covered some of the questions that we provided.

Mr Prior: Perhaps in closing I would emphasise my comment about the thin end of the wedge reversing the onus of proof, notwithstanding that there are deeming provisions, as I have said, in other statutes. Therefore, this Bill is not suggesting something that has never been done before. Strictly speaking it is a legal concept. However, once you start doing this regularly, where will it all end? I think that is a real question, because the causation issue in accidents can be a significant factor not only with drink-driving but also speeding. I use speeding and I use being tired as examples, but I suppose you could have a situation in two years when it is deemed that you caused an accident if you did not have a driver's licence, and you did not have a driver's licence because you did not deserve one. That is how far you could go with this sort of legislation if you continually cut away. As we say, whether you want to call it a reversal of the onus of proof does not really matter; the word "deeming" in a deeming provision is a pretty strong word in the legal sense of the effect it has.

The other thing, as I said, which we have alluded to, is the specific tragic case that might have been a trigger to this Bill. It might not have been the only trigger and perhaps only time will tell what happens to that prosecution. It would be interesting to know what happened in the past 12 months or so that caused the police to say that they now have enough evidence to charge this man with dangerous driving causing death. Because the case is sub judice we cannot really talk about it too much at the moment, but only time will tell. That is really all I want to say. I would like to thank you for the opportunity to address you all on behalf of the association.

Hon KEN TRAVERS: I just have two quick questions. Would you agree with the statement that it is almost an impossible task under the current system to persuade a jury that a drunken defendant should be acquitted?

Mr Prior: I think it is, I really do. Strictly speaking you should have an expert say what 0.08 and DUI mean. However, I think the general community believes that if you are 0.08 you are drunk; whereas in the words of the statute, the deeming provision in the Road Traffic Act, if you are 0.15 you are drunk-driving. That is what a lot of people like to call it - or, correctly, driving under the influence. I think people almost take their own judicial notice of that. I would not be surprised if the statistics on the level of convictions involving drink-driving have increased over the time.

Hon KEN TRAVERS: But in terms of a charge of dangerous driving when someone has been drunk -

Mr Prior: I think it will have a huge impact. I think your example of a jury also applies to a magistrate, as one should remember that these offences can be dealt with by judge and jury and/or a magistrate. I think a lot of magistrates would take that view as well; so, yes, I agree.

Hon GEORGE CASH: I have one general question that relates to the quantity of alcohol in someone's body. The offences are prescribed in the Road Traffic Act and can be scientifically proved. I do not have a problem with BAL, but I am interested in your comments. I do not want to get into a great scientific debate on it with you. Is there any difficulty in proving the quantity of drugs, notwithstanding the different classes and variety of drugs, that you need to have in your body to be proved incapable of having proper control of a vehicle?

Mr Prior: I will answer that question with some reasonable knowledge, as I chaired the health minister's advisory committee on amendments to the law following the drug forum. We looked at that as one of the issues. I think it is a technological problem. From what I understand, it is a case of finding a device to measure saliva, urine or breath, which is portable and reasonably accurate to get a reading from a wide variety of drugs. Then, if you could get a reading, the next question, which I do not think is a big step, would be to get some clear, scientific research that says if you have X amount of that drug in you - like if you are 0.08 - there is a significant impact on your ability to drive a car safely. I think it boils down to using portable, accurate technology. My understanding is that New South Wales is getting somewhere and moving in that direction in some of the various committees that are looking at road trauma and so on. I think it relates primarily to measuring saliva samples. I heard your comment also before about the nuance of different drugs. There is also the other issue of licit, as opposed to illicit, drugs for people on prescribed medication. There are probably plenty of people out there in this day and age, unfortunately, who are on prescribed medication and who are probably dangerous driving around now.

Hon GIZ WATSON: Thank you very much, Mr Prior, for attending and for your time this afternoon.

Committee adjourned at 3.41 pm