

**CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL
BILL 2001**

Third Reading

MR MCGINTY (Fremantle - Attorney General) [11.33 pm]: I move -

That the Bill be now read a third time.

During the course of the debate two undertakings were given to members opposite. I am very appreciative of the time available to enable me to adequately respond to those matters. The first undertaking related to whether the police procedures and standing orders would apply to the exceptional powers granted under this Bill. I have received a copy of the correspondence addressed to the Minister for Police dated 4 December headed "Police procedures in relation to exceptional powers". For the sake of the record, this is probably the most expeditious way of answering the undertaking that was given. The letter is signed by T.J. Atherton, assistant commissioner, crime investigation support. It is headed "Police procedures in relation to exceptional powers" and states -

Should the *Criminal Investigation (Exceptional Powers) and Fortification Removal Bill 2001* be passed, specific Commissioner's Orders and Procedures will be developed to provide safeguards and controls. This would occur in two ways. First, new orders and procedures would be created in relation to the legislation as a separate topic. Second, existing orders would be modified where necessary to accommodate any fresh powers, or they would be aligned to the legislation to ensure that relevant current orders clearly relate to the exceptional powers.

In respect of enhanced powers to enter and search, it is anticipated that new orders would be made. These would include a requirement that, where a police officer may enter, search or detain in accordance with an order from the special commissioner, the approval of a commissioned officer shall be obtained before the police officer may exercise those powers. Further, any such approval is to be recorded. There would also be a requirement for a police officer exercising these powers to report upon the matter to the Commissioner of Police, or delegate, so that the special commissioner is informed.

In relation to searches of premises under the enhanced powers, existing orders and standard operating procedures, including Administrative Order 24.21 concerning video recording of searches, would be amended to expressly apply those orders and procedures to the enhanced powers. Similarly, Commissioner's Administrative Order 24.20.4, concerning the search of a premises where such premises is unoccupied, would be so amended.

In relation to property that is seized by police during the exercise of the enhanced powers, the new orders would make explicit reference to the requirement of Commissioner's Administrative Order 49.5 concerning the issue of a receipt for all property.

In respect of enhanced powers concerning surveillance devices, the new orders would make explicit reference to existing procedures governing the coordination of all applications for warrants under the *Surveillance Devices Act* by the Bureau of Criminal Intelligence. In this way, Commissioner's Administrative Order 7 which provides that the Director BCI, a Superintendent, shall ensure the legality and integrity of the intelligence function in addition to control through the application of ethical standards and procedures, would apply to the exercise of the enhanced powers. Once approved by the Director, the applications must then be authorized by the Commissioner of Police, a Deputy Commissioner of Police or an Assistant Commissioner of Police for the action proposed. Only then may the application proceed before a court.

I trust this information clarifies the situation.

The second matter -

Mr Pental: I thought you had finished. Hope springs eternal.

Mr MCGINTY: The second matter I wish to comment on in considerable detail is the comparison of offences in the Criminal Investigation (Exceptional Powers) and Fortification Removal Bill with offences in the Royal Commissions Act, the National Crime Authority Act and the Criminal Code.

Mrs Edwardes: I have the rest of my questions here.

Mr MCGINTY: I have the answers to all of them if the member would like them. I will happily read the four pages of columns into *Hansard* if members wish me to do so. However, it might be just as easy to table this document.

Mr Pental: Hear, hear!

Mr McGINTY: I will summarise it. The issue raised by the member for Kingsley was whether the penalties in this legislation are deficient when compared with penalties in the other legislation. This document sets out the offences, starting at clause 26 of this Bill, and compares them with similar offences in the Royal Commissions Act, the National Crime Authority Act and the Criminal Code, where there is a relevant provision. I will summarise it by saying that the penalties for offences in this legislation in the vast majority of cases are equal to or harsher than the penalties in the comparable provisions in the three Acts. I will table the paper for the information of interested members.

[See paper No. 984.]

Mr McGINTY: Those were the two matters for which I gave an express undertaking to provide further information during the third reading stage. I indicate my thanks to all members opposite, except the member for South Perth, for their support of this legislation.

Mr Pental: You might get a surprise.

Mr McGINTY: Will more people oppose it? The member's insidious influence is spreading.

Mr Pental: There seem to be some defectors on your side. They told me they intend to cross the floor.

Mr McGINTY: I conclude by thanking members for their support. I hope that the passage of this legislation will usher in a new era in which our law enforcers will have the capacity to deal with the insidious problem of organised crime in this State.

MRS EDWARDES (Kingsley) [11.40 pm]: I thank the minister for his response and the way in which he has dealt with the legislation. It is a major piece of legislation for both the police and the community. The Bill deals with not only organised crime, but also those people who may have committed wilful murder in conjunction with any other schedule 1 offence, as defined under clause 4. Therefore, the powers being given to the police are exceptional. They will be used in exceptional circumstances. However, the legislation also contains some safeguards and checks and balances.

Concerns have been raised by members of the legal profession, particularly The Law Society of Western Australia, the Criminal Lawyers Association and the Freedom Forum. The Freedom Forum's concerns were restricted to local police officers not being competitive with the eastern States lawyers. I do not wish to be unkind to its concern, as it is one we similarly raised; that is, whether this legislation contains sufficient penalty to ensure that those from eastern States law firms do not breach the clauses of the legislation. The issues raised by the Law Society and the Criminal Lawyers Association could be summarised as relating to the use of a serving judge as a special commissioner. They were concerned that the independence of the judiciary could be broken, which could lead to a lack of confidence by members of the community. It is not a new concern. The use of judges in administrative matters has long been a practice not only in this State but also throughout Australia. However, we must always keep in mind the need for independence of the judiciary and ask how certain practices will affect that independence.

During the consideration in detail stage, the Attorney General indicated that he wants to appoint a panel of judges as special commissioners rather than select only one judge for the task. He also said that his preference is for a retired judge rather than a serving judge. I am not sure how many retired judges would be readily available to carry out the role of the special commissioner.

The other concern involved the special commissioner proceedings. It was indicated that the Supreme Court or District Court would be used for administrative purposes. During the debate we explored some of the difficulties with that, particularly in ensuring that confidentiality is retained and the sensitivity of information appreciated. I do not think it will be possible for the special commissioner process to slot into the current administrative system. That obviously needs to be worked through.

The Attorney General also indicated that no specific budget had yet been worked out for each of the occasions on which the special commissioner would be employed. I was thinking more along the lines of reimbursement, as is currently the case in Dietrich matters.

Other issues raised by the legal profession related to the "no right to silence" provision; the lack of judicial supervision, although that applied only to part 3 of the Bill and not to search and seizure; the removal of legal professional privilege; and the lack of legal representation in exceptional circumstances. That latter issue occurs when the public interest test is applied. It is more an issue about the balance between public interest and the freedoms and rights of individuals. Obviously, some of the checks and balances under the public interest test in part 9 of the legislation, which is a very important part, deal with the seriousness of the offence itself; whether current police powers enable the police to determine the information that will be gained; the time that has elapsed to use those ordinary powers; and whether the offence is at the heart of organised crime or on the fringes of it. A number of amendments were agreed to by the Attorney, I am sure not just for the convenience of getting

the legislation through the Parliament. He saw the merits of the amendments and obviously some reflected what was in his mind in any event. I refer to the Commissioner of Police's representative who obviously is a legal person. However, we have retained the provision for the police to be used in conjunction with someone with a legal mind and someone with an investigative mind.

Custody of records will be a major issue. A lot more work needs to be done on the way in which that provision will be implemented. Although one part of our amendment was agreed to, the major issue is who owns the records, what they are and what chain of events will lead to their retention and/or destruction. The deletion of the provision on relevancy of the production of a document so as not to be available as a defence was a good amendment and one which, again, the Attorney readily accepted. The removal of the sunset clause and the substitution of a review clause also reflected the work, effort and cost associated with putting a provision in place that requires legislation to come back to this place after three years, not only to continue the Bill but also to make appropriate amendments after a full review. It was obviously a back to front provision to include a sunset clause without adequate review.

I have not had a chance to compare the penalties provided by the Attorney, but I will do so. We highlighted a clause that had not been considered about the two-year difference between an offence under the Royal Commissions Act and an offence under the Criminal Code.

Another issue is that appropriate legislation should enable comparison of more than just offences. We are dealing with a class of person and exceptional powers. As such, an additional tariff should be added to the penalties to take account of that class of person. If the Attorney is serious about convictions for these offences acting as a deterrent, some penalties should be increased dramatically. We also raised the issue of the need for a power to make regulations and/or rules. The Attorney responded on the issue of surveillance devices.

The other issue the Opposition raised, and which was not accepted by the Attorney General, concerned the general warrant. That will be a major flaw in the legislation. The general warrant - the authorisation given by the special commissioner to a police officer to carry out search and seizure at any time and on anyone - lacks form, manner and particularity. As such, the carrying out and implementation of the authorisation cannot be tested against anything. If that cannot be done, there is no level of accountability. That is not good in anyone's mind. Although the Attorney General said that the special commissioner was not restricted from doing that, he should have been given the power to add any conditions that he deemed fit in order to do so. I accept the Attorney General's comment that the special commissioner is not restricted. The need for some conditions to be added in relation to the special commissioner was in the minds of members of this Parliament when that clause was debated.

The authorisation also lacks form and manner. Was it to be in writing and what did the police officer have in mind? There was no return date. The letter from Assistant Commissioner of Police Tim Atherton might have included information on how it would operate in the police procedures. We need to ensure that a proper mechanism is in place and that a reporting requirement is outlined, if not in the legislation, at least in the police manual.

The other problem with the legislation, which the Attorney General acknowledged, concerns fortifications. That provision needs streamlining. It is overly bureaucratic and cumbersome. As such, it will be a pain for police officers to use. I am sure that there will be time to review the operation of that provision to ensure that the clause will be streamlined.

I thank the Attorney General and his staff for the support and information they provided to the Opposition on this legislation. I wish the police and the community all the best with the implementation of this legislation.

Question put and a division taken with the following result -

Extract from *Hansard*
[ASSEMBLY - Tuesday, 4 December 2001]
p6348c-6351a
Mr Jim McGinty; Mrs Cheryl Edwardes

Ayes (45)

Mr Ainsworth	Mr D'Orazio	Mr McGinty	Ms Radisich
Mr Andrews	Mrs Edwardes	Mr McGowan	Mr Ripper
Mr Barnett	Dr Edwards	Ms McHale	Mrs Roberts
Mr Barron-Sullivan	Mr Edwards	Mr McNee	Mr Sweetman
Mr Birney	Mr Grylls	Mr McRae	Mr Templeman
Mr Board	Mr Hill	Mr Marlborough	Ms Sue Walker
Mr Bowler	Mrs Hodson-Thomas	Mrs Martin	Mr Watson
Mr Bradshaw	Mr Hyde	Mr Masters	Mr Whitely
Mr Brown	Mr Kobelke	Mr Murray	Ms Quirk (<i>Teller</i>)
Mr Carpenter	Mr Kucera	Mr O'Gorman	
Mr Day	Mr Logan	Mr Omodei	
Mr Dean	Ms MacTiernan	Mr Quigley	

Noes (3)

Dr Constable	Mr Pandal	Dr Woollard (<i>Teller</i>)
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Pair

Dr Gallop

Mr Waldron

Question thus passed.

Bill read a third time and transmitted to the Council.