CRIMINAL PROPERTY CONFISCATION ACT 2000

Grievance

MR P. ABETZ (Southern River) [10.00 am]: My grievance is directed to the Attorney General and relates to the Criminal Property Confiscation Act 2000. I wrote to the Attorney General in April this year on this matter. The matter is still unresolved and has recently received some media attention from no lesser person than Malcolm McCusker, QC, now our state Governor.

The legislation was passed to provide for the confiscation of property acquired as a result of criminal activity, and to allow for the confiscation of property, even legitimately acquired property, used for criminal activity. I agree that criminals should not be allowed to profit from their criminal activities and that their ill-gotten gains should be confiscated. However, this act, which allows for the confiscation of legitimately acquired property, has a major problem, in that it does not specify that the property needs to have been actively used in the commission of the crime in order for it to be confiscated. This is resulting in gross injustice.

For those not familiar with the Criminal Property Confiscation Act, I should point out that under the act, the Director of Public Prosecutions can apply to the court to confiscate an asset if the crime committed carries a penalty of imprisonment of not less than two years. The problem is that this act is being interpreted as meaning that even if the property was incidental to the crime, it can be seized. A criminal does not, of course, always use his own property to commit a crime. Therefore, the act provides that if the property used is not owned by the criminal, property of equal value owned by the criminal can be seized.

I will give members an example. A man takes a girl out on a little dingy and deals indecently with her and is sentenced to three years' jail. All that the DPP can apply to have confiscated is the dingy, worth, say, $500. However, if the man commits exactly the same crime on a $5 million yacht owned by a friend, the DPP can apply to have up to $5 million worth of honestly acquired assets of the offender confiscated in substitution for the $5 million yacht used in perpetrating the crime. So, effectively, we as a community are saying that if this man commits the crime on a luxury yacht, he deserves to be given his jail sentence, plus a $5 million fine; but if commits the crime on a dingy, a prison term plus a $500 fine is sufficient. With all due respect, I believe this makes a mockery of our legal system. It also serves to undermine confidence in our system of justice.

I have brought this matter to the attention of the Attorney General. In the Attorney General's written reply to me, he indicated that the DPP has discretion as to whether to confiscate, or not, in all crime-used property cases; and that, in the Attorney General's view, that is in itself sufficient to prevent injustice from occurring.

Not only does history bear out that this is actually not happening, but the principle seems to me to be wrong. The DPP is the prosecuting agency. The role of the DPP is not to make judgements as to whether a particular sentence is appropriate or not. This is the role of the court. In our Westminster tradition, the divisions of power are clear and do not support this duality of roles for the DPP. Therefore, I believe the act needs to be revised to spell out that only property actively used in the commission of the crime, and not just incidental to the crime, can be confiscated.

There are two other problems with this act that I want to touch on briefly, if time will allow. The act does not provide enough protection to the innocent co-owners of a property that has been legitimately acquired. It is true that an innocent party's share in a property cannot be confiscated. But, in practice, an innocent third party is often penalised. For instance, in the case of Bowers v DPP, which was eventually dropped by the state in view of the public outcry, the DPP was proposing to freeze Mr Bowers' interest in the matrimonial home. Once a property is frozen, the DPP may apply to have it sold. If the property had been sold, Mrs Bowers would have received her half share of the property in cash. But what could she have done with it? She would not have had enough money to buy even a modest home. If a home is very valuable, obviously it is possible to purchase another home. But even assuming that it would have been possible for Mrs Bowers to purchase another home, how just is it to force an innocent third party out of the family home when the home was never used for committing the crime, and the other family members were not involved?

The Attorney General responded to my concern, when I wrote to him, by saying that, in his view, the act is operating as it was intended to operate. I really find that difficult to believe. I also do not believe that was the intention of the house when it passed this legislation. I would say it is nothing less than a scandal if members of Parliament wish to inflict such injustice on criminals in this state. Criminals they may be, but they are still human beings, as are their families, and as human beings they certainly deserve justice—not a punishment that is totally out of proportion to the crime that they have committed.

From reading the second reading debate for this piece of legislation, I could not find any evidence in any of those speeches that members of Parliament were intending for incidentally-used property to be confiscated; nor could I

find any evidence that members of Parliament thought that innocent third parties should be forced out of a modest family home that had been acquired by legitimate means. It is clear that the primary intention of the act is to ensure that no person benefits from crime, and that innocent co-owners of property are protected. I would put it to the house that that latter part is actually not happening.

Finally, it can also be said that the act encourages criminals to default on their borrowings, because once a property is frozen, the mortgagee has no right to sell the property. It may take a long time for matters to be dealt with in a court. Therefore, that puts a lot of unfair pressure on a mortgagee who happens to have loaned money to a criminal.

It is patently obvious that an urgent review of this legislation should take place, in the interests of justice. I urge the Attorney General to take the necessary action to make that happen so that we can remedy this state of affairs, which is not satisfactory to say the least.

MR C.C. PORTER (Bateman — Attorney General) [10.07 am]: I thank the member for Southern River for his grievance. There is a difficulty that has been highlighted by the case of Bowers. I am not sure whether it is the difficulty that the member for Southern River has concentrated on. The matter of Bowers, with which I am very familiar, and which I understood, member, had been resolved to the satisfaction of the parties—that was the strong advice that I had received, but I will double check, because I understood, contrary to what the member has said, that it had been resolved —

Mr P. Abetz: Yes; that one has been resolved.

Mr C.C. PORTER: Okay. So the member is talking about the issue being unresolved. Right.

Mr Bowers pleaded guilty to three counts of sexually penetrating a child between the ages of 13 and 16 years, contrary to section 321 of the Criminal Code. All three of the offences were committed against the same complainant, on the same date, at the complainant's home; so at the child's home in Beechboro. It was a very serious offence. What the Criminal Property Confiscation Act allows for in those circumstances is that because the offence has been committed at some else's home—a home that the offender does not own—the offender's own home can be frozen and substituted in lieu of that crime-used property. That is the structure of the act and it has long been the structure of the act. This case has highlighted an anomaly. The anomaly is that in the act itself there is what I will just call loosely here a hardship provision. That provision says that the court may set aside a freezing notice or freezing order for a property if the objector establishes that it is more likely than not—a number of things follow—that the objector is an innocent party, the objector was usually resident on the property, and the objector would suffer undue hardship; and there are some other provisions. What that provision is meant to do, particularly with respect to a situation in which a property has been crime-used—say, for instance, to commit a sexual offence—is that, if an innocent third party who owns a half equitable share in that property will be put through undue hardship, the court can consider that situation and set aside the freezing order. The anomaly that has been identified here is that that hardship provision, it seems, certainly does apply to crime-used property, but not to substituted property. That is an anomaly in the Criminal Property Confiscation Act. The Director of Public Prosecutions has recognised that that is an anomaly in the act, and I have met with a range of parties on this case and have a view about how it should be resolved. Although I could not instruct the DPP about the specifics of this case, the DPP has resolved it in a way that I thought was appropriate in recognising that anomaly. That is an anomaly that should be fixed, and the next time this act is open for amendments—some amendments are contemplated for this act that are of a more technical nature, relating to mortgagees and so forth—this will be fixed. In the meantime, the DPP is exercising its discretion in acknowledgment of the anomaly and watching this with a great deal of caution and exercising discretion in the way it has in this matter. That is an anomaly that has to be fixed.

It seems that the substance and the essence of the member's grievance is that the whole idea of a crime-used property substitution, or indeed crime-used property, when it affects and impinges upon an innocent third party, is unjust, and that needs to be completely revisited. The member put the view that that could not have been the intention of the original act because he says that the act is deficient in that it does not specify how the property has to be used. I must say, respectfully, that the member is incorrect on that. The act states that, generally speaking, for property to be considered crime-used property, there has to be something slightly more than the fact that somebody simply committed the offence on the property; there has to be some kind of nexus. If the member read the decision of White, which I will provide to him, he would see that the President of the Court of Appeal describes how, generally speaking, there has to be something more than just the fact that the crime was committed on the property; there has to be some nexus between the offending and the property. The exception to that general rule appears at section 146(3) of the act, and all the case law is quite clear on this. It states —

> Without limiting subsection (1) or (2), any property in or on which an offence under Chapter XXII or XXXI of *The Criminal Code* is committed is crime-used property.

If the member likes, that is something more of a strict liability-type section, and the sections it is referring to are, if the member likes, sexual offences and offences against morality. After due and long debate, this Parliament decided that if a person commits a serious sexual offence on property, it is, in effect, enough that they used the property for the purposes of committing the offence—that is, that they committed the offence on the property. This Parliament plainly decided that that is sufficient for that person to be at jeopardy of losing that property, or their share in that property, or, by extension, if they committed it on another person's property, of losing their own property by substitution. That is what this Parliament absolutely and unequivocally decided; there is simply no doubt about that when we look over the case law.

The member's view is that that is too harsh, potentially, on third parties. There is, of course, a hardship provision that can ameliorate that hardship. There is an anomaly that it does appear to apply directly to a substituted order, and that anomaly should be rectified. In the meantime, I am assured that there will be no injustices because of that anomaly because of the way in which the DPP is using its discretion.

But the member is correct in the general tenor of what he is suggesting—that innocent third parties can be affected by confiscation. When a crime is committed, it is not just the victim who suffers; it is very often the innocent wife or innocent children of the offender. I put to the member that often homes are lost because the primary breadwinner commits a sexual or some other serious offence, and is jailed for a period of time and cannot pay the mortgage. There is no hardship provision in sentencing that allows for that person not to be jailed for five years because an innocent third party is being adversely affected. Very sadly, that happens on a regular basis in sentencing, but unfortunately crime causes victims who are not just the immediate victim, but indeed the families of the offender. What occurs with confiscations, generally, is that if a person commits an offence at their house—say, a sexual offence—they are liable to have their share of the house confiscated. The innocent party never has their share of the house confiscated, but of course the confiscation of the half from the husband, if the member likes, could well cause flow-on effects negative to the wife. However, that fact was taken into full account by this Parliament when it devised these laws, and it occurs with great regularity in the sentencing process. The member has identified, I think, an anomaly in this that we will rectify.