

Mrs Cheryl Edwardes; Mr Jim McGinty; Mr Paul Omodei; Dr Elizabeth Constable; Ms Margaret Quirk; Ms Sue Walker; Mr Kucera; Deputy Speaker

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

Second Reading

Resumed from 27 November.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 and 2 put and passed.

Clause 3: Meanings of terms used in this Act -

Mrs EDWARDES: The definition of organised crime refers to two or more persons associated together solely or partly for the purposes in the pursuit of offences and so on. Do they have to be together in the pursuit of those schedule 1 offences? Why is it two or more people? The United Kingdom legislation refers to three or more people. Why does this legislation refer to only two people? Offences have been committed when one bkie has disciplined another bkie or when one bkie has harmed another bkie's family as a warning. This legislation should cover that type of activity. If the offence involves only one person, the legislation will not apply.

Mr McGINTY: The provision for two or more persons associated together was derived from the relevant Hong Kong legislation dealing with organised crime. We looked at provisions from around the world and also here in Australia. Essentially we were looking for a definition that was sufficiently tight to ensure that any form of organised crime would be caught by it. For that reason, we could have extended it to three, four or five people. We wanted the tightest possible arrangement so that more than one person would fit the definition of organised crime, because obviously there must be more than one person to constitute organised crime. We took that provision of two or more persons as the base level.

We were aware that different definitions applied in different areas. Some of the definitions related to the nature of the offences, and others related to the nature of the organisation. However, we thought that the definition we came up with in the end would pose the least evidentiary problems; that is, it would pose the least difficulty in satisfying the first threshold of this definition. As the member has rightly said, it refers to the activities of two or more persons associated together solely or partly.

Mrs Edwardes: They do not actually have to carry out the activity together; it could be done on their own.

Mr McGINTY: There needs to be a measure of association at least to the extent that, in the pursuit of that association, two or more schedule 1 offences are committed. They do not necessarily have to be walking down the street arm in arm, but there must be a sufficient degree of association between those purposes in pursuit of which those crimes are committed. They do not need to be associated for the purposes of committing those crimes, but the nature of the association of the two or more persons must lead to, or have a connection with, the commission of two or more schedule 1 offences. That is essentially how the arrangement works. We looked at a number of different models. This definition leaves the nature of that association a little loose, because the tighter that association is, the more likely it is that organised crime figures could circumvent it.

Mrs EDWARDES: Do the two or more schedule 1 offences have to be committed at the same time in the same act? Can those two offences have been committed in totally separate time frames? Obviously, there would be a connection between the activities of the two or more persons. It could be 18 months apart or it could be a week apart; however, the two offences do not have to result from the same act.

Mr McGINTY: That is clearly what is envisaged; there need not be two offences arising out of the one act or the two offences need not be connected in a temporal sense. I was going to give the example of Don Hancock. Although two people were murdered on that occasion, I was thinking more of the connection with the death of the bkie Grierson 12 months earlier; however, it is not a good example. I will use that example in a broad sense, so let us forget who the perpetrators were on those occasions. Those two offences, which occurred nearly 12 months apart and which would be schedule 1 offences as they were both offences of murder, could be caught. The key is that the purpose of the association of those two people leads to the commission of those offences. It is the ongoing association for a particular purpose and it is the pursuit of a purpose that results in the commission of offences over a period. There is no limit on that period, so it could be years, months or days apart.

Mrs Edwardes: Could the purposes be general in nature? For instance, can it be as broad as the members of a bkie gang coming together to carry out activities that are of a criminal nature?

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Mr McGINTY: Yes; it can be general. If, in pursuit of those purposes, people get murdered, drugs are dealt or something of that nature occurs, this provision will come into operation. It is in pursuit of that purpose that the serious crimes are committed, as long as these people are associated for that purpose. It might be that people associate for the purpose of camaraderie and mutual enrichment. If, pursuant to that purpose, they murder or commit other serious schedule 1 offences, they will be caught by this particular provision.

Mr OMODEI: Other parts of the legislation refer to a meeting of a class of people to discuss matters or whatever. Can the minister give some examples of classes of people, other than a bikie group, who would be covered by the legislation?

Mr McGINTY: Bikies are not referred to in the legislation as best I recollect for a very simple reason: this legislation is directed at organised crime. The member referred to meetings of classes of people.

Mr Omodei: Clause 53(2)(b) refers to a meeting of a class of people.

Mr McGINTY: Clause 53(2)(b) relates to fortified premises. That is a specific power to order that the fortifications be removed. A fortified bikie headquarters is the clearest example I can give of that. It is a place that is habitually used as a place of resort by members of a class of people, a significant number of whom may reasonably be suspected to be involved in organised crime. That is specifically organised bikie gangs and their fortified headquarters. It could apply equally to other groups of people who were not members of a motorcycle gang but who might be members of a mafia gang, to bring it closer to home. I am referring to my constituents.

Mr Omodei: I thought you were referring to me.

Mrs Edwardes: I thought bringing it closer to home might refer to unions.

Mr McGINTY: I guess it could, if there is a suggestion that they are involved in organised crime which involved the commission of schedule 1 offences. It can extend beyond bikie groups. It could even refer to masonic lodge gatherings, for instance, if its members were involved in serious offences. No-one would suggest for one minute that those people are engaged in organised crime or that schedule 1 offences are being committed. Any organised group that meets at a particular place -

Mr Omodei: An Asian gang, for example, which has been referred to before in the media.

Mr McGINTY: Yes. Any of those could quite easily fit this description, if they have a headquarters which they frequent and a significant number of the people who frequent it are associated with organised crime.

Dr CONSTABLE: I am still a little confused about the definition of organised crime. I am mindful of the comments of the Law Society of WA, which is particularly concerned about the definition referring to the commission of crimes by two or more people. Just a moment ago the minister used the word "gang". Can a gang be two people? It involves two or more people and the commission of two or more crimes. Is that correct?

Mr McGinty: Yes.

Dr CONSTABLE: Two or more people can commit a murder and it is not regarded as organised crime, but two people can commit kidnapping and murder and it is regarded as organised crime?

Mr McGinty: Yes.

Dr CONSTABLE: I am finding it difficult to grasp this definition. My view of organised crime is from the movie *The Mob* - drugs, murder and gang warfare. This definition seems to have a large amount of slippage back to two people. I do not condone such crimes for a moment, but we need to be clear about the definition. I need further explanation from the minister.

Ms QUIRK: In defining organised crime it is important not only to look at the number of people involved, but also to link it to substantial planning. It is not just two people; it is two people and substantial planning. The definition is consistent with legislation in other jurisdictions.

Mrs EDWARDES: I am not sure whether I should ask my question of the Attorney General or the member for Girrawheen. What constitutes "substantial planning"? Substantial planning is the third limb. The definition refers to substantial planning and organisation. Two or more people must be involved; there must be a schedule 1 offence; and substantial planning and organisation must be shown. How has that been determined in the past? What is substantial planning, what constitutes substantial planning and what constitutes organisation?

Mr McGINTY: We sought to come up with a definition that was flexible enough to catch, as a threshold test, what is perceived by the broader community to be organised crime. As the member has rightly pointed out, the definition has a number of components, the last of which is that two people are associated for a purpose, the pursuit of which results in two or more very serious offences being committed. The commission of each offence

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must include substantial planning and organisation. As an example, a domestic dispute that resulted in family members committing an offence may fail the test of planning and preparation. Organised crime is of an ongoing nature and consists of arrangements to warehouse goods, trade goods, launder money, buy and sell drugs and amass an arsenal. It constitutes things of that general nature. Significant planning and organisation is a definition we took from another country's definition of organised crime. I cannot remember from which country's jurisdiction it was taken. If a crime has the quality of an ad hoc act of a serious nature, it would not be caught by this definition. It needs to be seen as part of a planned arrangement and an ongoing series of actions that would fit the definition of organised crime that one gets from the movies. That is the character the definition seeks to give. Simply referring to two or more people committing two or more offences of a serious nature could catch a raft of people when it is not intended to because the legislation is targeting organised crime. The most recent example in a public sense seen in this State was the police raid on the bikie headquarters that discovered an underground cellar. It was constructed without any outside knowledge. Media reports suggested it was there for an unlawful purpose. Such a room was built for a particular purpose and it fits the definition of substantial planning and organisation if crimes are committed in association with it. That is opposed to a crime of passion or something that might occur unconnected with ongoing organisation. That is the nature of what we are looking at.

Ms SUE WALKER: Can the Attorney General differentiate between a conspiracy and organised crime? What is the difference between them? If it is only a matter of organisation, how will that be defined? I do not have my copy of Douglas Brown's *Criminal Law in Western Australia* as it has been lent to Hansard. I would normally be able to provide a definition of "conspiracy".

Mr McGINTY: As members are aware, a conspiracy is simply two people acting together to achieve a criminal purpose or to break the law. We have specifically excluded conspiracy from the schedule 1 range of offences. No form of conspiracy is targeted by the Bill. We want to make that distinction quite clear: a conspiracy can involve a raft of offences planned by two or more people.

Ms Sue Walker: How will it be determined whether people are charged with a conspiracy or organised crime?

Mr McGINTY: A range of threshold tests exist that go well beyond a conspiracy. A conspiracy would be the first part of the definition of organised crime. It involves two or more people in association for the purpose of committing two or more crimes. As the member for Kingsley said, the definition has many components. I regard the first as broadly constituting the elements of a conspiracy. The definition requires more than one offence to be committed. A conspiracy can exist for only one offence provided two or more people work to commit the offence. Effectively, the conspiracy must be repeated; that is, the association giving rise to that.

Ms Sue Walker: How would you define association? There is a difference between association and organisation. There is no definition as to what constitutes that.

Mr McGINTY: No. The first element is to have two or more people in association. The second element is the pursuit of the purposes of the association. The third element is that two or more schedule 1 offences are committed. The fourth element is that substantial organisation and planning must be involved in committing the offences. Those components take it well beyond a mere conspiracy.

Ms Sue Walker: That could conceivably be defined as a conspiracy.

Mr McGINTY: The first part of that could be a conspiracy. There does not need to be a conspiracy to have substantial planning and organisation. There is no need to have a conspiracy to commit two or more offences. This definition goes well beyond a conspiracy and the legislation is not aimed at conspiracies. If an offence is a simple conspiracy, I would expect someone to be charged with a conspiracy and dealt with by the courts. If an offence goes further than a conspiracy, as described by this definition and the threshold tests, it is then a matter of invoking this legislation. This legislation creates the offence of organised crime. I am talking about an investigative tool. It is a matter of what triggers this rather than what is charged.

Ms Sue Walker: Given that the members for Girrawheen and Innaloo have been the substantial brains, if I can use that word, behind this legislation, does any case law define "organisation" in terms of organised crime? The member for Girrawheen said that the definition had been drawn from legislation elsewhere.

Mr McGINTY: I said that it was drawn from legislation in other countries around the world.

Ms Sue Walker: I want to know whether it has been defined by any court.

Mr McGINTY: I am sure that it would have been, given that the two-by-two component comes from Hong Kong. The provision for substantial planning and organisation would have been the subject of judicial expression in other jurisdictions.

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Dr CONSTABLE: We should spend as much time as we can on this definition because it goes to the heart of this legislation, which will give police greatly extended powers. This definition must be absolutely clear in everyone's mind. We need to know what is meant by organised crime. The point at which conspiracy becomes organised crime is still not clear, or where the two are differentiated. If two people get together and conspire, perhaps over a period of months, to kidnap and murder someone, is that conspiracy? Is there a time limit of some sort? Is that one of the threshold tests? If they conspire over a weekend, is it only simple conspiracy, to use the Attorney General's term? If the conspiracy occurs over a year or more, is that organised crime? Are they really organising and planning substantially for kidnap and murder? At which point does one become the other? I am curious about a comment the Attorney General made about money laundering. Was the Attorney General saying that organised crime must involve money? The Attorney General spoke about threshold tests. What are they? I ask the Attorney General to define them.

Mr McGINTY: The member for Churchlands gave the example of two people conspiring over a period. It does not matter whether it is over a month or a year.

Dr Constable: A weekend?

Mr McGINTY: It could be, but it would fail the fourth part of the test, which covers substantial planning and organisation.

Dr Constable: What makes you think that two nights does not constitute substantial planning and organisation? That is why I am asking about timing.

Mr McGINTY: All the components of the definition need to be met in order for that to be satisfied. I suspect that if two people planned a kidnapping and murder over a weekend, depending on the circumstances, one would find that it lacked substantial planning and organisation. It would meet a number of the tests. If, however, these people acquired a property on which to grow drugs, which were to be trafficked, and they were also planning to commit kidnap and murder, an element of substantial planning would be associated with it. Therefore, it would be brought within the definition. I find it hard to see how a fairly short time frame, such as two people getting together over a beer and planning to commit two crimes, could meet that aspect of substantial planning and organisation. Members should bear in mind that the definition of organised crime must be satisfied in order to convince a special commissioner to invoke these powers. Having satisfied the special commissioner that it is organised crime, the special commissioner has the discretion not to use those powers if, for instance, the investigation of that offence could be done by conventional means. If so, these powers would not be used. The test under clause 9(3)(b) would also need to be satisfied. The clause states -

... that there might be evidence or other information relevant to the investigation of the offence that can be obtained under this Part;

The discretion is ongoing, so that even if the definition of organised crime is satisfied, these powers will not necessarily be invoked. The special commissioner can say that on the public interest test or on a discretionary basis, he will not allow those powers to be used. When members look at the definition, they must also consider the discretion that accompanies it. The definition of organised crime must at least be satisfied. Even then, it is not, in itself, enough.

Mr OMODEI: The Attorney General spoke about the Quinninup case during previous debate on this Bill. That case involved bikies who raped a woman, who later committed suicide. I understand that rape would not be a schedule 1 offence under the Criminal Code. Would that sort of crime come under the definition of organised crime, or would it be captured under another part of this legislation?

Mr McGINTY: Assuming that what was reported in the newspaper was correct, that was a serious offence of a pack rape committed against that woman. That is not a schedule 1 offence because it is not traditionally the sort of offence associated with organised crime. That is not to say that organised crime figures do not commit rape, but other crimes such as amassing an arsenal, money laundering, murder and things of that nature are more commonly part of the organised crime scene. One member made the comment during the second reading debate that a vengeance rape could well constitute a part of organised crime, but it has not been included in this definition. Three offences were committed in the Quinninup case: rape, suicide and the failure to give evidence at the coronial inquiry. The Government has addressed the last of those offences in the next Bill, in which the penalties for failure to give evidence to the coroner are increased. That arose directly out of the Quinninup case. That incident would not be caught by the definition of organised crime.

The member for Churchlands asked whether money needed to be involved as a part of this definition. The answer is no. However, one would normally consider the acquisition of property to be part of the purposes of organised crime as it is popularly understood. Conceptually, it need not do that. A case of murder might well be unrelated to money. I have been advised that the murder of Don Hancock was part of the organised crime scene.

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That crime would be defined as having been committed as part of organised crime, but it is not directly related to money. I do not know the background to many of these cases, but a number of bikie murders seem to have had more to do with vengeance and intertribal warfare than money. Money does not need to be included in the definition; however, generally speaking, the purposes of the association will have something to do with unlawfully gotten money or property.

Ms SUE WALKER: I return to my earlier question: how will counsel argue that organised crime is different from conspiracy when they go before the special commissioner? As the Attorney General pointed out, that is dealt with under clause 9 of the Bill. Under clause 9(3)(a), the special commissioner must be satisfied that there are reasonable grounds for suspecting that a section 4 offence has been or is being committed. Clause 4 of the Bill provides the definition of section 4 offences, which are -

- (a) a Schedule 1 offence committed in the course of organised crime;

Organised crime is defined in clause 3 as -

... activities of 2 or more persons ...

Section 558 of the Criminal Code deals with conspiracies to commit indictable offences. That includes schedule 1 offences and a number of other offences. That section provides that -

- (1) Any person who conspires with another person -
 - (a) to commit any indictable offence; or
 - (b) to do any act or omission ...

is guilty of an indictable offence.

The commentary in *Brown's Criminal Law* states -

It is a preliminary to the commission of many crimes. It may be permitted where, for example, two men plot and plan to rob a bank and reach an agreement with each other as to when and how they will execute their plan.

How will counsel argue that the crime or the circumstances of two men talking constitutes a conspiracy, and is different from organised crime? The Bill does not contain a definition of what constitutes organised crime. In my view, this Bill will capture or bring into the net people who are not part of an organisation. "Organisation" should be defined. Can the two brains behind this legislation tell us if they have found any case law in Hong Kong or elsewhere that defines what is an organisation so that people who are part of a conspiracy will not be caught by this legislation? This legislation will give police far-reaching powers. It is important that "organisation" be spelt out in this Bill.

Mr McGINTY: This legislation is not concerned with conspiracies. As we have indicated, a conspiracy is two or more people planning together to commit a crime. The crime can be any of a significant number of indictable offences known to the law in Western Australia. We are not talking about a conspiracy to commit an indictable offence but about two or more people being associated together for certain purposes, in the pursuit of which two or more schedule 1 offences are committed. The schedule 1 offences are extremely limited.

Ms Sue Walker: They are indictable offences.

Mr McGINTY: No, they are not. The term "indictable offences" covers hundreds of different offences.

Ms Sue Walker: That is my point.

Mr McGINTY: A small number of indictable offences will trigger this legislation. This legislation is not about conspiracy to commit an indictable offence. I do not think it is productive to discuss the meaning of conspiracy, because it is irrelevant to this legislation. If somebody has committed a conspiracy or is part of a conspiracy to commit an indictable offence, he will be charged with conspiracy and dealt with by the courts of law. We are talking about what will trigger an application to a special commissioner to invoke the exceptional powers. Those triggers are listed in schedule 1. About a dozen are listed; there may well be more than that. Most, but not all, of the schedule 1 offences are indictable offences. The applicant will need to satisfy the four components of the definition of organised crime. There is no point inserting into the legislation a definition of "organisation" because the legislation is directed at not the existence of a body corporate or a recognised association but the activities of people. It is spelt out in the definition -

... activities of 2 or more persons associated together ...

That does not mean that a person must be a member of an organisation. We do not want that to be the case.

Ms Sue Walker: What does "organisation" mean? It is different from conspiracy.

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Mr Kucera: The crime is organised; not the group.

Mr McGINTY: The word “organisation” is not used in the definition. The word “organised” is used, and that is then defined -

... activities of 2 or more persons associated together ... for purposes in the pursuit of which 2 or more Schedule 1 offences are committed ...

We do not want to focus on the organisation or the association; we want to look at the relationships of people who come together for a purpose in the pursuit of which very serious offences that we popularly understand to be associated with organised crime are committed. We are not interested in conspiracy. That will be dealt with by the criminal law. Charges will be laid if someone conspires to commit an indictable offence. We are not concerned with associations or organisations. We are concerned with the activities of people. That is what this legislation is about. The member made an interesting point, but it is not relevant to the legislation.

Ms QUIRK: The definition of organised crime is somewhat vexed. There is much discussion among various intelligence communities in this country and elsewhere as to what constitutes organised crime. It is my understanding that law enforcement in this country has taken a reasonably standard approach. As the Attorney General said, people tend to want to identify it not by associations - for example, organised crime gangs or the Mafia - but rather as loose syndicates that are formed for the purposes of committing serious criminal offences. Those are particularly fluid. It is always a dangerous proposition to define the organisations, and that practice no longer exists. A decade ago, it was the practice of the law enforcement community to define by virtue of people associating in groups. There are problems with that, such as the question of stigmatisation. For example, Asian organised crime is no longer fashionable. Intelligence now tells us that these groups are fairly fluid.

It is more a question of looking at the purpose of the activity - the schedule 1 offences - rather than the groups simpliciter. It is generally held within the criminal intelligence community that the definition must be fairly fluid and loose because those groups and syndicates are similarly fluid and loose.

Ms SUE WALKER: The special commissioner would need to be satisfied that a schedule 1 offence was used in relation to organised crime. The question I come back to is: how can counsel satisfy that an organisation was involved when the legislation does not contain even a broad definition?

Mr McGINTY: The definition of organised crime in the legislation has four elements and focuses on the activities of two or more persons. The definition is not satisfied if only one person is involved in the crime. The police will need to satisfy the four elements of the definition of organised crime: first, activities of two or more persons; second, that those persons were associated together for certain purposes; third, that in pursuit of those purposes, two or more offences were committed; and fourth, that there was substantial planning and organisation. Those people are associated for the purpose of committing several offences. A nexus exists between the reason people have gathered and the commission of those serious offences. It needs also to be borne in mind that the offences need not be committed by the people who conspire to commit them. The answer to the member's question is simple: a person appearing before the special commissioner to get permission to invoke the powers contained in this legislation would need to establish that the four elements of organised crime listed in the definition are present on that occasion.

Mrs EDWARDES: I used an example when earlier exploring this definition that involved a warning by one person who is part of organised crime to another person. That may be caught by this Bill. A bombing of a house is a schedule 1 offence. In my example, that is the offence for which we want to bring the person before the special commissioner for questioning. The offence involves one bikie, who has not got together with the others, undertaking a rogue activity. The warning to the person not to cross the line by blowing up his house is, however, the commission of another schedule 1 offence. The bikies may have got together to engage in the substantial planning and organisation of a schedule 1 offence. Because one of them has bombed another person's house and the others do not know about it, that offence does not take him outside the definition. The offence is still a schedule 1 offence. He is still one of a group of people who have come together for the substantial planning of another schedule 1 offence. Is that situation captured under the provisions of the Bill?

Mr McGINTY: Yes, that probably most illustrates the point. It needs two people who are associated. It does not mean that those two people must be part of a conspiracy to commit those offences. The definition in the Bill covers “activities of 2 or more persons associated together ... for purposes” - therefore, the association must be for a purpose - “in the pursuit of which 2 or more schedule 1 offences are committed”. They might be committed by an individual member of the group, rather than carrying forward the notion of two people conspiring to commit the offence. There might be a falling out in a bikie gang, so that one person goes off and commits a series of schedule 1 offences. That again is not a conspiracy, but it could be that two or more people were associated for a purpose, and it was pursuant to that purpose that the offence was committed, perhaps by

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one bikie or by a group of bikies. If the bombing of Don Hancock, for instance, was done by one person, that offence would still be caught by this provision. Obviously, substantial planning and organisation went into that bombing, given the threat to kill him was made some 11 months earlier and the way in which the car bomb was planted and the crime was executed. It does not necessarily need to be two people who executed the act. I am probably jumping to some conclusions, given that nobody has been charged with that offence and we do not know exactly what occurred. However, if one takes the view portrayed in the media, it would seem to clearly fit within the definition.

Mrs EDWARDES: I move -

Page 2, after line 24 - To insert the following -

“State Records Commission” means the commission established under section 57 of the State Records Act 2000.

This definition needs to be incorporated if we are to pick up the later amendment that requires the State Records Commission to determine the destruction or retention of documents that come before the special commissioner. As we indicated yesterday, the Bill provides for the Attorney General to have that responsibility. We do not believe that is necessarily appropriate; in fact, it can have a downside. Under clause 23, the commissioner has the ability to decide the fate of some of the records, but the Bill goes on to provide that, in other instances, the authorisation of the destruction or otherwise of documents would be referred to the Attorney General.

Given the provisions of the State Records Act, if there is a question about the destruction or retention of those sorts of documents, the decision should be made by the State Records Commission as opposed to the Attorney General. In the forthcoming amendment, we acknowledge a role for the Attorney General. We believe that it may be appropriate in certain circumstances, but again a separate independent body has been formally established to deal with the State’s records, and, as such, it is a very important body. This amendment is a precursor and probably a very necessary definition if the forthcoming amendment is accepted.

To digress, who is responsible for the State Records Act? Under our Government, we believed it was the Minister for the Arts.

Mr McGinty: That has not changed. It is now the Minister for Culture and the Arts.

Mrs EDWARDES: Several sections of the Act would appear not to have been proclaimed. I do not know whether we need to raise that in this House and question when that is likely to occur. However, for the purposes of this debate, the necessary sections are in place for the State Records Commission to make the decision.

What happens to police records? Is a destruction plan automatically in place for government department documents? At some point, are some documents referred to the State Records Commission for destruction and some retained? If investigations have not been completed, particularly criminal investigations, I take it that the documents are left on file until such time as further information is available. The forthcoming practices of using people’s DNA might well result in many of those old files being dug out. What is the normal process with that type of material? Given the special nature and status of the special commissioner, we believe it is more appropriate that the State Records Commission make the final decision on the destruction of those documents on which the special commissioner does not make a decision to retain or destroy.

Mr KUCERA: If I might clarify the position, the Police Service has a regime of record retention; in fact, it won an award last year for doing that. Certain categories are applied to all material. What does not go to the archives is systematically destroyed or retained, depending on the nature of the material. Generally, in a criminal investigation, it is highly unlikely, if the investigation has not been finalised, that any part of the material would be intentionally destroyed.

Mrs Edwardes: Are you talking about state archives?

Mr KUCERA: Yes.

Mrs Edwardes: Is there an automatic link in any event?

Mr KUCERA: Yes, a process, which I understand other government agencies are now adopting, was developed through the Police Service for the retention of records generally.

Mr McGINTY: Clause 23(3), to which this amendment relates, reads -

If, after the completion of an investigation, any question arises as to how any records should be dealt with, the question is to be referred to the Attorney General who may order that any record be destroyed or otherwise disposed of or dealt with as the Attorney General considers appropriate, regardless of any other written law.

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The member has sought to amend that clause by inserting “State Records Commission” in place of “Attorney General”. The amendment would give to the State Records Commission rather than to the Attorney General the decision on what should be done with the records. The Attorney General is the appropriate person to decide whether the records should go to the Director of Public Prosecutions or a court, or whether they should be destroyed.

Mrs Edwardes: In the amendment we have included the words “unless the Attorney General requests otherwise”. We have recognised that very important role.

Mr McGINTY: The Government is happy with that part of the amendment. We will agree to the proposal on the Notice Paper to insert new clause 23(4).

Mrs Edwardes: Is the Attorney General saying that he will not agree to the amendment I propose to clause 23(3) to send records to the State Records Commission, but will agree to new clause 23(4)?

Mr McGINTY: Yes.

Mrs Edwardes: Can the parliamentary counsel apply his mind to how we can correct that before we get to clause 23?

Mr McGINTY: I hope so. The State Records Commission has expertise relating to the preservation of records, but should not make decisions - especially involving evidence of court proceedings - about where and when such records should initially go. That is why we are happy to agree with the member’s amendment to insert new clause 23(4). However, we are concerned about the initial decision. When I first looked at the proposed amendment, I was not too happy about the Attorney General having the power to destroy. That seemed to be something to which we should give some further consideration. The more I think about it, the more I think that the initial decision about where the records go should rest with the Attorney General or someone of that nature. Subsequently, once it is deemed appropriate that the State Records Commission deal with the records, it will make a decision on whether to destroy them.

The other point that should be made, which again refers to clause 23, is that in clause 23(2) the special commissioner may make any order about how the records are dealt with when the investigation is complete. This is really a default provision that deals only with the situation in which no particular order is made about how they are to be dealt with. I hope that has been of assistance to the member for Kingsley. In the light of that, if the member agrees with the general proposition that I am putting, she might be able to suggest a way the parliamentary counsel can do some work to accommodate the point she is now raising.

Mrs EDWARDES: Clause 23(2) would allow the special commissioner to make the decision on whether any further action needs to be taken with the records. Let us go back to what has happened: the special commissioner would have those records that would deal with the administrative processes, including the application for a warrant - I will use the term “warrant” - for questioning to help facilitate an investigation. The special commissioner would also have any documents or other evidence produced at that hearing. The special commissioner would not have any of the evidence or documentation that would come out of the search and seizure. The commissioner would have only those documents that would be produced at the hearing. Once the hearing is finished - not necessarily the investigation - surely those documents should go to the police; that is, those that would constitute documentary or other evidence to complete the investigation. The special commissioner does not carry out the investigation nor does he complete the investigation - the Commissioner of Police does. Therefore, once the questioning has occurred, that information should go to the Commissioner of Police unless the special commissioner says otherwise; that is, it is not relevant to the investigation, and that may well be the case. The other documentation is the administrative-type that one would think would be automatically dealt with in accordance with the State Records Act. Clause 23(1) reads -

A special commissioner is to cause the records to be kept of the investigation, including transcripts of all proceedings before the special commissioner.

The special commissioner keeps all the records. The special commissioner can then order how he thinks they should be dealt with. I take it that the Commissioner of Police has copies to complete the investigation.

Mr McGinty: That is the question.

Mrs EDWARDES: The police have to finish the job. They have to make an arrest - or not - to complete the investigation of this offence that has been brought to the special commissioner.

Mr McGinty: The transcript of proceedings would stay with the special commissioner.

Mrs EDWARDES: Yes, but obviously the Commissioner of Police would have a copy in any event.

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Mr McGinty: I would not have thought so.

Mrs EDWARDES: One of the clauses of the Bill makes that available to the commissioner.

Mr McGinty: This deals with records only after the inquiry is completed. The member's amendment to clause 23 is a default provision.

Mrs EDWARDES: We are trying to work out what documents the special commissioner has, and at what stage he relinquishes them. One thought is that he keeps them all, but is that correct? Is the investigation the investigation of the offence or the investigation that has come before him - in which case, when the investigation is complete, is it the questioning that is complete and then the special commissioner makes a determination on that, or is it the whole investigation of the matter that has been brought before the special commissioner? What documents does the special commissioner have and what investigation are we talking about, so that we know when the investigation is complete and what should be happening? It will not be the special commissioner who makes the decision that it should go to the Director of Public Prosecutions and/or elsewhere; the Commissioner of Police will make that recommendation. The special commissioner does not have those powers. If the special commissioner is making the decision about how the records will be dealt with when the investigation is complete, he should in any event be applying the State Records Act as per clause 23(2). He should be looking at what documents he has, and whether they fall within any of the categories under the State Records Act etc. In the situation in which some records are left over and he cannot make a decision, he will refer the question to the Attorney General to deal with. The Attorney said that some will go to the DPP and be dealt with in other ways. I am not sure that is the case.

Mr OMODEI: The matter of state records keeping is very important, and I would like the member for Kingsley to continue her remarks.

Mrs EDWARDES: I am not sure that is the case, because we are dealing only with the questioning of a witness before the special commissioner and not the completion of the whole investigation, which remains with the Commissioner of Police.

Mr McGinty: That is right.

Mrs EDWARDES: What will the Attorney General be making a decision on? Under clause 23(2), the special commissioner should be making the decision under the State Records Act. Clause 23(3) refers to anything that the special commissioner could not make a decision on; that is, he does not know how to do that. However, if the State Records Act is applied, somebody guides one through what the document is, how it is classified and how it should be dealt with in accordance with the State Records Act. It still should not be the Attorney General. The amendment that I have proposed, which inserts new clause 23(4), provides for the Attorney General to decide otherwise. There might be a carryover. I am putting in the "what if". What if an important document has not been caught up with this and is not with the Commissioner of Police? At the end of day, if the state records people have not been able to assist the special commissioner under clause 23(2) in how to deal with those documents, it should be referred to the commission to determine what to do with that documentation as against the Attorney General.

Mr McGINTY: We are getting a little ahead of ourselves. We have agreement about this amendment. The Government is happy to insert the definition of State Records Commission as proposed by the member for Kingsley. Perhaps we should address this issue when we get to the relevant clause.

The example has been given to me of someone who has documents or evidence about drug trafficking. That person might be reluctant to come forward and give that evidence; he might be fearful that government record keeping - in whatever form - is not secure and that it will be revealed that he has given evidence that has resulted in someone being charged or convicted. In those circumstances, there might be a request that all evidence given by that person be destroyed when it would otherwise have been kept forever. That is a situation in which one might well want to destroy the record once the matter was finalised. In those circumstances, one would expect the special commissioner to make that order under proposed section 23(2) to protect the person giving the evidence. We are dealing with the default situation under proposed section 23(3). If, for whatever reason, the special commissioner did not do that, the question would arise after the event. I am sure that, given her time as Attorney General, the member remembers unforeseen issues arising after the event. Attorneys General spend a great deal of time trying to patch up those situations. It is in that context that some power must be available. Whether it resides with the Solicitor General, the Attorney General or whoever, there should be some form of power to make that decision in the default situation. We can deal with that issue later in the debate. I will make the concession now and agree to the amendment.

Amendment put and passed.

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Clause, as amended, put and passed.

Clause 4: Section 4 offences -

Mrs EDWARDES: This clause picks up one of the definitions in clause 3, and it obviously refers back to organised crime. A section 4 offence is a schedule 1 offence committed in the course of organised crime. As has been stated, organised crime has three aspects: it must involve two people, two or more schedule 1 offences and substantial planning and organisation. The second component of a section 4 offence is a separate offence; that is, an offence of murder or wilful murder - which are both schedule 1 offences in any event - as defined in the Criminal Code, committed in connection with any other commission of a schedule 1 offence. Given our discussion about what constitutes organised crime, those two events must occur at the same time. That is dealt with in the definition of organised crime. How do paragraphs (a) and (b) work? There was obviously something in the Attorney General's mind to cause him to include paragraph (b).

Mr McGINTY: The member is correct in that we envisage there being two groups of section 4 offences. The first is the organised crime offences that must comply with the four-part definition of organised crime in clause 3. The second deals with the most serious offences under the Criminal Code; that is, the offences of wilful murder or murder. When those offences are committed, there need not be an organised crime connection. This is an extension beyond organised crime of the provisions of the legislation.

A section 4 offence is an offence of wilful murder or murder committed in connection with any other commission of a schedule 1 offence. A murder and a murder or a murder and a kidnapping would be sufficient to trigger it. It simply must be committed in connection with the commission of another schedule 1 offence. It is not an organised crime offence, but it could cover a serial killer. Although this Bill deals in a general sense with organised crime, this is an exception. The offence need not comply with the definition of organised crime, but it must involve ongoing organisation of particular offences. According to paragraph (b), a section 4 offence need not involve two or more people conspiring, as long as it is committed in connection with any other commission of a schedule 1 offence. The Claremont serial killer would be caught by this provision. This legislation could assist in that investigation.

Mrs Edwardes: If DNA does not beat it.

Mr McGINTY: We will be dealing with DNA tomorrow. This legislation deals with organised crime as defined, or murder and one other serious offence if there is a connection between the two. They are the two situations that trigger this legislation. The second is not rigorously defined organised crime as such. The two offences do not need to be temporally connected.

Mrs EDWARDES: That brings us back to some of the concerns that have been raised about balancing the public interest with removing the rights of individuals. The legislation contains a strong definition of organised crime, ensuring that it catches only a certain class of people. However, it is now extended to catch an individual who has carried out one schedule 1 offence in connection with murder or wilful murder. That could involve someone who has committed a robbery and killed a proprietor. The Law Society presented the scenario of such an offender being whipped into a hearing before the special commissioner in the middle of the night without legal representation if the public interest determined that that should happen. Such a person would be required to answer questions without judicial supervision. Organised crime is a separate issue. What protection exists for an individual involved in a one-off event like the one I have described? Obviously, such an offender would be caught by proposed section 4(b).

Mr McGINTY: A person might have committed the most serious offence under the Criminal Code in connection with any other schedule 1 offence. The member referred to robbery. Schedule 1 excludes basic robbery, because the penalty in that case is imprisonment for 14 years. It would need to be in circumstances of aggravation. If it involved a robbery and the offender strangled someone, that would not be sufficient. If the offence involved a shooting - that is, the offender was armed - or it was committed in company, it would be covered by this legislation because those offences attract life imprisonment and imprisonment for 20 years respectively.

Mrs Edwardes: That is a common occurrence.

Mr McGINTY: Yes, it is. In those circumstances, that would be sufficient to make it a section 4 offence, because the two people were there and were connected. A person would still need to satisfy the threshold test in clause 9; that is, whether it was in the public interest to invoke these exceptional powers; and the special commissioner would have the discretion to determine whether those powers should be used.

It is difficult to know how we could define it other than to talk about two offences that were committed in connection with each other; for example, if an armed robbery were to result in a murder, it would be one act, or

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one series of acts. The other way to approach this would be to say that the offences would need to occur on separate occasions or be separated in time. However, we would then get into a lot of difficult definitional issues. We took the view that if we were dealing with one serious offence and another serious offence had also been committed, that should be enough to trigger this provision. However, it is not intended to be used in the example that the member just gave, because I regard that as a matter that should be investigated by the police using their usual investigative skills rather than the exceptional powers that are contained in this legislation. It is clear that the traditional investigative techniques have not been able to solve the Claremont serial killings, yet two serious crimes have been committed and there is a connection between those two crimes. The legislation is not perfect, but I hope it will not be used in the scenario to which the member referred; namely, an armed robbery that resulted in death. If there were a way to exclude such a scenario, we could do that. However, I think it would probably be excluded by the public interest test in clause 9.

Ms SUE WALKER: There is clear law - I have not looked at that point, but it has been spoken about - that if a robbery and a murder were committed within five minutes of each other, they would be two separate and distinct acts. Therefore, in relation to schedule 1 offences, a person who had committed a robbery in a shop and in the process had committed a grievous bodily harm against one person and had shot another person would come within the definition in clause 4(b), would he not? A young man who had stupefied a girl and she had died would also come within the definition in clause 4(b), would he not?

Mr McGinty: I think that is right.

Ms SUE WALKER: Therefore, the tenor of this legislation captures much more than people who are involved in organised crime. Am I right?

Mr McGinty: Yes.

Ms SUE WALKER: Was that the intention of the Bill?

Mr McGinty: Yes.

Ms SUE WALKER: I am surprised. Has the Criminal Lawyers Association made any comment on this, considering the enormous powers that the police have?

Mr McGinty: Yes; the Criminal Lawyers Association and the Law Society of Western Australia.

Ms SUE WALKER: They are happy with it?

Mr McGinty: No.

Mrs EDWARDES: What then is the justification for including clause 4(b)? In the case of the Claremont serial killings, I think all members of the community would like that individual or individuals to be caught. Clause 9 allows for the investigation of a section 4 offence in the public interest if the normal police powers have not been sufficient to capture an offender. We should allow the police to exercise all their ordinary powers in an endeavour to catch an offender. However, if the hue and cry from the community is that it wants the Claremont offender to be caught - and I like going to the nightclubs in Claremont, but given that I am blond I will not go there -

Mr Andrews: You would not be chased anyway!

Mrs EDWARDES: Someone might confuse me with a 21-year-old blond female!

Mr Kucera: It could be easily done!

Mrs EDWARDES: I thank the minister for that compliment!

In a scenario in which strong community pressure was put on the police to solve a crime, could the exceptional powers be used before the police had had time to exercise their ordinary powers? It would be unavoidable for the public interest test before the special commissioner not to take into account the hue and cry from the community. If we were given some indication of what is likely to be regarded as being in the public interest, it might give us some comfort about the use of clause 4(b).

Mr McGINTY: Clause 4(b) deals with the most serious offence under the Criminal Code; that is, when one person takes the life of another human being. A murder in itself would not be sufficient, but if it were committed in connection with another serious offence, it might trigger the use of these exceptional powers. Either of the two examples that have been raised in the debate so far - namely, an armed robbery that has resulted in death, and an act intended to cause grievous bodily harm that has resulted in death - may constitute a section 4 offence.

Clause 9(1) states -

This Part is to facilitate the investigation of a section 4 offence.

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Clause 9(3) states -

The powers of a special commissioner under this Part cannot be exercised unless the special commissioner is satisfied that - . . .

- (c) there are reasonable grounds for believing that the use of powers given by this Part would be in the public interest having regard to -
 - (i) whether or not the suspected offence could be effectively investigated without using the powers; . . .

That is our attempt to deal with the points the member has raised; and it gives the discretion to the special commissioner. In a situation in which something as horrendous as the Claremont serial killings had occurred, the community would place enormous pressure on the Commissioner of Police to use powers of this nature to investigate that case. The clear legislative instruction to the special commissioner is to, first, satisfy his own mind that the traditional policing approach and powers are not adequate to deal with the issue. That is the clear instruction to the special commissioner. He should use these powers only when he thinks that the existing power is not adequate to properly deal with the situation. Today, that is a conclusion that would be very easily reached on the Claremont serial killer. I suspect that that would not have been the case five years ago and the special commissioner would have said that he would not use the powers in those circumstances because, at the height of the problem, when the murders were occurring, those were not the sorts of powers that should have been used in that context, assuming there was no suggestion that an organised crime gang was committing the murders.

Mrs EDWARDES: I suppose the point was that the murders took place months apart, and, therefore, once the first or second murders had occurred, the special commissioner's powers would have been invoked before the third. The public interest would have been met because if the police powers had not been successful in the first and second instances, then it is likely that the use of the special commissioner's power would have followed. I regard that as a special set of circumstances and incidents that highlight the fact that clause 4(b) will be a very useful tool. I am concerned that there might very well be other instances in which it may be used and, potentially, it would rely heavily on the special commissioner and his interpretation of what might constitute public interest.

Mr MCGINTY: We have opted for a person of this status to meet that sort of problem. If we had a person who did not have the status of a judge, or a retired judge, it could become a problem. That is one of the reasons that it is envisaged that these powers would be used only in exceptional circumstances. The two cases of grievous bodily harm and armed robbery that resulted in death would theoretically come within a clause 4 offence. In just about all circumstances, that would be ruled out by the public interest test in clause 9. However, in the case of the Claremont serial killer today - not five years ago - we would have been able to satisfy that public interest test.

Ms SUE WALKER: I refer to clause 4(b). I asked the Attorney General if it was intended by him that that sort of offence would be covered by this legislation, and he said yes. However, the second reading speech states that -

This Bill targets organised crime.

It went on to say that it will be used for "combating the sinister and complex activities of criminal gangs." This Bill is associated with organised crime and the second reading speech states that it gives "exceptional powers to fight organised criminal activity". Further on it says -

. . . the proposed reforms are aimed at providing the Western Australian community with greater protection from organised gang violence and related crimes . . . The central objective of the Bill is to provide the Commissioner of Police with greater investigatory powers

It goes on to say -

Of course, such powers are not to be used against people who are not engaged in organised crime or its associated activities.

That is why I wanted to find out what the Attorney General meant by organised crime. The speech continues -

For example, those powers come into effect only if there is a reasonable suspicion of the occurrence of serious indictable offences, if there is organised criminal activity . . . The core reforms in the Bill include broadening police investigative powers by introducing a compulsory examination procedure, widening police powers . . .

If the commissioner is satisfied that someone on a train has slashed the seats and pushed someone out of the train accidentally - he could be charged with murder, but it is not proved - the police could theoretically go before the

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commissioner and obtain the exceptional powers, with no warrant, that the Attorney General has referred to. They would have power of entry at any time, day or night, and they could stop, detain and search anyone. The Attorney General has just made an extraordinary admission, because the second reading speech clearly states that this Bill relates only to organised crime and gang activities. It goes on to say -

Members should note that as the Bill proposes extraordinary measures, it also contains a series of checks and balances.

It must contain those because of the extraordinary powers that can be given to the police. As we have already seen, the measures are not there. This is poorly drafted legislation. As I have said before, I have great confidence in the judiciary of the State. However, under this legislation, the police are able to go before the commissioner - we are relying on the integrity of the commissioner - for an investigation of matters that, as the Attorney General said to this House, are not intended to be caught by this legislation. Throughout his second reading speech the Premier referred consistently to gang and other organised crime groups. However, he did not mention individuals who are not part of organised crime groups - reference was made to motorcycle gangs. It is disturbing to find that the examination of these matters will occur in private and that the rules of evidence will not apply. It is important to note that in his second reading speech the Premier stated -

... no appeal or other judicial proceedings will be able to be taken against the exercise of powers or functions relating to a hearing before a special commissioner. If it were otherwise, organised criminals, who have significant financial and other resources, would easily be able to institute myriad legal actions for the purpose of and with the effect of frustrating, delaying and rendering futile investigations.

That provision captures people who can be taken to that tribunal with no legal representation, no rules of evidence and no right of appeal, and the Attorney General is telling me that that is okay and that is what he intended. I want his comments on that because it is quite alarming.

Mr McGINTY: If the member for Nedlands is upset about the Bill, she should vote against it; it is as simple as that. However, let us not get too excited. The implication in what the member has just said is that the second reading speech was misleading and did not cover the second situation described in clause 4 of the Bill. Well, unfortunately, it does. It is described very precisely in the second reading speech on page 5039 of *Hansard* where, under the heading of special commissioner, it states -

The central element of the Bill is the establishment of the office of a special commissioner.

The speech then makes reference to invoking the special powers -

That can only occur when the Commissioner of Police has satisfied a special commissioner that one of the following two situations exists -

This refers to clause 4(a) and (b). The first situation relates to paragraph (a) and the second to paragraph (b). It continues -

first, that there are reasonable grounds for suspecting that a serious offence has been or is being committed in the course of organised crime.

It mentions the definition and then it gets to the relevant part -

The second situation, which will enable the powers and functions in the Bill to be exercised, is where the Commissioner of Police satisfies a special commissioner that there are reasonable grounds for suspecting that an offence of wilful murder or murder has been committed in connection with another serious offence including murder, kidnapping, extortion, serious drug offences and offences involving firearms.

The member for Nedlands was saying that I made a remarkable admission. I am repeating what was said in the second reading speech, which stated that these powers would be invoked -

Ms Sue Walker: Now you are being smart. I have not made a mistake.

Mr McGINTY: The member for Nedlands has made a grave mistake in suggesting that what was contained in clause 4(b) was not disclosed in the second reading speech. I just read when I have said that the powers -

Ms Sue Walker interjected.

Mr McGINTY: Yelling will not help to cover the member's inadequacies in this matter.

Ms Sue Walker interjected.

The DEPUTY SPEAKER: Order, members!

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Mr McGINTY: I take objection to the member suggesting that things were not appropriately covered in the second reading speech. Two provisions are outlined in the second reading speech. The member for Nedlands should learn how to read. She is doing her own credibility no good whatsoever.

Ms Sue Walker interjected.

The DEPUTY SPEAKER: Order, members!

Mr McGINTY: The member should not stand there and talk about making amazing admissions. The member has been caught out not reading her own speech.

The DEPUTY SPEAKER: Order, members! The members arguing must remember that the member on his feet has the call. There is an appropriate way to interject and ask questions. Members must not argue and provide entertainment to the rest of the Chamber and the public gallery.

Mr McGINTY: For the sake of the record I will repeat what was said in the second reading speech, to which the member for Nedlands has just drawn objection. The first reference is to clause 4(a) of the Bill, which reads -

... that there are reasonable grounds for suspecting that a serious offence has been or is being committed in the course of organised crime.

The member for Nedlands was completely wrong about the second provision, which states -

The second situation, which will enable the powers and functions in the Bill to be exercised, is where the Commissioner of Police satisfies a special commissioner that there are reasonable grounds that an offence of wilful murder or murder has been committed in connection with another serious offence including murder, kidnapping, extortion, serious drug offences and offences involving firearms.

That is a very accurate description.

Ms Sue Walker interjected.

Mr McGINTY: There is no reference to organised criminal activity here. I am going to give up on the member for Nedlands. The member did not bother reading it. She thought she would make a smart comment but she fell flat on her face because she was fundamentally wrong.

Several members interjected.

The DEPUTY SPEAKER: Order, members!

Mr McGINTY: As a newcomer, the member is doing her credibility no good whatsoever with either her own colleagues or my colleagues.

Ms Sue Walker interjected.

The DEPUTY SPEAKER: Order! The member for Nedlands is called to order for the first time.

Mr McGINTY: The member should not make allegations of the nature she just did when she is so demonstrably wrong. The member need only read the section to which I have just drawn her attention. It deals expressly with the clause. Her credibility is badly dented.

Ms Sue Walker interjected.

The DEPUTY SPEAKER: Order, members! Members must show the Chamber more consideration.

Clause put and passed.

Clause 5: Delegation by Commissioner of Police -

Dr CONSTABLE: The clause refers to delegation by the Commissioner of Police to other police officers.

The DEPUTY SPEAKER: We are having difficulty hearing what the member has to say. I ask other members in the Chamber to desist from their conversations.

Dr CONSTABLE: Before I specifically address the clause, I want to make some other observations. The Commissioner of Police and his delegates already have substantial powers in the community. That needs to be recognised as we deal with the legislation. The legislation seeks to extend those powers to a remarkable degree. That must also be recognised. Under the legislation it is proposed that, in certain circumstances, police officers can search premises without a warrant. Many new powers are also proposed for police officers. If public officers and police officers are given powers, they can be used in one of two ways: they can be used wisely or they can be abused. The Fitzgerald inquiry in Queensland produced evidence of abuse of power by public

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officials and police officers. Today's *The West Australian* carries a front page article about the abuse of police powers in the random breath testing fiasco. These things do happen.

Implicit in this legislation is that we are asked to trust the police. The legislation relies on police officers to carry out their duties with integrity. I do not see many safeguards for the community in the legislation. It is all based on trust on our part. Clause 5(1) states -

The Commissioner of Police may delegate any power or duty of the Commissioner of Police under another provision of this Act to a police officer whose rank is Assistant Commissioner or higher.

Am I correct in assuming that applications to the special commissioner can be made only by the Commissioner of Police or one of the delegates? I would also like an explanation of clause 5(4). Does it mean that in operational matters, powers such as searching premises without a warrant can be delegated down through the ranks? Where is the end of the delegation of power?

Mr McGINTY: When this Bill was being drafted, I shared the concerns that underlie the issues raised by the member. I would have been very unhappy to see a general power of delegation to any member of the Police Force. From memory, it appeared in the first draft of the Bill. The powers are exceptional. I would not be happy to have them exercised by any police officer. Clause 5(1) states that delegation can be made only to the level of assistant commissioner. I am satisfied that the assistant commissioner, the deputy commissioner and the commissioner are officers of significant seniority. Below that level I would be concerned that the power might be exercised by any police officer. The power to delegate is expressly limited to the level of assistant commissioner. It is a protection designed to ensure that the powers can be exercised only by police at a most senior level.

Subclause (4) has two principles. One is the power of delegation and the other is that powers can be exercised through an agent or someone else. The interaction of subclauses (1) and (4) allow for delegation to the assistant commissioner level. The power to act through another is not a delegation. The provision to do something through another person is not intended to be displaced. It does not mean that it can be delegated because subclause (1) limits the power of delegation. I can think of a few examples in which power is exercised through another. It is not possible to delegate the power to make an application to a special commissioner beneath the level of an assistant commissioner. Subclause (4) seeks to leave in place the power to act through another in circumstances other than delegation. An example might be if someone writes a letter on behalf of the commissioner. That is commonplace. It is an example of someone acting on his behalf, but it is not a delegation in the sense that it is understood to make an application to a special commissioner.

This Bill makes it clear that delegation is possible down only to the level of assistant commissioner, but administrative functions carried out through another person will continue to be carried out in that way. Clause 5(4) provides for a continuation of the administrative practice that was in place. That is not a delegation.

Dr Constable: So if something goes wrong with the exercise of the new powers drafted in this legislation, responsibility lies with the commissioner, the deputy commissioner or the assistant commissioner. Does it not rest with anybody else?

Mr McGINTY: It will rest with the commissioner because he must make the application or delegate down to the level of assistant commissioner. If something goes wrong, it ultimately comes back to the commissioner. It cannot go beneath the level of the assistant commissioner.

Debate interrupted, pursuant to standing orders.

[Continued on page 6057.]