CRIMINAL PROPERTY CONFISCATION ACT

Grievance

MR P. ABETZ (Southern River) [9.18 am]: My grievance is directed to the Attorney General represented in this chamber by the Deputy Premier, and relates to the Criminal Property Confiscation Act 2000. I presented a grievance about this act in September 2011, and the former Attorney General acknowledged in his response to this house that this act needs rectifying. Unfortunately, the anomalies that he acknowledged exist are still not fixed. He also declined to address problems with the term "crime-used property" and the way the Director of Public Prosecutions interprets that. The High Court has upheld the way the DPP interprets this term, which shows that the problem is with the legislation.

The original idea behind the legislation was that if, say, a ute was used as the getaway car in a bank robbery, that ute could be confiscated, or if a small aircraft was used to fly drugs into the state, that plane could be confiscated. I do not think anyone has major issues with that. However, the way the legislation is framed allows the DPP to apply to the court to confiscate any property that has been directly or indirectly used in the commission of a crime.

Let me give a real-life example. Mr X grew 12 cannabis plants in a built-in robe in his home, and pleaded guilty to cultivating marijuana with intent to sell and supply. He was advised to plead guilty by his lawyer, who said, "You'll probably get a $1 000 fine. If you try to fight it by saying it was only for your personal use, it's going to cost you 50 grand in legal fees." Therefore, he pleaded guilty and, as his lawyer advised, was fined $1 000, and he thought that would be the end of the matter. That was in 2005. Some months later, the Director of Public Prosecutions moved to confiscate his house. He has now paid over $90 000 in legal fees to fight this. If the DPP proceeds with confiscating the house, he and his wife and kids will have no home. All of a sudden, an offence for which the magistrate thought a fine of $1 000 was appropriate now carries a fine of over $600 000. Surely the value of the confiscated property has to be commensurate with the severity of the crime.

In my previous grievance, I gave a hypothetical example of somebody indecently dealing with a child on a $500 dinghy, and contrasted that to the same offence being committed on a $5 million yacht. I find it repulsive that this act implies that if the crime was committed on the $5 million yacht, the offender not only serves the prison sentence, but also can have $5 million worth of property confiscated from him. But if he does it on a dinghy, nothing happens. It is only worth 500 bucks. It is not worth it for the DPP to try to forfeit that. Indeed, I think I am in good company; our highly respected Governor, Malcolm McCusker, QC, used a keynote address to a legal conference in August 2011 to call for this draconian law to be changed. I have the clippings here.

I believe that everyone should be equal before the law. But in the case of Mr X, this act allows the DPP to effectively impose a 600-fold increase on the fine that the magistrate considered appropriate. The rich and poor should be treated alike by the law. This flawed legislation is causing heartache and injustice to too many families. It needs to be fixed and it needs to be fixed now.

Another problem with the legislation relates to crime-used property that is owned by an innocent third party. Under those circumstances, if the third party objects, the crime-used property may be set aside and replaced by another property if the objector can establish that he was not involved in the crime. I do not have any issue with that being able to be set aside and another property substituted; however, if the substituted property is also part-owned by an innocent party, an anomaly in the legislation means that the substituted property cannot be set aside, although the crime-used property can be. It means that an innocent wife may lose her share of ownership in the family home if that property has been substituted for the property used by her husband in the perpetration of his crime, and she has no right to object. The former Attorney General acknowledged that this anomaly would be fixed, but it has not happened yet. It needs to be done, and done urgently.

Another anomaly concerns mortgagees. Under the current legislation, once a property is frozen, the mortgagee cannot exercise his or her power of sale. It means criminals are encouraged to default on their borrowings. Although the frozen property might even be disposed of by the DPP and the DPP may remit funds to the mortgagee, there is no obligation on the DPP to give any money to the mortgagee. I find it odd that section 91 of the act allows the owner of a property to apply to the court for an order to sell the property, but a mortgagee does not have that same right. It needs to be fixed.

The DPP has discretion on whether to confiscate or not confiscate a crime-used property. The DPP has a policy—I have a copy of it here—on when it would and would not move to confiscate property. But often it does not follow it, like with Mr X. The policy says that moves to forfeit would be done at the time the person is charged. In his case it happened months later. When challenged, the DPP said, "Oh, this is only a policy; it's not the law." Many legal experts are certain that the DPP, simply as a prosecuting agency, should not also have the role of making judgements on whether a property should be confiscated. Judgments should be a matter for the courts and the legislation should be clear enough for the courts to interpret correctly the original will of

Parliament. I put it to the house and to the Attorney General that this act is in desperate need of remediation. I therefore call on the Attorney General to introduce an amendment bill as a matter of great urgency.

DR K.D. HAMES (Dawesville — Deputy Premier) [9.24 am]: I have a response that has been prepared by the Attorney General. I will just read it out as I have no expertise whatever in this area.

There are a series of headings. The first is "Innocent parties and crime substitution orders (Bowers v DPP)". The Criminal Property Confiscation Act 2000 permits the confiscation of property that is used by an offender during the commission of an offence. If the property that is used during the commission of the offence is owned by a third party—rather than by the offender—the property may still be confiscated unless the third party meets the criteria set out in sections 82(3) and 153 of the act. An "innocent party in relation to crime-used property" requires that the innocent party is not involved in any way with the commission of the confiscation offence and did not know, and had no reasonable grounds for suspecting, that the relevant confiscation offence was being or would be committed. If the property is the matrimonial home, the offender's spouse may save the entire matrimonial house from being confiscated if the spouse is able to show that they are an innocent party and that they would have no other residence at the time of the hearing objection and would suffer undue hardship if the property was confiscated—section 82(3) of the act. The Supreme Court ultimately determines whether the third party is an innocent third party.

The incident specifically referred to by Mr Abetz refers to the situation whereby the offender's confiscation offence occurs at a residence other than the one owned by the offender and his spouse. In such circumstances, it is open to the Director of Public Prosecutions to make application to the Supreme Court for a crime-used property substitution order against the other property owned by the offender, which enables the DPP to seek a declaration from the court that the offender will pay the state a sum equal to the value of the crime-used property. For example, if a person sexually assaults a victim at a property owned by an innocent third party, the state can obtain a valuation of the property used during the sexual offence and then apply to take the offender's own home as crime-used property—to the value of the property where the offence occurred. The anomaly to which Mr Abetz refers is that the provision that protects the innocent spouse—section 82(3)—does not apply by way of the act to crime-used property substitution orders. That is, the spouse may object only if the actual property owned by the offender and the spouse is used in the commission of the offence. Mr Abetz raised this issue given that it was a matter that concerned the case of Bowers v DPP. The Bowers case was settled by consent between the parties with the DPP accepting that Mrs Bowers was an innocent third party and would suffer undue hardship if the matrimonial home was taken in circumstances whereby her offending husband had committed a sexual offence against a victim at another property. That is, the DPP utilised its overriding discretion not to strictly apply the provisions of the act. Since the Bowers case, the DPP has introduced a policy that will apply in all such cases by the DPP, ensuring that section 82(3) will apply in respect to crime-used property substitution order cases. Therefore, whilst legislative reform may eventually occur, the DPP will ensure that the anomaly will not apply. Consequently there will be no further Bowers v DPP–type cases relying upon the anomaly.

Mortgagees unable to exercise power of sale: The act does not permit a mortgagee to exercise the power of sale when the mortgage payments are not made in respect to a frozen property. The act envisages that the offender's property should remain frozen until the Supreme Court rules that the property should be confiscated.

The interest of the objecting innocent third party financial institution is always protected by the Director of Public Prosecutions ensuring that the equity held by the financial institution is paid to them upon the realisation of the property; that is, the state does not confiscate any property until the interest of the objecting mortgagee is fully paid out.

A new heading in response reads, "Confiscation proportional to the severity of the offence." The act provides that crime-used property may be confiscated if it was used by the offender when committing the offence. Mr Abetz notes that crime-used property may be confiscated even in circumstances in which the offending in question was to the lower end of the possible gradation of offending for that type of offence.

Madam Deputy Speaker, I continue to say "Mr Abetz" in response to what is written here, but I presume that I should substitute that with "the member for Southern River".

Parliament expressly decided not to make any reference to proportionality when enacting the crime-used property confiscation sections. In all crime-used cases the DPP has discretion on whether to confiscate. The DPP does consider, in appropriate cases, issues of proportionality. The member for Southern River refers to the circumstances of offences occurring on boats of differing values. The most significant factor for confiscation is the seriousness of the offending. If an offender is selling a significant amount of drugs on a boat on the Swan River, the DPP will confiscate the boat regardless of whether the boat is a $5 million cabin cruiser or a dinghy.

Parliament has determined that the act is a strong response to crime and, in particular, drug offences. The DPP will not exercise the discretion in a way that circumvents the will of the Parliament.

Mr P. Abetz: Will you take a quick interjection?

The DEPUTY SPEAKER (**Ms W.M. Duncan**): Yes, there is time.

Dr K.D. HAMES: I will stand to let the member get it on the record.

Mr P. Abetz: The Attorney General's response to which the member referred was not at all mentioned in my grievance and is quite unrelated.