PROHIBITED BEHAVIOUR ORDERS BILL 2010

Committee

Resumed from an earlier stage of the sitting. The Chairman of Committees (Hon Matt Benson-Lidholm) in the chair; Hon Michael Mischin (Parliamentary Secretary) in charge of the bill.

Clause 6: Court may make PBO after sentencing —

Committee was interrupted after the clause had been partly considered.

Hon MICHAEL MISCHIN: I recall that I was going through the processes or stages in the event of an application being brought by a prosecutor, or that the desire for a PBO had been identified by the court of its own initiative—I cannot remember which one I had covered.

Hon Adele Farina: It would help me if you just recapped on both, sorry; and if you could speak a little bit louder, please.

Hon MICHAEL MISCHIN: In the event that a prosecutor determines that a prohibited behaviour order is necessary, the application must be made prior to sentencing but after a conviction. It may very well be that sentencing could be adjourned if necessary, in order to enable evidence to be gathered in support of the PBO—that would be at the discretion of the court—but any PBO made has to be made after the passing of sentence by the court. In the case of a court-initiated order, the court does not make an application as such because it is a court-initiated matter. The court would assess the material before it, and if it considers a PBO necessary, it would make an order accordingly. However, in those sorts of cases it is almost inevitable that there would be some acquisition of evidence; there would have to be, in any case, the sentencing of the offender before a PBO was made, because, under clause 10 of the bill, any PBO must not be inconsistent with a variety of other orders that a court may impose. The court would need to sentence the offender and determine the other constraints that may be upon the offender before pronouncing its final decision as to whether a PBO should be made, and the structure of that PBO.

Hon ADELE FARINA: Following that clarification, does that mean that the hearing notice at clause 6(4)(d) would also include what sentence is proposed in order for the defence to ascertain whether there is any overlap and therefore mount a case in opposition to a condition if it feels that there is a condition being imposed in the PBO or in something else that is likely to create an overlap? The parliamentary secretary has indicated there cannot be an overlap between the sentence that is imposed and a condition in the PBO. It seems to me that the notice that is to be given to the offender under subclause (4)(d) does not require any notice of the sentence intended to be imposed; it requires only notice of the hearing. I understood the parliamentary secretary to say, in reply to a question asked by Hon Sally Talbot, that it would also include some detail of the likely conditions to be imposed as part of the PBO. Is that correct?

Hon MICHAEL MISCHIN: Clause 6 is not a statement of the procedures to be adopted or the contents of documentation that will be required, it simply sets out restrictions on a court as to circumstances in which it can make a PBO. It cannot make a PBO unless certain things are present or certain conditions are complied with. One of those is that the person who is to be subject to the PBO has to be present in court when the order is made and has to be given an opportunity to be heard. Another possibility, if the person is not present, is that he or she has to be given notice of the fact that a PBO is to be made and the terms of the PBO to be made. That person can then avail himself or herself of the opportunity to be heard or otherwise, as that person chooses. At least that person is on notice about what is being applied for against him or her.

As a matter of ordinary court procedure, no PBO would be made without the respondent being informed of the nature of the case to be put and the orders likely to be made. There is a different process for sentencing. The Sentencing Act requires that someone be present in the event that certain orders are made, or a term of imprisonment is to be imposed, so that sentences are explained to the offender and so on. This does not provide for that. It is a separate process, but the offender would of course be notified of what sentence is being made against him or her. If there is time required for the respondent to the application to consider his or her position, or to see whether any orders are going to be inconsistent, I am sure the court would grant that as a matter of course.

Hon ADELE FARINA: I think there is some ambiguity in the bill in that it requires a PBO to be made after sentencing, but the parliamentary secretary has told us that sentencing may be adjourned because of a need to be clear that there is no condition in the PBO that might double up with or override anything in the sentence, or cause any complication with the sentence imposed, or a sentence that might be imposed for other offences. However, at the time of consideration of the PBO, the offender—or respondent, for want of a better word—might not know what the intended sentence is and therefore be limited in raising any concerns about that. I raise

the concern that I think this is poorly drafted. It is a bit unclear how this will be implemented. It is likely to cause some confusion once we get to that point.

Hon MICHAEL MISCHIN: It is not poorly drafted. It is quite simple: a PBO cannot be made until a person is sentenced. Any PBO that is made cannot conflict with certain sentencing dispositions. All I said was that sometimes one or either of the proceedings, whether it be sentencing or the proceedings for a PBO, may be adjourned depending on the circumstances, but one cannot take place without the other having been completed. A PBO cannot be ordered without sentencing having taken place.

Clause put and passed.

Clause 7: Hearing of PBO proceedings —

Hon ADELE FARINA: Clause 7(1) states —

> A court considering the question of whether to make a PBO against a person may —
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> (a) proceed to hear the question after passing the related sentence; or
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> (b) adjourn the question to a hearing.

I would like the parliamentary secretary to put on the record in what circumstances it is likely that the courts would seek to defer a decision on a PBO if a sentence has already been imposed.

Hon MICHAEL MISCHIN: As I explained when we were dealing with clause 6 and other matters, there could be a variety of reasons a court would adjourn a hearing into the question of whether a PBO is be granted; for example, if it is contested, or if there is a need to gather evidence to support one case or another or the court requires further material to satisfy itself. Clause 9, for example, sets out matters that the court must consider. Those may or may not be available on a particular date. Clause 8 sets out the grounds upon which a PBO may be founded. Those may or may not be available to one of the parties to contest, so it may be adjourned to a later date to allow that to happen.

Hon ADELE FARINA: Clause 7(4) states —

> A court hearing PBO proceedings adjourned under this section is not required to be constituted in the same manner as the court that imposed the related sentence.

I ask the parliamentary secretary to put on the record the purpose of that subclause.

Hon MICHAEL MISCHIN: I think I already have.

Hon Adele Farina: If the parliamentary secretary has, I am sorry but I do not recall what he said. I think it is important to put it on the record.

Hon MICHAEL MISCHIN: There are a variety of reasons why the same judicial officer who sentenced the respondent may not be able to deal with the PBO application. It may be because of some personal circumstances or it may be for listing unavailability reasons. It may also be because the magistrate or the judge has retired or resigned, is incapacitated, or he or she may have discovered some kind of conflict of interest—I do not know. There could be a variety of reasons. It is not uncommon that proceedings on an application are commenced before one judicial officer and completed by another. The purpose of a provision like this is to ensure there is no confusion that there has to be the same judicial officer throughout the process.

Hon ADELE FARINA: The parliamentary secretary has hit on the reason that I asked the question, and that is it is not unusual for that to happen. I am curious to know whether this sort of provision exists in other legislation. I am not aware of it and want to know why it has been put in here, because it frequently happens in the court system.

Hon MICHAEL MISCHIN: I cannot name any similar provisions off the cuff, but the purpose of it is simply to make it clear that there is no problem with that and to also make it clear for listing purposes. One of the provisions is that the court that sentences the respondent must be the court that deals with the PBO. That means that if the sentencing is done by the Magistrates Court, the PBO application must be determined by the Magistrates Court but not by a particular magistrate, although one would think the bias would be towards the continuity of having the same magistrate deal with the application.

Hon KATE DOUST: Earlier today I referred to a letter from the Commissioner for Children and Young People. I understand that the parliamentary secretary has since obtained a copy of that correspondence. Before we move on to the next clause, I wonder whether the parliamentary secretary would table that document.

Hon MICHAEL MISCHIN: I understand that we do have a copy of the document available. However, I also understand that when submissions were sought on the green bill, which is when this submission was provided, it

was not made clear that it may be subject to being tabled or put on the public record or made public in some way. Accordingly, I understand there is a concern about obtaining the commissioner's agreement to that as a matter of courtesy. I would need to consult with the Attorney General about that and whether there is any objection to making it public. I cannot do that at the moment, but I will do it the moment I get the opportunity. The honourable member is after a copy of the document before we debate clause 8. I understood that the main relevance of the document was to see what the Commissioner for Children and Young People's views were about juveniles generally and on the publication of a juvenile's details in particular. That being so, I suggest that we have already dealt with part of whether the bill will apply to juveniles. The question of publication is yet to come and will be dealt with at clause 34. In that respect, the only significant area where the question of the application of the bill to juveniles arises is in division 2, which is from clause 16 onwards.

Hon ADELE FARINA: I would like to rise in support of Hon Kate Doust's request. I believe that the Commissioner for Children and Young People's submission may have some bearing on clauses 8, 9, 10 and possibly 11. I will move to postpone the consideration of clauses 8, 9 and 10, at the very least, until after the consideration of clause 50. That would provide the parliamentary secretary with ample opportunity to receive advice from the Attorney General. When I was a parliamentary secretary, I was often asked to postpone clauses to give me time to seek advice from the minister I was representing at the time. I frequently agreed to do that to facilitate the passage of the bill through the house so that we could get on with the other clauses. Members on this side want to see the submission by the Commissioner for Children and Young People because that would enable us to facilitate the passage of the bill, otherwise we might get bogged down in the consideration of clause 8 until we are able to get hold of that document. I will move that consideration of clauses 8, 9, 10 be postponed until after the consideration of clause 50.

Hon SALLY TALBOT: I have a quick question on clause 7(2), which states that if a PBO proceeding is adjourned, a registrar must issue a hearing notice to each party involved in the proceedings. Last night we canvassed at some length whether the parents or guardians of a child would be regarded as "relevant people" in the PBO hearing. Would they be among the people to whom a hearing notice must be issued by the registrar?

Hon MICHAEL MISCHIN: As I have pointed out, clause 28 provides that the practices and procedures to be followed in PBO proceedings are the same as in the court in which the application was made, whether it is the Children's Court, the Magistrates Court or the Supreme Court. The proceedings of the Children's Court require notices to be given to the responsible adults, if they are known. The same provisions would apply analogously to any notices given in PBO proceedings. The answer is yes.

Hon SALLY TALBOT: I think the parliamentary secretary referred me to the Young Offenders Act.

Hon Michael Mischin: It was that act.

Hon SALLY TALBOT: Is the parliamentary secretary confirming that the parents or guardians of the child would be included amongst the people who would receive a hearing notice and are regarded as a party involved in the proceedings?

Hon MICHAEL MISCHIN: The parents or guardians would not be regarded as a party to the proceedings, but the procedures that are applicable to proceedings in that court would have to be followed. If in the Children's Court there is a requirement that notice of proceedings be given to a child and to a responsible adult, that would apply in the case of an application for a PBO. In any event, I would have thought that a magistrate or the President of the Children's Court would want to ensure that anyone relative to the wellbeing of a juvenile would be alerted to it. Those sorts of things can be the subject of specific court rules made up by that court to cater to specific circumstances.

Hon SALLY TALBOT: Members may be more or less consoled by the parliamentary secretary's assurance. But I just refer to the point that has been made by a couple of my colleagues on this side of the house that the second reading debate, of which this committee stage is a part, will be referred to in the future by courts requiring further clarity on the provisions of the bill. I just point out that what the parliamentary secretary is saying to me, while I am not reflecting in the slightest on his sincerity, is not actually enough. I am talking about clause 7(2), which states —

> … a registrar must give a hearing notice to each party to the PBO proceedings.

If it is not absolutely beyond question that the parents or guardians of a child would be included in that category of "each party to the PBO proceedings", I would ask the parliamentary secretary to consider an amendment to that effect, which I would have thought in the light of what he just said he might like to move in his own name. If for some reason that is not appropriate, I am happy to move it in my name.

Hon MICHAEL MISCHIN: There is no need to do that. Apart from the fact that clause 28 prescribes the practices and procedures applying in a non-criminal jurisdiction —

Hon Sally Talbot: I am sorry, can I ask the parliamentary secretary to look up a bit?

Hon MICHAEL MISCHIN: I am sorry.

Hon Sally Talbot: It is the acoustics in this place; they magnify all sorts of peripheral noise.

Hon MICHAEL MISCHIN: Okay, I will bear that in mind. In addition to the requirements under clause 28, the bill in clauses 19 and 20 picks up the principles in the Young Offenders Act. Specifically, clause 20 states —

> In youth-related PBO proceedings, the *Young Offenders Act 1994* section 45 applies as if the youth-related PBO proceedings were proceedings for an offence.

Section 45(1) of the Young Offenders Act 1994 states —

> (1) In proceedings against a young person for an offence, the court is to enquire into the reason if a responsible adult is not present and, unless the court considers that —
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> (a) there is a valid reason to excuse attendance of a responsible adult; or
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> (b) it is not reasonable to delay proceedings for the attendance of a responsible adult,
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> the court, by order served personally on or sent by post to the address of a person who is a responsible adult, or any one or more of such persons, is to require the person to attend during all stages of the proceedings, whether or not from time to time adjourned, unless subsequently excused from further attendance by the court.

It is therefore done as a matter of course for any proceeding in the Children's Court involving a juvenile that may result in not only the imposition of non-custodial dispositions, but also sentences of imprisonment or detention. To assure the member about the matter she is concerned about, it is picked up specifically by this legislation.

Clause put and passed.

Clause 8: Grounds for PBO —

Hon ADELE FARINA: I move —

> That clauses 8, 9 and 10 be postponed for consideration after clause 50.

I moved this for the reasons I stated earlier, which I am happy to go through again if members need me to, but I am sure that members will recall the reasons that were stated.

Hon MICHAEL MISCHIN: I might have some sympathy for the suggestion if I knew the reasons why these particular clauses, which set out the bases upon which a PBO is made and the matters to be considered for the making of a PBO, are in any way related to the opinions of the Commissioner for Children and Young People. At the moment any opinion that she expresses, whatever that might be—I have not seen the actual document, although I have provided a summary of her views and the evidence she touched on—can be focused only on questions of whether juveniles are somehow affected by the legislation. If her views relate to questions of publication, that is the subject of another clause in the legislation specifically dealing with publication. If her views are related to the question of whether juveniles ought to be embraced within the legislation, that has already been canvassed on several occasions, and nothing that the commissioner can say, I suspect, is going to add to that. But nothing seems to relate to either clauses 7, 8, 9, 10 or 11, which are universal and apply to any application for a prohibited behaviour order. If there is some identification of some aspect that falls within the commissioner's expertise to which it is thought her opinion may relate, I might have some sympathy with it, but at the moment I do not see it.

Hon KATE DOUST: I would like to thank Hon Adele Farina for moving that deferment. When I raised this matter yesterday evening, the parliamentary secretary said he would go away and seek that correspondence. I made that request earlier today and the parliamentary secretary said that the correspondence was still being chased up. During the tea-break I asked the parliamentary secretary whether he had the correspondence and he said, yes, he did—and so I just assumed there would be no difficulty with tabling that correspondence and providing me with a copy. Now the parliamentary secretary is saying that he has to go away and ask the Attorney General for it. I would have thought that some time between yesterday evening and when the parliamentary secretary received that document today, somebody would have thought it necessary to ask whether it was okay to provide the document. I referred to correspondence from the children's commissioner in my second reading contribution three or four weeks ago. At that point I even said that I knew that the correspondence had been sent to the Attorney General, that it was not available and that I had actually spoken to the children's commissioner.

Perhaps I should have asked at that time for the parliamentary secretary to table the document, which might have saved us some time; so that is a learning curve for me.

I ask the parliamentary secretary to table the correspondence before we debate clause 8 because I am interested in the views of the children's commissioner on how this legislation will impact on young people in particular. Whether or not the parliamentary secretary thinks the commissioner's views are relevant to those clauses that we have highlighted does not really matter; all I want to do is read the correspondence. Once I have read it, I might decide that it does not need to be followed up at all, or I might decide that there are matters in her correspondence that will assist to clarify my views or assist me to ask questions. I think there is a range of matters that can be canvassed in each of those clauses. I am interested in her view on those clauses. I know that she probably has not specifically addressed each of those clauses, but she may have. I do not know what she has said, but I would like the opportunity to read her correspondence before we deal with those specific clauses. I think they are very important clauses in this legislation. I indicate now that I have a lot of questions, particularly on clauses 8 and 10, that I would like information on. I just do not understand why it has taken this long for somebody to realise that the Attorney General needed to be asked whether it was all right to provide that information. I would have thought that that would have been the first thing that was done when it was obtained from his office.

Although the parliamentary secretary may not understand the relevance, it is important to me to know what the commissioner's views are and whether I think any of that is relevant to the matters that we will pursue in these clauses. If the parliamentary secretary decides that he does not want to support the motion to defer consideration of these clauses until a later stage, and decides that he would rather deal with it all now, but in the meanwhile he will still get an opinion on whether he can provide that correspondence, we will still be able to ask a number of questions until he has that opinion. I do not know how long it will take to ask the question of the Attorney General. I would be interested in knowing how long the parliamentary secretary thinks it will take. I would hate to think that we will be on our feet at this time tomorrow and still not have an answer. I would have thought that it would just take a simple phone call. Given the number of advisers to the parliamentary secretary, I would have thought he would have packed one of them off to ask that question before we came back from the afternoon tea break.

I would like to see the correspondence. I am sure that there is nothing outrageous in what the children's commissioner has had to say. We take her opinions very seriously. I know that members of the former opposition, particularly Hon Barbara Scott, regarded it as a very important position. The children's commissioner has proven herself time and again in putting forward very balanced and well-informed views on a range of matters that relate to children and young people in this state. I know that she is very proactive in these areas. We would like to know what she has had to say about this legislation. It would be very disappointing if the Attorney General did not want to make that correspondence available to us, because we would then want to know why he is hiding it.

Hon ADELE FARINA: I rise in support of the comments made by Hon Kate Doust. I also point the parliamentary secretary to this document produced by the Commissioner for Children and Young People, which I referred to earlier—that is, "Improving legislation for children and young people: Guidelines for assessing the impact of proposed legislation on children and young people". Given that the Commissioner for Children and Young People has gone to quite some length to produce a document on improving legislation and guidelines for assessing legislation, I would be very surprised if her submission to the Attorney General is as narrow as the parliamentary secretary is suggesting it might be. I qualify that because the parliamentary secretary has said that he has not seen it. I think the reality is that we are all just wandering around in the dark. We do not know what is in the submission. It is reasonable for members of the opposition to be provided with a copy of that submission so that we can be informed and can have an informed debate in this chamber. When we sat on the government benches, we were frequently asked to provide submissions to ministers on reviews, proposed legislation and green papers. They were always tabled—and very early on in the consideration of the bill. As Hon Kate Doust has indicated, she made that request earlier in the debate and she is still waiting. The extraordinary length of time it has taken to secure a very simple document and a simple approval from the Attorney General is astounding.

Hon Kate Doust: I would be surprised if the children's commissioner didn't want to make it public.

Hon ADELE FARINA: It is irrelevant whether the parliamentary secretary thinks the comments within that submission may or may not relate to clauses 8, 9 and 10. The bottom line is that the parliamentary secretary has failed to produce that document to date. In the absence of knowing what is in that document, it is reasonable for the opposition to seek to defer consideration of those clauses. When one looks at this document that has been produced by the Commissioner for Children and Young People, it would be reasonable to presume that she would have made some comment in that submission that could be relevant to those clauses. For those reasons, I submit that favourable consideration of the motion should be had by all members in this place. We are seeking to

defer consideration of the clauses to try to facilitate the progress of the legislation through the chamber. It is extraordinary that the government should try to frustrate that process. However, we do not have the numbers on this side of the chamber; and, if that is the path that the government wants to take to frustrate the passage of the legislation through the chamber, so be it.

Hon MICHAEL MISCHIN: I should make the sequence of events quite clear. I was asked about the document. I had not seen the document. I said that I would endeavour to get a copy of it and have it available today. I put that in motion. It did not occur to me at the time that there may be any difficulties with it. It was only after the afternoon tea break, from memory, that I was alerted to the fact that the commissioner had not been given the courtesy of being informed that it may be made public; otherwise, I would have informed Hon Kate Doust of the situation. I personally do not have a problem with it being tabled, but I do understand the concerns of the Attorney General that the commissioner at least be given the courtesy of being alerted to the fact that it may be made public and be given the opportunity to say something about that. That is not in my control. I do not know whether there are any other bits of documentation to supplement that letter. I have not seen the letter. I will endeavour to make it available to members, if I am able to do so, as soon as I can, but I cannot do it at the moment. If something in any of these clauses fell within the ambit of or dealt specifically with juveniles, as opposed to adults or any person, I would have some sympathy for the argument, but at the moment I do not. If anything had anything to do with juveniles, it was earlier clauses and later clauses, not these clauses.

Hon Kate Doust: It's all to do with juveniles, as well as adults.

Hon MICHAEL MISCHIN: No, it is to do with adults and all sorts. There is nothing specifically relating to juveniles as opposed to any other respondent to an application. I cannot agree to the motion.

Hon SALLY TALBOT: I want to make one quick comment in response to what the parliamentary secretary has just said. I appreciate that the parliamentary secretary seems to have some sympathy for our request and that if he had not just been informed that there was a question about the commissioner's willingness to have the document made public, he probably would just table it. I think that the parliamentary secretary is wrong when he says that we are not considering clauses that are relevant to what the commissioner might have to say. I draw his attention to the definition of "conviction" in clause 8, which is what we are about to consider and which is the first clause that Hon Adele Farina is suggesting that we defer consideration of. Subclause (1) states —

> In this section —
>
> ***conviction*** —
>
> (a) includes a finding or admission of guilt despite the fact that a conviction is not recorded under the *Young Offenders Act 1994* section 55 …

That refers to the provisions relating to the treatment of young people under this —

Hon Michael Mischin: No, it does not.

Hon SALLY TALBOT: What—section 55 of the Young Offenders Act 1994?

Hon Michael Mischin: Just because something refers to the Young Offenders Act does not mean that it is referring to or impacts on juveniles.

Hon SALLY TALBOT: I am just reading section 55 of the Young Offenders Act 1994. It states —

> If the court finds a young person guilty of an offence other than a Schedule 1 offence or a Schedule 2 offence and does not impose a custodial sentence, the court is not to record a conviction unless it is satisfied that there are exceptional reasons for doing so.

How can the parliamentary secretary argue that there is nothing in clause 8 that relates to the provisions of the bill as they affect young people?

Hon MICHAEL MISCHIN: It is just a definition of what is embraced by a conviction. It could be an adult who has been subjected to —

Hon Adele Farina: And it could be a youth. You're not excluding that.

Hon MICHAEL MISCHIN: It is just saying what a conviction is for the purposes of that section —

Hon Adele Farina: You're wasting time. We could have considered other clauses of this bill.

Hon MICHAEL MISCHIN: That is right, and we have had enormous debate about deferring. I have no doubt, whether the letter is here or not, that we are going to have a long debate about the rest of these provisions.

Hon Adele Farina: We certainly will now.

Hon MICHAEL MISCHIN: I challenge the member to tell me how it would ever be shortened.

Hon KATE DOUST: All we are trying to do is gather some information. All the parliamentary secretary has to do is go away and ask the question. It may speed things up. We are just trying to say that if we defer dealing with those clauses so we can move on to some others, things might move a bit more swiftly. If the parliamentary secretary does not want to be accommodating on that, that is fine; we understand that. We would be interested in knowing the commissioner's view on a number of matters contained in these clauses. It is not up to the parliamentary secretary to tell us what is or is not relevant based on the commissioner's view. It is up to us to read the letter and decide whether it is relevant to the lines that we want to pursue on these clauses. We believe that a number of these provisions are relevant. That does not matter. This is a procedural matter and perhaps we should just deal with the procedural matter now and then see where we end up.

Question put and a division taken, the Chairman casting his vote with the ayes, with the following result —

Ayes (13)

Hon Matt Benson-Lidholm	Hon Sue Ellery	Hon Ljiljanna Ravlich	Hon Ed Dermer *(Teller)*
Hon Helen Bullock	Hon Adele Farina	Hon Sally Talbot	
Hon Robin Chapple	Hon Jon Ford	Hon Ken Travers	
Hon Kate Doust	Hon Lynn MacLaren	Hon Alison Xamon	

Noes (17)

Hon Liz Behjat	Hon Philip Gardiner	Hon Robyn McSweeney	Hon Max Trenorden
Hon Peter Collier	Hon Nick Goiran	Hon Michael Mischin	Hon Ken Baston *(Teller)*
Hon Mia Davies	Hon Nigel Hallett	Hon Norman Moore	
Hon Wendy Duncan	Hon Alyssa Hayden	Hon Helen Morton	
Hon Brian Ellis	Hon Col Holt	Hon Simon O'Brien	

Pairs

Hon Giz Watson	Hon Donna Faragher
Hon Linda Savage	Hon Phil Edman

Question thus negatived.

Progress reported and leave granted to sit again at a later stage of the sitting, on motion by Hon Michael Mischin (Parliamentary Secretary).

Sitting suspended from 6.00 pm to 7.30 pm