CRIMINAL ORGANISATIONS CONTROL BILL 2011

Third Reading

MR C.C. PORTER (Bateman — Attorney General) [11.52 am]: I move —

That the bill be now read a third time.

MR B.S. WYATT (Victoria Park) [11.52 am]: I rise to speak to the third reading of the Criminal Organisations Control Bill 2011. The shadow Attorney General is on his way and will very shortly make some comments on this issue. The shadow Attorney General and a number of opposition members have spent a considerable amount of time cross-examining the Attorney General on this bill. To his credit, the Attorney General did take on some of the amendments suggested by the shadow Attorney General. The Attorney General should be commended for being so reasonable in listening to the shadow Attorney General, with all his experience of criminal law, to ensure that those amendments that will make the legislation just a little bit better were taken on. I commend the Attorney General in that regard and I look forward to hearing what the shadow Attorney General has to say on the third reading.

MR J.R. QUIGLEY (Mindarie) [11.53 am]: Prior to the Criminal Organisations Control Bill 2011 being presented to the chamber, and during the second reading debate, the opposition indicated that it did not oppose most of this bill. Indeed, during debate on the bill, as the member for Victoria Park has said, we put forward a number of amendments designed at improving the efficacy of the legislation and not in any way derogating or diminishing it. An example of that is the amendment by the member for Gosnells on the return of seized items following the expiration of a control order. There are several other amendments. I will not go through those amendments now because they have all been debated and passed by this chamber. The other amendments that we put forward, but which were defeated, were also designed to improve and ensure that this bill was robust and beyond legal challenge. We had discussed at length in debate the High Court's decision in the Wainohu case when it struck down the New South Wales Crimes (Criminal Organisations Control) Act on the basis of what was in section 13(2) of that act—namely, that a designated person making a declaration was not required to provide any grounds or reasons for the decision. The High Court said that this impugned the institutional integrity of the Supreme Court of New South Wales because the designated judge, albeit acting persona designata, was seen by the world at large to be a Supreme Court judge, and in making a decision or a declaration without the requirement to give reasons for his decision could seem to be undermining the whole judicial process of the Supreme Court of New South Wales. The High Court rendered the legislation nugatory and it was struck down. As the opposition said at the outset, the way was open for the Western Australian government—we were not seeking to undermine the legislation, but make it more robust—to follow the High Court's directions, as did the New South Wales Liberal government, the O'Farrell government. I have here the Crimes (Criminal Organisations Control) Bill 2012 which has already passed through both chambers of the New South Wales Parliament. The only difference between the new legislation that has passed through the New South Wales and the previous legislation is in making good the deficiency in section 13(2) of the original legislation; that is, to require reasons for a decision to be given by a designated judge in making the declaration order.

The Western Australian government, instead of carefully following the High Court's ruling and securing for the people of Western Australia robust legislation that will be beyond challenge, has sought to achieve bragging rights by including part 10 in this Western Australian bill, which provides all of the real teeth of the legislation as we discussed yesterday in consideration in detail. The real teeth are not the control orders, which are one thing for which there are penalties of two or three years; the real teeth of this legislation are to be found in part 10, which has mandatory terms of imprisonment to be inflicted on people who are members of declared organisations and who commit offences in part 1A of the schedule to the bill. As I have said previously, the opposition is not ideologically opposed to the imposition of those mandatory sentences, given that they will be inflicted upon those who are avowed anarchists and who set themselves as a group against the community. When these people go out in the community and use muscle and intimidation, the community look to their representatives who are assembled in this chamber to strike back on behalf of the community.

Therefore, this particular case provides an exception to our ideological opposition to mandatory sentencing. However, where we say the legislation is fragile and able to be—likely to be—challenged is in this whole notion of the designated judge of the Supreme Court, albeit acting persona designata, making a declaration that on the balance of probabilities an organisation is a criminal organisation. I have no problem with that, but I do with the finding being used to prove an element of an offence and I take issue with the Attorney General stating that in proposed section 221E a criminal organisation is not necessarily an element of this offence. Of course it is an element of the offence; it is something that a jury must find proven beyond reasonable doubt before there can be a conviction under proposed section 221E, because it is facilitating the commission of an offence by the criminal organisation, which constitutes the offence. Similarly, in the mandatory sentencing provisions the sentencing judge must be satisfied beyond reasonable doubt that the person standing in the dock for sentence is a member of

a declared organisation, and there can be circumstances in which that is proven simply by the tendering of a certificate of declaration or the order of declaration.

As I pointed out in the second reading debate and in consideration in detail, we have a situation with a judge—a justice of the Supreme Court. Let us look at this in the specific: it was wrong of the Attorney General yesterday to talk about just a persona designata; that is not the descriptor. The person designated to hear these matters is a Supreme Court judge. He acts in exercising his authority—he is exercising it—persona designata, but he is a Supreme Court judge sitting in a Supreme Court, deciding a matter that has been filed in a Supreme Court registry and conducting himself in accordance with rules issued by the Supreme Court. The High Court has raised the issue on a number of occasions. It was raised in a statement by Justice McHugh in relation to Hilton v Wells [1985] HCA 16 —

> "In determining whether incompatibility exists, the appearance of independence and impartiality is as important as its existence … The greater the association between the judicial status of the persona designata and the executive functions that he or she performs, the greater is the likelihood that the judicial and non-judicial functions of that person will seem to be fused. In that situation, it is likely that members of the public will fail to distinguish between the judicial functions of the judge and the executive functions of that person as persona designata and will conclude that the judge is neither independent of the executive government nor impartial when dealing with actions between the citizen and the government and its agencies."

That was the point I was making about where all this takes place: it takes place in the Supreme Court of Western Australia; it takes place in a courtroom; it takes place after papers have been filed at the Supreme Court registry. As Justice McHugh said —

> … the association between the judicial status of the persona designata and the executive functions that he or she performs, the greater is the likelihood that the judicial and non-judicial functions of that person will seem to be fused.

In this particular case they will seem to be fused. It is London to a brick that as soon the first declaration is made it will be on the news and all over the papers that a Supreme Court judge has made a declaration—not persona designata has made a declaration, but that a Supreme Court judge has made a declaration. The significance of this to the Western Australian bill, as opposed to the New South Wales bill, is that I predict the New South Wales bill will pass muster 100 per cent in the High Court because the New South Wales government has closely followed the directions of the High Court in Wainohu. In the joint judgement of Chief Justice French and Justice Kiefel, they said that the shortcoming of the legislation could be made good, as the lead judgement of Justices Gummow, Hayne, Crennan and Bell pointed out, only by giving reasons for the decision. If the Western Australian government had followed the New South Wales model, we could say in this chamber 100 per cent that this legislation would pass muster in the High Court. But in this case we could have the following situation occur whereby an application is brought before a justice of the Supreme Court of Western Australia for a declaration. Let us just say he is a justice with vast experience in criminal law—for example, Justice McKechnie, who, as the Attorney General would know, has jointly authored a text on criminal law. There is an application for a declaration. During the application the Commissioner of Police says that the information is police intelligence and his honour says that it will have to be heard in camera. They go into camera and submissions are made. We must bear in mind the provisions of this legislation, in that this bill closely follows the situation in New South Wales. The declaration does not have to be evidence based; it can be based on submission and it can be on anything that persuades his honour that the group is a criminal organisation. His Honour Justice McKechnie is required to publish decisions—I am only using his honour as an example—and in his decisions he may say, "I have heard matters in open court and I have heard matters in private. After considering all that the Commissioner of Police put before me, I cannot say that I am persuaded beyond reasonable doubt that this is a criminal organisation; I do not have to be. I am, however, of the opinion that to the required level, to my satisfaction on the balance of probabilities, it is a criminal organisation. I am not satisfied beyond reasonable doubt, but I do not have to be. Therefore, in these circumstances, under law, I make a declaration that XYZ Inc is a criminal organisation." The Commissioner of Police is then required to publish that on the internet or at least to make that decision public. The public at large then knows that XYZ Inc is a declared criminal organisation and the public is also appraised of the fact that the justice has said that he is not satisfied beyond a reasonable doubt, but that it is a criminal organisation on the balance of probabilities in other proceedings under the legislation, be they sentencing proceedings or a prosecution of an offence under proposed section 221E. For example, there is a trial being run before a jury in which someone is presented on indictment charging that the defendant has facilitated the commission of an indictable offence by a criminal organisation. That trial is being run in front of a jury being presided over by the Chief Justice. When charging the jury, the honourable Chief Justice, having received the declaration as proof of the criminal organisation, has to look the jury in the face and say that as a first element—that is, whether it is a criminal organisation—the jury cannot go beyond the certificate that proves

beyond reasonable doubt that it is a criminal organisation and that the jury will accept as a matter of law, as the judge's direction to it, that the first element, that the organisation is a criminal organisation, has been proven beyond reasonable doubt. This is very likely to be regarded as impugning the integrity of the Supreme Court, because we have the Chief Justice telling a jury that it will accept the first element proved—that the organisation which he is said to facilitate is a criminal organisation—and they will accept that beyond a reasonable doubt. We as an opposition say that this is where this legislation is in danger of being toppled. These provisions do not exist elsewhere.

The learned Attorney General helpfully pointed out that the bill before the New South Wales Parliament makes good the original shortcomings of the legislation in New South Wales. I have obtained a copy of that bill this morning. As I have said, the printed copy reveals that it has passed both houses in New South Wales, but nowhere in the New South Wales bill do the provisions appear that are now being sought to be introduced by this government. There is no doubt that the New South Wales bill will pass muster in the High Court. The Western Australian bill is extremely problematic. The Attorney General wants bragging rights to say that this is the toughest piece of legislation in Australia, and that might well be the case; however, it is also the most problematic for the reasons that I have just outlined.

Just because, as we have said before, the Attorney General says, "Look, this person making this decision is persona designata and therefore not a judge at the time he is making the decision, that is not determinative of this issue." In Wainohu v New South Wales, the judgement of the Chief Justice and Justice Kiefel in part reads —

> But so long as that function is conferred upon the judge by virtue of his or her office as a judge, the distinction is difficult to grasp and the fact that the function is conferred persona designata should not be given great weight. It would generally not be determinative of the question of compatibility.

That is reinforcing remarks made in Love v Attorney-General (NSW) (1990) 169 CLR 307.

What is happening in this declaratory process is that it is an executive action. The separation of powers document does not prevent non-judicial functions being conferred on a state judge, but one has to look closely and examine closely the connection between the exercise of the executive act and the jurisdiction conferred upon the Supreme Court.

If one looks at questions of substance rather than form—that is, what is the judge doing—he is making a decision on behalf of the executive whilst a Supreme Court judge. He is making that based on the balance of probabilities, and then his declaration made on the balance of probabilities is being used in the courtroom next door by another judge to say that that is proof beyond reasonable doubt of the matter asserted in there.

The Attorney General says that it is not unusual that the executive would promulgate something—I think the example he gave was the fishing zone—which stands as proof of that fact in court. We agree with that. That is why we moved the amendments that this declaration process should happen elsewhere than in the Supreme Court of Western Australia where the declaration is to be used as proof beyond reasonable doubt.

I invited the Attorney General to describe another circumstance where neither the executive nor someone on behalf of the executive, but a Supreme Court judge, is exercising an executive function and, having exercised that executive function, their determination stands as proof beyond reasonable doubt in a court next door. That is why we say this legislation is problematic in the extreme. We do not seek to undermine the principles of the legislation. We certainly do not in any manner, shape or form seek to undermine the objectives of the legislation as described in clause 4 of the bill, which states —

> (1) The purposes of this Act are —
>
> (a) to disrupt and restrict the activities of organisations involved in serious criminal activity, their members and associates so as to reduce their capacity to carry out activities that may facilitate serious criminal activity; …

We do not demur; we agree. We agree that this is proper legislation, but we say that part 10 makes the whole thing problematic for the use it intends to put these declarations to.

As a Labor opposition we moved a number of amendments that were not accepted. We moved that the executive function of the declaratory process be heard, determined and exercised by the Corruption and Crime Commission; put that away from the Supreme Court. The executive, having made that declaration, albeit through the offices of the CCC, could not reflect upon the Supreme Court in any way. When we put that suggestion forward and argued those amendments, the Attorney General said, having regard to the functions of the CCC, that they would probably be the worst people to give such a powerful functional decision. We disagree strongly. We see that almost as a reflection upon Mr Macknay, QC, who spent, to my recollection, about a quarter of a century as a judge in the District Court of Western Australia. Indeed, the Premier has flagged that he wants to give even more power to the CCC in relation to organised crime—that is, an original jurisdiction in organised crime, which we will oppose for the reasons put by the Joint Standing Committee on the Corruption and Crime

Commission of this Parliament, chaired by a member of the government and dominated by government party members. We say that the CCC is the very body that should be making this declaration. Having made the declaration, there could be no challenge under the Kable principle in the High Court, because the executive function, as set out in this legislation, would be performed not by the Supreme Court of Western Australia; it would be performed by another organisation.

Since at least the 1920s there has been a debate in Australia as to the advisability of justices of the Supreme Court acting on behalf of the executive. We know that there has also been a long history of judicial officers exercising executive function, but it is to be avoided, as the High Court has said, when there could be controversy. One only has to look at the Wivenhoe Dam disaster and the subsequent inquiry conducted by Justice Holmes in Brisbane, where members of the bar pleaded with the court not to put a Supreme Court justice on the royal commission because it was likely to just be mired in controversy, and indeed it was. Although the justice was a very careful justice who sits on the Court of Appeal, when she put out her interim findings, they were horribly wrong. They were picked apart by *The Australian* newspaper. I think it was reporter Mr Hedley Thomas who pointed out that the draft findings had overlooked inconsistencies in the evidence. The justice then restarted the inquiry. The whole thing was controversial because there was a deadline for the inquiry to complete and publish its findings in advance of the election in Queensland. Now she has made findings that are damning of certain people and certain agencies in Queensland, and there will now be a huge class action based on findings already made by a member of the Queensland Court of Appeal. It is always problematic for a justice to become involved—as the president of the Bar Association of Queensland became involved—in an investigation on behalf of the executive.

That is what will happen under the Criminal Organisations Control Bill 2011. As the High Court says, look at the substance, not the form; do not get distracted by the fact that it is said to be persona designata. However, to make a declaration, the Supreme Court is being asked to conduct an inquiry on behalf of the executive and to make an executive decision about whether a group is or is not a criminal organisation, and to do so on the balance of probabilities, in the opinion of a Supreme Court justice. As I have said, a Supreme Court justice might come out and say, in giving his reasons for a decision, that he is not satisfied beyond reasonable doubt that it is a criminal organisation but that he does not have to be. He might then say that, having heard the submissions made and the advancements advanced on behalf of the Commissioner of Police and having been privy to police intelligence, he is of the opinion that, on the balance of probabilities, it is a criminal organisation. Unlike in New South Wales or Queensland, that declaration would then stand as proof beyond reasonable doubt of an element of the offence under proposed section 221E, or as proof beyond reasonable doubt of the fact, which enlivens the mandatory sentencing provisions. We would have a judge saying that he is not satisfied beyond reasonable doubt, but that he is of the opinion that, on the balance of probabilities, the organisation is a criminal organisation, and then we would have the Chief Justice presiding at a trial telling the jury that it will accept a piece of paper as proof beyond reasonable doubt.

The opposition says that it tends to impugn the integrity of the Supreme Court for a Chief Justice to say to a jury, "Don't worry about what you've read on the internet," even though someone on the jury might have read something on the police commissioner's site to the effect that a senior Supreme Court judge has said that he is not satisfied beyond reasonable doubt that it is not a criminal organisation but that on the balance of probabilities he is satisfied. However, the jury will be bound to follow the trial judge's direction that, notwithstanding that information, they must accept that it is proof beyond reasonable doubt. The opposition says that this is the very thing that the High Court will be concerned about.

Indeed, according to my notes, Gummow J said in Fardon v Attorney-General (Qld) 66 204 HCA 46 —

> "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes."

The Attorney General will be unable in reply to point to a case that specifically defines it.

DR A.D. BUTI (Armadale) [12.23 pm]: I am sure the Attorney General will be pleased that I will take only about five minutes at the most, or maybe slightly more, but not much more.

I would like to take the opportunity to thank everyone who has contributed to this debate, including the member for Mindarie, the member for Gosnells and, of course, the Attorney General and his departmental advisers during consideration in detail. As the member for Mindarie said, the opposition is supportive of this legislation. It is a complex piece of legislation and, in the main, as I think I stated during my contribution to the second reading debate, the Attorney General should be congratulated for producing this bill. Of course, we are not completely happy with it, and I am sure the Attorney General will not be surprised at the opposition not being completely happy with all aspects of the bill. The member for Mindarie outlined our lingering concerns, and we thank the Attorney General for agreeing to some of the amendments, which we think will make this bill a much better piece of legislation.

Of course the main issue, in many respects, is whether this legislation will be constitutional. The Attorney General and the drafters have had the benefit of the findings of the High Court cases over the New South Wales and South Australian legislation, and have been able to correct the mistakes made in those jurisdictions. I am sure that the Attorney General hopes that this legislation will stand up to any challenge in the High Court, but the opposition still has some concerns about its constitutionality. That is a debate for another day. No doubt, if this legislation is ever put into effect, I am sure that there will be a High Court challenge.

It is interesting that there is similar legislation in Queensland that I do not think has actually been used yet, and it will be interesting to see whether this legislation is ever used in Western Australia. It is, of course, a significant departure from the normal law-making of a state Parliament, in that we are imposing a punitive system on someone who has not necessarily committed a crime, because of their associations. That is probably the main criticism I have received from civil liberties groups, but as I and the member for Mindarie responded to a concerned citizen about this issue, we are not necessarily dealing with people whose civil liberties should be respected. Of course, everyone's civil liberties should be respected to a degree, but we are here dealing with what the state considers to be criminal organisations that are detrimental to the good governance of Western Australia. No human right is necessarily absolute, but we always have to be mindful about impinging on those rights and civil liberties. We agree with the government that, in this case, some of those civil liberties should be encroached upon, and that is the basis of our support for this legislation.

In the short time I have, I should clarify a statement I made during consideration in detail. Attorney General, I was not actually saying that a ride with a motorcycle gang for a Christmas event was a criminal activity, but just that that could be associated with criminal activity; that is all I was trying to imply. I have always liked Santa Claus and Father Christmas, and that in itself is not illegal!

Mr C.C. Porter: We're not planning to arrest either of them!

Dr A.D. BUTI: That is very good to hear, because I am sure the Attorney General would have lost the mothers and fathers in the next election!

I still have some other concerns. As this legislation applies to 16 and 17-year-olds, their names will be published on a website—even though they have not committed a crime—because they have associated with a criminal organisation. However, if they have committed a crime, their names will not be published. I understand the Attorney General's rationale for his response to me, but it still seems to me quite strange in this case that association, for a 16 or 17-year-old, is actually more punitive in terms of public knowledge than having committed a crime. The Attorney General's response was that this has to be the case if this legislation is going to work. I am still a little uneasy about that.

The proof will be in the pudding, if a case reaches the High Court—even more so, if it ends up having a practical effect. Presumably the Attorney General's motivation in bringing this legislation before the house is to reduce the activities of certain criminal organisations. The law itself will not be successful until we see how it is implemented, and the consequences of it. I am sure that that will be played out over the next few years.

I should be congratulated; I said I would take only five minutes, and I did!

MR C.J. TALLENTIRE (Gosnells) [12.29 pm]: It will be a short contribution from me as well. I would like to thank my colleagues and the Attorney General for a very methodical and sensible way of debating the Criminal Organisations Control Bill 2011. We have made necessary improvements to it. I do wonder, though, whether we really tackled, and this legislation really tackles, the bikie culture or criminal organisational culture. Most of the people who are involved in these so-called bikie gangs are not criminal masterminds; they are just the people who follow along. They are said to be people of a character that is best described as being marginal. They are people who are outsiders; they do not fit in, yet they find—we did touch on this in our discussions—a certain security in the quite strict rules and codes of conduct that exist within their organisation. There is a strange irony that these people on the one hand are nonconformist—they are anarchists by nature—yet they almost crave the structure that they find within a criminal organisation. There are some things about the culture within criminal organisations that I do not think we fully understand. It makes me worry about how useful the legislation will be and how well it will work when we do not understand the real culture. I think it will be effective, though, when it comes to the hardened criminal masterminds—those very few people who exist in these criminal organisations. That is where the legislation does have potential and will be of value.

The other issue I want to touch on in my brief contribution to the third reading debate is the definition of a criminal organisation. We talked at length about this in debate. I guess I was reassured by clause 4 and statements that were made about the intent of the legislation. Clause 4 states that the legislation will not diminish the freedom of persons in this state to participate in advocacy, protest, dissent or industrial action. On the face of it, that sounds good. I am concerned, though, that where perhaps an advocacy organisation, a protest or some form of dissent or industrial action has been deemed illegal, how could it then be that the state would not want to

use every law available to it to take action against a body that was acting illegally? I just find it somewhat difficult to accept, as much as I want it to be the case, that when an advocacy or union group perhaps goes beyond the law to make its case and perhaps acts illegally—not that I would be wanting to condone that—there would be a desire on the part of the state to not use a legislative tool such as this to rein in their activities. There is a concern there. I can see that the legislation will work fine when advocacy, protest, dissent or industrial action is deemed to be legal, but once that steps into areas where it perhaps becomes illegal, there are concerns about how this legislation could be applied.

The third area that I want to quickly touch on relates to the amendments concerning guns and the restitution of guns. I am very pleased to hear that Hon Michael Mischin in the other place will be effecting changes to the legislation, by way of amendments, that will ensure we do not return guns to those who have been the subject of an order or are members of an organisation that has been the subject of an order. That is a good thing. However, it leaves me wondering why the drafters of this legislation ever allowed that to go through in the first place. I have the utmost respect for those who draft legislation that comes before this place, but sometimes I find oddities in legislation. I have heard from colleagues that there is, of course, the potential for this legislation to end up in the High Court anyway. I suppose that as capable as those people are, they do still make mistakes. There are problems with the legislation, as expert as they may be in their drafting. The example of their confusion over what the community's view might be on the restitution of guns to people who have been through a control order under this legislation shows that they can get things wrong in their drafting of legislation. I will conclude my remarks there. I look forward to seeing how this legislation progresses and whether it will end up in the High Court.

The ACTING SPEAKER (Mr P.B. Watson): Member for Riverton, the Speaker has spoken about this before: when you come into the chamber, you must acknowledge the Chair. Thank you.

MR C.C. PORTER (Bateman — Attorney General) [12.35 pm] — in reply: I thank all members opposite who participated in the second and third reading debates and the consideration in detail stage of the Criminal Organisations Control Bill 2011, and for the amendments that were moved. I do agree that they were amendments that offered some logical improvements to the bill.

This is very difficult but very important legislation. I appreciate that the member for Gosnells is uncertain whether the legislation will tackle the fundamentals of the bikie culture. The bikie culture is very difficult to understand for people who are not inside it. I would say that based on my recent correspondence from these groups, they take the view that this legislation might do something in terms of limiting their future activities. What it will do is tackle the activities of persons who engage in that culture, however it is defined.

In this third reading response I want to limit my comments largely to the constitutional issues raised by the member for Mindarie, because they are of substance and importance. The member for Mindarie focused on three aspects of the bill which he was concerned could give rise to possible grounds for constitutional challenge. The first aspect concerns the provision for a designated authority to declare an organisation to be a criminal organisation. The bill before the house requires the designated authority to be either a sitting Supreme Court judge acting as a designated person or a retired Supreme Court judge. The member for Mindarie suggested that the Corruption and Crime Commission would better fulfil that function. That is the first issue the member for Mindarie raised. The second issue concerned the provision for the declared criminal organisation to be a criminal organisation as that term is defined in proposed section 221D(1)(a) of the Criminal Code. That appears on page 120 of the bill. That definition operates for the purposes of new offences, which appear in the bill in proposed sections 221E to 221F, which will be new sections of the Criminal Code. The third issue raised by the member for Mindarie concerns the sentencing consequences that flow from the making of a declaration where a member of the declared organisation may be liable to mandatory penalties if they commit listed offences. The member for Mindarie's concern there was not the existence of those sentencing consequences but how they might bear upon the possible constitutionality of the bill.

To address those issues, and particularly the first issue, I think it is necessary to pay some brief attention to the High Court cases of Totani and Wainohu, where the South Australian and New South Wales variants of the control order–type legislation were respectively considered. What did the High Court determine in Totani and Wainohu? In considering the issues that we have spoken about in the context of this legislation, it is important to bear in mind what the High Court decided in Totani and Wainohu and why the legislation in those two cases was struck down. The South Australian legislation was considered under Totani. The High Court held that legislation to be partly invalid. The reason the legislation was held to be partly invalid in the South Australian case related to a particular feature of the South Australian legislation; that is, it was the Attorney General of South Australia who made the declaration of an organisation as a criminal organisation. In Totani, the High Court held in effect that the South Australian act required the courts making control orders to act at the behest of the political branches of government, which created new rules of conduct. There is the declaratory stage and the control order stage. In South Australia the declaratory stage was undertaken by the Attorney General of South Australia and

the control order stage was undertaken by the Magistrates Court. The High Court held that the making of control orders by the Magistrates Court involved a process in which the Magistrates Court was acting at the behest of the political branches of government in making the control orders, which created new rules of conduct. That was seen to be incompatible with the constitutional role of those state courts—that is, courts making the control orders and in so doing exercising federal jurisdiction.

The problem that infected the legislation in South Australia in Totani was not found to exist in the New South Wales legislation considered in Wainohu. Therefore, that problem of the executive—the Attorney General—making a declaration that had the effect of requiring the courts making control orders to act at the behest of the political branches of government in creating new rules of conduct did not arise in the Wainohu matter. That problem was not present. The New South Wales legislation provided for a declaration to be made by an eligible judge of the New South Wales Supreme Court; that is a system similar to that which we now propose. It also provided for the second stage of the process—that is, the control orders—to be made by the New South Wales Supreme Court if the court was satisfied that there were sufficient grounds in existence for the making of a control order. That is what was under consideration and determined by the High Court in the Totani decision emanating out of South Australia and the Wainohu decision emanating out of New South Wales.

I want to deal with the three issues raised by the shadow Attorney General. The first is the suggestion that the Corruption and Crime Commission should be the designated authority or body that declares an organisation a criminal organisation. In providing for declarations to be made by a sitting or retired judge, this bill adopts the New South Wales structure. The decision of the High Court in Wainohu indicates that structure is valid. In both New South Wales and, pursuant to this bill, in Western Australia, the problem identified in the Totani case is being addressed by taking the executive government out of the process of making declarations and then, latterly, control orders. If the executive government does not make a decision about when a declaration or a control order is granted, it cannot be said that the courts are being required to act at the behest of the executive when they have regard to a declaration or control order. We will completely remove the executive government from the process of declaring an organisation a criminal organisation.

The government's difficulty with the suggestion from the member for Mindarie is that if we were to plug back into the process an executive institution such as the Corruption and Crime Commission or the Attorney General, we would increase the prospect of the argument in Totani being successfully raised again in respect of the legislation that we would pass through this place. In the government's view, the best way for the legislation to avoid being seen as requiring courts to act at the behest of the political branches of government when they come to make a control order is to keep the executive government, including the Corruption and Crime Commission, out of the process entirely. As a parallel matter, the government argues, as it did during consideration in detail, that making an investigative executive body responsible for declaring an organisation as criminal is simply too much power for that executive body. That would be an unwise move. The CCC is fundamentally a fact finding and executive body that then gives opinions of matter in reports. To give the CCC the ability to investigate, formulate and document an opinion as important as whether a body should be considered—for secondary purposes from which serious consequences flow—a criminal organisation, reposes too much power in one single body that is part of the executive government.

That brings me to the second issue, which relates to proposed section 221D(1)(a), which will be a new section of the Criminal Code as proposed in this bill. Proposed section 221D does not suffer from the problem identified by the High Court in Totani. It does not require the courts to act at the behest of the political branches of government. It merely requires a court to recognise that a declaration made by the designated authority, independent of the executive branches of government, exists. Proposed section 221D does not require the court dealing with the offence or the designated authority to act in a manner repugnant to the judicial process, including through the publication of reasons for decision, which was the defect of the New South Wales legislation held invalid in Wainohu. Proposed section 221D and associated provisions attach legal consequences to the making of an administrative instrument—in this case, a declaration made by the designated authority. Describing the declaration as an element of the offence misses the better description of the declaration of an organisation as a criminal organisation by a designated authority being the making of an administrative instrument.

Proposed section 221D is a definition section that has to be read in conjunction with the provisions that create the substantive offences. The substantive offences are those contained in proposed section 221E onwards. When we do that, for example, in proposed section 221E(1), we can see what the offence is prohibiting. The elements of the offence created by that provision, so far as it relates to declared organisations are that, firstly, an organisation has to be declared to be a criminal organisation; secondly, the accused participates in an activity of the organisation; and, thirdly, the accused so participates for the purpose of enhancing the ability of the organisation to commit an indictable offence. The first element is shown by proving the existence of a valid declaration—ordinarily through the tender of the declaration itself. The declaration is an administrative

instrument. The proposed sections do not deem that the declared organisation has certain characteristics and they do not deem elements of the offence to exist. But the making of the declaration is itself an element of the offence that must be proved in the ordinary manner. When a declaration is made, the bill will prohibit conduct by reference to the declaration.

I stress again that the government's view, based on all its advice and reading of the relevant High Court decisions, is that the declaration is an administrative instrument to which the bill attaches certain legal obligations that may be enforced by criminal proceedings. There is nothing unorthodox about that approach. The example that I used earlier of the fishing offence is not, as the member for Mindarie suggests, somehow lacking in relevance to this situation. The Minister for Fisheries may declare an area to be a prohibited fishing area. The act prohibits fishing in the area so declared. The prohibition may be relied upon in court as showing the existence of a prohibited area and may be enforced by criminal prosecution. That is a very similar situation to that which we propose here.

The other example is part 5.3 of the commonwealth Criminal Code. That creates offences in relation to the membership, funding et cetera of listed terrorist organisations prescribed by regulation. The formula used is the same in that section of the Criminal Code as it is in the fisheries example. The executive government makes the instrument—namely, the regulation listing organisations. The act attaches legal consequences to the instrument, creating a prohibition against funding of a listed organisation et cetera. The courts deal with any allegation that the prohibition has been infringed in criminal proceedings. The validity of part 5.3 of the commonwealth Criminal Code was considered in Thomas v Mowbray (2007) 233 CLR 307. Although the validity of the offence provisions were not directly in issue in those High Court proceedings, there is nothing in the judgements of the court to suggest that the offence provisions infringe some constitutional requirement or infect the rest of the legislation.

The point that we would make here is that this bill does not differ from the fishing or terrorist examples except in one respect. Under this bill the executive government does not make the instruments on which the act operates to create the relevant obligations and prohibitions—that is, the offence. The declaration that the court later relies upon is not made by a minister or the Governor in Executive Council; it is made by a sitting or retired judge who acts independently of the executive government. The point I tried to make at the second reading stage is that particular difference reduces rather than increases the risk of constitutional challenge. The fact that the body that declares is further away from the executive than in the fisheries example or in the commonwealth Criminal Code example strengthens the constitutional position of the legislation.

The member for Mindarie quite properly said that there are, if we like, examples where the executive makes the declaration and then the judicial body hears the offence. Yes, that is right. A persona designata is not only non-judicial but is also non-executive. We do not control the persona designata. There are examples of an administrative instrument which later becomes a feature of a criminal trial and which is even made by a judicial organisation. Restraining orders are a perfect example of that when a court makes a restraining order and the existence of the restraining order may become a feature of a later criminal trial for the breach of the restraining order, and the earlier court's decision is relied on. We do not believe that this small departure from the New South Wales scheme in any way changes the situation or increases the likelihood of unconstitutionality.

Debate interrupted, pursuant to standing orders.

[Continued on page 1209.]