CRIMINAL CODE (IDENTITY THEFT) AMENDMENT BILL 2009

Second Reading

MR J.R. QUIGLEY (Mindarie) [4.02 pm]: I move —

That the bill be now read a second time.

The Criminal Code (Identity Theft) Amendment Bill 2009 is a relatively short bill that introduces two new offences into the Criminal Code, which are contained in proposed section 440B(1) and (2) of the bill. The need for these offences was first dealt with by the Standing Committee of Attorneys-General by way of report in March 2008, subsequent to a review of identity crimes by the Model Criminal Law Officers' Committee of the state and commonwealth Attorneys General. In reporting in March 2008 on the need for nationwide laws concerning identity theft, the state and commonwealth Attorneys General noted that two states had already legislated in this regard—namely, Queensland and South Australia.

In drafting the bill before the chamber today, I have pretty well exclusively drawn upon the Queensland model, which varied a little from the South Australian model in its detail, and I did so because the state of Queensland has a Criminal Code and a format of criminal law very similar to what we have in Western Australia. Therefore, I picked up Queensland's section 408D, which I have included in this bill as proposed section 440B. Just before I run through it, the need for it is that until now and until the passage of this bill into legislation, there has been and will be a number of offences that occur when a citizen uses or misuses another person's identity. Indeed, the preceding section 440A of the Western Australian Criminal Code deals with illegal access to a computer by using someone else's identity, which itself is an indictable offence. There are a range of other indictable offences in the Criminal Code when citizens use another person's identity, which can include anything from forgery, whereby one creates correspondence using a scanned identity in the computer, through to the offence of theft by using someone's personal identification number to steal from a bank account. There are numerous indictable offences, such as forgery and false pretences, that people may commit once they have embarked upon the criminal conduct of using another person's identity. The problem arises that, before the use or misuse of that identity to commit an offence, hitherto it has not been an offence—it is still not until the passage of this bill into legislation, hopefully—to possess someone else's identity. It has not been an offence except in exceptional circumstances, whereby it might be an offence to possess someone else's driver's licence. However, generally speaking it is not an offence to possess someone else's identity or to pass someone else's identity information on to another person. This bill seeks to outlaw such conduct and does so by the provisions in proposed section 440B(1) and (2) of the bill. Proposed section 440B(1) states —

> (1) A person who obtains or deals with another entity's identification information for the purpose of committing, or facilitating the commission of, an indictable offence commits a misdemeanour.
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> Maximum penalty — 3 years imprisonment.

That was the recommended penalty coming out of the conference of state and commonwealth Attorneys General in March 2008. I have had some experience with this in the courts. Section 440B(2) adds to that which is enacted in Queensland, and states —

> (2) A person who possesses equipment that is capable of being used to make identification documentation, with the intention that the person or another person will use the equipment to commit an offence against this section commits a misdemeanour.

Once again, it is punishable by a maximum penalty of three years' imprisonment. In all these cases the relevant threshold point is the intention to commit an indictable offence in section 440B(1) or (2); that is, possessing equipment with the intention to commit an offence against this act. It will often be that prosecuting upon an intention is often the situation of time, place and circumstance.

Therefore, if a person has skimmed an automatic teller machine by using a video camera device and has photographed the ATM and videoed the PINs being entered at the ATM and has a list of those on the film, that person would be, of course, obtaining another person's identification information. If, for example, that filming is taking place at an ATM and one looks at that time, place and circumstance, it could be inferred upon those circumstances quite safely that that information was being garnered for the purpose of committing an indictable offence. Under this bill, such activity would be unlawful and the police could charge at that point; they would not have to wait until there is usage of that information against an ATM. As a matter of fact, in recent weeks senior police mentioned to me their frustration in investigating the Romanian crime gang that was operating with skimming devices in Western Australia several weeks ago, in that possession of the skimming device itself did not constitute an offence. Therefore, the police had to wait until the device and the information gathered was

used. This legislation plugs a hole in the same way as a policeman can prosecute a safebreaker who has safebreaking equipment at his house; he does not have to wait for the offence to occur.

Proposed section 440B(1) has been drawn from the Queensland legislation and proposed subsection (2) has been drawn from the recommendations of the Standing Committee of Attorneys-General. Thereafter, the proposed subsections follow the Queensland code. It was the intention of the state and commonwealth Attorneys General to come up with uniform legislation, because, as we saw with the Romanian gang, gangs operate Australia-wide and move very quickly. I repeat that it was the intention of the state and commonwealth Attorneys General to have standard legislation. I have chosen to closely follow the Queensland model, for which the state and commonwealth Attorneys General gave specific approval, because it was considered suitable to meet the problem.

Proposed subsection (3) provides that even if it is ultimately impossible to commit an indictable offence, that is immaterial. It might be that an offender skims a person's identity but when he tries to use it finds it impossible to do so because of further safeguards that the credit provider or the bank has in place—for example, further passwords—that frustrate the offender. That does not matter. Nor does it matter whether the person whose identity it actually is has consented to the offender having the identity in his or her possession. For example, a young driver who had his licence suspended may, with the consent of another person, be carrying that person's driver's licence with the intention of fooling the police should he be apprehended. It does not matter that that driver had the consent of the true owner of the driver's licence to have the identity information in his possession. What is critical is that the person who had that identity information, which was not his own, had it in his possession with the intention of committing an offence. The offence that I am alluding to is, of course, an attempt to pervert the course of justice.

Proposed subsection (4) obviously excludes from capture within the legislation one's own identity. It does not apply to possessing one's own identity information. It is immaterial, as proposed subsection (5) sets out that the person whose real identity it is, or the corporation whose real identity has been misappropriated, is alive or dead, or exists or does not exist, because someone might assume the identity of a dead person for a quite improper purpose. We have seen the case of former Mr Justice Einfeld, who sought to not assume a person's identity but to refer to a dead person. In like manner someone could try to assume the identity of a dead person for a false purpose.

Proposed subsection (6) is very important and appears in both the South Australian and Queensland legislation. Again, I have chosen the wording of the Queensland legislation for consistency between the code states. It provides that when sentencing an offender who has unlawfully used someone else's identity information, the court can issue a certificate to the true owner of that identity or entity stating the offence that had been committed, the entity's name against whom the offence had been committed and anything else that the court considers relevant for the entity's benefit. It might be such things as the date on which the offence started, the type of identity information that was used by the offender—credit card, personal information number, false credit card, false PIN or false driver's licence. This will enable the victim, the true entity, to approach his credit provider, financial adviser, service provider or whomever and, with the judge's certificate, be in a position to explain to that financial institution or credit or service provider that it was not him involved in the transactions.

Proposed subsection (7) is relatively simple and provides that the certificate can be made by the judge in favour of the person whose identity has been stolen. The judge can make that decision of his own volition or upon the application of the true owner of the identity.

Proposed subsections (8) and (9) stipulate that the judge cannot deal with an application for the issue of such a certificate until the expiry of the whole appeal process. The certificate can only be issued when it is beyond question that the recording of the conviction and the expiry of the appeal provision is at an end. If a conviction stands, the victim is entitled to a certificate to give him that ability to explain to others that his identity was misappropriated.

It is important to remember that it is only an intention to commit an indictable offence that is captured. Therefore, in those situations that occur quite often in Northbridge on a Friday or Saturday night whereby a young and impetuous person just below the age of 18—say 17 and a half—acquires his friend's driver's licence or birth certificate to prove age to a bouncer on the door and gain underage admission to a nightclub. Such people would not, if caught, face a three-year maximum term of imprisonment under this legislation. They would be misusing an identity but not for the purpose of committing an indictable offence. This legislation is aimed at those persons who steal our identities with the intention of using our identities for the purposes of committing a serious offence. Without being exhaustive, I will repeat those offences: stealing from ATMs, forging documents or letters, false misrepresentations, or indeed, under the preceding proposed subsection, misusing a computer—for example, having this information for the purpose of hacking into a computer that requires a password.

I gave public notice on the second day of the resumption of this session of Parliament that if the government had not introduced this bill, I would move to do so because, having had discussions with police from the major fraud squad, there is a real and urgent need for this legislation to protect our identities. After I made that announcement I noticed that the Attorney General, who is present in the chamber this afternoon, commented that my announcement sprung from a report that came out of SCAG and that I was not coming up with a new idea. I have never heralded it as my idea or a new idea. This bill is nothing more that my attending to the nuts and bolts left over from SCAG. I noticed at that time that the Attorney General said that he also supported such legislation. He might not support the wording of this particular legislation. However, as this legislation closely copies the Queensland legislation, except for proposed subclause (2), which is drawn from the report of the resolutions of SCAG in March 2008, I am hopeful for the people of Western Australia that the Attorney General will indicate to the chamber that the government will also support this legislation and that it will have a quick passage through the Parliament. A lot of people in the community would be horrified to think that the possession of their identity by a criminal is not an offence and that it only becomes an offence when the offence occurs. If we could get an indication from the Attorney General that he and the government would support the passage of this legislation through this chamber and the Legislative Council, I think the people of Western Australia would be very comforted. The bill is a very good step forward in law and order.

Debate adjourned, on motion by **Mr R.F. Johnson (Leader of the House)**.