

GRAFFITI VANDALISM BILL 2015

Consideration in Detail

Resumed from 14 October.

Clause 8: Costs of cleaning graffiti —

Debate was adjourned after clause 7 had been agreed to.

Mrs L.M. HARVEY: With your indulgence, Madam Acting Speaker, I would like to clarify my response to the member for Armadale in consideration of clause 5. I made a reference to section 24 of the Criminal Code, “Mistake of fact”, being accessible to people charged under the Graffiti Vandalism Bill 2015. That is correct. Section 24 of the Criminal Code does apply because section 36, “Application of Chapter V”, states —

The provisions of this Chapter apply to all persons charged with any offence against the statute law of Western Australia.

Should there be some ambiguity about whether consent was obtained before applying graffiti to a wall, someone charged with a graffiti vandalism offence could use section 24 of the Criminal Code, which reads —

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

Ms M.M. QUIRK: Clause 8 deals with the costs of cleaning graffiti and subclause (2) states that a court may make certain orders —

- (a) to take remedial action to restore the property to the same state as it was in before the offence or ...
- (b) to pay another person to take remedial action to restore the property to the same state as it was in before the offence or to a state specified in the order.

Does the court make one or other of the orders, or is it up to the offender to decide whether he pays a third party to take remedial action or performs it himself? The clause provides two alternatives. Is the court order in relation to (a) or (b), or does it effectively combine (a) and (b)?

Mrs L.M. HARVEY: That is at the discretion of the court. The court will order that the offender either takes remedial action to restore the property to the state it was before the offence, or pays a third party to take that remedial action to restore the property.

Ms M.M. QUIRK: What are the sanctions if the court order is not complied with? There do not seem to be any time frames—within a reasonable time or whatever. Is it necessary before commencing that remedial action for there to be consent from the owner?

Mrs L.M. HARVEY: Under subclause 2(a) or 2(b) the court will issue an order to an offender. I am advised that failure to comply with this then becomes a civil matter.

Dr A.D. BUTI: Under clause 8, if the court orders that the offender is to pay another person to take remedial action to restore the property, will the court decide who that other person is or will it be up to the offender to decide who they will pay?

Mrs L.M. HARVEY: The court will not specify specific contractors to perform remedial work. It is incumbent on the offender to ensure that an appropriate person is employed to undertake the remedial action if that is what the court so orders.

Dr A.D. BUTI: Who will determine whether the offender has engaged an appropriate person and that the remedial action was done to the standard specified in the order?

Mrs L.M. HARVEY: I am sorry; could the member repeat the question?

Dr A.D. BUTI: The minister said that it is up to the offender to determine who that person will be. Who then will supervise to ensure that the person engaged has done the remedial action to the standard specified in the order?

Mrs L.M. HARVEY: I am advised that if the victim is unhappy with the standard of the work, they can then take civil action against the person who performed the work. However, with the way these things usually work, often the graffiti is cleaned up prior to the court appearance and then the cost of the graffiti clean-up forms part of the judgement at the time of the court appearance. That is how we envisage most of these orders will work,

given that it often takes some time between an offender being charged and being convicted of an offence. Generally the property owners want the graffiti cleaned off in the intervening period.

Dr A.D. BUTI: The minister said that this is how it usually works. I am not sure where —

Mrs L.M. HARVEY: I am advised that that is how we expect it will work.

Dr A.D. BUTI: The minister said that the graffiti will often be cleaned up before the court action. If that is the case, there will not be an order for remedial action because the graffiti will have already been cleaned up. What will happen when a court determines that the remedial action should take place and that the offender will either restore the property to the state that it should be restored to or pay another person to do the job, but that property is now too dangerous to enter? There is an issue about tort liability, but the offender might say that it is too dangerous for someone to go back to remove the graffiti.

Mrs L.M. HARVEY: Each case would have to be considered on its merits. My reference to the way these things usually work was in the way that property damage offences often work when the property damage has been repaired by the time the offender goes to court—that was where that reference came from. I draw the member's attention to clause 9, "Application of Sentencing Act 1995", which in effect includes reference to sections of the Sentencing Act. Section 122 of that act provides that a person who fails to comply —

... commits an offence punishable —

- (a) by the Supreme Court as for a contempt; or
- (b) after summary conviction by the court that imposed the order, a fine of \$10 000 or imprisonment for 12 months.

If the court orders reparation as part of the judgement, clause 9 ensures that the order is taken to be consistent with part 16, division 1 of the Sentencing Act 1995, which treats it as though the order were a reparation order. Further penalties would apply to the offender if they failed to comply with the court for reparation.

Dr A.D. BUTI: What if they cannot comply with it because it is too dangerous?

Mrs L.M. HARVEY: In those circumstances, I put it to the member that it would be more probable that the court would order that a third person take the remedial action to repair the property to ensure that it would be done safely and to the standard required by the victim.

Ms M.M. QUIRK: I refer to clause 8(2)(b). As the minister pointed out, in many circumstances the graffiti will already be cleaned off before the offender gets to court. What happens when an owner cleans it off and then seeks to recover the costs, but the costs are actually highly inflated? Is there any way that the court can assess what a reasonable cost is if the court makes an order, for example, for compensation, which would not come under clause 8(2)(a) or (b) but under the general compensation provisions in the legislation more generally? How can the costs be at least contained to some extent?

Mrs L.M. HARVEY: The court would need to make a judgement at the time as to whether the costs applied for by the victim were reasonable. Sections 118 and 119 of the Sentencing Act refer to compensation orders in favour of a third party or enforcing a compensation order, and it is the court that needs to judge whether the compensation order is appropriate.

Clause put and passed.

Clause 9 put and passed.

Clause 10: Conditions to attach to community orders —

Ms M.M. QUIRK: Clause 10 provides that —

- (1) Where an offender is sentenced to a community order, the court must impose a condition that a minimum of 10 hours unpaid community work be carried out by the offender.
- (2) The unpaid community work is to be performed by the offender ... at the direction of the CEO and the work is to comprise graffiti removal work, where practicable.

Will the Department of Corrective Services supervise that work? Has any estimate been made of the additional personnel, equipment or the like that will be necessary to enact this provision?

Mrs L.M. HARVEY: There has been consultation with the Department of Corrective Services. It will supervise the application of the orders and ensure that they are completed. At this stage it includes this work as part of its normal work.

Ms M.M. QUIRK: The minister will not be in a position to answer this question now, but perhaps before the third reading the minister could advise how many hours per annum of graffiti removal is currently being conducted under the aegis of the Department of Corrective Services.

Mrs L.M. Harvey: I will endeavour to find that information for the member.

Clause put and passed.

Clause 11 put and passed.

Clause 12: Immunity for owners of property when individuals enter property to remove graffiti —

Dr A.D. BUTI: Of course, this is a very sensible clause to include; I just want some clarification. Subclause (3) states —

- (3) An action in tort against the owner that is prevented by subsection (2) may be taken instead against the State as if the State owed the duty of care.

Then subclause (4) states —

- (4) If a breach of the owner's duty of care is found to have amounted to gross negligence, the State may recover from the owner as a debt any damages, including costs, paid by the State as a result of any action taken under subsection (3).

Can the minister give us an example of when the provisions in subclause (3) would arise?

Mrs L.M. HARVEY: When a graffiti clean-up order is issued to an offender and they are undertaking that work, this subclause essentially exempts the owner of the property from being sued or liable for the death or injury of the person performing that work, except in the cases in which the owner of the property could be seen to be grossly negligent. There can be all sorts of examples of that. The opportunity is there to bring a civil action against the state if we are not supervising our offenders performing their clean-up orders, for example. Obviously, there would then be some responsibility on behalf of the state for the supervision of the offenders performing the clean-up orders.

Dr A.D. BUTI: That is very reasonable and logical. However, if that is the case, under subclause (4), why does the state then recover damages from the owner? I understand why subclause (2) will prevent an action in tort from being taken against the owner and that an action may be transferred to the state, but how can the state then go back to claim from the owner? I do not understand that part of the provision.

Mrs L.M. HARVEY: This provision effectively applies if an offender is injured while performing a clean-up order. The state has insurance, through the Department of Corrective Services, to cover offenders doing community-based orders. The usual procedure is that a claim would be made against the state through that insurance process. However, this provision means that if an individual decides to circumvent that system and go against the owner of the property, the state has the ability to step in and take over that claim. If it is found that the property owner has been negligent, the state will then proceed for claims against the property owner. It covers off an offender trying to circumvent the process by going straight to the owner of the property, rather than going through the process of the offender appealing to the state, should the offender be injured. Indeed, should the offender be killed in the process of graffiti removal, it circumvents the relatives of the offender from appealing.

Clause put and passed.

Clause 13: Forfeiture of property —

Dr A.D. BUTI: As members know, I flagged this clause in the second reading debate and the minister said I was drawing a long bow. To reiterate, I was not saying that the graffiti, per se, is protected under any constitutionally implied freedom of political speech; I was talking about the transmission of the graffiti. After the graffiti has been put on a wall and a photograph has been taken of it, it may be put on the internet and whatever. The question is: if we then remove a person's ability to transmit that graffiti, which may have a political message to it, could that run foul of the implied freedom of political communication that has been found to be within our Constitution?

Mrs L.M. HARVEY: The short answer is no because we are creating an offence to commit vandalism using graffiti. Irrespective of what the graffiti is—whether it has a political message or anything else—if it is applied to a surface or to the property of somebody without their consent, it is an offence and it does not matter what it is. If the person takes a photograph of that and uses an iPhone, for example, to transmit it—or tweet it, or whatever—to demonstrate that they have done the graffiti, there is an opportunity for the court to permanently confiscate whatever device has been used to transmit the image. This is not about the image; it is about the fact that the placing of the image is an offence under this legislation. The device would be confiscated in the context of the

application of the graffiti to an owner's property without their consent being an offence. There is an opportunity, for example, for people who want to demonstrate or distribute a political message to inscribe that on a piece of cardboard and transmit it. Providing the cardboard belongs to them, under this legislation it would not be an offence to transmit that and they would not be subject to forfeiture of their iPhone, iPad or whatever was used to distribute that. But if they choose to put that political message on someone's property without that person's consent, that is the offence. If they then transmit it, they will be subject to having that electronic device confiscated under this legislation.

Dr A.D. BUTI: I thank the minister. Of course the actual act of graffiti is an offence under this bill, but clause 13 goes that one step further by also making it an offence to transmit an image of that graffiti. The image of the graffiti is not causing any further damage to the property because the property already has been damaged by the graffiti. I am not sure whether, for instance, the High Court would consider it necessary, as is the intention of this bill, to then impose a further prohibition on the transmission of that image. The offence, of course, is doing the graffiti. In her second reading speech, the minister explained that she is trying to discourage the transmission of graffiti because that might encourage people to engage in more acts of graffiti. I understand that, but I am still not convinced that taking away a person's ability to transmit a message that may be political in nature, just because someone's original political message was done via an act of graffiti, will not run foul of the implied freedom of speech. I am not sure whether the minister wants to say anything further on that matter.

Mrs L.M. HARVEY: We do not believe it will. As I have said previously, the opportunity to transmit a political message is there, and people do not need to be in the act of commissioning an offence to send a political message. If the offender is convicted of graffiti vandalism, this clause will allow for the forfeiture of the property that was used in the commission of the offence.

Dr A.D. BUTI: I think that is where the minister and I are not connecting on this. I do not think this clause refers to taking away the instrument that was used for the graffiti; it refers to taking away the instrument that was used to transmit an image of the graffiti. The graffiti might have been put up with a paintbrush. I am not saying that the court cannot order that the paintbrush be taken away; I am saying that the iPhone had nothing to do with the graffiti act. The iPhone was used to transmit an image, and that is where I think there is a substantial difference. I do not think that will be considered to be proportionally necessary to the intention of the bill.

Mrs L.M. HARVEY: As I said, the offence is graffiti vandalism. Often offenders will film or record their vandalism act, so by virtue of this legislation, that will be an offence. When police apprehend these offenders, they often take the phones and things such as that into custody to see whether they can find evidence of the offence being committed. If the person is then convicted of the offence, the prosecutor would need to apply to the court for an order to have that transmitting device permanently forfeited. That is what this clause allows. If an offender has filmed a graffiti vandalism offence, they have transmitted the image and they are consequently convicted, this clause will allow us to apply to the court for it to be permanently forfeited after the court process rather than have that device returned to the offender. If the offender is not convicted, this clause will not come into play.

Dr A.D. BUTI: I think the minister said that taking a photograph of the graffiti is an offence. That is not an offence. The offence is doing the graffiti. Taking a photograph of the image is not an offence. Section 731 of the Criminal Code might be incorporated into this, but I am not sure. I do not think the transmission of the image is an offence under the bill. However, the clause allows the prosecutor to seek an order for the device that was used to transmit the image to be forfeited. I may be wrong, but I do not think the bill makes the transmission of the graffiti an offence. I ask the minister that question first. Is the transmission of the graffiti image an offence?

Mrs L.M. Harvey: No.

Dr A.D. BUTI: If it is not an offence, I believe that allowing the court to order that the person's iPhone be taken away, and therefore take away their ability to transmit a political message, would possibly be in violation of the implied constitutional right to freedom of political speech or communication. I think there is a problem there.

Mrs L.M. HARVEY: I disagree, because this is not about what the graffiti is. The fact that someone has applied graffiti or writing, or whatever it happens to be, to someone else's property without their consent would constitute an offence under this legislation. Clause 13(2) states —

For the purposes of subsection (1) “any thing that was used in or in connection with the commission of the offence” includes a thing that was intended to be used, and includes —

- (a) a graffiti implement; and
- (b) anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

Although we are not making the transmission of a graffiti image an offence, by virtue of clause 13(2), we are allowing the court to order the forfeiture of the property that was used in connection with the commission of the offence, and that can include anything used to transmit the image of the graffiti. This is not about what the graffiti is; it is about what has been used as part of the graffiti offence, and we clarify it in clause 13(2).

Dr A.D. BUTI: I know what the clause allows, and that is the problem. It allows legislation to be enacted by Parliament that has the potential to impose a restriction on people's right to political expression or communication of a political speech. As the minister said, the fact that someone takes a photograph of graffiti and even transmits that image is not an offence; the offence is doing the graffiti. However, this clause allows for equipment that has not been used in the commission of the crime to be taken away. The commission of the crime is done with the graffiti implement, which can be taken care of under clause 13(2)(a). That is understandable; there is no question there. However, this will allow the court to order that the offender's property that was not used in the commission of the offence be taken away. If that image is of a political nature, could that not run foul of the freedom of political communication implied in our Constitution as far back as 1992?

Mrs L.M. HARVEY: We fundamentally disagree. The case that the member used was the Coleman case. In that case, I understand that the circumstances involved a police officer taking exception to political information that was contained in a flyer and actions happened as a result of that. The High Court ruled that the police officer's actions were inappropriate because, although he was offended by the flyer, what was in the flyer was a political message and it was not offensive material. Although he had been apprehended under the vagrants act, I think, for committing offensive behaviour and distributing offensive material, there was not an appropriate intervention by the police officer and that charge was not appropriate. The circumstances that the member has used are very different, because it is not illegal to distribute a flyer, unless the person goes on to contravene the Litter Act. It is not about the message. By virtue of clause 13, ultimately the court will make the decision on whether it is appropriate for the offender to forfeit the graffiti implement or anything used to record, store or transmit images of the graffiti caused by the offender. The court will need to make that fairness test at the time, but we are creating an opportunity for the forfeiture of property that has been associated with the commission of this crime, just as we confiscate motor vehicles for hoon drivers, for example.

Dr A.D. BUTI: I do not think I am implying that every form of confiscation may run foul of the implied right to freedom of political speech; that is not what I am arguing. It is an interesting argument the Minister for Police makes—that we will allow the court to decide whether the order it makes will run foul and be unconstitutional. It is the legislation that determines whether it is constitutional; it is not whether the court's final position is constitutional.

The whole issue of implied freedom of political communication and whether a law will be unconstitutional is: does the law in its terms, operation or effects, effectively burden freedom or communications about government or political matters; and, if the law effectively burdens that freedom, is the law nevertheless reasonable, appropriate and adapted to serve a legitimate end in a manner in which it is compatible with the maintenance of representative and responsible government? The minister has said a number of times that taking a photograph of graffiti and even transmitting that photograph is not an offence under this bill. If it is not an offence under this bill, where is the legitimacy or the reasonable aspect of now taking away someone's ability to make a political statement? We can take away their ability by making it an offence to do the original graffiti. That is an offence under the bill—fine. But as the minister has stated numerous times, taking a photograph of that image is not an offence, and then transmitting that image is not an offence, but the minister will still allow the court, under her legislation, to take away that property. That may severely prohibit the ability to communicate a political message.

Mrs L.M. HARVEY: I am willing to take an amendment from the member for Armadale if he would like to make it an offence to also transmit a graffiti image. If he would choose to put that amendment on the notice paper to clarify this matter, I would be willing to take that. However, this comes back to the fact that the government has made graffiti vandalism per se an offence in certain circumstances, and if a person then records and transmits that offence using an iPhone, we are giving the court the ability through this bill to confiscate that item. That is what we are proposing here. Yes, it may be tested by a High Court of Australia challenge. Generally, High Court challenges are very interesting experiences. We must also bear in mind that the Constitution does not give any individual in Australia the ability to break the law in order to make a political point—it does not.

Dr A.D. Buti: That's right, but they're not breaking the law.

Mrs L.M. HARVEY: If somebody chooses to make a political point by defacing, damaging or destroying another person's property, then consistent with this legislation, they will have broken the law. The Constitution does not support that.

Dr A.D. Buti: And I haven't argued that.

Mrs L.M. HARVEY: We are saying that if they then transmit that —

Dr A.D. Buti: That's the issue. That's not a defence, though.

Mrs L.M. HARVEY: We do not care what the graffiti says. We are saying that if they use a device to transmit that, the court can confiscate that device by virtue of this clause. It is not about confiscating someone's iPhone because they choose to tweet a political message about somebody; it is if that political message has been illegally applied to someone else's property and they then choose to transmit it, they can be subject to forfeiture. Those are the circumstances. I think the member and I fundamentally disagree on the principle he is arguing, because I do not believe that people should be able to deface someone's property and then transmit the image. I think they should be subject to having —

Dr A.D. Buti: But it's not an offence. You haven't made it an offence.

Mrs L.M. HARVEY: If the member would like to move an amendment to make it an offence, I will take it.

Dr A.D. Buti: No, it's your bill.

Mrs L.M. HARVEY: We do not think we need the offence in order for clause 13 to work.

Dr A.D. BUTI: The offence is the graffiti—the government has made that an offence. If the minister thought it was so bad that they should not transmit the graffiti—it is pretty hard to transmit the offence. The minister said they transmit the offence. They do not transmit the offence; the offence is the graffiti itself.

Mrs L.M. Harvey: Member, will you take an interjection?

Dr A.D. BUTI: Yes.

Mrs L.M. Harvey: Often they do transmit the image of the offence. They videotape themselves while they are performing the act of criminal damage.

Dr A.D. BUTI: In the case that they do not do that, the image is up there, they come back the next day or even a week later and they have taken a photograph of it. Doing that is not an offence; they have not transmitted. As the minister said herself, the transmission of the graffiti image is not an offence. I do not think I have argued that the government should not make the actual graffiti an offence; the opposition supports that. That is not the issue. It is no good for the minister to come into this place and say that they should not be able to do this and they should not be able to do that. I agree: they should not be able to commit a graffiti offence. But this is not an issue about graffiti; this is an issue about taking an image of the graffiti and then transmitting it, and the minister is then going to confiscate their property, even though it is not an offence to transmit the image. It is not an offence to transmit the image, but the minister is going to take their property away. She uses the example of hoon drivers. What does that have to do with this? With hoon driving the driver of the vehicle commits an offence. Taking a photograph is not an offence, but the minister still thinks it is okay to take away that phone. If the minister thinks it is that bad, she should be the one coming to this place and ensuring that the commission of the image is an offence, but she has not done that.

Ms M.M. Quirk: That would be unconstitutional because they would be wanting to regulate communications, which is a federal matter.

Dr A.D. BUTI: That would definitely be. It would be interesting if it did go to the High Court, but of course governments at the state level have an obligation to ensure that when they bring legislation before the house, as far as possible they have ensured that adequate attention has been paid to the constitutionality of their legislation. I am not sure that the minister has done that. It could be quite expensive if this legislation went to the High Court. Perhaps the government would succeed; maybe it would not be held to be unconstitutional. But I think the government is on shaky ground, particularly when taking away people's property for something that is not an offence. It is not an offence under this bill to transmit the image, yet the minister will still take away the iPhone, or whatever device is used.

Mrs L.M. HARVEY: The advice I have is that we do not need to create a further offence; that clause 13 adequately covers this. Although the member has presented another hypothetical scenario that may well be tested in the High Court, the advice I have is that this clause is sound. Parliamentary Counsel's Office has taken into consideration all of the various ramifications and has determined that this is the way to draft the bill. I am satisfied with that. If the member wants to move an amendment, that is entirely up to him.

Dr A.D. BUTI: The minister should not try to verbal me in the sense that I am not saying that the minister cannot do it under the bill.

Mrs L.M. Harvey: That's rich coming from you!

Dr A.D. BUTI: In what way, minister? Can the minister give me an example of when I have verballed her?

Mrs L.M. Harvey: You are now!

Dr A.D. BUTI: How?

The ACTING SPEAKER (Mr P. Abetz): Let us get on with it, members.

Dr A.D. BUTI: The minister should not make an allegation if she cannot back it up. She said to me that I am saying that this section does not allow the removal of the image. Of course it allows the removal of the image; that is the issue.

Mrs L.M. Harvey: I didn't say that at all.

Dr A.D. BUTI: Yes, she did. We will look at *Hansard* if she wants. The minister did say that is what I said; I did not. The issue I am on about is that under this clause the court can remove the equipment that was used to transmit the image. That is the issue. Of course this clause allows that, but the minister is allowing that to happen. The minister should not ask her advisers whether or not she did; I think that is putting them in a predicament. The issue here is that this clause will allow property to be removed even though that property was not used to commission an offence under this bill. That is what I said. And if this clause is passed in this place, that is what will happen. That is not the issue; the issue is whether it is constitutional.

Mrs L.M. HARVEY: I would like to put on the record that if I said that clause 13 provides the ability to remove the image, it was not my intention. It obviously allows for forfeiture of property used in the commission of the offence, including anything that could be used to record, store or transmit the images. That was my intended response; if I jumbled my words, that was not what I intended to say. As I said, if the member wants to move an amendment, it is entirely up to him.

Dr A.D. BUTI: I do not want to be accused of verballing the minister, so I am asking for some clarification. Did the minister say, for instance, that an iPhone is used for the commission of a crime, or not?

Mrs L.M. Harvey: No, I read out clause 2.

Dr A.D. BUTI: So the iPhone is not being used for the commission of the crime; it is being used to take a photograph. That is not an offence. The taking of a photograph is not an offence. Is that right?

Mrs L.M. Harvey: Sit down and I'll answer. When you're finished, I'll answer.

Dr A.D. BUTI: It might be nice to say please or thank you.

The ACTING SPEAKER: Minister.

Mrs L.M. HARVEY: Thank you, Mr Acting Speaker!

Clause 13(2) reads —

For the purposes of subsection (1) “any thing that was used in or in connection with the commission of the offence” includes a thing that was intended to be used, and includes —

- (a) graffiti implement; and
- (b) anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

That is what we are proposing and, as I said to the member, we fundamentally disagree on a number of issues in this clause. I do not believe that we are violating anybody's constitutional right to be politically active and to convey a political message. We are saying that if someone carries out an act of graffiti vandalism by inscribing anything on somebody else's property without their consent, consistent with the offence we have created, then under clause 13(2) the court can require permanent forfeiture of the device used to transmit the image. That is what we are proposing here. If there is a constitutional challenge, I will welcome that; they tend to be very interesting experiences.

Dr A.D. BUTI: It is interesting that the minister welcomes a constitutional challenge; I thought we should try not to have constitutional challenges because they cost a lot of money. That is interesting. The minister read out that clause, but I am now confused by what she is saying. Can the minister clarify whether she is saying that the taking and transmission of a photograph is part of the commission of the offence? Is it or is it not?

Mrs L.M. HARVEY: It is anything that was used in, or in connection with, the commission of the offence.

Dr A.D. BUTI: But for the last 20 or 30 minutes the minister has said that the taking or transmission of the photograph was not an offence. Is it an offence, or is it not an offence?

Mrs L.M. HARVEY: We have already been very clear on that. The transmission of the image is not the offence here. We are saying that the offence is the graffiti vandalism offence and then, by virtue of clause 13, the court can allow forfeiture of anything that has been used in or in connection with the commission of the offence.

Somebody needs to be convicted of the offence of an act of graffiti vandalism before anyone can apply to the court for, or the court can order, the forfeiture of anything that has been used in, or in connection with, the commission of the offence. I think it is quite clear.

Dr A.D. BUTI: The commission of the offence is painting the graffiti—painting the image. That is the offence.

Mrs L.M. Harvey: Unlawfully.

Dr A.D. BUTI: Yes, okay, under clause 5. That is the offence. How, then, is taking a photograph part of the offence? The minister has said a number of times in answer to my questions that the offence is the actual graffiti, which she calls graffiti vandalism, and she has said numerous times that the taking of the photograph is not an offence, so how can it be a commission of the offence? She said that it is not an offence. The offence is doing the graffiti unlawfully, under clause 5. That is the commission of the offence. Whether I then take a photograph does not make it more of an offence; as the minister said herself, that is not an offence, so where is the commission of the offence in taking the photograph of the image?

Mrs L.M. HARVEY: The purpose of this clause is to provide a deterrent to graffiti offenders and to try to interrupt their activities. The way these graffiti offenders work is that they scribble whatever it is they want to scribble on other people's property without their permission, and they often then photograph it and transmit it. They have social media websites and there is an active social network of people who engage in this illegal activity, and we want to try to intervene in that and in the ability of people to participate in graffiti vandalism offending. That is the purpose of this clause: to provide a deterrent by virtue of confiscation of the devices used to transmit or record images of the graffiti. That is what the purpose is, and we believe that this clause will help us achieve that purpose. It is about graffiti vandalism offending and trying to interrupt the activities of the offenders. We are doing that by taking away the graffiti implements and devices that are used for them to brag about it and connect with other offenders to basically continue to perpetrate graffiti vandalism offending. That is what our purpose is. We think that clause 13, if passed, will help us achieve that purpose.

Dr A.D. BUTI: I understand the rationale behind what the minister is trying to do, and I do not disagree with that rationale. She made that clear in her second reading speech. It is the wording, though, that I disagree with. Clause 13(2), as the minister read out, reads in part —

For the purposes of subsection (1) “any thing that was used in or in connection with the commission of the offence”

The commission of the offence is the painting; it is actually doing the graffiti. The offence has already been committed once they have painted the image on property without the consent of the owner. That is it; it is all over red rover. That is the commission of the offence. Coming back later and taking a photograph is not aiding and abetting the offence; the offence has already occurred. There is no doubt that taking a photograph is connected to transmitting an image of what happened, but it is not connected to the actual commissioning of the offence unless, of course, someone takes a photograph of them actually doing it, but I am saying they are not taking a photograph of them actually doing it; they are just taking a photograph of the actual image.

Mrs L.M. HARVEY: The clause is worded specifically: “any thing that was used in or in connection with the commission of the offence”. The recording device would have to be used at the time of the commissioning of the graffiti offence. This is not about somebody going around photographing a catalogue of graffiti vandalism or graffiti images and then transmitting them; this is about an offender who has committed an act of graffiti vandalism and has set up, for example, a GoPro to film it as they are doing it, and has then used the GoPro footage to transmit the image of what they have done. It is about that device being used in connection with the offence of graffiti vandalism.

Dr A.D. BUTI: That clarifies it and narrows it down, and should be placed on record. In other words, this clause will apply only to equipment used—such as a GoPro camera, as the minister said—to actively record the commission of the offence. Therefore, if I have video of me doing the painting, it can be taken away, but if I come back the next day and take a photograph of that image and transmit it, there will not be authority under this clause to take away the iPhone; is that correct?

Mrs L.M. HARVEY: Member, this is not just about people going around and collecting images. The device would have to be linked to the offender and the actual act of graffiti vandalism. This is not, for example, about webpages that show photographs of graffiti vandalism or graffiti art or whatever it is. It is not about that. It is about an offender charged with an act of graffiti vandalism who has used their GoPro, iPhone or iPad to record or transmit that offence. If they are convicted of the offence, the court, by virtue of this clause, would be allowed to order that they permanently forfeit the device.

Ms S.F. McGURK: I want to clarify this point. The image, as I understand it, would need to have been taken by the offender, not a third party—I think that is what the minister said. I was thinking of a T-shirt that my partner

wears that has an image of a Banksy piece of work on it. It is a man with a scarf around his face, and his stance is as though he is about to hurl a bomb, but in fact he is about to hurl a bunch of flowers. It is a very popular image. It is on the cover of *Wall and Piece*. Numerous books feature Banksy and other graffiti artists' pieces. What would happen if the image was taken by the offender—if, in this case, the Banksy image was taken by Banksy—and was not only transmitted on social media and the internet, but also published in a book and put onto T-shirts and the like? I have talked about Banksy, but it could quite conceivably be a Stormie Mills piece—he is a Perth artist. If he graffitied a wall that he was not authorised to use and took a photograph and that piece was published in a book et cetera, what would be the circumstances around the publication of that work or the production of all sorts of merchandise? The Banksy documentary was titled *Exit Through the Gift Shop*. He was having a bit of a dig at the merchandise industry, but I imagine he has made quite a bit of money from it. Perhaps the minister could talk about how this clause would relate to other ways in which that image could be transmitted or reproduced.

Mrs L.M. HARVEY: First of all, the offender would have to be charged with the offence, and then the device used to record or transmit the image by the offender could be subject to forfeiture. With respect to Banksy, sadly, not all graffiti artists are as good as Banksy. This is about graffiti vandalism and people defacing other people's property without their consent, and the recording or transmission of that action. A person would need to be convicted of the offence, and the device would have to have been used in, or in connection with, the commission of the offence for that to apply. The T-shirt of the member's partner is safe from this clause 13, "Forfeiture of property".

Ms S.F. McGURK: The point made by many members on this side during the second reading debate was that Banksy may well not be prosecuted under this bill, but an artist operating in Perth and graffitiing a wall or a space that he or she was not authorised to use could be. That was one of the grey areas that we were concerned was not picked up by this bill. My question related to other ways in which the image could be transmitted, published and otherwise reproduced. Perhaps not in the case of Banksy, but if, in the case of Stormie Mills—a Perth artist—he took the image and was prosecuted, and the image was published in a book or put onto other merchandise, what would be the circumstances about other ways in which that material was communicated?

Mrs L.M. HARVEY: Member, once again, it is not about the image; it is about the offence. The application of graffiti onto a person's property without their consent is the offence, so the device would have to have been used in connection with the commission of the crime for it to be forfeited. It is not about the image or whatever happens to the image; it is about the devices used to record, transmit or store the image in connection with the commission of the offence. As an example, lots of graffiti artists obtain the consent of the owner after they have painted a mural on a wall. In those circumstances it is highly unlikely that a person would be charged with or convicted of an offence. It is not about the image; it is about a device used to record, store or transmit the commission of the offence—something used in connection with the commission of the graffiti vandalism offence. It comes down to whether a person's property was destroyed or defaced without their consent.

Ms S.F. McGURK: Clause 13(2)(b) reads —

anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

I am not convinced that that wording could not mean that later publication and production of merchandise et cetera could not be the subject of the forfeiture provisions in this clause. I do not understand how that later publication could not fall foul of this clause.

Mrs L.M. HARVEY: The member needs to read subclause (2)(b) in the context of the whole of clause 13. Legislation does not make sense unless it is taken in context. We have been debating this for a while, member; I do not know that I am going to give the member much relief. I think I have explained it as well as I can. If the member chooses to move an amendment, I think that is what we need to get to.

Ms S.F. McGURK: I wish to finalise that point. Other members have made the point that we have an obligation to ensure that the legislation makes sense, and that when police are trying to prosecute graffiti offenders and are looking at the forfeiture of property, the legislation is workable in the real world. Despite the minister's responses, I am concerned that, given the popularity of quality street art, various means to transmit graffiti may be used by the offender. I understand that the offender has to have taken that image, and that might be a restriction. Apart from that, a very broad interpretation of this clause could mean that anyone publishing that work needs to be very cautious because of the provisions of this bill.

Mr S.K. L'Estrange: Good.

Ms S.F. McGURK: The member for Churchlands has interjected again.

Mr S.K. L'Estrange: I said, "Good".

Ms S.F. McGURK: I heard what the member said.

Mr S.K. L'Estrange interjected.

Ms S.F. McGURK: I did not take the interjection, Madam Acting Speaker.

Mr S.K. L'Estrange: Yes, you did.

The ACTING SPEAKER (Ms L.L. Baker): Members for Churchlands and Fremantle, I am on my feet. Member for Churchlands, if you want to interject, can you do so without yelling across the chamber. Just approach the member and ask if she will take an interjection.

Ms S.F. McGURK: The member for Churchlands chose not to make a contribution to this debate. He did not make a speech but perhaps he should have. It would have been interesting to get on the record his understanding of how public art works and how people have contributed. Perhaps he should do some reading on this subject. Frankly, he is embarrassing himself on his understanding of public art and street art.

The ACTING SPEAKER: Member for Fremantle, you need to ask a question.

Ms S.F. McGURK: Is the minister concerned that people who may publish graffiti or street art that otherwise will be caught under this legislation could be implicated under this clause of the bill?

Mrs L.M. HARVEY: This legislation is not about public art. There are numerous beautiful examples of public art all through Perth and Fremantle. Many years ago, I lived in Canada for a year. I visited Montreal, which has beautiful murals everywhere. These murals were posted by artists with the consent of the owners. This clause is not about that; it is about graffiti vandalism in which images are placed on somebody else's property without their consent, and that is the offence. If that graffiti offender is convicted of the offence and they used their iPhone, for example, to record, store or transmit images of the graffiti, they could be subject to a forfeiture order of that device by the court. Those are the circumstances that would apply.

Any prosecutor would draw a very, very long bow to say that a T-shirt was used in connection with the commission of an offence. This clause is about GoPros, cameras or iPhones that are used by offenders in the act of committing the graffiti vandalism to record, store and transmit the image. By virtue of the fact that it was placed there without the consent of the owner, that is an offence. It is not about the image or public art; it is about the fact that people are destroying and defacing another person's property by virtue of graffiti, and that is the offence.

Ms M.M. QUIRK: My stomach muscles are hurting from jumping up and down so often. I am not familiar with the graffiti vandal's milieu. As I understand it, the mischief of this clause is to stop a frequent activity of publicising the fact that the graffiti vandal has completed a particular act of graffiti in an unauthorised fashion. I am sorry; should I wait until the minister has finished her message?

The ACTING SPEAKER: Member, I think the minister is still listening.

Ms M.M. QUIRK: The minister was using her phone while I was asking a question.

Mrs L.M. Harvey: I was checking the time, member.

Ms M.M. QUIRK: I draw the minister's attention to the clock in the chamber. Perhaps she can look at that rather than not listen to the question that I have been waiting an hour to ask.

Mr P.C. TINLEY: I would be thrilled to hear the conclusion of the question after the phone shaming.

Ms M.M. QUIRK: Is the misuse of this legislation to stop what the minister says is the prevalent activity of transmitting pictures or video of the commission of an offence, which in some way adds to the kudos that the offender receives from having committed the offence?

Mrs L.M. HARVEY: This bill is designed to act as a deterrent to reduce the incidence of graffiti vandalism in our community. That is it.

Ms M.M. QUIRK: The act of graffiti vandalism, as the minister said ad nauseam to the member for Armadale, is the placing of unauthorised markings, etchings and so forth on property in an unauthorised fashion. It is not about the transmission of those images. The minister wants to ban the transmission of these images. For what reason?

Mrs L.M. HARVEY: I have already dealt with that question.

Ms M.M. QUIRK: I asked the minister a question and she has not yet answered me. I suggest that a yes or no answer will suffice for my purposes. Is this clause in the bill because she wants to deter the gratification that offenders get from transmitting evidence of their offending behaviour?

Mrs L.M. HARVEY: It is about reducing the incidence of graffiti vandalism and providing a deterrent to graffiti vandals by allowing the court to forfeit the devices that they use to store and transmit their images.

Ms M.M. Quirk interjected.

Mrs L.M. HARVEY: I have already said that it is not about the transmission of the image; it is about a device that has been used in connection with the commission of the crime and it needs to be anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

Ms M.M. QUIRK: I am actually on the minister's side but I really need to understand whether the storage of images of the commission of the offence is an aggravating circumstance that the minister wants to deter offenders from bragging about.

Several members interjected.

The ACTING SPEAKER: Member for Girrawheen, perhaps you would like to have a conversation with the member for Southern River outside rather than across the chamber. Minister, would you like to respond?

Mrs L.M. HARVEY: As I have said ad nauseam —

Ms M.M. Quirk: No, you haven't.

Mrs L.M. HARVEY: I have. This is not about the transmission of the image; it is about providing a deterrent. It is about allowing the court to have an offender forfeit the property used to store or record anything used in the commission of the offence. I do not know how much clearer I can be. Evidently, my command of the English language is not sufficient to answer the member's question. I have no other answer to give her.

Ms M.M. QUIRK: I will go back to first principles. Is the Graffiti Vandalism Bill about preventing and deterring people from doing unlawful graffiti? The minister can answer by interjection to speed things up.

Mrs L.M. Harvey: Can I? Yes.

Ms M.M. QUIRK: Good, a one-word answer—excellent. The minister told the member for Armadale that the transmission itself is not part of the offence—yes or no?

Mrs L.M. Harvey: Yes, as I've said a number of times.

Ms M.M. QUIRK: She said that graffiti offenders frequently record such activity on their phones or other devices. Yes?

Mrs L.M. Harvey: Yes.

Ms M.M. QUIRK: The minister wants to deter that from happening, so that is why this clause is in the bill.

Mrs L.M. Harvey: Yes.

Ms M.M. QUIRK: Under this clause an order is not made until the matter has been brought to prosecution. Yes?

Mrs L.M. Harvey: Correct.

Ms M.M. QUIRK: Does the minister agree that that will be some time after the commissioning of the offence?

Mrs L.M. Harvey: Yes.

Ms M.M. QUIRK: Does the minister agree that between the intervening time of the commissioning of the offence and the forfeiture order, that image could have been transmitted millions of times over?

Mrs L.M. Harvey: Yes.

Ms M.M. QUIRK: Does the minister not agree that in terms of any gratification that a would-be graffiti offender would get out of publishing the image, the stable door would be well and truly open and the horse would have bolted?

Mrs L.M. Harvey: No.

Dr A.D. BUTI: That was a very good question from the member for Girrawheen. I think the member for Bassendean alluded to this in the second reading debate when he said that the images have gone into the stratosphere—the cloud or whatever—so its confiscation would be a bit too late. In her answer to the final part of the member for Girrawheen's question, the minister said that the horse would not have bolted. How could that possibly be true when it is likely that the matter would go to court many months after the commission of the offence and its transmission by the offender? How can the minister not say that the transmission has not occurred many times over? I do not understand how she can legitimately stand up to a forensic and well-presented argument by the member for Girrawheen, alluded to in the second reading debate by the member for Bassendean, and say with a straight face that the horse would not have bolted.

Mrs L.M. HARVEY: Perhaps we can go back to how police operate in practical terms. Subject to section 146 of the Criminal Investigation Act, a police officer can seize, for evidentiary purposes et cetera, stolen property or anything used in the commission of an offence. These items would be in police custody until the offender went to court. The offender needs to be convicted of the offence before the prosecutor can apply for the device to be forfeited. I do not have anything further to add.

Mr P.C. TINLEY: I am not clear about clause 13(2)(b), which reads —

anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

There might be an evidentiary issue here, but if I am walking along and I take an image of somebody committing an act of graffiti and I transmit that image, I am not part of committing that act, yet it is still being transmitted. Am I then culpable as an accomplice, or as an accessory after the fact? Will I therefore lose my recording device or any other transmission device from then on?

Mrs L.M. HARVEY: A third party not engaged in the act of graffiti vandalism who might be filming it could have their device confiscated temporarily as part of the evidentiary process. But they would not be subject to a forfeiture order unless they were charged with the graffiti vandalism offence. This is about the graffiti vandalism offender, the person convicted of the offence, and their devices used in connection with the commission of the offence.

Mr P.C. TINLEY: As we know, the act of graffiti vandalism is undertaken typically by groups of young men in areas of high risk, particularly down our way. The old Fremantle Power Station comes to mind, which is some 20 or 30 metres high. How they get up and do graffiti without a cherry picker stumps me. They often operate in groups. If the offender is caught doing it and someone else in the group is filming them, do the police or the prosecution have to somehow make a connection between the offender and the recorder of the offence to charge the recorder as an accessory?

Mrs L.M. HARVEY: All the facts of the case and that person's involvement in the crime would need to be examined. Under this clause, they would have to be charged with and convicted of the offence to have the device forfeited.

Mr P.C. TINLEY: Subclause (2)(b) reads —

anything used by the offender to record, store or transmit images of the graffiti caused by the offender.

The minister is saying that if a third party films or records that offence, they can have their property confiscated for the purpose of the prosecution. If I take an image, or video more typically, after the fact and transmit the offence, will I then be culpable in any way for the commission of that crime?

Mrs L.M. HARVEY: As I said, under clause 13, the person would have to be charged with a graffiti damage offence to be subject to forfeiture of their device.

Dr A.D. BUTI: To clarify that; is the offence restricted purely to the recording of the actual commission of the offence; therefore, it has to be in real-time. In other words it has to be recorded at the time the graffiti is being drawn, painted or whatever. Is it correct that post the image or the graffiti happening, it will not be covered by that clause?

Mrs L.M. HARVEY: First of all, the offender will need to be convicted of the offence and then, for the forfeiture of the property to be ordered by the court, it will need to be proved that the thing was used in or in connection with the commission of the offence. All the components of this will need to be satisfied by the court for the forfeiture to take place.

Dr A.D. BUTI: I understand that the offence needs to be proved—that is fine—but I am saying that the issue about the transmission of the commission of the offence relates only to the recording of the commission of the offence. In other words, it has to be in real-time. It has to be a recording of the actual graffiti damage offence taking place. That is what the minister said previously about the GoPro. She said a GoPro had been used to record the offence actually happening. If I come back the next day and take a photograph, that is not connected to the commission of the offence; the commission of the offence is me painting the image. If I come back the next day, it is not connected to the commission of the offence. The minister previously said the recording had to be done with a GoPro et cetera. Is this clause restricted purely to recording in real-time images of the commission of the offence?

Mrs L.M. HARVEY: The court needs to be satisfied that the thing was used in the commission of or in connection with the commission of the offence. The court would need to satisfy itself that that item was used by the offender to record, store or transmit images of the graffiti caused by the offender and that it was used in or in connection with the commission of the offence. The court would need to be satisfied, in order for the forfeiture of the device to occur, that all of the elements of this had been satisfied.

Dr A.D. BUTI: Of course, the court would need to be satisfied, but it has to know what it has to be satisfied about, so it will look at the intention of Parliament. I am now a bit confused and surprised that the minister is not repeating the answer she gave 25 minutes ago, which was that it will be the recording of the actual commissioning of the offence, so I am seeking clarification because we have had some questions since then. Is clause 13(2)(b) referring purely to the transmission of images recorded in the commission of the offence—the commission of the offence is the actual defacement of the property through graffiti—therefore it can only be a real-life recording of the image? I understand it can be transmitted later, but the actual doing of the offence is specified in clause 5, therefore, clause 13 is restricted to real-life recording of the graffiti taking place.

Mrs L.M. HARVEY: No, member, that is not correct. The answer I gave previously used an example of how graffiti offenders operate. Graffiti vandals film themselves as they are engaged in their offence. The member needs to read clause 13(2) in context. It is anything that was used in or in connection with the commission of the offence, which includes a thing that was intended to be used, including a graffiti implement and anything used by the offender to record, store or transmit images of the graffiti caused by the offender. The offender needs to be convicted of the offence and then the court needs to be satisfied that the thing over which the prosecutor has applied for a forfeiture order satisfies all of the components of clause 13.

Dr A.D. BUTI: I am really confused now. The commission of the offence is the defacing or damaging of property without the consent of the owner. As the minister said previously, nowhere in the bill is the taking of the photograph an element of the offence, which is set down under clause 5. Therefore, to come within the purview of clause 13(2), it must be anything that was used in or in connection with the commission of the offence, the actual doing of the act of graffiti. I thought the minister's previous explanation was fine; it made sense, but now she is backtracking and I am confused. How can the taking of a photograph, post the commission of the offence, be in connection with the commission of the offence? We have to look at the wording of clause 5, which is all about the commission of the offence—the actual defacing or damaging et cetera of the property without the consent of the owner; therefore, it would have to be a real-life recording of that offence. It cannot be an image that is recorded a day or two or whatever after the offence. The minister explained that before, but now she seems to be backtracking on that.

Mrs L.M. HARVEY: I suggest that the member read clause 5 to understand the offence of damaging property by graffiti. Clause 5(1) states —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

That is the offence.

If the elements of clause 13 are satisfied and something is determined to be used in or in connection with the commission of the offence, it could be subject to a forfeiture order. I do not have another answer for the member.

Dr A.D. BUTI: But I have another question. As the minister suggested, let us go back to clause 5(1), which is the offence —

A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

That is the offence under this bill. If a person does that, they are commissioning the offence. Clause 13(2) states —

For the purposes of subsection (1) "any thing that was used in or in connection with the commission of the offence" ...

Ms M.M. Quirk interjected.

Dr A.D. BUTI: I am not talking about the graffiti implement, but the recording. The commission of the offence is the actual destruction, damage or defacement of the property. That is the commission of the offence, and if that is being transmitted, it has to be a recording of the commission of the offence. The minister has said numerous times that the image is not the issue; therefore, if I come back tomorrow and take a photograph of the image, how can I be caught under this clause, because that is not connected with the commission of the offence?

Mrs L.M. Harvey: I have already answered this question many, many times. I have no other answer for you.

Dr A.D. BUTI: Minister, which answer do we take? Do we take the answer the minister gave about 15 minutes ago in which she said it had to be a recording of the actual doing of the image?

Mrs L.M. HARVEY: No, member; I said it could be something used in the recording of the image or it could be something used to store or transmit the image of the graffiti caused by the offender, if the offender is convicted of the offence.

Dr A.D. BUTI: Therefore, how can my coming back tomorrow and taking a photograph of the image be connected to the commission of the actual offence?

Mrs L.M. HARVEY: It is because clause 13(2)(b) makes it so.

Dr A.D. BUTI: If the minister reads her answer in *Hansard*, she will see that she said numerous times that the transmitting of the image is not part of the offence. The minister said that this bill does not make it an offence to transmit the image. This clause allows that device to be taken away but, as the minister has said numerous times, the transmission of the image is not an offence, therefore, it is not connected to the commission of the offence.

Mrs L.M. HARVEY: I have nothing further to add, member.

Ms M.M. QUIRK: I take the minister to subclause (2). We have established that the purpose of clause 13 is to deter the additional gratification the offender receives from transmitting the image, so the forfeiture of the phone or other device is seen as a deterrent to the offender's getting the gratification and boasting to their mates that they have done the offence. Is that so?

Mrs L.M. HARVEY: This bill is about deterring graffiti vandalism and reducing graffiti vandalism in the community in any way that we can do that. For instance, having those offenders, upon conviction, forfeit that property that has been connected with the commission of the offence is part of our strategy to deter graffiti vandalism and reduce the incidence of it in the community.

Ms M.M. QUIRK: All right; as my colleague the member for Armadale said, this is not an element of the offence but, that aside, what happens if the device was used to record the state of the property at the time of the commission of the offence so that when an order is made for remediation, the offender was able to establish the exact nature of the work that he had done and what he was required to remediate, as opposed to recording the image for the purposes of boasting to his mates?

Mrs L.M. HARVEY: The member is describing a scenario whereby a graffiti vandal who has vandalised somebody's property then takes the time to take an image of all of that to determine what the remediation works would cost them after they are convicted. In that scenario, if the offender has been charged with the offence and it can be determined by the court that that device was used in connection with the commission of the offence, that person's device can be confiscated.

Ms M.M. QUIRK: In other words, the minister is saying that the mischief of this section is not about deterring offenders from doing what is now part of the *res gestae* or the whole scenario of committing the offence and bragging to their mates about the graffiti, but is about taking a recording for any purpose whatsoever, and that it deals with the recording, not necessarily the transmission. The minister would have seen numerous graffiti markings on walls of various properties. It may well be that a person did one tag and wanted to record it for their own purposes. Down the track they might be prosecuted for significantly more damage and they will be able to say, "This is the only thing I did at that time at that place."

Mrs L.M. HARVEY: Yes, member. If that person tagged that property and is convicted of a graffiti vandalism offence and that device was used to record that image, and if the court is satisfied that that device was used in connection with the commission of the offence to record, store or transmit images of the graffiti caused by the offender, then, yes, it could be subject to forfeiture.

Ms M.M. QUIRK: I will raise another issue. We made what I think is a valid point that the confiscation does not occur until months after the offence, by which time millions of those images have basically gone worldwide —

Mrs L.M. HARVEY: Not necessarily, because if the device has been taken into evidence —

Ms M.M. QUIRK: I am getting to that minister. If the police did not see the phone or the device being used to record any images concurrently with the commission of the offence, on what basis can it be seized under the existing law?

Mrs L.M. HARVEY: It can be seized under section 146 of the Criminal Investigation Act 2006. Under that section a police officer can seize anything to preserve it for its evidentiary value, for example, or for a forensic examination —

Ms M.M. QUIRK: Can you perhaps read out the section, because I want to ask you some questions about that?

Mrs L.M. HARVEY: When police investigate an offence pursuant to section 68 of the Criminal Investigation Act 2006, they can search a person if it is reasonably suspected that the person might have in their possession or under their control anything relevant to the offence. Given the way that we have detailed this offence, that is how police would act under the CIA in these circumstances. Subject to section 146 of the CIA, a police officer may seize anything given —

- (a) that the thing is property that has been stolen or otherwise unlawfully obtained;
- (b) that the thing may be seized under another written law;
- (c) that possession of the thing at that time and place by the person in possession of it is unlawful;
- (d) that the thing may be forfeited to the State or the Crown;

I think paragraph (d) is relevant here. The act continues —

- (e) that it is necessary to seize the thing for one or more of the following purposes —
 - (i) to prevent it from being concealed, disturbed or lost;

That is also relevant —

- (ii) to preserve its evidentiary value;

That is also relevant —

- (iii) to do a forensic examination on it;
- (iv) to prevent it from being used in the commission of another offence.

Police would mostly be seizing and retaining graffiti implements, cameras and phones et cetera pursuant to section 146(b) of the CIA.

Ms M.M. QUIRK: We have established that the elements of the offence are as follows: firstly, to destroy, damage and deface et cetera; secondly, that it relates to property, which we have discussed; and, thirdly, it is done without consent. If the police officers did not see the phone being used, how are they able to, on reasonable grounds—the minister might talk to me about the onus as well—assert that that phone, because we have established that photographing or transmitting of those pictures of itself is not an offence, provides evidence of the commission of an offence?

Mrs L.M. HARVEY: They would have to reasonably suspect that the item may contain evidentiary value that is relevant to the commission of the crime.

Ms M.M. QUIRK: What onus is that? What is the level of proof at which that reasonable suspicion needs to be?

Mrs L.M. HARVEY: A reasonable suspicion.

Ms M.M. Quirk: What does that mean?

Mrs L.M. HARVEY: It is what it has always meant when police go about their work under the Criminal Investigation Act.

Ms M.M. QUIRK: Perhaps I will limit it to the facts in question. If the police did not see the use of the device, what sorts of things does the minister consider would give the police enough grounds to seize the phone in the circumstances?

Mrs L.M. HARVEY: Section 4 of the CIA states —

Reasonably suspects, meaning of

For the purposes of this Act, a person reasonably suspects something at a relevant time if he or she personally has grounds at the time for suspecting the thing and those grounds (even if they are subsequently found to be false or non-existent), when judged objectively, are reasonable.

That is how they would seize the device.

Ms M.M. QUIRK: The police have not seen the offender use the phone. The offender has made no admissions about the use of the phone or the device for recording his offending activity. What sorts of things does the minister believe police would need to be cognisant of before they had the legal right to seize the phone?

Mrs L.M. HARVEY: I do not see how this is relevant to clause 13 because this is about section 146 of the CIA and the police seizing something linked to the commission of an offence. I would expect, for example, that if the police apprehended an offender committing a graffiti vandalism offence, and the phone was in the offender's possession, they would seize that as evidence. The police would need to have a reasonable suspicion that the item was associated with the crime and the offending.

Ms M.M. QUIRK: Great, we are back to my question about the sorts of things that would constitute reasonable suspicion in the absence of admissions or direct evidence such as observation by police. The minister said we are dealing with clause 13, and so am I. I asked the original question about the purpose of this legislation, given that the court is making the forfeiture order many months after the transmissions have gone ahead.

Mrs L.M. HARVEY: Police would need to form a reasonable suspicion that the item had been used as part of the offence. If they apprehend a graffiti vandalism offender and take them into custody, for example —

Ms M.M. Quirk: That is different; that is a protection issue. That has nothing to do with the commission of the offence.

Mrs L.M. HARVEY: I would appreciate it if the member would let me finish my sentence. The police can seize it to preserve its evidentiary value and it might be forfeited to the state or the Crown. I have explained this. This is not relevant to clause 13.

Ms M.M. QUIRK: It is highly relevant to clause 13. What the minister has told this chamber will be used to interpret the provision in the courts, so what she says is significant. If there is no suggestion to police that a phone has anything to do with the evidence—I have said that the basis for reasonable suspicion would either be observation or, alternatively, admission by the offender—how does a phone constitute evidentiary value if the minister has already told us that the mere filming of graffiti is not an element of the offence?

Mrs L.M. HARVEY: If police apprehend an offender in the act of committing a graffiti vandalism offence, they will seize anything that they believe is relevant at the time.

Ms M.M. Quirk: I agree, so what is the basis of that belief?

Mrs L.M. HARVEY: If the offender does not have a phone on them, for example, police will not seize a phone. If it is not there, it is not part of the offence. However, it may happen that evidence leads police to apprehend an offender and charge somebody with an offence after the commission of the offence, and if the phone can be reasonably seized for its evidentiary value under section 146 of the Criminal Investigation Act, then that would occur at that time. Police know what they are doing, member for Girrawheen. I do not think they need me to dictate to them what is of forensic and evidentiary value while they are going about their business.

Ms M.M. QUIRK: Frankly, I find that answer absolutely appalling. Police have to operate within the law. The minister is telling me that by virtue of the fact that they are police officers, they have the right to seize any item whether or not there is any legal basis for doing so. It is an absolute disgrace.

Mrs L.M. HARVEY: If the member has an issue with the Criminal Investigation Act, then —

Ms M.M. Quirk: I have an issue with you giving police the green light to disobey the law.

Mrs L.M. HARVEY: I did not say that at all!

Ms M.M. Quirk: Yes, you did.

Mrs L.M. HARVEY: No, I did not.

The ACTING SPEAKER (Ms L.L. Baker): Members!

Ms M.M. Quirk: You said that they had the right to seize the phone and you gave us no grounds.

Mrs L.M. HARVEY: I did not say that. I said, subject to section 146 of the CIA, a police officer can seize anything. Then I went through paragraphs (a) through to (e) and subparagraphs (i) through to (iv) of section 146. That is how police can seize objects under the CIA. If the member has a problem with the CIA, we need to debate that at another time.

Ms M.M. QUIRK: The minister quoted certain elements of section 146, for example, an object that is of forensic value. Forensic value means that it is connected with the commission of an offence. Subparagraph (ii) mentions evidentiary value. Again, that is connected with the commission of an offence. I am asking the minister: what are the grounds for seizure, and how can she say that it is committed on the grounds of the offence when she has already said ad nauseam to the member for Armadale that filming and transmission, per se, is not an element of the offence?

Mrs L.M. HARVEY: As I said, under section 146 of the CIA, police can currently seize a phone if they reasonably suspect that it might have evidentiary value. That is how it works. I did not ever, at any point in time, say that I give police carte blanche authority to seize anything that they want. They need to operate under the legislative instruments —

Ms M.M. Quirk: All right, well what is a reasonable suspicion? That is the problem. The minister has not been able to tell us what a reasonable suspicion would be.

Mrs L.M. HARVEY: With respect, I detailed reasonable suspicion —

Ms M.M. Quirk: You read it out, but I am asking you for a scenario in this case.

Mrs L.M. HARVEY: Reasonable suspicion is defined, as I said previously, under the CIA; so I have defined it.

Ms M.M. QUIRK: What is it about someone having a phone in their pocket that generates a reasonable suspicion?

Mrs L.M. HARVEY: As I said previously, police are subject to section 146 of the CIA. Police know what they are doing when they apprehend offenders and they understand how they need to act.

Ms M.M. QUIRK: I do not want to flog a dead horse—clearly I am. There are circumstances—I have certainly had experience with this; I appreciate that the minister has not—in which police operate with an excess of zeal. I am asking the minister what the protections are for someone who is doing a legitimate activity of having a phone in their pocket and it is subject to seizure for many months when no reasonable grounds exist for the seizure. I ask the minister to please tell this Parliament, as guidance to the courts, the circumstances in which the minister envisages the police could have a reasonable suspicion if there was no admission by the offender and they did not personally observe the use of that phone.

Mrs L.M. HARVEY: How is this relevant to the forfeiture of property post-conviction? The member has not explained how this is relevant to clause 13.

Ms M.M. QUIRK: You answered it.

Mrs L.M. HARVEY: Do I have the call?

The ACTING SPEAKER: You do.

Mrs L.M. HARVEY: Right, because there were two members on their feet.

Ms M.M. Quirk: At least I'm not on my phone texting!

Mrs L.M. HARVEY: We are talking about the forfeiture of property post-conviction. I think I have explained ad nauseam how this graffiti vandalism offence occurs and how the forfeiture of that property is possible post-conviction. I have nothing further to add.

Ms M.M. QUIRK: To answer the minister's question so that somebody reading this in 15 years understands its context, the seizure by police was raised by the minister herself when I asked her what the utility of this provision was, given that the court could make the order of forfeiture of the phone many months after the event. We said that if the message of the legislation was to stop the transmission of images, too bad, too sad; it would have already happened thousands and millions of times over. That is the context in which the forfeiture of property post-conviction came up. The minister's response to that was that police can just ride roughshod over and seize a phone irrespective of the legal requirements. We understand that it is the government's policy for the court to make the forfeiture order. We think it is of little utility; however, it makes sense for the court to make the formal order because it has the evidence before it, it has the admissions or otherwise of the offender, and it has the determination beyond reasonable doubt of the circumstances of the offence. We have little issue with the fact that it is the court making the forfeiture order. We have issue with what the minister is now saying, which is that there is a de facto forfeiture order based on grounds, about which she cannot tell us, at the time of the commission of the offence. That is what we are unhappy about. If the minister is unable to appreciate the subtleties, I cannot do anything about that; I am sorry.

Clause put and passed.

Clause 14: Terms used —

Mr P.C. TINLEY: I want to clarify the general term “public place” in clause 14. The minister may have already done this; I was not able to attend all of the consideration in detail stage yesterday. In my contribution to the second reading debate, I talked about the idea of the ownership of property. For example, we are all familiar with vacant lots between buildings in the City of Perth. There are plenty of those open to the street; they are not blocked off. But there is graffiti—I will call it graffiti—on the wall and the wall is a zero-setback wall, or a parapet wall. The physical building of the adjacent property may have one owner and the vacant lot may have another owner. The bill mentions property ownership in relation to consent. The issue of consent for the graffiti may have come up previously—I will be educated by the minister. If the vacant lot owner gave consent, even after the fact, but the property owner of the building with the zero-setback or parapet wall did not give consent, would that be considered a public place? Where is ownership defined?

Mrs L.M. HARVEY: I am not sure that the member is really talking about a public place, because if it is a property and there is a wall, a person or entity would own the wall. The consent of the owner of the wall would need to be obtained for a person not to be convicted of this offence. Vacant lots are not public property.

Mr P.C. TINLEY: So, it is privately owned.

Debate interrupted, pursuant to standing orders.

[Continued on page 7492.]

Extract from *Hansard*

[ASSEMBLY — Thursday, 15 October 2015]

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Mrs Liza Harvey; Ms Margaret Quirk; Dr Tony Buti; Ms Simone McGurk; Mr Peter Tinley
