PROHIBITED BEHAVIOUR ORDERS BILL 2010

Introduction and First Reading

Bill introduced, on motion by **Mr C.C. Porter (Attorney General)**, and read a first time.

Explanatory memorandum presented by the Attorney General.

Second Reading

MR C.C. PORTER (Bateman — Attorney General) [12.28 pm]: I move —

That the bill be now read a second time.

The Prohibited Behaviour Orders Bill 2010 aims to provide courts with a mechanism to restrict a person who has a history of antisocial offending from activities or associations which the court considers are preparatory to or otherwise increase the likelihood of a person committing another relevant antisocial offence.

In Western Australia, there are certain categories of criminal offending that have traditionally been considered particularly grave by Parliament and the courts. These offences carry high maximum penalties and often result in terms of immediate imprisonment. In addition to those forms of homicide involving a willed act to assault a person, some of the offence categories the Supreme Court appears to view as being amongst the most serious crimes include aggravated burglary, which in Rodriguez v The Queen were considered by the legislature to be an extremely serious offence; serious sexual offences against children, which in The Queen v Wilson were said, as a general rule, to be regarded as so grave that they require significant custodial sentences; armed robbery; and drug related offences involving sale or supply, which in Mishal v The Queen the court observed would often result in the imposition of lengthy sentences of imprisonment.

This bill fulfils a key Liberal Party commitment given during the 2008 state election campaign, which is driven by what is, in the government's view, significant, ongoing and informed concern amongst the community about several categories of lower level, higher volume antisocial criminal offending.

This bill seeks to target the types of offences that, when viewed in isolation, are of less gravity than the most serious or grave criminal offences in the statutes of Western Australia, such as those I have just described, but which have a considerable cumulative impact on the lives of ordinary Western Australians. I do not propose to list in this second reading speech all classes of offence that could conceivably amount to such antisocial offending; indeed, it is not the government's position that it is possible to exhaustively do so. However, we are generally referring here to offences of the nature of graffiti, general damage to property, disorderly conduct, hooning, shoplifting and threatening or violent offending in public or against persons providing public services.

This type of crime is sometimes referred to by law enforcement officers as volume offending, and because of its volume it impacts significantly on the community in a variety of ways. First, it is necessary to note that some crime impacts on the community in a significant way simply because there is a lot of it. In 2009, 43 495 property damage offences were reported to police; there were 72 252 instances of theft; 23 194 assaults; and 5 635 instances of threatening behaviour. Within each of those offence categories there will be a significant range of criminality that, in a strictly comparative sense, will range from the relatively minor to the extremely serious. However, experience demonstrates that the majority of these offences that are charged will be dealt with in the Magistrates Court and the quite overwhelming majority will, having regard to the appropriate existing law and comparative sentencing practices, not be considered serious enough in any given discrete instance to be dealt with by a term of imprisonment. This proposition is borne out when the volume of traffic through the Magistrates Court is considered proportionate to the number of cases dealt with in the higher courts.

In the year following March 2008, there were 2 578 convictions in the District Court. In the same period, there were 98 411 convictions in the Magistrates Court, of which less than three per cent were considered in all circumstances to justify a term of immediate imprisonment. Matters dealt with in the District Court and the Supreme Court are more likely to be recorded and at times are subject to intense media reporting and scrutiny. In comparison, the passage of matters through the Magistrates Court is possessed of the opposite characteristics, in that it is a vast and often not publicly reported volume of crime. If criminal justice were an iceberg, the higher court matters are the tip of that iceberg and the Magistrates Court is the mass of ice beneath the surface. The second point is that volume crime often impacts very publicly. Some kinds of criminal activities that I have mentioned—for example, graffiti and hooning—often occur literally on public property, or at least within the public view. Other categories—disorderly conduct would be the prime example of this—include as a statutory element of the offence that they occur in public. Other categories of offending impact on places and people who are providing a public service; for example, aggressive and threatening behaviour on public transport or in hospitals and emergency rooms. Other categories of offending, because of their comparatively very frequent

occurrences, impact on people's quiet enjoyment of their own premises or their livelihood in a way that is so commonly known and experienced that they become public concerns. Simple, non-aggravated home burglaries and shoplifting would fall into this category as does, I would suggest, the majority of low-level drug-related offending. Because these offences impact publicly on all ordinary Western Australians, it is perhaps not surprising that they feature heavily amongst perceived problems in neighbourhoods. The Australian Bureau of Statistics publication "Crime Victimisation, Australia, 2008–09" includes a survey of perceived problems in neighbourhoods. Respondents were asked what forms of crime they viewed as problematic in their neighbourhood. In Western Australia, 55 per cent of respondents reported that dangerous driving is a problem in their neighbourhood; 45 per cent reported graffiti or vandalism to be a problem; 40 per cent said burglaries were a problem; and car theft, youth gangs, drunkenness and drugs as a problem were each reported by 20 per cent of respondents.

The third point is that the rate at which many of these volume offences are being dealt with in the lower courts is, based on the experience of the last decade, increasing. Between 2000 and 2008, there was a 147 per cent increase in the number of traffic and vehicle offences dealt with in the Magistrates Court. In the same time frame, there was a 73 per cent increase in public order offences, a 59 per cent increase in property damage offences and a 59 per cent increase in acts intended to cause injury dealt with in the Magistrates Court. Consequently, there is an understandable and very strong community concern about the forms of offending to which I have referred, and a clear mandate exists to legislate in a new attempt to curtail the activities of the perpetrators of antisocial offending.

Every member in this place will have heard from constituents who have experienced these forms of criminality in their lives to the point at which the constituent considers the situation to have become intolerable. The manner in which police, courts and corrective services can presently deal with such offending is limited. This is because of the sheer volume of charges and individuals they are required to deal with coupled with the comparative lack of seriousness of each specific instance of offending when considered in isolation. These are very difficult forms of offending to police. They are also, at least in relation to repeat offenders, sometimes difficult forms of offending for courts to deal with appropriately. Imprisonment is, very properly, a sentence of last resort in relation to the overwhelming majority of criminal offences in this state. This means that courts ordinarily will not impose a term of imprisonment unless they consider that it is the only justifiable punishment or that the protection of the community requires it, having regard to the seriousness of the offence and the offender's criminal record, as well as due consideration being given to a range of other aggravating and mitigating factors.

In relation to these lower level offences, it is often the case that sentencing principles will militate against sentencing courts imposing terms of imprisonment. This is so, even when the offender has been convicted of a significant volume of offences because of the fact that the offender, who might demonstrate a substantial criminal record, has repeatedly committed offences that in a comparative sense, when considered against more grave offences, are at the lower end of the spectrum of seriousness. Several pieces of available criminological data highlight this phenomenon of the sustained existence of repetitious, high volume, low grade offending. One example is provided by a 2004 study of the Children's Court by the Crime Research Centre of the University of Western Australia. This analysis tracked the passage of a group of young offenders through the juvenile justice system and found that, of the sample examined, approximately 75 per cent of young offenders who initially came into contact with the system had four or fewer subsequent contacts with the juvenile justice system, but about five per cent of the offenders had 12 or more contacts with the juvenile justice system after their initial contact. This data demonstrates that in the very early stages of offending the state has considerable success in ensuring that juveniles who offend once or twice are diverted away from the system and do not reoffend. Equally, and notwithstanding the state's best efforts at diversion, a small group of juvenile offenders persist in their offending behaviour over a number of years and by repeatedly committing individual antisocial offences. Similarly, in the Magistrates Court, we know that 30 adult offenders in the past three years have each been sentenced in connection with offending on at least 19 separate occasions. This group of offenders averages some 44 distinct charges each and these figures exclude charges involving driving without a licence.

The way in which the Sentencing Act 1995 constructs principles of sentencing will be such that over a two or three-year period the most prolific offenders, in terms of their number of charges and convictions, will necessarily be those who do not commit grave offences which activate the last resort sentence of a jail term, but rather those who repetitiously commit offences that, when considered individually, are not of a sufficiently serious nature to warrant imprisonment. However, when these types of offences are considered collectively for their cumulative effect on our community, the relevant offending represents a serious impact on local communities.

The Prohibited Behaviour Orders Bill 2010 seeks to give police, courts and, indeed, the community a meaningful and practical way of responding to this category of serial antisocial offenders. It will provide courts with a mechanism, the imposition of a prohibited behaviour order—PBO—to restrict a person who has a history of such

offending from activities or associations which the court believes increase the likelihood of the person engaging in further antisocial behaviour, including by engaging in acts preparatory to offending.

This concept is related to a particular form of antisocial behaviour order used in the United Kingdom, known as criminal antisocial behaviour orders, which can be made only following conviction for a criminal offence. In crafting this legislation, the government has paid close attention to those elements of the UK scheme that have been most efficient. Targeting this form of intervention against persons already engaged in repeat criminal offending means that the focus of police and courts will squarely be on the persistent group of offenders who are responsible for a disproportionate amount of antisocial behaviour.

Under the Prohibited Behaviour Orders Bill 2010, PBOs are orders that are civil in nature but can only be made once a person has been convicted of a criminal offence. These orders ban people from doing acts, which, whilst not unlawful in themselves, contribute, assist or relate to that person's offending. In keeping with the bill's focus on serial offenders, PBOs may only be made against an offender who has committed multiple relevant offences and is either an adult or a juvenile aged 16 years and over. Details of offenders subject to a PBO will ordinarily be subject to publication, although courts retain some discretion in this regard, and a breach of a PBO will be a criminal offence. A PBO may be made either upon application of a prosecutor or at the discretion of the court. In either instance, the court must be satisfied that grounds for making a PBO exist. The grounds that must be satisfied for a court to make a PBO are as follows.

Firstly, an offender must have been convicted of a relevant offence and in the three years prior to that conviction, must have been convicted of another relevant offence. Relevant offences are defined in the bill as an offence involving antisocial behaviour. Antisocial behaviour is in turn defined as behaviour that causes, or is likely to cause, harassment, alarm, distress, fear or intimidation to one or more persons; or damage to property. To assist the courts in their understanding of how this definition should be applied, and to enhance the efficacy of the bill, offences may be prescribed by regulation as being presumed to involve antisocial behaviour in the absence of proof to the contrary. It should be noted that these prescribed offences are not the only offences that might, in specific instances, involve antisocial behaviour; rather, this list exists to provide guidance as to the kind of offences that should ordinarily be taken to involve antisocial behaviour without further inquiries and are of the nature of offending that Parliament seeks to target with this bill.

The second ground requires a court to be satisfied that, unless constrained from certain otherwise lawful behaviour, the person is likely to commit another relevant offence. This ground requires the court to assess whether the person is likely to commit a further relevant offence, and whether there are lawful activities and behaviour which if not constrained, will assist or contribute to that person's future offending.

Finally, the court is required to assess whether making a PBO is appropriate in all the circumstances. In considering whether to make a PBO, a court must have regard to the matters set out in the bill. First and foremost, a court must have regard to the desirability of protecting other persons and property from relevant offences. This underlines the bill's intended application to those cases in which a person's offending has had such a detrimental impact that a court must first and foremost have regard to providing the police and the community with an enhanced method to prevent and respond to further offending by that person, even in a manner that restricts the offender's civil liberties. The court must also consider the degree of hardship caused to the person if a PBO is made, and it may consider any other relevant matters that the bill permits.

A PBO may impose such constraints on lawful behaviour as is considered reasonably necessary to reduce the likelihood of the person committing a relevant offence. The bill does not seek to exhaustively list all forms of constraints that may be imposed. The forms of lawful conduct that the bill would anticipate may be constrained, if a court considered it reasonably necessary to do so, are effectively unlimited. Situations that were contemplated in the drafting of this bill include banning being in or entering a particular place, such as a suburb where a person has offended, a particular shopping centre, or a hospital, or associating with co-offenders, or being in possession of particular items, such as spray paint or alcohol.

A necessary aspect of the bill is that details of a PBO can be published. The purpose of publication is to enable members of the public to report breaches of a PBO to police. This is particularly important for offenders who repeatedly offend within a local community or against specific people or in specific places, and publication exists to provide such people, and the broader public, with a better means of assisting police and law enforcement by being made aware of the forms of behaviour that are prohibited for the person the subject of a PBO. A judge or magistrate that makes a PBO can order that all details or certain specified details relating to the restrained person must not be published if it is believed there are circumstances justifying suppression. In the case of a youth, the judge or magistrate must have regard for the wellbeing of the youth when deciding whether to publish the details of the PBO. Details of the PBO that will be published, unless suppressed by the court that made the PBO, include the name of the constrained person, a photograph of the constrained person, the town or suburb where they live, and the constraints imposed on otherwise lawful activities and behaviour.

A court will not be able to issue a PBO to a person under the age of 16 years. Where a PBO is being considered for a person aged 16 or 17 years, the court must follow the principles of the Young Offenders Act 1994 in determining whether a PBO is appropriate in that instance. These principles will also apply in the event of a breach of a PBO. Having regard to the nature of offenders that the bill seeks to target, it is the government's expectation that the general principles of juvenile justice are such that they will be unlikely to conflict with the primary importance of the desirability of protecting other persons and property from acts that constitute relevant offences.

The imposition of a PBO is not intended as a punishment. They are designed as a practical mechanism to prevent further offending by enhancing the capacity of the state to restrict and monitor the behaviour of such offenders. Breaches of PBOs are criminal offences punishable by, if the PBO was made in the Children's Court, a fine of $2 000 or imprisonment for two years, or both; if the PBO was made in the Magistrates Court, a fine of $6 000 or imprisonment for two years, or both; and if the PBO was made by the Supreme or District Court, a fine of $10 000 or imprisonment for five years, or both.

In all instances, it should be recognised that despite criminalising behaviour that would otherwise be lawful, PBOs will be applied in situations in which offenders have engaged in a pattern of sustained unlawful behaviour. They recognise that in spite of the limited gravity of a single relevant offence, the cumulative effect of such offences on the public is considerable and significant. Accordingly, it is expected that a breach of a PBO will be recognised as a serious matter by courts, which will result in very significant penalties up to the statutory maximums, having regard to ordinary sentencing principles, including the need to protect the community. I commend the bill to the house.

Debate adjourned, on motion by **Mr D.A. Templeman**.