

CRIMINAL INVESTIGATION AMENDMENT (VALIDATION) BILL 2023

All Stages — Standing Orders Suspension — Motion

MR D.A. TEMPLEMAN (Mandurah — Leader of the House) [1.03 pm] — without notice: I move —

That so much of the standing orders be suspended as is necessary to enable the Criminal Investigation Amendment (Validation) Bill 2023 to be introduced forthwith without notice and to proceed through all stages without delay between the stages.

I would like to briefly speak to this motion. I want to acknowledge and thank the opposition parties for their understanding of the importance of having this proposed bill debated and passed today. I acknowledge that they have also postponed debate on their matter of public interest this afternoon, which is appreciated, and they have attended briefings on this bill. The Minister for Police will shortly explain the importance of the bill when he reads it in. I again urge the house to deal with this bill forthwith.

MR P.J. RUNDLE (Roe — Deputy Leader of the Opposition) [1.04 pm]: I briefly want to speak on the motion to suspend standing orders and the urgency of this matter. As the Leader of the House pointed out, the opposition supports the suspension to ensure that this legislation can be debated and passed in the required time frame. However, I want to make a few points about the government's treatment, in some ways, of this Parliament with its complete control of both houses of Parliament and its obvious record party room numbers. With that control of both houses of Parliament, one would expect a very smooth and efficiently running Parliament, probably the most efficient it has been in its history. A simple error of definition that has serious ramifications translates to another error of delivery from the government. This is systemic of this government that has, in some ways, arrogantly treated this house as nothing more than a place in which to rubberstamp its agenda.

I will briefly run through some of the 13 bills that have been rammed through the Parliament with little or no notice. It is almost getting to the point now that we expect on a weekly basis to have to turn up to a Monday briefing on some bill that Parliament will look at on a Tuesday or Wednesday. The problem is that we are not receiving these briefings in a timely manner. Obviously, this time we are dealing with a very serious issue and we had a very small window of opportunity in which to have a briefing, but my worry is about the lack of due diligence and the ability for our side of the Parliament to be a constructive contributor to the Parliament on these various bills.

In the space of two years, 13-odd bills have been introduced without notice or with a day's notice that require the suspension of standing orders to be considered. I will quickly run through them. There was the Planning and Development Amendment Bill 2022, which the minister then delayed the passage of by a day to allow the house more time to consider its implications; the COVID-19 Response Legislation Amendment (Extension of Expiring Provisions) Bill 2022, a bill that the government refused to justify; the Treasurer's Advance Authorisation Bill 2022 that sought an additional \$820 million; the Small Business Development Corporation Amendment (COVID-19 Response) Bill 2022, which the Minister for Small Business wanted to pass before he retired from that portfolio; the Aboriginal Cultural Heritage Bill 2021 and the Aboriginal Cultural Heritage Amendment Bill 2021, which we know is still flawed and has seen the new minister dig in his heels; and the Constitutional and Electoral Legislation Amendment (Electoral Equality) Bill 2021, which was rammed through this house, breaking a promise that it would not be on the government's agenda. We have spoken about that one many a time. It was not on the agenda, but, funnily enough, the Attorney General and the Premier managed to put it straight on the agenda immediately after the election.

The SPEAKER: Member, if I can just interrupt for a moment. This is a motion to suspend standing orders. You are required to speak to the motion—so, for or against the motion—about whether we should suspend standing orders for the consideration of this particular bill. I will ask you to address the motion that is on for debate.

Mr P.J. RUNDLE: Thank you, Madam Speaker. I wanted to point out those particular bills—I have another half a dozen here that I will not run through—as an example of the *modus operandi* of the government. We understand the urgency of this bill and the scenarios that have led up to it that I am sure the Leader of the Opposition and the Leader of the Liberal Party will speak to.

As I said at the start, we will be supporting the suspension of standing orders. However, as manager of opposition business, I find it very disappointing that a pattern has developed over time whereby opposition members are briefed on a bill the day before and are then expected to somehow talk to all our stakeholders and come up with a coherent response to the bill.

The SPEAKER: Members, as this is a motion without notice to suspend standing orders, it will require an absolute majority in order to succeed. If I hear a dissentient voice, I will be required to divide the Legislative Assembly.

Question put and passed with an absolute majority.

Introduction and First Reading

Bill introduced, on motion by **Mr P. Papalia (Minister for Police)**, and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR P. PAPALIA (Warnbro — Minister for Police) [1.11 pm]: I move —

That the bill be now read a second time.

The Criminal Investigation Amendment (Validation) Bill 2023 will amend the definition of “serious offence” in the power of arrest provisions of the Criminal Investigation Act 2006 with retrospective application. The bill will address the unintended impacts on the power of arrest resulting from family violence legislative reforms that were progressed on an urgent basis in 2020 in response to the COVID-19 pandemic.

The power of arrest provisions in section 128 of the CIA authorise police officers to arrest persons without warrant in certain circumstances. The requirements for arresting a person for a serious offence are less stringent than for a non-serious offence. A police officer may arrest a person for a serious offence if the officer reasonably suspects that the person has committed, is committing or is just about to commit the serious offence. A police officer may arrest a person for a non-serious offence if the officer reasonably suspects that the person has committed, is committing or is just about to commit the offence, and one or more specified circumstances apply—for example, the officer reasonably suspects that if the person is not arrested, they will continue or repeat the offence or will endanger another person’s safety.

Since 2012, the definition of “serious offence” under the power of arrest provisions of the CIA has included an offence under section 61(1) of the Restraining Orders Act 1997. Until recently, that section provided that it was an offence to breach a family violence restraining order or a violence restraining order. The breach of either an FVRO or a VRO was therefore a serious offence under the power of arrest provisions in the CIA.

In early 2020, the government progressed urgent family violence legislative reforms as part of the response to the COVID-19 pandemic. The Family Violence Legislation Reform (COVID-19 Response) Act 2020 enabled changes to the in-person and manual methods of operation used by the justice system. Those changes, among other things, improved access to restraining orders so that social distancing requirements would not be a barrier for victims of family violence who were seeking orders. These reforms commenced on 7 April 2020.

As part of these reforms, section 61 of the Restraining Orders Act was amended so that the offence provisions for breach of an FVRO or a VRO were split into two subsections. The offence provision for breach of an FVRO remains in section 61(1) of the Restraining Orders Act. However, since 7 April 2020, the offence provision for breach of a VRO has been contained in new section 61(1A). As a result of the offence provision for breach of a VRO having been moved to a new section of the Restraining Orders Act, breach of a VRO is no longer a serious offence under the power of arrest provisions in the CIA. As a result, a police officer cannot arrest a person for breach of a VRO under the power of arrest for serious offences. Instead, the more stringent requirements for non-serious offences must be applied; that is, in addition to the police officer reasonably suspecting that the person has breached the VRO, the police officer must reasonably suspect that other specified circumstances apply, such as the person will commit or repeat the offence or will endanger another person’s safety.

This is an unintended consequence of the family violence legislative reforms made in 2020 that has only recently come to light. The Western Australia Police Force has advised that between 7 April 2020 and 8 January 2023, the day before police officers were alerted to this issue, over 900 distinct offenders were arrested in respect of a total of over 1 500 breaches of VROs. Not all these arrests are impacted by the amendments made in 2020. The figures include offenders who were processed by police for additional offences at the same time as a breach of a VRO. The figures also include incidents when the more stringent requirements for exercising the power of arrest for non-serious offences might have been met.

That said, legislative amendments are necessary to address the risk that a number of arrests for breaches of VROs might have been made without legislative authority. Associated risks that might arise include potential civil claims, including for assault and false imprisonment, in respect of the unlawful arrest of persons for breaches of VROs. These might be matters when an arrested person resisted arrest and was subsequently charged with offences arising from that resistance; however, it might subsequently be held that the persons were acting in self-defence to guard against an unlawful arrest. Further, there might be issues surrounding the valid exercise of powers by police officers on arrested persons, including the carrying out of searches and forensic procedures on persons while they were in custody, the seizure of items found as a result of those searches and the imposition of bail conditions prior to their release.

To address the risk of claims in respect of unlawful arrests and to ensure that police officers will have appropriate powers of arrest in the future, legislative reform is required to retrospectively reinstate breach of a VRO as a serious offence under the power of arrest provisions in section 128 of the CIA. The Criminal Investigation Amendment (Validation) Bill 2023 will amend the definition of “serious offence” in section 128 of the CIA so that it will include the offence of breaching a VRO under section 61(1A) of the Restraining Orders Act.

The bill will also have retrospective application by providing that for the period beginning on 7 April 2020 and ending on the day the legislation receives royal assent, the definition of “serious offence” will be taken to have included the offence of breaching a VRO. The bill will ensure that anything done, or purportedly done, on or after 7 April 2020 is taken, and will always have been taken, to be as valid and effective as it would have been had the definition of “serious offence” in section 128 of the CIA included the offence of breaching a VRO. This will remove the risk of claims in respect of the unlawful exercise of the power of arrest or other powers that might be exercised in relation to arrested persons. This includes, for example, powers to conduct searches of, and seize items from, arrested persons.

The bill will also ensure that an act done on or after 7 April 2020 that would have been an offence if the definition of “serious offence” included the breach of a VRO will be taken to be, and to have always been, an offence. This will address the risk that persons who have committed an offence while resisting an arrest, such as assaulting a police officer, could claim that the arrest was unlawful.

The bill will give appropriate legislative authority for police actions in response to a breach of a VRO and the apprehension of offenders.

I commend the bill to the house.

MS L. METTAM (Vasse — Leader of the Liberal Party) [1.20 pm]: I rise as the representative for the police portfolio in the Legislative Assembly. Our shadow Minister for Police is obviously in the other house. The opposition supports not only the urgent passage of the Criminal Investigation Amendment (Validation) Bill 2023, but also the amendments in it. We also thank the advisers for providing a briefing on the bill.

This is very sloppy of the government, indeed. For the second time in a matter of five months, the McGowan government is rushing legislation through Parliament to address a loophole of its own making. We hear that over 900 arrests without a warrant have been made in Western Australia by WA police in relation to violence restraining orders between 7 April 2020 and 8 January 2023, and they are potentially jeopardised. These are serious offences that carry a penalty of a prison sentence of five years or more. In November 2022, we had to fix a bill related to illicit drugs in a similar manner. That was the government’s legislation. It is extraordinary. It is embarrassing for the government, and we would not call it good governing.

Again, we are dealing with this legislation in good faith, as we did back in 2020, and we support the intent of what has been put forward. We are doing this without seeing the second reading speech. The government has had to make changes to the parliamentary process. We have put on hold a matter of public interest today, and there have been changes to the parliamentary program to support and ensure that this legislation is dealt with as soon as possible.

We absolutely support WA police in being able to go about their jobs and their duties, but record levels of police officers have left the force. The number of WA police men and women seeking mental health support has quadrupled over the last four years. There are over 100 unfilled positions in regional WA. There have been countless high-speed chases, as well as acts of car ramming, which has led to one officer sustaining a broken neck. We will add this to the list. For almost three years, WA police have not been adequately protected in the way they believed that they had been under the state’s legislation allowing the arrest of a person of interest who is suspected of having breached a violence restraining order. The job of government is to protect the WA community. That is why we supported this urgency motion in the first place.

The minister raised the question of how our police can be expected to do their jobs when they are not protected. Much was made of the need to protect Western Australians during the COVID-19 pandemic, particularly from domestic violence, which is why we were also very supportive of the government’s moves and the intent of the legislation introduced in 2020. We have supported efforts taken to address this, but there has clearly been an issue with the drafting of this legislation.

Recognising the urgency of this legislation and the need for it to go to the upper house as well, I will leave my remarks there. We absolutely support this bill and its retrospective application. Again, I thank the advisers for making themselves available last week and today for members of Parliament.

MR R.S. LOVE (Moore — Leader of the Opposition) [1.24 pm]: As the member for Vasse has outlined, we will support the Criminal Investigation Amendment (Validation) Bill 2023, which will overturn a drafting error—a mistake I guess it could be put as. A sloppy mistake was made in one of those many COVID bills that were rushed through this place in great haste during those uncertain times, when the opposition sought to provide the government with an opportunity to make the changes needed to keep Western Australia safe through the application of the COVID temporary order that was place in the fortieth Parliament. Apparently, this mistake happened in one of those bills.

We heard from the Minister for Police that an amendment to the Restraining Orders Act led to a provision relating to violence restraining orders being moved to a different section of that act. That was not picked up at the time the corresponding bill was rushed through Parliament, and, unfortunately, it led to, I think, 1 500 arrests relating to

900 people being potentially unlawful. From that were a whole lot of other ramifications for any consequential events that may have occurred following those arrests, which were then perhaps unlawful, relating to interaction with the finding of evidence, future proceedings or, in fact, the validity of bail if an order was breached.

We were briefed by the minister's advisers, and I report that the briefing to the entire opposition occurred only at 11 o'clock this morning and was limited to only 20 minutes. It was made clear that we could not have any more time than that as there was something important the advisers had to get to. The opportunity for members of the opposition to understand what this bill was about was there from only about 11 o'clock today. We were provided with one copy of the bill and explanatory memorandum at a briefing held last week, which was attended by me, the Leader of the Liberal Party, the shadow Minister for Police and the Leader of the Opposition in the Legislative Council. At the briefing, we were provided with one copy of the bill and we were told it had to be kept confidential within our group, which it was, so members of the broader opposition had only today to get an understanding of the bill. That did not leave a lot of time for them to properly scrutinise the legislation.

The Legislative Council is the place where legislation is especially scrutinised to make sure there are no mistakes as it comes from this place. Often, the time the government takes on bills is held up to some degree of ridicule. I know the Legislative Council's processes have been somewhat curtailed this term of Parliament from what they normally are, but in that place many mistakes in legislation are found.

It is an interesting fact that the Legislative Council has a scrutiny role. As part of that role, there is the Standing Committee on Legislation to which bills can be sent to be considered. I understand that committee has not been sent one piece of legislation in this term of Parliament, so it is a committee that has had no purpose. Presumably, members are being rewarded for sitting on that committee—I do not know whether they sit on other committees, which would negate that expense to the state—and perhaps research staff also are dedicated to the committee. That committee has not considered one bill in this term of Parliament. That does not indicate a government that takes the need to properly vet legislation seriously. This is an example of that.

These are serious matters that pertain to people's liberty and safety and the work of our police force, which we all support and want to see enhanced, appreciated and reinforced by a government that is doing its job properly to ensure that legislation it brings forward as a COVID rush bill is properly vetted, is properly written and is covering all bases.

It is interesting that we were told on 9 January that a senior constable at Midland uncovered the fact that the Criminal Investigation Act's serious offence provisions did not actually cover these violence restraining orders. All power to that senior constable! I do not know what position that person is working in—perhaps it is in prosecutions—but he picked up something that the government had not, which was that this is a serious situation. After that time, we were told that the police issued a broadcast to all members of the force to tell them that they had to use the more complicated path for arrests and had to have in mind all those other factors partly outlined by the minister in his second reading speech when they make an arrest, rather than just a simple suspicion of a breach of a VRO. That senior constable is certainly owed a bit of consideration for promotion in the future and a reward for the merit of what he has done. I am not sure that the government and the drafters of the original bill deserve the same level of praise.

We will make every endeavour we can to ensure that this matter is put through Parliament today so it can gain royal assent and become part of the legal landscape almost immediately so people will have no ability to use the opportunity that might have been presented by the potentially invalid nature of some arrests. I note that the second reading speech the minister provided to Parliament today says —

This will remove the risk of claims in respect of the unlawful exercise of the power of arrest or other powers that might be exercised in relation to arrested persons.

I would like a solid guarantee that that will be the case and that it will be completely removed. The minister can give those assurances to the house and perhaps give us an understanding of what the officer was engaged in because that story would be quite interesting to know. That person, who is not a commissioned officer or anything, seems to me to be doing a great job. I really believe that that person needs to be commended for their actions.

I return to the information provided to the opposition in order to properly examine this bill. The opposition asked for a copy of the proposed second reading speech to be provided or for roughly equivalent briefing notes. The advisers said that they would ask the minister, but that was denied. In the spirit of working with the opposition, one would have thought those things could have been provided. It does not serve the minister well to expect the opposition to maintain confidence, as it has done, and to work willingly and cooperatively when the information flow coming from the minister is not vast. I made a request to his office, and I was told he would be consulted. I was told today that he was consulted, and the answer was no. That does not speak of someone who wants to work willingly with both sides of the chamber to ensure that the legislation is passed. Thankfully, I believe we now have enough information to support the change, but, in my opinion, there was absolutely no reason for the information not to be provided.

I will conclude my remarks. We may have a very brief moment of consideration in detail. I understand from the Leader of the House that the government would like to have this bill sent to the other place before question time. We have agreed to move our matter of public interest to another day so that, in case consideration just happens to be interrupted by question time, it will at least get up there in plenty of time for the other place to discuss it just after three o'clock or thereabouts. It is our intention to try to assist to achieve the two o'clock deadline. I conclude my remarks, and I am sure we will see this bill progress through the Parliament today.

MR P. PAPALIA (Warnbro — Minister for Police) [1.35 pm] — in reply: I thank the members for their contributions, and I also thank them for their tolerance with regard to this necessary amendment, the urgent Criminal Investigation Amendment (Validation) Bill 2023. I note with regard to the Leader of the Opposition's concerns about the briefing that a couple of briefings were offered and taken last week. The first was with the leadership group and subsequently, on the second day, another was provided with the shadow police minister and advisers. Today, as the member is aware, we offered a further in-person briefing by advisers for the wider party and those who were interested.

It is a five-page bill. It has not been brought about by any error or failure by police, my agency or my office. It is a consequential amendment to a bill that was missed at the time of COVID. As I said at the outset in today's second reading speech, the Family Violence Legislation Reform (COVID-19 Response) Act —

... enabled changes to the in-person and manual methods of operation used by the justice system. Those changes, among other things, improved access to restraining orders so that social distancing requirements would not be a barrier for victims of family violence who were seeking orders.

That was essential at the time of COVID and had to be passed rapidly. It could not be subject to the lengthy period of analysis that would normally have been the case in the upper house, as the member indicated. There was nothing intentional or malicious in rushing that legislation through; it was done to protect people at a time of serious threat.

I absolutely endorse the Leader of the Opposition's observations about the officer concerned who identified the omission. He did a great job. I cannot give the Leader of the Opposition the answer right now about how he came about it. Does the opposition intend or want to go into consideration in detail?

Ms L. Mettam: Just a brief consideration in detail.

Mr P. PAPALIA: I can find out. I can get the information about how he came about it. He was obviously doing a great job; I totally agree that he should be commended for identifying the omission that resulted in this correction of an unintended consequence at the time.

I commend the bill to house.

Question put and passed.

Bill read a second time.

[Leave denied to proceed forthwith to third reading.]

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement —

Ms L. METTAM: Our intention is to complete consideration in detail of the Criminal Investigation Amendment (Validation) Bill 2023 before question time. With regard to the commencement date, this issue was originally raised by an officer, as we understand it, late last year. Can the minister explain the time frame, and why the commencement of this bill is being introduced now, in March? Why has there been a time lag between the issues being raised by the officer late last year and what happened earlier this year?

Mr P. PAPALIA: There was quite a protracted process. Firstly, police had to confirm the concern that was raised by the senior constable. They then had to seek advice from Parliamentary Counsel and the State Solicitor's Office. As I understand it, there were some five drafts of the amending legislation to resolve that issue. It took some time to arrive at the point at which we could introduce it into Parliament.

Mr R.S. LOVE: Still on clause 2, I have been reading through this so I might be asking a question that has already been asked. Clause 2(2) states —

Section 4 comes into operation on the day after that day.

That is, the day after the legislation receives royal assent. Why will it come into operation on the day after, rather than on the day it receives royal assent?

Mr P. PAPALIA: I am informed that that is normal drafting convention.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 128 amended —

Ms L. METTAM: This obviously deals with the substantive issue—the serious offence. The legislation has gone through a number of drafts and I would like some clarification. There were 900 people arrested, but 1 500 arrests. Can the minister clarify that?

Mr P. PAPALIA: There were 900 individuals, but some of them had been arrested multiple times, so there were 1 500 instances of an offence.

Ms L. METTAM: Can I assume that all those 900 individuals had breached a violence restraining order?

Mr P. PAPALIA: The answer is yes. Some were arrested for other offences, but they had all breached restraining orders.

Mr R.S. LOVE: On the subject of the original change, we are putting violence restraining orders back in under the serious offence provision. In the minister's second reading speech he mentioned the reason for the change in the first place: it was to separate family and domestic violence restraining orders from VROs. Could the minister clarify exactly what the intent was when that was being undertaken, and whether there is any indication that, having made that change, there has been any effect on the operations of the system with regard to that offence?

Mr P. PAPALIA: The change was not made in this legislation, but in the Family Violence Legislation Reform (COVID-19 Response) Act 2020. It was an unintended consequence; it was not intended to diminish violence restraining orders in any way and make them a less than serious offence. That was just something that happened when the legislation was separated. That is not my act, so with regard to the motivation for doing it in that act, it is not really something that I am across, but this consequential amendment is the thing we are dealing with. The need for a consequential amendment arose because that was what happened—because of the nature of what was going on at the time, the drafters missed that need.

Clause put and passed.

Clause 5: Part 15 inserted —

Mr R.S. LOVE: This is the clause that relates to the validation of acts that occurred in that period. We know it is from 7 April 2020 and we know that the police broadcast went out on 9 January this year. It is believed that, since that time, there have been no further arrests using that simple system, and instead a more complex method of determining whether a person is committing an offence is being used. Why does the validation period not extend to 9 January and instead extends to the day on which clause 5 of the Criminal Investigation Amendment (Validation) Bill 2023 will come into operation?

Mr P. PAPALIA: The broadcast is to the officers so that they change their behaviour, but the law still has to be amended and it must encompass the full period. That is why.

Clause put and passed.

Title put and passed.

Third Reading

MR P. PAPALIA (Warnbro — Minister for Police) [1.47 pm]: I move —

That the bill be now read a third time.

MS L. METTAM (Vasse — Leader of the Liberal Party) [1.47 pm]: As I stated in my contribution to the second reading debate, we certainly support the urgency of what has been presented—the Criminal Investigation Amendment (Validation) Bill 2023. I thank the advisers. The substantive issue here is about ensuring that when there is suspicion of a breach of a violence restraining order, the police have that important power to arrest. We support the police in being able to undertake their lawful duties. We have already raised concerns about the manner in which this bill came before the house, but we support its urgent passage through the upper house today.

MR P. PAPALIA (Warnbro — Minister for Police) [1.48 pm] — in reply: I again extend my thanks to the opposition for its indulgence on this important matter. With regard to the advance briefing, I repeat that we did everything we could, bearing in mind that there was a necessity to retain in confidence as much as possible the information that was being provided. I understand that copies of the bill were provided this morning to the opposition as well. I thank the opposition again for its support, and I look forward to the swift passage of this bill through the other place.

Question put and passed.

Bill read a third time and transmitted to the Council.