Legislative Council

Thursday, 10 November 2011

THE PRESIDENT (Hon Barry House) took the chair at 10.00 am, and read prayers.

CANNING BRIDGE INTERCHANGE–CURTIN UNIVERSITY RAPID TRANSIT — ALTERNATIVE ROUTE

Petition

HON KATE DOUST (South Metropolitan — Deputy Leader of the Opposition) [10.02 am]: I present a petition containing 134 signatures and couched in the following terms —

> To the President and Members of the Legislative Council of the Parliament of Western Australia in Parliament assembled.
>
> We, the undersigned residents of Western Australia, are opposed to the intention of the Western Australian Planning Commission, Central City Planning Framework, and the WA State Government Department of Transport, Public Transport Plan for Perth in 2031, to join Henley Street Como/Manning to Jackson Road, Karawara, the connecting link being an unmade section of Murray Street, Como, to develop a new medium density corridor and high frequency, rapid transit route for buses and light rail between Canning Bridge Interchange and Curtin University.
>
> Your petitioners therefore respectfully request the Legislative Council to oppose this intention and to recommend that Manning Road, an arterial road, be considered as a more appropriate route.

[See paper 4070.]

TIER 3 GRAIN FREIGHT RAIL LINES — CLOSURE

Petition

HON KEN TRAVERS (North Metropolitan) [10.03 am]: I present a petition containing 14 signatures and couched in the following terms —

> To the President and Members of the Legislative Council of the Parliament of Western Australia in Parliament assembled.
>
> We the undersigned residents of Western Australia are opposed to the closure of the Tier 3 Grain Freight Rail Lines across the Wheatbelt. We believe that the decision to close the Tier 3 lines will result in a significant increase in truck numbers both in the Wheatbelt and the Perth Metropolitan area as they deliver grain to the Kwinana Freight Terminal.
>
> We believe that in determining to close these lines, the Barnett Government failed to consider all of the road safety impacts, economic impacts, environmental impacts and the social/amenity impacts of the line closures.
>
> We believe the Government has failed to give proper consideration to the CBH Business Case which demonstrates that rail transportation of freight can be competitive with road.
>
> We therefore urge the Legislative Council to investigate the Government decision making process for the closure of these lines with particular consideration to the CBH business case.
>
> And your petitioners as in duty bound, will ever pray.

[See paper 4071.]

PAPERS TABLED

Papers were tabled and ordered to lie upon the table of the house.

DISALLOWANCE MOTIONS

Notice of Motion

1. Shire of Derby–West Kimberley Waste Services Local Law 2011.

2. Shire of Kalamunda Keeping and Control of Animals and Nuisance Local Law 2011.

Notice of motions given by **Hon Sally Talbot**.

WHEATBELT RAIL LINES — CLOSURE

Motion

HON KEN TRAVERS (North Metropolitan) [10.06 am] — without notice: I move —

> That this house notes that the Barnett–Grylls government failed to properly consider the economic, social, environmental and road safety impacts before deciding to close 700 kilometres of Wheatbelt rail lines. We believe this is a bad decision and it will result in thousands of additional trucks on Perth roads. We call on the government to reverse this decision and to place a high priority on the appropriate use of rail to our ports.

There is no doubt that the decision to close 700 kilometres of rail lines in our Wheatbelt areas is a bad decision. It is a bad decision for the people of the Wheatbelt; it is a bad decision for the people of the Perth metropolitan area. I want to say at the very outset, though, that this is not a debate about being anti-truck. At forums that I have been to recently, the Minister for Transport has tried to portray some of the community members who oppose the closure of these rail lines in that light. This is about using rail when it is appropriate to do so—that is, when bulk commodities have to be shifted and when containers need to be moved in and out of ports. That is what this is about. Everybody knows and accepts that trucks will continue to play a significant role in the freight task within Western Australia, but there are appropriate places to use rail. Moving grain from the Wheatbelt to the Kwinana and metropolitan grain terminals is a perfect example in which it is appropriate to use rail rather than trucks.

For a number of years I have been raising this issue in this house, and until now I have focused on the impacts that closing those lines will have on those Wheatbelt communities. Therefore, if anybody wants to criticise me because in this motion I finally start to talk about it being related to the impacts on Perth roads, let me explain why I have done that. It is because Mr Barnett, Mr Buswell and Mr Grylls have not listened to the concerns of the Wheatbelt community. If we can make sure that they understand and if the residents in those marginal seats such as Forrestfield, Jandakot and Riverton realise that this decision will mean thousands of additional trucks going down their streets as they travel to the Kwinana or the Forrestfield grain terminals, maybe we will be able to get this government to sit up and listen, because when we have simply raised the concerns of the Wheatbelt residents, we have been met with deaf ears from this government. I congratulate the Wheatbelt people because they knew from the very beginning that this was the wrong decision. They did not need to take time to analyse and go through the decision; they knew instinctively that it was wrong. The people of the Wheatbelt have continued to work over the past two years to show that the analysis carried out has simply failed to recognise the situation correctly.

There is still a range of questions about the business case and the modelling the government used in making its decision. One question that I look forward to getting an answer to through the estimates hearing process is about the type of truck the government's modelling is based on. Was it based on a restricted access vehicle class 7 or a restricted access vehicle class 3? Why is that an important question?

Hon Simon O'Brien interjected.

Hon KEN TRAVERS: The failed former Minister for Transport can laugh at me for that, but it is a very crucial point.

Hon Simon O'Brien: You're so far off the mark, it is unbelievable.

Hon KEN TRAVERS: When we asked the government's bureaucrats that question in the estimates committee, they could not answer.

Hon Simon O'Brien: You are so far off the mark!

Hon KEN TRAVERS: I hope that the minister can answer that question for us today because it is crucial; it determines how many trucks are needed. A RAV 7 will carry almost double the load of a RAV 3 or RAV 4. That is a crucial question. If the government gets that wrong, its whole modelling falls apart. Let us face it, when we ask governments to model these things, sometimes they get it right and sometimes they get it wrong. I think, though, that if we ask a major player in the industry, such as Co-operative Bulk Handling Ltd, whether it is prepared to put skin into the game and front up and put its money where its mouth is, the answer is yes it is. CBH would not say that if it had not done the modelling and the work on the business case to assure itself that the proposal is economically sound for the members of that cooperative. It is putting up $175 million of its members' money. That CBH is prepared to do that tells me there is a good case to reopen these rail lines. In fact, one reason it wants to do that is the estimation that transporting grain by rail instead of road will save Wheatbelt farmers about $6 a tonne. I would have thought that after the hard time Wheatbelt farmers have had in the past couple of years, everyone in this house would want to assist them as best they can. Finding a way to give farmers an extra $6 a tonne sounds to me like a good thing to do, especially as it is a simple equation for the government. The equation is that we put money into roads or we put the same amount of money into rail. We are not even

asking the government to stump up more money for rail than what it is putting into roads. In many cases, these roads will not be used for any purpose other than to transport grain to terminals. That is why we should support this motion. That is why this Council, if it is a house of review, should be demanding that the government review this decision because the government has got it wrong.

Of course, we need to explain this to the people of the metropolitan area so that they start to understand the issue. I have to say there are some good people in the Fremantle area who are holding a rally tonight who have started to realise what the impacts of this decision will mean for people in the Perth metropolitan area. The government strategy is called the Brookton strategy. That is the basis on which the government has devised its model. Under the government's model, the plan is that we will close 700 kilometres of rail across the Wheatbelt. I have brought in a map for the benefit of anyone in this place who does not understand the issues. Under the government's plan, the rail will be closed to bins in places such as Quairading and Corrigin and the grain will be trucked from those locations to either Brookton or Kellerberrin, which are the two major points of delivery —

Hon Jim Chown: Merredin.

Hon KEN TRAVERS: And Merredin, but the two major bins that require an upgrade are at Kellerberrin and Brookton. Some grain will also be trucked to Cunderdin, but the two bins identified as needing a significant upgrade as part of this —

Hon Jim Chown interjected.

Hon KEN TRAVERS: If Hon Jim Chown wants to get up, I will look forward to him defending his government's position that is at the expense of his constituents. Please be my guest when I finish!

Hon Jim Chown interjected.

The PRESIDENT: Order!

Hon KEN TRAVERS: I hold the map up for the benefit of members and if they do not have a copy, I am happy to table it a little later. This map shows how the government's strategy is to move grain by truck to railheads at Brookton, Kellerberrin and other places on the east–west line—but Brookton and Kellerberrin are the main two—and aggregate it at those locations.

When I speak to people in the Wheatbelt, they tell me that it simply will not work for a number of reasons. It is a bad decision for a number of reasons. The first reason is that once we have loaded grain into a truck and driven it to Brookton—we do not need to be very smart to know this—it is quite a short distance down Brookton Highway to the Kwinana grain terminal. There is the additional cost of unloading the grain. As anyone who understands the economics of train travel knows, often a big cost is in the double handling. Therefore, unloading grain from a truck to then load it into a train to take it to the Kwinana grain terminal will simply become uneconomic. The modelling that Hon Jim Chown referred to earlier showed—this is the government's own modelling—that it was supposedly cheaper to deliver grain by road, rather than rail, from Brookton to the port at Kwinana. However, somehow, mythically, under the government's modelling, it will be able to deliver that grain cheaper by rail, even though that is the government's own modelling! That is the government's own reports that Hon Jim Chown wanted to refer to earlier. The simple fact is that that modelling was wrong; it is cheaper to put the grain on at the head of the rail. In fact, we know for a fact that for places like Kulin, even under the government's own modelling, it was always cheaper to carry the grain by rail rather than road. Once we put grain transportation onto road, it will stay on road.

Hon Jim Chown: CBH disagrees with you.

Hon KEN TRAVERS: The member will get a chance to put his case. Grain transportation will stay on the road and it will come into the metropolitan area in volumes such as people have never before seen.

Hon Simon O'Brien: How many trucks do you think?

Hon KEN TRAVERS: That is an interesting question and I welcome the interjection from the failed former Minister for Transport. Clearly, he does not know. The simple answer to that is there is about a 30 000 tonne average grain loading onto grain vessels. Therefore, at 55 tonnes a truck it will equate to over 1 000 truck movements every time a grain vessel is loaded with 30 000 tonnes. That is the sort of truck movements that we are talking about. When we transport grain by train, it is 10 train movements, not 1 000 truck movements.

Hon Jim Chown: So you're saying the —

Hon KEN TRAVERS: No, the member will get his chance. If he lets me finish, he will hear it all.

The PRESIDENT: Order, members! We know that this session is limited in time. Each member who gets to speak has a limited amount of time; therefore, members who interject who want to speak at some later stage will have no excuse for being interjected on. I do not want to see that happen; I want to see each member have their allocated time without interruption so that they can make their point.

Hon KEN TRAVERS: Mr President, I appreciate that and I must say that at one level I am pleased that this debate has sparked Hon Jim Chown's interest in this issue. I forgot that he was even in the chamber because I had not heard from him for so long! It is nice to see the member here. This might be Hon Jim Chown's moment of glory in the chamber if he can prove me wrong.

However, let us look at the logistical issues that we are talking about. Another crucial issue to handle the task that the government has set itself requires a significant upgrade of the Brookton terminal. In fact, the business case prepared for the government as part of the WA strategic grain network review identified a requirement for a range of industry contributions to be made to the grain network. The report listed that a number of investments needed to be made by CBH. Page 46 of the report states —

- Brookton — New over-rail loading bins – $l0m
- Avon — investigation of rebuild of the Narrow Gauge/standard Gauge interchange (which would cost $17m)
- Kellerberrin — New road receival and fast conveyors for train loading – $l0m
- Merredin — Road receival upgrades – $7m

If we were so far down the track, one would think we would be at the point at which those upgrades would be occurring. When this issue first arose a number of months ago, I asked the failed former Minister for Transport when he was going to upgrade the roads to handle the task. He kept saying, "It will all be okay. I've got the questions here. If any members don't believe me, I can get them out for them." He answered Hon Matt Benson-Lidholm in the same way—that it will all be fixed; the roads would be sorted by the time the rail system is closed. What did we find earlier this year? They had not even started and they had to find a rescue package of $3 million, which, if they close the rail, will be $3 million worth of wasted, dead money.

Hon Mia Davies interjected.

Hon KEN TRAVERS: If the member waits, I will go through it all. The interesting thing is that Hon Mia Davies' party chose to sit with her Liberal buddies here. They are the government, they are the ones who need to fix it, and fix it today! Before the next election, I will make it very clear what the Labor Party's policies are. Do not worry about 12 months' time, let us worry about today. The National Party is in a coalition with its Liberal buddies, it has to deliver it! The Liberal–National government is the government today. We will have our policies out there for people. One of the things that I will put out very clearly is Labor —

Several members interjected.

The PRESIDENT: Order! Obviously quite a few members around the chamber want to have something to say about this. I want to give every member the opportunity to do that, but in their own time.

Hon KEN TRAVERS: I am more than happy to stand and debate anywhere, anytime, Labor's record on rail versus Liberal–National governments' record on rail in Western Australia. The Liberal and National Parties have 30 years' history in this state of making promises about rail and failing to deliver. Mr Grylls made the promise before the last election that he would fund and maintain all 2 300 kilometres of rail. Has he delivered? The answer is no. When we make a promise, not only do we deliver, we deliver it well, which is the difference. We make promises about rail that we intend to keep.

I come back. Not only has the Liberal–National government made a bad decision, it is failing on the implementation of that decision as well. The roads were not ready in time. The government has had to go out and spend $3 million. That is $3 million out of the state budget that could have been used in so many other ways to keep these rail lines open for another year. If it follows through on its policy, it will be money down the drain. Has the government got those agreements with Co-operative Bulk Handling Ltd to upgrade the Brookton, Kellerberrin and Merredin locations? The simple answer is no. I asked that question this week of the minister representing the Minister for Transport. In his usual slippery way, the Minister for Transport did not want to give a straight answer. He said, "Yes, we've got ongoing negotiations." I wonder whether the government actually has ongoing negotiations because I understand it is very clear that CBH has said it is not going to make those investments; but that is for CBH to determine. The simple fact is what the Minister for Transport made very clear in his answers this week; they simply have not finished that work, yet in 12 months' time they expect to transfer it over. I predict that it will not be ready.

The reason that becomes a crucial issue can be seen if one looks at the Brookton terminal. It currently carries about 200 000 to 300 000 tonnes of grain through it on an annual basis; I think Brookton is about 200 000. Added to that will be about 500 000 from the up-country sites coming in. It will end up trying to move 750 000 tonnes through the Brookton terminal. I do not think it will be physically possible to load 10 trains out of that location, even if half that number came down from the Avon yard along the standard gauge rail so there would only be five in about a 10-hour period coming out of one grain terminal; yet that is the government's plan. I do not think it has thought through the logistics. I do not think it will be physically possible. It will result in more

trucks coming down the hill, whether it is Brookton Highway or Great Eastern Highway. Grain will be travelling through seats such as Forrestfield, Riverton and Jandakot. They are the seats that it will go through as it heads to the Kwinana terminal, because, under the Brookton strategy, that is the only way the grain can be transported to the terminal. Trucks will need to be used. That is why this week, when I asked the Minister for Transport to guarantee we would not see an increase in trucks on our roads in the Perth metropolitan area, he was unable to give that guarantee. He knows in his heart of hearts that the Brookton strategy means more trucks on roads in the Perth metropolitan area. That is why we, as a house of review, need to be the force that says to this government, "Stop! Have another look at this. You have made a bad decision." It is a bad decision on economics. I have gone through enough of that today to highlight it, but as I again recap, if CBH is prepared to put its $175 million up, that says to me that it might be the government that has its modelling wrong, not the private sector.

The second reason this is a bad decision is how it impacts on the environment. As I mentioned earlier, we are talking about 10 trains versus over 1 000 truck movements for one shipment of 30 000 tonnes of grain. Just from this area, we are talking about between 1.5 to two million tonnes of grain. The long-term average is just short of 1.5 million tonnes of grain. That means a significant increase in carbon dioxide gas. If one is a climate change denier, as many on the other side are, that might not be a problem, but for the rest of us in the community, that is a major problem. It is a bad decision on social grounds. There is no doubt that it will have a social impact on the fabric of the communities from which we will rip this rail out. That is why those communities are fighting. I take my hat off to those community members who stood up to be counted. I understand how difficult it has been. For many of those people, it is about challenging the political party for whom they have given life-long support. I understand how difficult that is for those sorts of people. I take my hat off and congratulate them for the effort they are making in this area.

It is a bad decision for road safety. Rail transportation is six to nine times safer than road. Of course we cannot always, as I said when I started this conversation, use rail transport, but there are places like Fremantle harbour where we can use rail over road. It is a bad decision that follows on from the bad decision made by the Court–Barnett government when it originally privatised these lines. It has not delivered. In fact, that privatisation has made it worse. Now this government wants to privatise our hospitals. God only knows what that will be! I look forward to finally hearing from the Liberal members of the Agricultural Region defending their region.

HON SIMON O'BRIEN (South Metropolitan — Minister for Finance) [10.27 am]: Firstly, the government rejects the premise in this motion that portrays either the mover's fundamental lack of understanding of this issue or the determination of the opposition to perpetuate a myth. The failed former parliamentary secretary for planning and infrastructure says he is going to tell us what the Labor Party policy is on this matter some other time, but we already know what the policy is.

Hon Adele Farina interjected.

Hon SIMON O'BRIEN: The member who was the parliamentary secretary, and the other one who is beetling on behind him, who was also, in her day, a parliamentary secretary to Hon Alannah MacTiernan, ought to know this as well, or perhaps they were kept in the dark because they were not important enough to know! But former Ministers Ellery, Ford and Ravlich were all ministers in a Labor government that received the proposals, I believe from the former Minister for Planning and Infrastructure, to spend money on various components of a package to deal with grain rail networks and other associated matters. They considered it at least once, but possibly in a couple of budget rounds in 2006 and 2007. Having considered that, the former Labor government decided to do nothing. There was no talk —

Hon Ken Travers: We were negotiating with the federal government to get money, and we did not close the lines!

The PRESIDENT: Order! Let me remind members that the same rules apply to everybody. We have limited time for each member to speak on this motion and they should be entitled to that time without interjections.

Hon SIMON O'BRIEN: The Labor government considered the matter and did not put anything into it. I heard no haggling from the failed former Parliamentary Secretary to the Minister for Planning and Infrastructure, the mover of this motion, about $3.3 million for this or $100 000 for that, because there was nothing on the table—not one cent. So let us not have any of the member's blowhard nonsense on this motion about the millions of dollars that should be involved in doing this, that and the other, because when Labor had the purse strings and the policy levers, it did absolutely nothing. It did actively consider it, it researched it and, on that basis, it then made the decision to do nothing.

Hon Ken Travers: That is a lie and you know it!

Hon SIMON O'BRIEN: Did the member just say I was lying?

Hon Ken Travers: I said, "That is a lie".

Hon SIMON O'BRIEN: Mr President, if it is a lie, I urge one of those former ministers to get up and tell me that is the case, because the former Labor government did consider the matter—it was a very detailed matter and I believe it was considered in cabinet subcommittee budget forums—and all the outside evidence that was available and it rejected it.

Hon Adele Farina: How do you know that?

Hon SIMON O'BRIEN: How do we know that? What is the ultimate proof? Was it an issue for years? Yes, it was. What showed up in any Labor budget? Zero. Was Labor asleep at the wheel? Was it blind to it then but it is suddenly aware of it now? The hypocrisy of these people is quite unbelievable.

The other point I want to nip in the bud right at the outset is all this emotive stuff about decisions being made to close railway lines. This government has made no decisions to close railway lines. This government is not about closing railway lines. If rail lines are not going to be used because there are no customers or because no rail operators want to operate trains on them, why should the taxpayers of Western Australia spend many millions of dollars upgrading rail lines that are not going to be used? That is the ultimate test. The point is that it is a question of whether rail lines are going to be used by farmers and others; it is not about whether this government is closing rail lines. We have done a heck of a lot—I am going to come to that in just a moment—to make sure that we have an extensive rail network fit for purpose and fit for the future. The previous government was spectacular in its lack of ability to get to the point and make a decision—to make a commitment on this. We know about the Grain Infrastructure Group; we have heard about it.

Hon Kate Doust: All you lot do is talk about things; you don't deliver.

Hon SIMON O'BRIEN: That interjection from Hon Kate Doust is a stupid interjection.

The PRESIDENT: Then you can safely ignore it!

Hon SIMON O'BRIEN: Mr President, why do we not just compromise and I will simply treat it with the contempt it deserves.

We have already established that the Grain Infrastructure Group exercise of the previous government delivered zero. Under this government, when I was the minister, the strategic grain network review concluded and reported—we have discussed this before in this place many times—that there was merit in investment in parts of our rail network, that a considerable amount of re-sleepering investment was warranted, and that investment has been put into the tier 1 and 2 rail networks and, I might add, the tier 3 network. Money has been put into that network, which those people in the opposition ignore. As an alternative to having the grain from some tier 3 line bins going directly to port by road, the Brookton strategy was proposed. The whole idea of the Brookton strategy is to get grain onto rail—grain that otherwise would remain on road. All grain goes on road at some stage. There are no rail loading facilities in the middle of wheat paddocks. All grain goes on road at some point, and it is a question of how early in the supply train it is transferred to rail. That is what impacts on how much remains on road as it comes through the metropolitan area of Perth on its way to Kwinana, not the Fremantle inner harbour as Hon Ken Travers said, or, indeed, through the centres of Geraldton, Albany and Esperance. This state government, with the commonwealth government, assessed the strategic grain network review and we approved infrastructure funding of $187.9 million for rail re-sleepering alone. Compare that with the zero that was put in by our critics. That is for the tier 1 and 2 rail networks, and a lot of progress has been made on that. I will not give members a progress update because of a lack of time. Also, $118 million is to be applied to roads in the tier 3 rail line areas in particular, but also elsewhere. Of these funds, $171 million was provided by the state government. In addition, a transitional assistance package of more than $10 million was provided to keep unviable tier 3 lines open in the interim. The benefits of all those works, whether those benefits be to the grain industry, road users or other stakeholders in the rail industry, are being delivered by this government, whereas the former government failed to do a thing.

As I say, we are going to hear in due course from Hon Ken Travers, when he is ready, what Labor is going to do about this particular issue next time around, if it ever gets a chance. But it has a lot of ground to make up. I do not know whether Hon Ken Travers fancies himself as the next member for Central Wheatbelt. I want to say something about Hon Brendon Grylls. I have observed him closely in this debate and I think he has shown integrity and guts, which is lacking in members on the other side—especially integrity—when we review the hypocritical statements that are being made.

Hon Kate Doust: Excuse me! That is not appropriate.

Hon SIMON O'BRIEN: It is highly appropriate, in view of what was said earlier in this debate. Unlike the opposition spokesman, who is just trying to get some sort of leverage out of this for the seat of Riverton, or whatever he mentioned, Hon Brendon Grylls represents a very large part of the Wheatbelt. I have been with him on a number of occasions when he has stared down those people who say that the government has to keep all these railway lines open regardless of whether there is a case to do so. He has asked them why they do not put

their grain on those rail lines. He has publicly said that if a benefit of 50c a tonne is to be made, some farmers will get up in the middle of the night to take their trucks down little, rickety back roads to avoid paying the extra 50c a tonne. And that has the stamp of truth on it. Hon Brendon Grylls inhabits a real world that I do not think Hon Ken Travers even knows exists.

I am proud of what this government has done, and of what I have done for that matter, via the strategic grain network review, in producing a package of hundreds of millions of dollars to deal with the future of the grain rail and associated road networks in Western Australia. I am proud of it. It is something that I can hold up as an achievement. Of course, it is always going to be a work in progress, and that is why the package I took to the Barnett-Grylls government, as the member opposite likes to call it, which was approved and funded by that government in concert with the commonwealth, exhibited the flexibility to deal with an emerging and ever-changing environment for the state's grain growers. Of course, from one year to the next there are going to be peaks and troughs—highs and lows—of yield in various districts in response to weather and other conditions, and we have to have transport systems that are responsive to that world reality as well. That is what we are delivering. Is it capable of evolving? Indeed, it is. I do not know whether members are aware of it, but the government has now authorised further money to assist with the operational life of a number of tier 3 lines to reflect the current larger-than-average harvest.

Hon Ken Travers: No, it is because you didn't do the work. That is why you are putting more money in. You failed to implement your plan.

Hon SIMON O'BRIEN: The empty pockets of the empty vessel condemn those opposite who want to criticise what we are doing. We have shown that we are adaptable and flexible, but more to the point we are committed to guaranteeing the future of a grain rail network in Western Australia. That is what we have done. Coming along in our wake and wallowing in their irrelevance because of their former inactivity are Labor Party members; all they want to do is to try to nitpick on some matters around the periphery. They do not bring a lot of credibility to this debate.

Will there be more trucks on metropolitan roads, as the member threatens us with? The final sentence of the motion states —

> We call on the government to reverse this decision —

I have already dismissed the premise of that part. It continues —

> and to place a high priority on the appropriate use of rail to our ports.

We have a government that has put a high priority on the appropriate use of rail to our ports. That has been demonstrated at the port of Geraldton. That has been demonstrated at the port of Kwinana. I think it was a slip of the tongue by the member, who said that we go to the Fremantle inner harbour. The appropriate use of rail to our ports has been exhibited in Albany. I am proud to say that the re-sleepering that I argued for and got funded for that line is now approaching completion. It is out there, Mr Travers, when you want to tell us that we never do anything about rail. We have done it and it is out there between Perth and Albany, if Hon Ken Travers wants to go and have a look at it. Clearly, this motion has no basis. Clearly, the mover of this motion has no credibility. The debate does not merit any further attention.

The PRESIDENT: I know that members want to speak in this debate but I have to try to be fair. It is non-government business, so I will give the call to Hon Matt Benson-Lidholm. I have noted the other members who rose and I will make sure that each party gets a chance to put their point of view.

HON MATT BENSON-LIDHOLM (Agricultural) [10.43 am]: Thank you, Mr President. Firstly, I thank Hon Ken Travers for bringing to the attention of everybody in the house and no doubt the many communities who are listening to this debate today—who will also read it in *Hansard*—issues that are of significant importance to the very livelihood of many of the constituents whom I represent. A number of comments have already been made in the chamber. I just want to focus on some of them. Hon Ken Travers made a very pertinent remark when he said that Labor is basically concerned about the appropriate use of rail and the appropriate use of trucks. The appropriate use of trucks is not to transport grain to Kwinana through the escarpment and the Swan coastal plain. That is a given. Hon Ken Travers also made a particularly relevant point about the Brookton strategy, explaining the roles of Brookton, Kellerberrin and Merredin. He particularly noted the unworkability of that strategy. The other point that I think bears repeating, and I will make mention of this in a while, is that Co-operative Bulk Handling Ltd has done its modelling and is prepared to go ahead with an initial investment of something like $175 million for the rail transportation of grain.

Hon Simon O'Brien: It was this government that gave it the confidence to do that. That is what they have said publicly.

Hon MATT BENSON-LIDHOLM: Minister, I am not here to argue with you. The minister had 20 minutes in which to speak and I have only 10 minutes. I have only eight and a bit minutes left now. The fact of the matter is

that if CBH is prepared to go down that pathway, let us give it a chance and let us shore up the future of communities that have tier 3 rail lines throughout their localities. That is my comment.

The minister said that we do not understand. I wonder whether he has conveyed that message to the farming communities that are promoting the retention of these rail lines. They are going to be around the place. Is the minister prepared to go out and tell them that they do not know what they are talking about? I doubt it. I am also led to believe that there was in place some sort of 15-year cyclical maintenance review agreement. However, come 2008 Labor obviously lost the state election, so that particular responsibility is now very much vested in the current government. I believe that the minister is talking about a selective grain rail network. The government's only promise is to guarantee tiers 1 and 2. Tier 3 lines, as I will demonstrate very shortly, are the ones that are going to be closed if the government has its way. They are the ones I am particularly concerned about.

I would like to acknowledge the endeavour and commitment of a couple of groups. One is the Wheatbelt Railway Retention Alliance. I particularly note the contributions thus far of its chairman Bill Cowan and coordinator Jane Fuchsbichler. The second is the Fremantle Road to Rail Campaign group. I have not had a lot to do with that group. I have met with them, but being more concerned with the Agricultural Region, I have steered clear of the group in relatively recent times for no other reason than that it has not necessarily been my focus. Many thousands of Western Australians from both the Agricultural Region and the metropolitan area have thrown their support behind this campaign—we will see that this afternoon with the presentation of petitions. This is a campaign that will hopefully, for the farming communities I represent, see a refocus on the long-term retention of rail as the predominant means of transporting grain, particularly in the southern Wheatbelt zone.

I will give some historical perspective to this matter. Hon Ken Travers has already mentioned something about the privatisation of Westrail Freight. The promise was made some 10, 11 or maybe even 12 years ago to deliver a dynamic and sustainable rail system. Largely, that has happened. But what has happened in Wheatbelt south and what could possibly happen over the next year or so, once the next 12 months are out of the way, is something I do not necessarily want to see. The windfall payment to the government back in 2000 either has been squandered or, as has been suggested in many quarters, was not used to maintain the ageing infrastructure, let alone to invest in rolling stock improvements. That is a condemnation of this government because of its obvious relationship with the previous government. Now the government is seeking to adopt the cheap option and to force grain onto an unprepared road system. That is why we are seeing a 12-month hiatus. In the meantime, no money is being spent on those roads.

Basically, what the government is now seeking to do through the Strategic Grain Network Committee report is to close down 736 kilometres of Wheatbelt railway lines. The Strategic Grain Network Committee review suggested that rail transport is $78 million more expensive than road transport. However, according to the new CBH-Watco proposal—I understand they have done their homework—that particular deal is now seen to be in the order of $9 million cheaper than road transport. It is also noteworthy that CBH is committed to using tier 3 lines for the long term. CBH is also committed to investing in infrastructure to support rail use, including rapid rail-loading facilities. It is also worthwhile to note that, being a cooperative, CBH is there for the long haul. It is not like a publicly listed company that is prepared to take its money wherever it suits. CBH represents farmers and farming communities; it is there for the long haul. It has done its homework and I would believe CBH rather than a publicly listed company that is prepared to move its money at the whim and fancy of the markets.

Farmers in the Wheatbelt south zone are entitled to feel let down over the government's decision to seek to close tier 3 rail lines. I mentioned that back in 2000 the Court government went down the privatisation pathway, and I just remind members about the $585 million price tag on the sale of Westrail Freight, and a supposed $400 million commitment to track maintenance and rolling stock over a number of years subsequent to that. The net effect of that particular benefit should have been something like $985 million. It was the responsibility of the Court government to make sure that that was well and truly put in place, but from what I can see, that did not happen. The promise from the Court government, though, was a dynamic and sustainable rail system. As Hon Ken Travers has already indicated, privatisation has been a disaster, particularly in some of these Wheatbelt Railway Retention Alliance shires—Narembeen, Merredin, Mt Marshall, Quairading, Kondinin, Trayning, Corrigin, Cunderdin, York, Beverley, Bruce Rock, Kulin and Mukinbudin. These shires are now calling for tier 3 lines that are destined for the chopping block to be reinstated as the preferred means of getting grain to the port.

I would like to address some of the points made by Hon Ken Travers, particularly the economic considerations, because at the end of the day this is a dollars and cents issue. However, it is not purely and simply a dollars and cents issue, as I am sure other members will articulate shortly. There are some facts worth considering. Firstly, a business case prepared by CBH for government shows that, with the new, more efficient trains that are proposed, tier 3 rail can move grain cheaper than road, saving something up to $6 a tonne. I know where farmers would rather that money be. They would rather it be in their pockets, not in the pocket of trucking companies. The other interesting point is that I am led to believe that 98 per cent of grain arriving at Kwinana port comes by rail, with

a significant contribution to that coming from the Wheatbelt south zone. That 98 per cent is the largest received on rail by any port in Western Australia. That certainly calls into question the minister's earlier claims.

I turn to some other very important economic facts. Capital spent on rail lasts 35 to 40 years, whereas capital spent on roads lasts one to 10 years. The cost of repair and upgrade to rail is around $150 000 to $160 000 a kilometre; whereas the cost of repair and upgrade to roads for road train specifications ranges from $600 000 to $1 million a kilometre, and most of the roads that are in place now are unsealed, old roads that need lots of work, and the machinery that runs up and down those particular roads is very, very new and much larger.

HON PHILIP GARDINER (Agricultural) [10.53 am]: I disagree with the motion because it refers to "deciding to close 700 kilometres of Wheatbelt rail lines". Nothing is closed until the trains or trucks have actually stopped running. Currently we have a decision that these railway lines will be open for at least another 12 months. We are really talking about some of the background that can be considered in making a decision of road versus rail in the tier 3 area. For me, nothing is final until a closure is absolute so that nothing runs on those lines.

In the process of discussion we have had over a number of months on this issue, we have not just consulted CBH, which is claiming efficiencies it can bring on rail compared with road, but also spoken to those outside CBH who are highly experienced in rail, both in Western Australia and the United States, and the efficiencies that people external to this argument are making; they tend to reinforce a difference from what was concluded in the December 2009 grain freight network report. When I examined that report soon after it was released, I found it to be flawed. However, that was the foundation upon which decisions have so far been largely cast—not totally, but so far. The flaw is that we cannot rule off something if there has been no maintenance expenditure on rail for the previous 15 or so years; we are just drawing an arbitrary line. We then used that logic in the analysis that was the basis for the $100 million it appears we need to spend on rail when comparing it with road, when road has had taxpayers' funds spent on it continuously. If we are to deal with this using economic rationalism, either we have to add equity to the argument or we need to respect the differences. That difference really affected the way I considered the grain freight network report.

The report claimed that road is cheaper than rail in the long haul. It certainly was at that time. That is absolutely true. The interesting point is that road was cheaper than rail by between $1.80 and $15 a tonne across different parts of that tier 3 area, so road was much cheaper. What did the people out there who were growing the grain do? They paid the higher price to put 92 per cent of the grain from paddock—not from bulkhead—onto rail. Does that make sense to any of the economic rationalists here?

Hon Jim Chown: It was subsidised.

Hon PHILIP GARDINER: No, it was not subsidised. I am sorry, but Hon Jim Chown has got it wrong yet again, unfortunately. People are voting with their pockets at a higher price. Why have they done that? It is because the most important thing for a farmer harvesting grain in his paddock is to make sure that that truck is back at the farm, so they are not sitting in a header waiting for it. The further the truck has to go, the greater the chance it will not get back in time. Why is that so important? It is because the risk of not getting a crop off is high if a farmer is sitting around and wasting time while there is the risk of rain, thunderstorm, hail or even fire—they could do the insurance. Rain deteriorates the value of their grain, and if there are 1.5 million tonnes of grain in the paddock, which is the average five-year harvest—I do not know if that included last year but it is a fair number to consider—and, let us say, one-third of that is there when a storm comes on in mid-December, which is well into the course of the harvest, farmers might lose 500 000-odd tonnes, at $30 a tonne. The grain will have been downgraded from good quality grain to stained grain or, even worse, sprouted grain, when the discount is greater. There is a cost to that community and to those growers of losing that time. They cannot afford those delays.

The only thing that is certain in the costings of road versus rail is the rail cost. Brookfield has done a good job on that. Road is a very variable cost in this whole thing, and the risk is that money will continue being poured into roads because either the foundations or the edges are not right. The Department of Transport has told us that the roads will be pretty good, but that is a risk we will have to run. Already they are over $800 million behind in maintenance work, as a result of getting in contractors who have not done that work quite to the standard that CBH wanted for state roads. They are running behind anyway, and they have already received $60 million to try to cover that delay. They are battling. We know that they are battling because the program that was meant to be implemented this year has not been. That is why rail is back operating for this harvest.

Then we come to the risks that we will be running with so many trucks on the road—if we do go the road route. Opting for the road route will mean that CBH will move nearly all its grain from its sidings located along the rail line onto roads that are yet to be done up or are in the process of being done up. CBH, a business organisation, which also is pretty sensible about where its dollars go, has invested $175 million—it is a cooperative so it is grower money—in rolling stock. Any board would have to be pretty confident to make a decision to spend that much money on rolling stock. If there was any doubt that rail would not work for the company, the board would

not do it. The only reason CBH spent the $175 million is because new information has come through that makes the December 2009 grain freight network report outdated. The new information is that an American operator, which confirms what we know about it from outside discussions we have had, has confirmed CBH's claim of efficiencies that can be extracted. That is a critical part of the confidence we can have in the numbers and the business case that CBH has made.

The figures I have from the Office of Road Safety show that the Wheatbelt of Western Australia has the highest road fatality rate of anywhere in the world—the highest rate in the world. Unfortunately, four deaths have occurred in the past three months out there. The number of road deaths in the Wheatbelt is higher than it is in places such as Thailand, Greece and Poland. This is not only about trucks, but an additional 55 000 50-tonne truck movements up and down the roads, because we do not have rail, will add to the risk. In the meantime, we should not forget that CBH is a logistics manager.

However, if members opposite think that maintaining the tier 3 line will mean that all the grain will go on rail, they should change their minds. That will never happen. We know that 92 per cent is transported on rail already, but at the CBH sidings CBH has to mix protein loads that require segregation for the shipments. They might be 50 000 to 70 000-tonne shiploads of wheat. They have to get enough grain of the same quality from different sites, but often they have to use trucks to aggregate those loads, because there is no rail system there. Members should not think that no trucks will go on the road; they will. But the rail system is the foundation of the transport system that serves that area. In my view, our system will be much riskier if we go for road over rail. Economically, at worst transportation on rail breaks even, but is more likely to be cheaper than road transport based on the efficiencies that CBH–Watco claim they can make. The government may have to consider more investment into rail if it takes that course, and that investment would be about equal to any investment it would have to make into roads. In addition, rail is cheaper to operate and if the Brookton strategy is used, it means an ongoing subsidy will be paid by government of $1.30 or $1.50 a tonne, because Brookton works only if the government pays that subsidy under the transport access project. The government has done well with tier 1 and tier 2 rail lines. The tier 3 line should therefore remain.

HON LYNN MacLAREN (South Metropolitan) [11.03 am]: Thank you very much for the opportunity to speak. I know that many members in this chamber want to speak. It is particularly important that the Greens (WA) put on the record that we are 100 per cent behind this motion. There are several reasons for that; one is that this motion is particularly well crafted. It indicates that we are concerned about economic, social and environmental issues and road safety in light of a decision this government has made to close rail. We are also calling on the government to reverse the decision.

Hon Simon O'Brien: What decision? Identify a decision that has been made along those lines.

The PRESIDENT: Order! Let the member on her feet have her say.

Hon LYNN MacLAREN: Thank you, Mr President. This is not a motion that merely seeks condemnation. This is a constructive motion that calls for particular aspects of a decision to be reviewed and for that decision to be reconsidered. The Greens are 100 per cent behind that. Hon Alison Xamon is really keen to discuss how the extra truck movements will impact on her electorate as they will, particularly in my electorate in Fremantle.

This issue has created unlikely alliances. The first thing I did when I got the Greens portfolio for transport was to front up to the Pastoralists and Graziers Association of Western Australia campaign to restore the tier 3 lines. Can members imagine how difficult it was for me as a Greens member of Parliament to walk into a PGA meeting? But we found common ground on which to fight a campaign that we are equally committed to. It was a beautiful moment. We did not discuss genetically modified food or live exports in detail. We talked about rail and about reducing the number of trucks on the roads in these communities. As Hon Philip Gardiner has so aptly pointed out, 740 people have been killed on the roads in the southern Wheatbelt in the past 10 years. Three hundred and twelve people per 100 000 head of population have died just because of the roads. This is unacceptable and using rail provides an opportunity to increase safety for those residents. That is one of the key reasons for this campaign and one of the reasons we support it. I want to point out that in Cunderdin the additional trucks we are talking about putting on the road—I remind members there will be 85 000 extra truck movements a year because of the decision to close the tier 3 line—will go past a school, a retirement home and a hospital. That will involve vulnerable people and they will be put at greater risk because of this government's decision.

In Moora, as I am sure Hon Philip Gardiner will know, the council has been worried for a while about more trucks on the road and has been examining ways to improve rail efficiency so that it can take more trucks off the road. How will this decision impact on the council? The Barnett–Grylls government seems hell-bent on going in the opposite direction and that is why tonight there is a public meeting in the Fremantle City Council chamber at 6.30 when the Mayor of Fremantle will speak, along with the Wheatbelt Railway Retention Alliance; Fremantle Councillor, Sam Wainright; and the Fremantle road-to-rail campaign speaker Barry Healy. This is what they are putting out to the public. Everyone needs to be aware of why this is a key issue. They are saying that shifting

millions of tonnes of grain by truck will make regional WA roads deathtraps and it will funnel more truck movements through the metropolitan area. Up to 98 per cent of the harvest in the Kwinana zone is currently rail freighted to port. The sheer scale of what Troy Buswell intends is mind boggling. Tens of thousands of road train movements will destroy roads and communities, spewing diesel particulate pollution. They are also concerned about the health impacts, which I will cover quickly if I can.

Hon Jim Chown interjected.

Hon LYNN MacLAREN: The Wheatbelt situation is similar to that of Fremantle. The overwhelming majority of people want the obvious solution to the freight task and that is rail, and it is a motive because it matters, Hon Jim Chown. If he underestimates how much this matters, he will pay for it at the next election. Fremantle residents can be proud of the role our council is playing by joining the Wheatbelt Rail Retention Alliance. Fremantle people have joined their regional counterparts to stop the government's mania for trucks. These are unlikely alliances; they are not just a few people living in a country town out in the middle of where the minister does not visit.

Hon Simon O'Brien interjected.

Hon LYNN MacLAREN: We all care what happens on those roads. This is a city issue. As Hon Ken Travers mentioned —

Several members interjected.

The DEPUTY PRESIDENT: Order, members!

Hon LYNN MacLAREN: — there are three particular areas where this will impact; namely, Forrestfield, Jandakot and Riverton. Members will know why they are important. They are not the only people who care about this issue and I wanted to bring that to members' attention. I want to cover two other reasons the Greens support this motion and then I will sit down because other members want to speak.

We know that extra trucks on the roads will have climate change impacts. One single 600-metre train can carry the load of 50 trucks, or 80 trucks if the load is double stacked. That is a good result. If we can shift that freight onto rail we will reduce the number of trucks and reduce the climate change impacts, which this government seems to have no commitment to, but we would like to see a greater commitment for that. Per container, road transport consumes four times as much fuel as rail on a short haul, and over six times as much on a long haul. My friends, have you considered peak oil? There is no long-term solution to how to move important products in this country, including grain, which is a significant product. We need to take into account the peak oil impacts of moving that grain out to export, and that is an economic and a social issue.

I will wrap up by saying that the health concerns are growing the more we move trucks on our roads, and that is why the people in Fremantle, who have had it up to here with that smog right in their backyards, are now activating in big numbers to stop that movement. We know the impacts of trucks on human health. It is no longer a question. We want to reduce those impacts. This decision will push more trucks onto the roads, and we are entirely opposed to that.

Several members interjected.

The DEPUTY PRESIDENT (Hon Brian Ellis): Order, members!

Hon LYNN MacLAREN: Any person in Western Australia can drive on these roads. If people live in Fremantle, they do not drive around just in Fremantle; they go —

Hon Simon O'Brien: I grew up in Fremantle. Have you ever been there?

Hon LYNN MacLAREN: Has the minister ever been out to the Wheatbelt? Has he ever driven on those country roads where people's lives are at risk?

Government members: Come on!

Hon LYNN MacLAREN: Three hundred and twelve people per 100 000 die, and the government is making a decision that —

Point of Order

Hon KEN TRAVERS: The President was keeping order earlier and keeping that noisy rabble on the other side quiet to allow members to hear what speakers were saying, and I would urge you to do the same, Mr Deputy President.

The DEPUTY PRESIDENT (Hon Brian Ellis): There is no point of order.

Debate Resumed

Hon LYNN MacLAREN: There has been a lot of talk about trucking grain to Brookton and then putting it onto rail. It would be easier for trucks to continue straight to Kwinana rather than putting grain on a train up to Avon

and then down to Perth. The closure of tier 3 lines will inevitably result in more trucks not only on regional roads, but also on our city streets, especially around Kwinana, which any member for the South Metropolitan Region would be well aware of. The increase in the amount of freight on our roads is largely unplanned and unbudgeted for. I have not even begun to ask why we did not ask for federal infrastructure funding to upgrade those tier 3 lines. I have not even mentioned that and I am hoping that another member will. We need proper regional planning to move our freight in the most efficient way possible, not this current ad hoc approach that the Barnett–Grylls government is adopting. I entirely support the motion and I ask both those parties on the other side to give good explanations for why they are intending to close the tier 3 lines.

HON JIM CHOWN (Agricultural) [11.12 am]: I am changing the whole gist of my address today and I will tackle the issue of heavy transport coming to the metropolitan area during the harvest period. Obviously, Hon Lynn MacLaren has no idea what takes place out there in the Agricultural Region when harvest time comes around. We are hearing this fallacious story, also from Hon Ken Travers, that 20 000, 30 000, 40 000 or 50 000 heavy traffic movements will take place in the metropolitan area in the next few months. Rubbish; it is not going to happen. As Hon Philip Gardiner expressed earlier, it is logistically impossible. Let us not forget that the Co-operative Bulk Handling Ltd receival points are still operating. Farmers will be carting grain from their properties to those receival points, and unless those receival points fill up and overflow, there will be no additional traffic in the metro area during harvest. Let us also not forget that the transport of that grain out of those receival points takes place over 12 or 18 months—normally over 12 months. It is a very rational process. In fact, the only time in recent history when there has been a surge of heavy transport through the metro area was two years ago when deregulation took place. The markets demanded grain out of this state within the first four months after harvest, and CBH did not have the rail traffic or the ability to move by rail the tonnage required to be moved. In fact, it is only recently that the Kwinana receival point has been made available to unload road transport. Most of the road transport goes to Forrestfield. I have never heard in recent times of heavy grain road traffic going through Fremantle, so Lord knows why people are having a rally down there, but best of luck to them. Let us not let the facts get mixed up with a good, emotional story that appeals to the member's political base.

Hon Simon O'Brien interjected.

Hon JIM CHOWN: Exactly. One of the reasons the tier 3 lines have an issue regarding competition with road transport is that they head in the wrong direction. They head towards Merredin; Fremantle port is west. Therefore, from an efficiency perspective, every grower would understand that CBH has subsidised their freight task until recent times, and it is no longer tenable in this deregulated situation. So many of those growers have taken the option to use transport to a bin closer to the port of Fremantle. With the rationalisation, the tier 3 lines will be open for 12 months for all the reasons expressed by Hon Simon O'Brien, and in time they will be mothballed. But the industry is virtually pursuing the fact that tier 3 lines be mothballed.

Hon Lynn MacLaren: I don't think your National Party colleagues agree with you. I think your National Party colleagues are disagreeing with you, Hon Jim Chown.

Hon JIM CHOWN: Just hang on a minute. I am talking about the industry. I will read a letter that was sent by the general manager of CBH operations, Colin Tutt, to the Minister for Transport at the time, Hon Simon O'Brien. It is dated 14 April 2009.

Hon Max Trenorden: It's ancient history.

Hon JIM CHOWN: It is not ancient history. It is still relevant today. The letter states —

- The CBH Group has grave concerns about the future of the southern half of the Kwinana zone. As you are aware up to 4 million tonnes of grain passes thru the Perth metropolitan area each year via the rail network. Nearly half of this grain is moved on rail lines which have a circuitous route to port —

As I said, they head in the wrong direction —

> and where road is increasingly becoming a more competitive pricing option for the transport of grain to port. This is occurring because the road distance for many of our rail receival points is half that of the rail distance. Currently CBH is assisting the rail system by implementing a "network pricing" model which distributes the additional rail costs over all sites in our storage network. In the inevitable circumstance where —

In other words, other growers throughout the state are subsidising the rail task, the rail freight, in the tier 3 area, and that is untenable today.

Hon Max Trenorden: Were.

Hon JIM CHOWN: Exactly. That is the point I am absolutely making here, Hon Max Trenorden: they were. CBH no longer has the ability, due to transparency requirements through deregulation, to subsidise these things.

Hon Philip Gardiner interjected.

Hon JIM CHOWN: There are no new efficiencies yet. The letter continues —

> CBH experiences direct site based storage and handling competition, the "network pricing" model will be at grave risk of collapse … This scenario will see large sections of the narrow gauge network … made redundant overnight and road become the dominant competitive mode of transport.

On the transport issue, as I have already explained, there will not be a massive surge in heavy transport through the metro area at any time in the near future. Just for the information of the people in this house, especially Hon Lynn MacLaren and Hon Ken Travers, this year's harvest is estimated to be a very good harvest of about 12.5 million tonnes. In its report, the Grain Infrastructure Group dealt with the percentage of road transport into receival ports down the west coast and south. The report states that the Geraldton zone, for example, will receive 1.8 million tonnes by road, which is 60 per cent of its harvest. Albany will receive 1.15 million tonnes by road, which is 50 per cent of its harvest. The Esperance zone will receive 1.26 million tonnes, which is 90 per cent of its harvest.

Hon Ken Travers: And Kwinana?

Hon JIM CHOWN: For Kwinana—I have just been corrected—the Grain Infrastructure Group report estimated that 65 per cent would go by rail and 35 per cent by road.

Hon Ken Travers: No, 96 per cent goes to Kwinana by rail today, and it will go by road under your proposal.

Hon JIM CHOWN: On the extrapolation of these figures, that is two million tonnes by road.

Hon Ken Travers interjected.

Hon JIM CHOWN: I agree that that percentage is wrong, but the reality is —

Several members interjected.

Hon JIM CHOWN: I do my own research. The point I am making is that the majority of the grain that goes to port in this state is by road through built-up areas without a problem.

Let me get back to the proposal in the Grain Infrastructure Group report, which was commissioned in 2004 by Hon Ken Travers' government, under the auspices of the then transport minister, Minister MacTiernan.

Hon Ken Travers: So you accept that we did some work on it.

Hon JIM CHOWN: I accept that that government did some work; absolutely.

Several members interjected.

Hon JIM CHOWN: But the basis of that report's recommendations had more than 1 000 kilometres of narrow gauge line being closed and the rationalisation of 196 receival points up-country to 46 key bins. Therefore, in effect, that report estimated if that took place, there would be more grain transport traffic on the road over a longer distance at harvest time than ever before.

Hon Ken Travers: And that report was wrong, and it was rejected.

Hon JIM CHOWN: No, it was not rejected. What actually happened is that members opposite lost government—thank goodness for that!

The report also made recommendations to the effect that all tonnes transported on rail would be levied; therefore, growers would be taxed to put their grain on rail to pay for the narrow gauge system infrastructure. That is how the previous government was going to finance it. Legislation was required to formulate rules of entry for potential competitors, so it was going to be anticompetitive. We were going to have a monopoly—these are the recommendations, members opposite should read their report!

Hon Adele Farina interjected.

Hon JIM CHOWN: No, I am not making it up. There would be a single coordinated manager to manage the supply chain for efficiency and equity. We know who that would be—Co-operative Bulk Handling—so there goes deregulation out the door and the industry would be captured by a couple of entities. What is most interesting about that GIG report is that the people represented on the committee were from the Department for Planning and Infrastructure, the Australian Railroad Group, rail carrier WestNet Rail, the Australian Wheat Board and CBH. It is the minister on this side who, when he was Minister for Transport, threw it out the door and instigated another group of people who included representatives from industry groups. They spent 12 months deliberating the issues of the efficiency of narrow gauge and how to overcome the problem. That group included industry representatives—namely, from the Pastoralists and Graziers Association, the Western Australian Farmers Federation and, yes, CBH. After a year of deliberation, that group signed off on the fact that

the best way to make the narrow gauge system efficient for the grain industry was to mothball the tier 3 lines, as I said before, because they headed in the wrong direction. If members opposite want to put inefficiency into the transport system of this state, go right ahead.

Some issues are evolving in regard to grain freight across the whole state, which has been mentioned in this place today; that is, the fact that CBH has taken on the task of having its own rolling stock. That rolling stock has to be operational by 1 May next year because ARG has walked away—it has lost the tender. As a member for the Agricultural Region, I am very concerned that that will not take place. In fact, industry sources tell me that it is unlikely to be fully operational by August, September or October next year, if then.

HON ADELE FARINA (South West) [11.22 am]: I welcome the comments made by Hon Philip Gardiner who has obviously given consideration to this matter and is right across the issue. The only thing that concerned me about what he said was that he felt he could not support the motion because a decision had not yet been made about closing the tier 3 rail lines. I just point out that I am holding a mass of media articles in which the Minister for Transport acknowledges that that decision has been made and that the decision to allow freight to continue on rail for the next 12 months is finite—it ends in 12 months' time. As far as the minister is concerned, his decision is made and he will implement it.

Hon Max Trenorden: There are two parties in this government.

Hon ADELE FARINA: I acknowledge that and I am grateful that there is.

Hon Ken Travers: There is only one Minister for Transport.

Hon ADELE FARINA: Exactly! Hon Ken Travers is absolutely right; there is only one Minister for Transport. If my experience with that minister as a local member is anything to go by, the Minister for Transport does not listen before he makes a decision, so the chance of getting him to listen after he has made a decision is absolutely impossible. Just ask all the people in Busselton about the Busselton Hospital decision that he will not move on.

This motion identifies that the decision has been made and needs to be reversed. Therefore, I urge all members of the National Party to support this motion because it asks for exactly what they want as an outcome at the end of the day. The issue is that communities want freight on rail. For members to say that Hon Alannah MacTiernan did nothing to achieve that when she was Minister for Planning and Infrastructure is absolute nonsense. As her parliamentary secretary, I spent a huge amount of time attending and chairing public meetings that were all about getting freight on rail and having meetings with rail operators on a range of issues. It was a major issue in the south west, but it related to logs and not to wheat, obviously. We invested a huge amount of time and effort in ensuring we got to the point at which we could get logs on rail and reopen the Greenbushes–Bunbury rail line. That was ready to be signed off on when we lost government. What did this government do? Absolutely nothing! This government sat on its hands, despite the fact that right before the election its members went to the community and said that they would honour Labor's commitment to put $20 million into reopening the Greenbushes rail line.

Several members interjected.

The DEPUTY PRESIDENT (Hon Brian Ellis): Order, members!

Hon ADELE FARINA: But once this government was elected, it just sat on its hands and did absolutely nothing. Three years later we are still waiting for this government to honour that commitment. The reality is that this government has a poor track record on rail. It has no commitment to rail. We have an excellent track record on rail—absolutely!

Several members interjected.

The DEPUTY PRESIDENT: Order! There is only one speaker at a time and there is little time left.

Hon ADELE FARINA: I urge members in this place to support this motion because it delivers the outcome that National members want.

Hon Max Trenorden: We don't accept those lines are going to close.

Hon ADELE FARINA: The member is living in la-la land! The Minister for Transport has acknowledged time and again that he has already made that decision. For the member to simply say that decision has not been made is just ridiculous, given that the minister continually acknowledges and reaffirms that that decision has been made.

Motion lapsed, pursuant to temporary orders.

COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS AMENDMENT BILL 2011

Report

Report of committee adopted.

EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Second Reading

Resumed from 9 November.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [11.28 am] — in reply: At the conclusion of the last episode, I was winding up addressing a number of aspects of the policy of the Evidence and Public Interest Disclosure Legislation Amendment Bill in which the government believes it has struck the right balance between the competing interests of a free press that is able to disclose matters that are in the public interest, and the disclosure of information that may be relevant to inquiries conducted by parliamentary committees or other tribunals and the need for the disclosure of relevant evidence in courts. After addressing a number of other issues raised by speakers, perhaps I will now turn to the question of submissions that were received in respect of the bill, which was a matter raised by not only Hon Sue Ellery but also Hon Giz Watson. The government approached, at a very early stage, various media representatives from the print, radio and television media, and also judicial and legal representatives, for comment regarding the government's intentions with respect to this bill, or to shield laws generally. I am not in a position to disclose the submissions that have been received as they were sought on the basis they would assist in informing government policy and drafting of the bill, and it was never understood that those submissions would be made public. The government would be reluctant to disclose that material without the various submitters being aware that they are being disclosed and seeking their views on that.

Hon Sue Ellery: Did you even ask if they minded?

Hon MICHAEL MISCHIN: I have not sought that, no, but I am in a position to provide a summary of what those submissions were. It must be understood these were received at a fairly early stage. A number of views were expressed as to the shape that the various stakeholders thought the legislation should take and were not comments on the bill as introduced to the house. They were at a fairly early stage in the process and helped inform the government's thinking on the issue but are not actually comments on the bill itself.

As far as television organisations are concerned, submissions were sought from Ten news, Nine news, Seven news, ABC news, *Stateline* and *Today Tonight*. As far as the print media were concerned, submissions were sought from *The West Australian*, *The Sunday Times*, the Community Newspaper Group and *The Australian*. As far as the radio media were concerned, submissions were sought from 98.5 Sonshine FM, 92.9 FM, Nova 93.7 FM, Mix 94.5 FM and 6PR, and generally from the Media, Entertainment and Arts Alliance of WA. We received written responses from Channel 10, *The West Australian*, *The Sunday Times*, *The Australian*, Channel Seven, and the Media, Entertainment and Arts Alliance.

As a general proposition, the responses received from the media stakeholders were of the view that the government's legislation should not be modelled on the protections that had previously been in force in New South Wales and the commonwealth. The range of opinions varied, but the substance of specific views expressed were as follows. There are conflicts between them; they are not in any way homogenous, but these are the range of opinions that were received in substance. One was that any shield laws must include a presumption that journalists should not be compelled, or compellable, to reveal sources. In other words, they should not be required to make an application to the courts to obtain the protection. The onus should be on the party seeking to void the protection to establish that the protection should be lost. Another submission expressed an awareness of the need for courts to weigh up matters that might qualify the privilege. Another was that the protection should not be absolute; however, misconduct should only be one factor courts take into account when determining whether privilege should be lost. Misconduct should not be automatic grounds for the protection to be lost. Protection should only be lost in circumstances in which serious wrongdoing had occurred. Another submission was that protection should apply in fora other than courts; for example the Corruption and Crime Commission. Another was that the courts are best equipped to determine what categories of media the protection should apply to, but the definition should take into account the changing nature of journalism. I think what was being driven at there was that we are traditionally accustomed to print media. Media, of course, have evolved over time to embrace radio media and now television media. Much journalism is now reduced to access to the internet by way of websites or other forms of electronic media. Another view stated the development of a suitable level of protection is long overdue and should be proceeded with forthwith.

As I mentioned, the government also sought comment from the legal and judicial fraternity regarding the approach, and received comment from representatives of the judiciary, the Law Society and the Western Australian Bar Association. A divergent set of views was expressed. I will summarise some of the salient submissions. It will be noted that quite a number of them are contradictory or inconsistent with each other, but these are examples of the range of views received by the government on certain aspects of how the bill should be framed. They included concerns regarding proposals to grant privilege to journalists at all, and the view that the present level of protection for journalists was adequate. Another was that, for clarity, the law should set out the factors leading to the protection being granted, were a protection to be granted. Another view was that proposals

that the privilege not be lost in circumstances involving misconduct would require "careful consideration". Another view was that it was essential that privilege should not apply to persons privately engaged in blogging or citizen journalism. Privilege should not apply to persons who have been shown to engage in conduct that would constitute a clear breach of journalistic ethics. Another view was that expansion of the whistleblower legislation would likely be a more direct and appropriate route to ensure protections for such persons who leak to journalists. The matter should be the subject of a further Law Reform Commission reference and protection should extend to tribunals other than courts. Another view was that no such privilege should be created at all. If such a privilege was to be created, a presumption in favour of the privilege should not be supported. Members will see that the government has taken a different view to that.

It was said journalists should have to make an application to seek the protection of sources. Another view was that laws of this nature are being agitated for by journalists to remove or weaken one of the few available sanctions to control the power of the media. Another view was that any benefit discerned by the proposed change should not outweigh the public interest that exists in prosecuting people who break the law, allowing private citizens to protect their reputations by uncovering the source of defamatory statements, allowing people or companies to protect private information or preventing journalists from sheltering behind anonymous or fictitious sources. Another view was that there is a risk of informants providing deliberately false information to journalists to safeguard their own interests; for example, to manipulate financial markets or damage the reputation of third parties. Another view was that if the privilege is introduced in a limited fashion, those reforms could apply to tribunals, parliamentary inquiries or commissions of inquiry. If a privilege is introduced, it should be automatically lost in the event of misconduct or wrongdoing, and that there can be no basis for an informant in such circumstances having their identity protected. Members will see that the balance that has been struck by the government is somewhat short of that. Another view was that if such a privilege were to be created, a presumption in favour of the privilege would not be supported by that particular submitter. Another view was that if a presumption were to be created, it would be desirable to list the factors that the court might take into account in overriding the presumption. Members will see that the government has endeavoured to do that. Another view was that privilege should not be automatically lost due to the presence of misconduct, and the government has taken heed of that. Another view was that the definition of "journalist" should be limited to those who derive income from that occupation and should not extend to bloggers, tweeters and the like. Members will see that a wide range of views were expressed at a fairly early stage in the process about the form that this legislation should take, and the government has done considerable work in achieving what it considers to be a reasonable balance of competing public interest considerations.

Hon Giz Watson raised the issue of section 81 of the Criminal Code and asked a few weeks ago a question without notice of which some notice was given about whether a review had been conducted in accordance with the recommendation, I think, of the select committee report. She was informed that, yes, a review had been conducted. With respect, it is not a matter germane to the purposes of this bill, but suffice it to say that the review had been conducted and the government received advice from Mr Tannin, in his capacity as State Counsel. I will discuss with the Attorney General to what extent the substance of that advice can be revealed at some later stage. That deals with the disclosure of confidential information in a particular context. It really does not have a bearing on the merits of this bill. This bill deals with the matter of whether a journalist ought to be compelled and under what circumstances a journalist ought to be compelled to reveal the source of information, which might very well be derived from a breach by a public servant or someone else under a duty not to disclose information within the scope of section 81. It is not germane to the way that section 81 operates or to any deficiencies in that section; it looks at another aspect of the situation. I am not in a position to go into the merits or otherwise of section 81; that is an argument for another day. But I have explained to Hon Giz Watson that I will raise that issue with the Attorney General, and it may be that some further information can be disclosed outside the house about that advice and the government's position on that section.

I have already mentioned the balance being struck and the relevance of misconduct. One of the factors, of course, is that we have to be careful that we are not encouraging dishonesty, breaches of trust and breaches of confidentiality in order to provide material for publications. A line has to be drawn. There are certain breaches of the law that might reveal some more grave public interest matter that warrants a breach of confidentiality, but in many cases that would not be the case. We have to be careful in balancing the various public interest considerations that we are not, by providing these sorts of protections and shields, simply encouraging dishonesty by people who wish to provide information to the press, or for what might be a purpose of a private nature and have nothing to do with the public interest.

Hon Giz Watson raised the issue of a time limit in proposed section 7A, which is one of the amendments proposed to the Public Interest Disclosure Act 2003, and asked why a six-month time limit had been selected. Frankly, some kind of time limit had to be picked. To leave it up in the air as whatever is reasonable is open to argument. This will allow for some kind of certainty. An inquiry can be quite an involved matter. Twelve months is probably too long. One might argue whether it ought to be nine months, six months or three months, but six

months seems to be a reasonable period in which to allow a responsible authority to complete an inquiry in a satisfactory way and make recommendations as a result of that inquiry, and to expect some kind of action from the responsible authority on that issue. In a sense it is an arbitrary figure, but it is not an unreasonable one. Again, one might argue whether it ought to be a month here or there, but it will allow more certainty than simply saying something like "a reasonable time", which would have to be based on relevant circumstances and be fairly subjective. Six months seems to be a reasonable period.

Hon Giz Watson asked whether these sorts of amendments more properly ought to be included in standing orders. There are a couple of responses to that. In a sense, they could be, but they have not been. Parliament has been seized of the report of the select committee for quite some time, and nothing has happened in that regard. The government has responded to the need for some form of limited protection and, after considerable work, has articulated that in this bill. Standing orders are certainly the expression of the will of this house of Parliament, not Parliament generally. This bill, when made an act, will be an expression of the will of Parliament as a matter of law rather than as a matter of practice and standing orders.

Hon Adele Farina: But still of this house.

Hon MICHAEL MISCHIN: It will be, hopefully, of the Parliament. We are part of a bicameral system.

Hon Adele Farina: That's true, but given how long it takes to change standing orders in this place, you can reasonably argue that once the standing order is made, it's going to be around for a very, very long time!

Hon MICHAEL MISCHIN: That is true, and it will probably be easier to change —

Hon Adele Farina: The legislation than it will be to change a standing order.

Hon MICHAEL MISCHIN: Entirely so! There will also be a little more certainty, because the same principles will be applied to committees that are agents of this house in receiving evidence as will be applied to committees that are agents of the Legislative Assembly and also to courts and other tribunals. There is no inconsistency; the same principles will be applied.

The other feature, of course, is that if a situation were to arise in which one particular party, or combinations of parties in this place, were to be of a mind to do so, standing orders could be suspended and those rules would then be inapplicable, whereas this will be the law of the land. To the extent that it does qualify the behaviour of this house—I have already gone through the levels of that—it would still be applicable to proceedings by committees of this house and the things that this house ought to be taking into account. There is an element of transparency and certainty for those who are subject to inquiries by this Parliament. I would have thought that what we are proposing is not an abdication of the powers and privileges of the Parliament or of this house, but a statement of the principles that will be applied, and that they will be applied by not only the Parliament and committees of the Parliament but also courts, tribunals and others, such as the Corruption and Crime Commission, who are receiving evidence. There is that level of certainty and transparency. They cannot simply be suspended by the whim of a party or parties of the day which might seek to suspend standing orders and which have obtained an absolute majority in that regard in a particular case.

Some mention has been made of potential penalties and the like. Again, that is an argument for another day. We are not affecting parliamentary privileges and the avenues that Parliament has to enforce the recommendations and decisions of the committees that it creates and that act on its behalf. A question has been raised about opening up Parliament to challenges from the courts. With respect, that simply cannot be substantiated. There are no clear words in the legislation that would permit that, there is no standing to be able to challenge a ruling of a parliamentary committee, and there is simply no cause of action that could be brought that would allow a court to interfere with the workings of Parliament, bearing in mind Parliament's paramountcy in that regard.

I have already pointed out and tabled the advice of counsel on those issues. The government is of the view that it correctly expresses the law and Parliament's intent. I should add that it ought to not be thought that the tendering of that privileged information will set a precedent. It has been done in this case for particular reasons relating to the need to answer concerns of the Clerk of the Council. It contains no sensitive information or any factual information that may be in dispute. It simply answers legal issues, and the government in this particular instance is content that it be made available to the house. Having made those comments, I move that the bill be now read a second time.

Question put and passed.

Bill read a second time.

Discharge of Order and Referral to Standing Committee on Procedure and Privileges — Motion

HON GIZ WATSON (North Metropolitan) [11.53 am] — without notice: I move —

(1) That order of the day 7, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, be discharged and referred to the Standing Committee on Procedure and Privileges for

consideration of clause 5, proposed sections 20G to 20M, and to report not later than 8 March 2012.

(2) That the committee has the power to consider the policy of the bill.

Hon Norman Moore: If I had been given some notice of that, it would have been useful.

Hon GIZ WATSON: I did discuss it yesterday.

Hon Norman Moore: Not the motion.

Hon GIZ WATSON: Not the words. I understand that. I have only just finished —

Hon Norman Moore: People yell at me when I do not tell them things in advance.

Hon GIZ WATSON: I apologise for not being able to give the Leader of the House the form of the words. Perhaps if I might speak to the motion?

The DEPUTY PRESIDENT (Hon Brian Ellis): Order, members. We will not resume debate on this motion until a copy of it has been circulated to the leaders of the relevant parties. You may now proceed, Hon Giz Watson.

Hon GIZ WATSON: I apologise to members that I was unable to provide the exact wording of that motion ahead of moving it, but I had foreshadowed, certainly with the Leader of the Opposition and the Leader of the House and, indeed, with the parliamentary secretary, that it was my intention to move for a committee referral.

I thank the parliamentary secretary and counsel for the additional information that was provided this morning before we commenced sitting. We had an opportunity to canvass some of the issues around privilege. However, I still have some residual questions that I think would be properly addressed by the Standing Committee on Procedure and Privileges. I remind members that under the schedule to the standing orders, the Standing Committee on Procedure and Privileges is to —

> … keep under review the law and custom of Parliament, the rules of procedure of the House and its committees, and recommend to the House such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the House or its committees.

The first question for me was: does this bill still raise a question of impacting on parliamentary privilege? As I said, despite the conversations that we had this morning, I am still of the view that by constraining the operation of parliamentary privilege, the bill does in fact meet that threshold of waiving the powers of the Parliament to be in control of its own business.

I want to respond to a number of comments. I listened carefully to the response of the parliamentary secretary to the second reading debate. It was on the basis of those responses that I decided to still proceed with the referral. The proposition I put in the second reading debate was that we basically agree with the policy of the bill. The chamber agrees with the policy inasmuch as we have just passed the second reading. We all want the bill to basically achieve the same outcome—that is, to provide journalists with a degree of protection from the requirement to reveal sources of information, including in the parliamentary context. The question that remains is whether this is appropriately dealt with in the statutes or under the Parliament's own rules, which are the standing orders. Despite what has been said, the standing orders have a higher threshold for how they can be changed. It was suggested to me that the standing orders are all very well but they can be suspended. However, they can only be suspended by an absolute majority of this place, and they can only be amended by an absolute majority; so, in fact, there is a higher threshold for changing the standing orders of Parliament than there are for bills that pass through the Parliament, which can pass with a simple majority. Therefore, they are more secure.

It is not correct to say that the standing orders are not transparent. The standing orders of this house are available on the website, in the public realm and to every journalist who might want to access them. Unlike the suggestion that these are merely rules by which the Parliament operates, they have the same power and effect as laws of the land, so they are significant. I suggest that if we want to set up these criteria by which we test whether a journalist should be excused or that the presumption should prevail, then the standing orders is the correct place.

I notice the parliamentary secretary said that the Parliament had not responded to recommendations by the Select Committee into the Police Raid on *The Sunday Times* suggesting changes to standing orders. The select committee did not suggest that was necessary—again, without revisiting my second reading speech—because it came to a good and fair decision and there was no impact on the journalist for refusing to answer that question. It does raise the question that a future committee might not be so generous and might interpret matters differently. That is why I agree with the way this debate has moved, certainly in the public realm, that there is reason to put some other criteria in place by which committees will be guided. The question is how we do that.

I also ask the chamber to consider what other act removes or waives parliamentary privilege and puts into statute something that will impinge on parliamentary privilege. The only act that I can think of is the Corruption and Crime Commission Act, which is a relatively controversial act in and of itself. I again say that the commonwealth took a different position on parliamentary privilege, and I understand that it would have thought long and hard about this as well. I have a sense that the commonwealth's position is the right one. Its decision was to enact shield laws, but it did not alter in any way the commonwealth Parliament's privilege.

The other reason I believe that standing orders is the appropriate place to deal with this—I know we have debated this—relates to whether there will be any interplay between the Parliament and the courts over these changes. The judiciary can look behind the statutes and read them down; whereas the standing orders of this place cannot be interrogated in that way. Again, that maintains the separation of powers and the Parliament's right to make its own rules, which we should all be defending with vigour.

Members will note that my motion limits this inquiry's consideration of clause 5 to proposed new sections 20G to 20M to the Evidence Act 1906, which is that part that deals with parliamentary privilege. From what I have heard in this debate, members have no objection to the rest of clause 5, which we would all like to see passed as soon as possible. This section should be appropriately scrutinised by the Standing Committee on Procedure and Privileges because that committee can take evidence, hear evidence and present that evidence to the house from expert witnesses such as constitutional lawyers, journalists or indeed the Clerk of this place, from whom we have had evidence provided by correspondence, which is appropriate. For those of us who are members of committees—most of us are at some point or other—the opportunity to cross-examine and question witnesses is vital. It is a vital part of this Parliament, so why would we not use a committee that we have set up to do this? It is so rare that we get a question on a bill on this threshold question that it almost beggars disbelief that we would not take it seriously enough to look at it within a parliamentary committee. It might prove, when the Standing Committee on Procedure and Privileges looks at this, that we are all comfortable with it and it is not going to be a problem, but we would be abrogating our duties as members of Parliament if we do not do that.

We can hear from expert witnesses and we can view the submissions that we have just heard about from the parliamentary secretary. This is the other frustration with this bill. We are told that comments have been made and submissions given, but we do not get to see them. I note that a lot of journalists' organisations have been consulted, but I do not recall the parliamentary secretary suggesting that the officers of the Parliament or constitutional lawyers have been consulted. When we are dealing with matters of parliamentary privilege—members who want to do the reading can go way back—there are reasons why parliamentary privilege is defended by the Parliament. If we do not do that, I suggest we are doing a disservice to this Parliament and to future Parliaments. We need to see those submissions and we need to be able to consult with all those who we consider might have a useful view on this.

In finalising my comments and calling on the chamber to support this motion, I hope that members in this place are not motivated or driven by a fear that the media will criticise us for delaying or blocking important legislation. I can see the headlines now! I am a bit beyond all this. I am quite happy to argue in the public arena and to the media that this is an important change that we have to get right—for their sake as much as ours—and we do not want it to be subject to misinterpretation, confusion or legal challenge, or any of the above. I am also really clear that if the commonwealth has taken a certain course of action, we need to understand why it chose that and why it did not choose to do what we are contemplating today. For those reasons, I encourage members to put to one side that anxiety, if it is there, that we will be criticised in the media for delaying or blocking legislation, because I can anticipate that that might well be the reaction. We are not dealing with a simple proposition. It requires careful consideration and it requires the benefit of that consideration to be reflected back in the house so that we can all make an informed decision. If there is an anticipation that this bill should get through before Christmas, or whatever has been promised to the journalists—I do not know what has been said—I suggest that sort of promise and those sorts of expectations should not have been raised, because the Parliament has an important job to do and we are not driven by the media in our decision making. We are driven by good process and ensuring that we make decisions in full knowledge of their implications and in full knowledge of what we are setting in place for future Parliaments, not just for this one. The intersection between the media and the Parliament always has the potential for friction. They are our accountability body. However, the Parliament must remain in control of its business and rules.

I reiterate that I am seriously concerned that if this bill remains unaltered, we will be handing over some of that parliamentary privilege, at least in part, to the statutes. I think it is certainly something the commonwealth did not do and I do not understand why we cannot resolve this question in another way. I think with a little thought and consideration in the committee and a report back to this place, we can do that. I realise that some members might suggest we have a shorter inquiry. I am open to discussion around that, but at the very least, let us pause for breath and take some expert advice on the implications of what we are contemplating voting on today. I think it is extraordinary. We need to take a little more time and use the systems and committees this Parliament has

had in place for however long to do the job that they are expected to do. Everyone will have a chance to debate what comes out of that. People can accept or reject that but let us at least have that information before us.

Point of Order

Hon NORMAN MOORE: On a point of order, is it the member's intention that part 2 of the motion remain in the motion? The house has agreed to the policy of the bill. If we want to deal with just one section of the bill, we can hardly deal with the policy of the bill. I want clarification of the actual motion.

Hon Adele Farina: That depends on what the policy is.

Hon NORMAN MOORE: I am not talking to Hon Adele Farina; I am speaking to the member who has moved the motion. I want a yes or no.

Hon GIZ WATSON: My advice is that an investigation of clause 5 covering proposed sections 20G to 20M will require inquiring into the policy. But I am not unattracted to the idea of removing part 2, because I think the key is to look at clause 5. I agree with what the Leader of the House is saying—that basically, in voting on the second reading, the house has agreed to the policy.

Hon NORMAN MOORE: I am seeking clarification so that I know what we are debating. If the member wants to leave in part 2 of her motion, that is her prerogative; if she wants to take it out, she can let us know so we know what the debate is about.

Hon Giz Watson: I will be happy to remove it.

Hon NORMAN MOORE: We are dealing with part 1. Is the house comfortable with that?

The PRESIDENT: That is up to the house to determine. If the house determines that way, I will rephrase the motion I put to the house.

Adjournment of Debate — Motion

HON NORMAN MOORE (Mining and Pastoral — Leader of the House) [12.12 pm]: In view of the fact it has been moved in the form it is in, I move —

That the debate be adjourned to a later stage of this day's sitting.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [12.13 pm]: I wonder if it might not be possible, so that we know the leader's intentions, for you to leave the chair, Mr President until the ringing of the bells —

Hon Norman Moore: We'll deal with it today. I wanted to spend a bit of time to find out what it means in reality, before making a decision on the floor of the house without taking advice.

Hon SUE ELLERY: Okay, I am trying to establish whether it is the Leader of the House's intention that we not deal with that bill until we have resolved that question.

Hon Norman Moore: Yes, you are quite right; that is the motion before the house.

Hon SUE ELLERY: I am trying to figure out what is the Leader of the House's intention next; do we jump to the next bill, or whatever? That is all I am trying to find out.

Hon Norman Moore: We'll go to the next bill now and later in the day we will come back to this.

Question put and passed; debate thus adjourned.

[See page 9302.]

CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Second Reading

Resumed from 8 September.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [12.14 pm]: Mr President, you might imagine that I was not immediately anticipating I would be making my second reading contribution at this moment, so I would like a minute to get myself organised.

The PRESIDENT: I can shuffle my chair for a bit!

Hon SUE ELLERY: You do that, Mr President. You could sing or something, if you like, as well!

The PRESIDENT: Oh, no; I would not do that to you!

Hon SUE ELLERY: The bill before us amends the Criminal Appeals Act to, in a nutshell, add three exceptions to those provisions that prevent a person, until now in our law, from being tried twice for the same matter. That is the principle that is referred to as double jeopardy. It is a very serious principle, one that is long enshrined in

our legal system. The principles behind that go to ensuring, I guess, that the might of the state cannot be unreasonably used against an individual, so it is about balance in our legal system. That is the principle that sits behind double jeopardy.

The bill before us has been to the Standing Committee on Uniform Legislation and Statutes Review and its report provides, at page 22, the history of double jeopardy. I thank the committee for its report and for providing us with a copy. It is certainly a long-standing principle and it goes to balancing the rights of the individual against, I guess, the might of the state, as I described earlier. Over time, the changes to the laws have been based on several factors, including, for example, making sure that people can have faith in the legal system itself and that public confidence in the legal system needs to be maintained. We cannot have a legal system in which, clearly, justice has not been seen to be done, particularly for the victims and families of victims who might reasonably expect to see offenders being properly punished. Another factor is that the law itself should not be static; it should evolve. One of the arguments around that, for example, is that with changes in science and technology, particularly around the use of DNA evidence, there has been some notoriety and controversy around, for example, a number of cases in which DNA evidence has been relied on and been found subsequently to be wanting, and a person has been either wrongly convicted or otherwise because of faults with the technology. At the time that technology was introduced, it was heralded as the single answer to all the dubious questions around evidentiary material in the past, but like many other advances in science and technology, it was found not to be infallible at all.

The balance on the other side that the committee sets out against lightly tweaking or amending the provisions around double jeopardy is that, equally on the question of confidence, it is important that the community sees, and can hold faith in the fact, that decisions made by the courts are final and binding, bearing in mind the court system has a system of appeals. It is important that people know that they cannot take matters through the courts frivolously, that matters will come to an end and that the court system is not a revolving door through which people can keep testing until they get the outcome they particularly want. That is part of the argument for why we should not lightly tweak laws around principles as important as double jeopardy. The actual driver of the reforms in front of us came out of a Council of Australian Governments decision, which I will turn to in a minute.

There are three triggers, if we like—the three exceptions—for when the double jeopardy principle will not apply. The first exception is when there is fresh and compelling evidence. The view expressed through COAG, which was reflected in the model that it proposed, is that that exception should apply to acquittals for only the most serious categories of offences. The second exception is when there has been a tainted acquittal. Again, COAG, in its model, expresses the view that this exception should apply to acquittals for serious offences. The third trigger was administration of justice offences, and the COAG model states that this exception should apply to acquittals for all indictable offences. Administration of justice–type offences include tampering with a jury, perjury or some kind of perversion of the course of justice during the conduct of the matter before the court.

The COAG model set in place a framework or a term of reference along these lines —

> 1. The rule against double jeopardy should be reformed so that a person acquitted of an offence would not be protected by the rule of double jeopardy from:
>
> a. retrial of the original offence or prosecution for a similar offence where there appears to be fresh and compelling evidence …
>
> b. retrial of the original offence or prosecution for a similar offence where the acquittal is "tainted" … or
>
> c. prosecution for an administration of justice offence where that offence is connected to the original trial …

It then sets out the definitions for each of those three exceptions. In respect of fresh and compelling evidence, the COAG model states —

> a. Evidence is "fresh" if it was not adduced in the proceedings in which the person was acquitted, and it could not have been adduced in those proceedings with the exercise of reasonable diligence.
>
> b. Evidence is "compelling" if it is reliable, substantial, and highly probative of the case against the acquitted person (in the context of the issues in dispute in the original proceedings).
>
> c. Evidence is not precluded from being fresh and compelling merely because it would have been inadmissible in the earlier proceedings against an acquitted person.

In respect of the second trigger—that is, whether the acquittal was tainted—the COAG model states —

> 4. This exception should apply to acquittals for serious offences, being the offences in each jurisdiction corresponding to the offences …

They are set out in an appendix to the set of principles. But the definitions in respect of that state —

5. An acquittal is "tainted" if:

a. the accused person or another person has been convicted …

That is, either in that jurisdiction or somewhere else —

of an administration of justice offence in connection with the proceedings in which the accused person was acquitted; and

b. it is more likely than not that, but for the commission of the administration of justice offence, the accused person would have been convicted.

The administration of justice offences exception definitions state —

7. This exception should apply if there is fresh evidence of the commission of an administration of justice offence by an acquitted person in connection with the proceedings in which the person was acquitted.

8. An "administration of justice offence" includes any of the following:

a. bribery of, or interference with, a juror, witness or judicial officer;

b. perversion of (or conspiracy to pervert) the course of justice; and

c. perjury.

9. In circumstances which would admit of a prosecution for an administration of justice offence (where double jeopardy would otherwise have been an impediment to prosecution) or an application for retrial under these laws, the prosecution would only be able to bring one of those two proceedings.

The COAG model sets out what it describes as safeguards or tests to be met, and they are —

"Interests of justice" test

10. A court may only order a retrial if it is satisfied that "in all the circumstances it is in the interests of justice for the order to be made".

11. An order for a retrial is not in the interests of justice unless the court is satisfied that a fair retrial is likely in the circumstances.

12. In determining whether it is in the interests of justice for an order for a retrial to be made, the court must have regard in particular to:

a. the length of time since the acquitted person allegedly committed the offence; and

b. whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with the application for a retrial of the acquitted person.

The COAG model principles go on to describe the requirement for Director of Public Prosecutions authorisation before police can reinvestigate an acquitted person. That is an important threshold to ensure that the double jeopardy principle is overturned only in very serious circumstances. The model goes on to say —

13. A police officer is not to carry out or authorise a police reinvestigation of an acquitted person unless the Director of Public Prosecutions (DPP) has:

a advised that in his/her opinion the acquittal would not be a bar to the trial of the acquitted person in this jurisdiction for an offence; and

b. given his/her written consent to the investigation.

The model goes on to define what police reinvestigation is. It states —

14. In this context, "police reinvestigation" means any investigation of the commission of an offence by an acquitted person in connection with the possible retrial of the person for the offence, that involves:

a. any arrest, questioning or search of the acquitted person … or

b. any forensic procedure carried out on the person …

whether with or without the consent of the acquitted person.

15. The DPP must not give his/her consent to a police reinvestigation unless satisfied that:

a. there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation;

That is a very important test, because before the reinvestigation is commenced the DPP needs to be satisfied not that police are going on a fishing exercise because they have some kind of hunch that they might find something, but that there is sufficient new evidence to warrant that investigation. The police cannot have got that new evidence in the course of doing any of the things that I listed previously that constitute the definition of a reinvestigation; therefore, that new evidence must have come to the police via some other method than the police going and looking for it, using the normal tools that I listed before as to how they carry out their investigation. The model continues —

and

b. it is in the public interest for the investigation to proceed.

The COAG model continues —

16. There should be an "urgency" exception to the requirement for DPP authorisation of police reinvestigation, to allow a police officer to take investigative action without DPP consent if:

a. the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced; and

b. it is not reasonably practical to obtain DPP consent before taking the action.

I imagine that the circumstances in which that might occur would be very limited, because that is saying that the officer cannot go to the DPP to get authorisation before they start this reinvestigation. I imagine that would be in a very unusual set of circumstances in which it was not possible for a person to get to the DPP within a reasonable time, given the way in which people are accessible these days. However, I would welcome any comments that the parliamentary secretary might have on that.

Further safeguards that should apply to this urgency exception were spelled out in the Council of Australian Governments model, which states —

a. the DPP must be advised as soon as practicable of any investigative action taken on the basis of urgency; and

b. the DPP's consent is required for the continuation of a reinvestigation commenced under the urgency exception.

The model further spells out —

Prohibition against further retrials —

I think this is canvassed in the report as well —

18. Not more than one application for a retrial may be made in relation to an acquittal.

19. An application based on "fresh and compelling evidence" cannot be made in relation to an acquittal resulting from a retrial under these laws.

20. An application based on a "tainted acquittal" can be made in relation to an acquittal resulting from a retrial under these laws, if a person has been convicted of an administration of justice offence in connection with the retrial.

Restrictions on publication

21. The court may prohibit publication of any matter, if it appears to the court that such publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial.

That is also an important provision because we can imagine that the circumstances in which a retrial would be applied for is not something that will happen every day and these will be matters for which there have been calls for this kind of provision. Everybody is familiar with those notorious cases; they attract a huge amount of controversy and often they also attract a huge amount of community emotion. Therefore, it would be difficult to put in place for such matters a jury comprising members who have not in any way been influenced by all the community controversy that might have gone with the first trial. Accordingly, it is not unreasonable that restrictions about publication are in place as part of that process.

The COAG model also states —

Time limits on applications for retrials

22. An application for a retrial is to be made not later than 28 days after the acquitted person is charged with the offence or a warrant has been issued for the person's arrest in connection with such an offence.

23. The court may extend this period with good cause.

24. An indictment for the retrial of a person that has been ordered by the court cannot, without the leave of the court, be presented after the end of the period of two months after the order was made.

25. The court must not give leave unless it is satisfied that:

    a. the prosecutor has acted with reasonable expedition; and

    b. there is good and sufficient cause for the retrial despite the lapse of time since the order was made.

Prohibition on referring to court's findings in ordering a retrial

26. At the retrial of the accused person, the prosecution is not entitled to refer to the fact that the court has found that (as the case may be):

    a. there appears to be fresh and compelling evidence against an acquitted person; or

    b. more likely than not, the accused person would have been convicted but for the commission of the administration of justice offence.

That goes to the issue I raised before about how we expect that these sorts of matters will arise quite irregularly, but when they do they will undoubtedly have been the subject of a certain degree of notoriety in the community and bring with them a certain amount of emotional response. Therefore, it is important that a retrial is conducted on the same premise as the original trial, with the same assumptions of innocence or guilt.

The COAG model also states —

Coverage of Acquittals from Other Jurisdictions

27. The exceptions to the rule against double jeopardy should apply to acquittals in other jurisdictions …

However, the COAG model qualifies that by referring to constitutional limitations. The model also states —

Retrospectivity

28. The "fresh and compelling evidence" and "tainted acquittals" exceptions should apply retrospectively.

29. The "administration of justice offence" exception should apply retrospectively.

Attached to that COAG model, which I will not go through now, is the appendix—that is, the list of those serious offences that I referred to when I first talked about the COAG model. I seek leave to table that appendix, which is headed "Offences under the Model Criminal Code carrying a maximum penalty of life or 15 or more years imprisonment".

Leave granted. [See paper 4072.]

Hon SUE ELLERY: I have just referred to the Council of Australian Governments model. The Standing Committee on Uniform Legislation and Statutes Review's sixty-sixth report provides the house on page 7 with a table of evidence provided to the committee by the Acting Solicitor-General on the differences between the principles set out in the COAG model and the bill before the house. I will go through those differences because it is not a large table. The report states that the COAG principle of —

> The 'fresh and compelling' evidence exception to the double jeopardy rule applies to acquittals for only the most serious categories of offences. The 'tainted acquittals' exception to apply to a broader range of serious indictable offences and the 'administration of justice' exception would apply to all indictable offences.

The report states that, according to the evidence given by the Acting Solicitor-General, the bill before us —

> Opts for consistency between the three categories of exception with regard to the kinds of offences which may be the subject of a new charge following an acquittal.

The report states that a COAG principle is —

> 'Serious offences' to which the tainted acquittals exception relates carrying a penalty of more than 15 years imprisonment.

However, the report states that the bill "provides for 14 years". We will not quibble over one year.

Hon Michael Mischin: Fifteen years is I think peculiar to some offences in Queensland. We do not have any offences, to my knowledge, in Western Australia that have a penalty of 15 years. We have more than that, such as 18 years for certain burglaries, 20 years and life, and we have penalties of 14 years, but I don't think we've got one of 15. So, the threshold there has been chosen as 14 years to reflect Western Australian law.

Hon SUE ELLERY: Yes, and looking at the nature of the offences, it is the same category of offences. The report also states —

> This leaves a range of middle indictable offences that are too serious for Magistrates but not serious enough to have a 14 years penalty for which the common law rule remains intact.

The report states that the COAG principle for —

> The 'administration of justice' exception requires fresh evidence of the commission of an 'administration of justice' offence by the acquitted person as well as the Court of Appeal being satisfied that it is in the interests of justice that a re-trial occurs.

The evidence of the Acting Solicitor-General to the committee was that the bill —

> Only requires that the Court of Appeal be satisfied that it is in the interests of justice that the acquitted accused be charged with an 'administration of justice' offence

The report states that a COAG principle is that —

> Only the Director of Public Prosecution's authorisation for police re-investigation of an acquitted accused.

However, the report states the bill provides that "other senior legal officers can give authorisation". I welcome the parliamentary secretary's comments on that.

Hon Michael Mischin: Sorry, which part was that?

Hon SUE ELLERY: The COAG model states that only the Director of Public Prosecutions can authorise a police reinvestigation, whereas the bill provides that other legal officers can authorise a police reinvestigation.

The report also states that a COAG principle is —

> The Court of Appeal may grant leave to prohibit publication of any matters if it appears that such publication would give rise to a substantial risk of prejudice to the administration of justice at a re-trial.

According to the evidence of the Acting Solicitor-General, the bill —

> Provides automatic restriction on publications which may identify the acquitted accused as the subject of proceedings unless the Court otherwise orders or until the proceedings or re-trial are complete.

Finally, the acquitted person can be charged with a relevant offence before leave is granted—that is the Council of Australian Governments' principle. The bill provides for the Court of Appeal to grant leave for a person to be charged with a new charge.

The report of the Standing Committee on Uniform Legislation and Statutes Review makes a number of recommendations; most go to asking the parliamentary secretary to provide information to the house on certain matters. I am sure the parliamentary secretary will do that. There is one recommendation I would particularly welcome the parliamentary secretary's advice on—that is, recommendation 8. It states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General advise the Legislative Council whether it is the intent of the Executive to remove the double jeopardy defence for an acquitted accused under the age of 18. If so, explain the rationale and amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**
>
> **Furthermore that the Bill be amended to make clear and put beyond doubt, the Executive's intention with regard to how this law will be applied against an acquitted accused under the age of 18 at the time of the original offence who is later, as an adult, charged with a "*serious*" or "*administration of justice*" offence.**

On page 24 of the committee's report it is stated —

> **8. OTHER MATTERS**
>
> 8.1 The Commissioner for Children and Young People queried whether a child, acquitted of a serious offence and then later retried under the Bill, would be retried as an adult or as a child, if they were, at that time, an adult.

My understanding of the law and of the Children's Court of Western Australia Act is that if an accused was acquitted of a serious offence that was committed when the accused was a child, and later re-tried, the accused would be re-tried as if the accused was a child. That relates to any penalties that apply et cetera, and any differences between the law as it applies to adults and children, regardless of how old they are. That is what happens now and is what has happened forever, as I understand it. The committee report goes on to state —

> 8.2 The Acting Solicitor General said under subsection 19(2) of the Children's Court of Western Australia Act 1988, the exclusive jurisdiction of the Children's Court extends to the trial of a

> person who has attained the age of 18 in respect of an offence committed … by the person before the age of 18.

My understanding, as I have just expressed, is that the Children's Court act extends to the trial of a person who committed the offence when they were a child but might come before the courts as an adult. The reference in the report to that is an answer to a question on notice answered by Mr Robert Mitchell, Acting Solicitor-General, on 6 October 2011. Paragraph 8.2 of the report goes on to say —

> An acquitted accused minor can elect to be tried on indictment by the Supreme Court or District Court and if over 18 at the date of the new charge, the Children's Court may order the transfer of the prosecution notice to the Magistrates Court having regard to the seriousness of the offence.

But the Magistrates Court then treats the person as if they were a child, as they were when the offence was committed. The report continues —

> 8.3 The Committee is of the view that the Acting Solicitor General's advice does not address the concerns of the Commissioner for Children and Young People. The advice does not clarify whether the Bill is intended to apply to an acquitted accused under the age of 18 years.
>
> 8.4 The Committee draws to the attention of the House that arguably, it may be in the best interests of the child that the double jeopardy defence be retained for an acquitted accused child. The Committee therefore makes the following recommendation.

I have already read out that recommendation. I ask the parliamentary secretary to take us step by step to the head of power that reflects my understanding, or to point out to me if my understanding is incorrect. I understand that, firstly, someone who commits an offence as a child is tried for that offence as a child; and, secondly, that this bill will apply to children as well. Can the parliamentary secretary show me the head of power where that is spelt out? If it is not spelt out, there is an argument to say the bill needs to express that. I am looking forward to hearing the parliamentary secretary walk us through that issue.

Since this matter was raised with me, I have read the relevant sections of the Children's Court of Western Australia Act. In my mind it is the case that for a very long time in our legal system a person who has committed an offence when the person was a child has been tried as a child, and that will continue under this bill. Nothing in this bill will stop that from happening. I want the parliamentary secretary to make that absolutely clear to the house. If he cannot, I will have to ask some questions. If he cannot establish that it is clear that this bill applies to children as well, then I flag that I might have an amendment, which I have not written yet.

Hon Michael Mischin: The bill does not differentiate between types of accused. It applies across the board on acquitted accused. If there is no distinction drawn between adults and children, it would apply to both adults and children. Once the matter has been re-committed to an appropriate court, once they have gone through the filtering process with the Court of Appeal, the same law would apply to the accused as would have applied, or be applied, in ordinary circumstances. The same principles would apply to a child who is the subject of proceedings under this bill as would have applied at the first trial. Unless the law changes in the meanwhile, yes, they would be tried by the Children's Court subject to any of the exceptions that are in section 19(2) of the Children's Court of Western Australia Act. Remember, courts are still seized with their own discretion and powers regarding abuse of process and the like, which is independent of the processes in this bill and so would be sensitive to the fact that there has been an acquittal in the past and it may be many, many years between that acquittal and the revival of the charge. I would have thought, as a matter of experience and basic principle, that they would be very sensitive to the way that that trial is conducted and issues of abuse of process.

Hon SUE ELLERY: One would certainly think so because of the nature of these matters. This is not going to be happening in our courts every day.

Hon Michael Mischin: Not at all. I would expect no more than perhaps one a decade.

Hon SUE ELLERY: It is just when they do come, they come with a whole bunch of notoriety and sometimes emotion as well.

I did not hear the evidence of the Commissioner for Children and Young People. There may be something else behind her evidence that is not reflected in the report. If members of the committee are of the view that there is more behind why she raised that issue, I will leave them to raise that. From my point of view, I take on board what the parliamentary secretary said by way of interjection, but there might be more the parliamentary secretary wants to say about that particular matter.

I will conclude my comments at this point. The opposition supports the bill and will vote for it. I look forward, though, to hearing the answers of the parliamentary secretary to the matters raised in the committee's report. With those comments, I indicate we support the second reading of the bill.

HON ADELE FARINA (South West) [12.50 pm]: I rise to speak to the report of the Standing Committee on Uniform Legislation and Statutes Review and to take the opportunity to acknowledge the work of members of the committee. I thank them for their diligent work on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 and all other bills that come before the committee. I also acknowledge the excellent support we get from the advisory officers to the committee, who carry an enormous workload and do an excellent job in advising the committee on the matters that it is required to consider.

The Criminal Appeals Amendment (Double Jeopardy) Bill 2011 makes significant changes to the criminal law in Western Australia, a system of law that has lain substantially undisturbed for the past century. The bill prescribes certain serious and administration of justice offences as offences for which the common law rule against double jeopardy, codified in section 17 of the Criminal Code as a defence, will be removed. The rule provides that no man is to be brought into jeopardy of his life more than once for the same offence. If the prosecution attempts to do so, the accused may plead that he has already been convicted or acquitted of the same matter. The removal of the defence against double jeopardy followed public outrage over the decision in the case of R v Carroll in 2002, as well as other local and international criminal case law and inquiries. So this has been coming for some time.

The committee adopted its usual procedure in considering this bill. The committee inquiry was advertised in *The West Australian* and details of the inquiry were published on the committee's webpage. The committee wrote to stakeholders, inviting submissions. A list of the stakeholders is attached in appendix 1 to the report. The committee received nine submissions as a result of that process, and extends its appreciation to those who made submissions. Because of time constraints, the committee held only one hearing on 28 September with Mr Robert Mitchell, Senior Counsel, Acting Solicitor-General at the Department of the Attorney General. Answers to questions were taken on notice and were provided later on 6 October. Just to clarify a matter raised by Hon Sue Ellery, the committee did not have time to also undertake a hearing with the Commissioner for Children and Young People. The committee did, however, receive a submission from the commissioner and the basis of that submission formed the references to her concerns in the report, but I will come to that later.

Supporting documents reveal that there is no intergovernmental agreement reduced to written form for this bill. There is no memorandum of understanding. Extracts of two Council of Australian Governments communiqués were provided to the committee. The first is an April 2006 communiqué on the merits of double jeopardy reform, and the second, dated April 2007, is on the agreement to implement the reforms, which I will come back to a bit later. A third document was also provided titled "Double Jeopardy Law Reform: Model Agreed by COAG", which is a set of agreed principles for reform. A model bill was not drafted. Of this document, the Attorney General said that it was up to each jurisdiction to determine how and when the principles are to be applied, and the principles contained in that agreement have been replicated in appendix 5 to the report. The Attorney General advised that, as at December 2010, four states had enacted the reform, with the commonwealth, Victoria and the Northern Territory considering their position, while the Australian Capital Territory does not intend to enact these exceptions to the double jeopardy law.

The bill contains 11 clauses in three parts. The most significant clause is in part 3. Clause 5 proposes to amend section 17 of the Criminal Code, which, as I have explained previously, has remained substantially undisturbed for the past century. Section 17 of the Criminal Code gives statutory expression to the fundamental common law rule against double jeopardy by way of a defence. For members' information, it states —

> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment or prosecution notice on which he might have been convicted of the offence with which he is charged, or has already been convicted or acquitted of an offence of which he might be convicted upon the indictment or prosecution notice on which he is charged.

Clause 5 proposes to amend section 17 of the Criminal Code to state that it will be subject to proposed section 46M(4)(b) and (c) of the Criminal Appeals Act 2004. Proposed subsection (4) denies an acquitted accused of the entitlement to plead on a new charge in relation to certain serious offences and administration of justice offences that he or she has already been acquitted of, or to prove or refer to that acquittal.

Other significant clauses are located in part 2 of the bill. Clause 4 proposes that the current double jeopardy rule shall remain but prescribes exceptions. Thus, persons acquitted of 128 serious offences, such as manslaughter, murder and aggravated sexual assault, as well as 13 administration of justice offences, such as bribery of a public officer and witness tampering, can no longer avail themselves of a defence against double jeopardy under section 17 of the Criminal Code. Those persons will be able to be retried by various authorised officers.

As I have previously explained, the impetus for the bill was the 2002 High Court of Australia decision in R v Carroll. In 1985 Carroll was convicted of murdering Deidre Kennedy, a 16-month-old toddler, but was later acquitted on appeal. In 2000, Carroll was convicted of perjury based on his denial of the murder charge on oath at his initial trial but later was acquitted of this charge by the Queensland Court of Appeal. The High Court upheld this decision, finding that trying Carroll for perjury triggered the double jeopardy rule. I have already

explained what the rule provides. Obviously, given the circumstances and the aggravated nature of that case, there was a huge community outcry over the decision in Carroll. But it was not the first time that there had been some public disquiet about the double jeopardy rule. There has been significant media coverage of public concern over perceived guilty persons being freed by the courts, and there have also been international public inquiries into the matter.

It is important that members understand that the bill makes significant changes to the criminal law in Western Australia, a system that has been largely undisturbed for the past century. However, just because something has been around for a long time does not mean that, where appropriate, it cannot be reformed. The law should reflect community expectations, and there is strong community sentiment that justice should be done and that people should be held to account for wrongful actions. If justice is done, it strengthens the community's confidence in the law. However, when making such a significant change to the law, it is important that safeguards be provided. The proposed legislation attempts to do this not by abolishing the rule of double jeopardy, but by providing two exceptions to the rule and by applying the public interest of justice test. I will discuss the exceptions and the test in more detail later.

I will just go on to what the committee has outlined in its report about what has driven the reform. As I have stated, the decision in Carroll was the main trigger. Although there had been some discussion at meetings of the Standing Committee of Attorneys-General, it took some time before agreement was reached by SCAG. In November 2003, SCAG released a public consultation paper, and later in April 2006, COAG agreed with the proposal from SCAG to implement reform of the double jeopardy law; however, it also acknowledged that there would be some regional variations to take into consideration the differences between the states.

Sitting suspended from 1.00 to 2.00 pm

Hon ADELE FARINA: I had got to page 7 of the committee report, where the committee identified a number of differences between the double jeopardy reform model agreed by COAG and what is contained in the bill. Hon Sue Ellery went through this in detail, so I do not propose to do the same. I just think it would be interesting for members to note that when COAG initially agreed to the double jeopardy law reform, it was intended to apply to the most serious categories of offences, which carry a penalty of more than 20 years' imprisonment. However, this was later reduced to 15 years and this bill lowers it to 14 years, which means that many more offences are caught by the bill, including a range of middle indictable offences, while for other middle indictable offences with a penalty of less than 14 years' imprisonment, the double jeopardy rule continues to apply. Legal Aid WA stated in its submission to the committee that it preferred the original COAG model, which would have ensured that a much more limited list would apply. Legal Aid WA felt this would have been a better model to adopt.

The committee then went on and looked at a number of clauses in the bill. Proposed section 46A(2) takes 13 offences from the Criminal Code and inserts them into a table of administration of justice offences. The Acting Solicitor-General advised the committee that the table was based on a list that had been provided from Queensland. The list is taken from chapter 16 of the Criminal Code of Queensland. The committee considered whether differences in other jurisdictions' administration of justice offences might be problematic for an authorised officer applying for leave to charge an acquitted accused. The Acting Solicitor-General said that the identification of an interstate administration of justice offence as one which is substantially similar to a Western Australian offence accommodates regional differences of this kind, and that while there may be cases where the sufficiency of the degree of similarity is open to debate, that debate will be resolved by the Court of Appeal on an application for leave. He then went on to explain that the first step in the process for leave is when an authorised person makes an application under proposed section 46E, which the committee noted may be made without giving notice of it to the acquitted accused. However, as was made very clear to the committee by the Acting Solicitor-General, it cannot be determined at that point. After the application is made, the Court of Appeal issues either a summons or an arrest warrant to have the acquitted accused brought before the court under proposed section 46F. The court does not deal with the merits of an application made without notice to the acquitted accused at this time. Following the issue of a summons or warrant the acquitted accused appears or is brought before the court, and the court then considers whether the acquitted accused should be released unconditionally, granted bail or kept in custody. The acquitted accused is entitled to be present at the hearing and determination of the application for leave to charge the acquitted accused with the new charge.

The committee noted that because the application for leave may be made without giving notice, the acquitted accused is thereby denied an opportunity to argue before being summonsed or arrested that the administration of justice offence is substantially dissimilar. The committee understands, however, that the reason this is put in place is that it is designed to ensure that the acquitted accused does not flee the jurisdiction. Just as a matter of note for members, the submission by the WA police service to the committee raised some questions about a lack of clarity with this procedure. It may be that the parliamentary secretary may want to address some of the issues raised by the WA police service in his response to the Parliament.

The committee then looked at proposed section 46A(1), which provides the definition of "serious offence". The Acting Solicitor-General provided a list of 125 serious offences under the Criminal Code and three under the Misuse of Drugs Act 1981 for which the defence in section 17 of the Criminal Code against double jeopardy will no longer be available. For the information of members, the committee has provided the list at appendix 6 of the report. Proposed section 46B(1)(b)(ii) provides that for the purposes of part 5 of the Criminal Appeals Act 2004, a person is defined as an acquitted accused if they have been tried on a charge of a serious offence and at the trial acquitted of that charge and any other offence of which they might have been convicted instead of the charge. This suggests that the "any other offences" may be less serious offences than the serious offence, hence preserving the rule against double jeopardy for the benefit of that person on the less serious offence. The Acting Solicitor-General said that where a person is charged on indictment with an offence, it is open to the trial court to convict the person of a less serious offence although not specified in the indictment. For example, with murder, various alternative verdicts are available, running from manslaughter to dangerous driving causing death or grievous bodily harm. Some of those are serious offences and some of them are not. Just so that members are very clear, it is open for an acquitted accused to be retried for the same serious offence or for an alternative serious offence, but being one that was open under the original indictment. At the hearing I asked whether an acquitted accused could be charged with a serious offence but have the jury return a verdict of a lesser offence. The Acting Solicitor-General replied —

> That is a good question and I have noted that the bill does not seem to provide an express answer to it.

The committee placed the question on notice to provide the Acting Solicitor-General with time to consider the matter and give a considered opinion to the committee. On answering that question on notice, the Acting Solicitor-General said —

> … in my view there is uncertainty as to whether an alternative verdict for an offence, which was not a serious offence, would be available on an indictment for a serious offence filed following the grant of leave …

Given that there is uncertainty about these provisions in the bill, the committee's first recommendation was that the parliamentary secretary consider amending the bill to make it clear and put beyond doubt whether an alternative verdict for an offence, which is not a serious offence, could be made available on indictment for a serious offence filed following the grant of leave. I note that the parliamentary secretary has not advanced an amendment on this issue. I just want to draw to the attention of members that here we have a senior law officer of this state, the Acting Solicitor-General, advising the committee that in his view the provisions of the bill are unclear as to their intent. The committee procedure is that when we call department officials to give evidence to the committee, we actually provide them with the questions we are going to ask ahead of them coming to the hearing so that they have some time to do research and formulate a considered opinion before they come before the hearing. We are not trying to catch them off guard; we are trying to get information. The Acting Solicitor-General, therefore, had the questions before he came before the committee. We put the questions on notice to give him more time, as this issue arose out of a question that was on the list of questions provided to the Acting Solicitor-General. After that opportunity to give a considered opinion, he still came back to the committee and said that as far as he is concerned the provisions in the bill on this issue are uncertain. For that reason, the committee made the recommendation that the government needs to amend those provisions in the bill to make it clear and to put the government's intention beyond doubt so that when the courts are applying these provisions, they will understand the government's intent, which of course will then be the intent of Parliament if the bill is passed by Parliament.

The committee then had a look at proposed section 46B(2) of the bill which introduces retrospectivity. There is a rule against the retrospective application of laws or changes to laws, and the committee report details the discussion on the issue. It is important for members to understand that the law will not be read to apply retrospectively unless the provisions in the law expressly state that that is the intention. The committee finds at page 14 of the report that this is in fact expressly provided for in the bill, and so that is clearly the intent. The committee also notes that another code state, being Queensland, has not applied its double jeopardy reform bill retrospectively. We are therefore in the situation of the Council of Australian Governments having agreed to uniformity on this issue and the code state of Queensland saying that it will not apply its provisions retrospectively, but the code state of Western Australia saying that it will apply the provisions retrospectively. The committee makes no judgement about this, but has asked the parliamentary secretary to explain to members of this place why WA has taken a divergent view to that of Queensland.

The committee looked at proposed section 46E(1) as a result of a submission received from Western Australia Police. WA Police pointed out that the bill is silent on the scenario of giving leave to charge an acquitted accused with a new charge but there being the need before the trial to amend or substitute the charge—for example, because a new witness comes forward. WA Police argues that it is unclear whether the new charge can be amended or substituted or whether such amendment or substitution is precluded by the fact that leave was given for a particular new charge only. Given the ambiguity, again the committee has made a recommendation and

asks the parliamentary secretary to clarify the government's intent on this provision and to amend the bill so that it makes clear and puts beyond doubt the provision that is intended to apply. Again, I stress to members of the house that WA Police, which is required to enforce laws, has said that it thinks the law is unclear in this case. Again, I note that no amendment appears on the notice paper from the parliamentary secretary to address that issue.

The committee then looked at proposed section 46E(2). The report states —

> 7.27 This proposed subsection raises the question of how many times an acquitted accused can be re-tried following a successful application for leave. Both the Explanatory Memorandum and Item 18 of the *Double Jeopardy Law Reform: Model agreed by COAG* state "*not more than one application for a retrial may be made in relation to an acquittal*." However, the Committee noted that Items 19 and 20 of the *Double Jeopardy Law Reform: Model agreed by COAG* qualify Item 18.
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> 7.28 Item 19 states: "An application based on fresh and compelling evidence **cannot** be made in relation to an acquittal resulting from a retrial under these laws." However, Item 19 states: "An application based on a tainted acquittal **can** be made in relation to *an acquittal resulting from a retrial under these laws, if a person has been convicted of an administration of justice offence in connection with the retrial*". As was explained by the Acting Solicitor General:
>
> > *The effect of proposed new section 46E(2) is that where leave is given to re-try a person on the basis of fresh and compelling evidence, an application cannot be made for leave to re-try the charge a third time. However, this provision does not prevent an application for leave being made to retry for a third time a person who has been re-tried on the basis of a tainted acquittal*.
>
> 7.29 The Committee finds that the Items 19 and 20 of the *Double Jeopardy Law Reform: Model agreed by COAG* between an application for leave to:
>
> - re-try an acquitted accused on the basis of fresh and compelling evidence; and
> - re-try on the basis of tainted acquittals;
>
> results in an important distinction between the two types of acquittal.

I would be interested to hear from the parliamentary secretary the rationale for that difference in retrying someone more than once. The report continues —

> 7.30 The Committee finds that the statutory language of the Bill is unclear in respect of the number of times an acquitted accused can be retried. This may be contrasted with the position in South Australia, where for example, it is clearly stated that only one application for a retrial is available in relation to category A offences … Section 337 of the *Criminal Law Consolidation Act 1935 (SA)* states that an application … *may only be made once in respect of the person's acquittal of the Category A offence*." A 'Note' then states: "*An application cannot be made under this section for a further retrial if the person is acquitted of the Category A offence on being retried for the offence (but an application may be made under section 336 if the acquittal resulting from the retrial is tainted)*."

The committee then proceeds to make two recommendations, which are recommendations 4 and 5, and I will read them out because they are important. Recommendation 4 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of a tainted acquittal may result in more than one retrial. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**

Recommendation 5 states —

> **The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**

It is really important in passing legislation in this place, when people have made submissions to a committee saying that they do not think these provisions are clear, that we try to address those issues and make sure that at least the intent of the legislation is very clear.

The other issue I want to point to is proposed section 46L(2), which deals with restrictions on publicity. Members will not be surprised to learn that this proposed section received a fair bit of objection from the

Western Australian Journalists' Association, which argued that section 46L(2) infringes the freedom of the press to comment on such applications and investigations. The report states —

> 7.40 The Acting Solicitor General stated the proposed subsection will restrict the capacity of the press to report on applications for leave that identify the acquitted accused. This has been done so as to ensure that the trial on the new charge is not prejudiced. In other words, it is protective of the acquitted accused.
>
> 7.41 The Western Australian Journalists' Association … has deep concerns about the restraint on publicity as no rationale is provided in the Explanatory Memorandum. WAJA —

That is the Western Australian Journalists' Association —

> said the media plays an important role in exposing injustice and inequity and that it should continue to have the ability to bring to light any impropriety, wrongdoing or injustice. The restraint takes an acquitted accused–centric approach but the media's concerns are not necessarily confined to the acquitted accused's interest.
>
> 7.42 According to WAJA, the media must be able to roam freely to take on board a wide range of concerns and interest, including those of the victims of crime. WAJA said the restraint on publicity may be unworkable given contemporary challenges in controlling publicity. Merely controlling publication by mainstream media only serves to drive discussion underground.

As a result of that, the Standing Committee on Uniform Legislation and Statutes Review made finding 3, on page 20. I would be interested to hear the parliamentary secretary's views on the concerns raised by the Western Australian Journalists' Association on that issue, particularly in light of another bill that is being considered by this Parliament.

The committee then looked at proposed section 46M(1), which deals with who may commence a prosecution of a new charge after leave has been given by the Court of Appeal. Western Australia Police point out that the term "authorised person" is not defined in proposed section 46M(1) or elsewhere in the Criminal Appeals Amendment (Double Jeopardy) Bill 2011. In contrast, the person given leave in the same subsection is an "authorised officer"—a term that is defined. WA Police argue that it is unclear whether, after leave is given to charge, it is a police officer who should be laying the fresh charge. I quote from the submission by WA Police on this matter —

> *Presently, even for charges that are to be heard in the Supreme Court, it is usually a police officer who lays the initial charge in the Magistrates Court. It is anticipated that the DPP will have a very close relationship with the investigating police on any matter that proceeds under these proposed amendments given the DPP will have to approve any investigation and then have to be the officer who charges the acquitted accused rather than police.*

Given the ambiguity that has been raised in the view of WA Police, the committee made recommendation 7, asking for the parliamentary secretary to confirm the persons who are intended to fall within the term "authorised person" under proposed section 46M(1), and to amend the bill to make that clear and to put beyond doubt the executive's intention with regard to those persons.

The other matter I want to touch on, noting that time is passing, is that the Commissioner for Children and Young People queried whether a child acquitted of a serious offence and then later retried under this bill, would be retried as an adult or a child, if they are an adult at the time of retrial. Hon Sue Ellery has already gone through what appears in the committee report on this issue, so I do not intend to repeat it, given the lack of time available. However, Hon Sue Ellery raised the point that she was not aware of the issues raised by the commissioner in the hearing. I made clear at the beginning of my speech that we did not hear from the Commissioner for Children and Young People because of the time restrictions on the committee to report back to Parliament; we did not have time to hear verbal evidence from everyone who made a submission to the committee. However, we received an email from her. I thought it had been made public on the committee's website, as is normally the case, but when I went back to check during the lunch break, I realised that it was not. I have a copy of it here and I plan to read it into *Hansard* so that it is on the record. It reads, in part —

> Thank you for the opportunity to comment on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 (the Bill).
>
> As Commissioner for Children and Young People in Western Australia I have a responsibility to monitor and review laws, policies, practices and services that affect the wellbeing of children and young people and to advocate for what is in their best interests. Further, in performing all functions under the Commissioner for Children and Young People Act 2006, I am required to have regard to the United Nations Convention on the Rights of the Child (UNCRC).

> I am unable to provide any detailed comments on the Bill. However, the Committee may wish to consider whether the Bill is intended to apply to children and young people under the age of 18 years. If the answer is 'yes', the Committee may also like to consider whether the Bill is in the best interests of children and young people.
>
> In its deliberations the Committee may wish to consider the *Commissioner for Children and Young People Act 2006* and the *Young Offenders Act 1994*, particularly the principles and objects of these Acts.
>
> As the Committee is aware, I produced guidelines to assist policy makers and others drafting legislation - Improving legislation for children and young people - and these are available on my website.
>
> I thank the Standing Committee for the opportunity to raise this issue for consideration in the further drafting of the Bill. By doing so the Bill will better safeguard the best interests of Western Australia's children and young people.

Clearly, the Commissioner for Children and Young People has the view that our committee can look at policy and actually redraft legislation, which is novel, at least for this state, but not so novel for other jurisdictions in Australia and overseas. As a result of that, I have actually sought leave of the committee to meet with the commissioner to explain the role of the committee, but these were the issues that were of concern to her and resulted in the comments made by the committee in the report on pages 24 to 25.

In addition to recommendation 8 on page 25, I ask the parliamentary secretary to advise the house whether the guidelines for drafting legislation developed by the Commissioner for Children and Young People were applied in the drafting of this bill. This is a matter that I have raised previously in this house with regard to other legislation that impacts on the rights of children and young people, and it has also been raised by the commissioner in her letter to the committee. I think it is reasonable to ask the government to inform the house whether the guidelines that have been developed by an office established by this Parliament are actually being followed by the government in the drafting of legislation.

The last matter raised by the committee in its report is the review of the proposed legislation. The committee noted that there is no provision in the bill for a review of proposed amendments to the Criminal Appeals Act 2004 or the Criminal Code. The committee is of the view that the significant nature and scope of the proposed amendments to the criminal justice system in WA warrant a review within a reasonable time. Therefore, the committee recommends an amendment to the act to provide a review within five years. The detail of that amendment is provided in recommendation 4.

Before I conclude my remarks, there is one other matter I would like to raise. I would be interested to learn from the parliamentary secretary how often, in those states that have adopted the Council of Australian Governments' exceptions to the double jeopardy rule, these provisions have been used; how many applications for leave have been made; how many of those applications have been successful; and how many retrials have been held as a result of these amendments to double jeopardy laws in other states. The parliamentary secretary stated earlier that he expected the provisions proposed in this legislation are likely to be used once in a decade, and I suspect that he is probably right on that. But as a matter of interest, it would be useful to learn what the experience has been to date in states that have made these changes and adopted the COAG recommendations. With that I conclude my comments.

HON GIZ WATSON (North Metropolitan) [2.27 pm]: We are dealing with the Criminal Appeals Amendment (Double Jeopardy) Bill 2011. I want to make some comments on behalf of the Greens (WA) on this bill. This bill amends the double jeopardy rule of criminal law, which provides that no person can be tried twice—that is, placed in jeopardy of conviction or punishment twice—for the same offence. It is proposed under this bill to legislate certain exceptions to the double jeopardy rule. Discussion of the bill involves three new definitions. The first is "serious offences". This means an indictable offence that has a statutory penalty of imprisonment for life or for 14 years or more. Appendix 6 of the recent report of the Standing Committee on Uniform Legislation and Statues Review lists the offences in the Criminal Code and the Misuse of Drugs Act that fall under this category. There are a couple of possibly controversial inclusions in this list; for example, the possession or cultivation of a prohibited plant with intent to sell or supply. This inclusion may interest the 13.4 per cent of Western Australians—particularly 40 plus-year-olds—who use cannabis and quite possibly share it with friends. That statistic comes from the National Drug Strategy household survey report. "Tainted acquittals" means the acquitted accused or a third party has been convicted of an administration of justice offence; but for that offence, it is more likely than not that the acquitted accused would have been found guilty or acquitted, on account of unsoundness of mind, of the offence or an alternative offence. The second is "administration of justice offence". This means an offence listed in proposed section 46A(2); or, if convicted in another jurisdiction, an equivalent offence.

The bill amends the double jeopardy rule to provide that a person who has been acquitted at trial or appeal—other than on the ground of unsoundness of mind—of a serious offence and of any alternative offence of which

she or he could have been convicted instead, can, provided the Court of Appeal gives leave, later be charged with the same or substantially similar serious offence; an alternative serious offence of which the person could have been convicted at his or her trial; or an administration of justice offence allegedly committed in or in connection with his or her trial.

The leave process is that the Attorney General, Solicitor-General, State Solicitor or Director of Public Prosecutions applies to the Court of Criminal Appeal for leave to charge the acquitted accused with one or more of those charges just mentioned. This application can be made without giving notice to the accused. However, proposed section 46F provides that as soon as practicable after the application is made, the Court of Appeal must, unless it is satisfied that the application is an abuse of the process, arrange for the acquitted accused to be summonsed or arrested to be brought before the court for the court to make orders about the hearing of the leave application and about bail. A copy of the leave application is to be provided to the acquitted accused when she or he is served with a summons or is arrested. When the leave application is heard, the acquitted accused has a right to be heard; although if she or he fails to turn up, despite having been notified of the date, the application can go ahead in their absence. It provides also that the court can exercise the same powers as it would when dealing with an appeal. For example, the court can order something to be produced in court, or a witness to give evidence, or admit any other evidence. The court can also exercise the same powers as it would regarding the attendance of a party to the appeal who is in custody; for example, via their legal representative, or by video link.

If the application seeks leave to charge the acquitted accused with the same or similar offence, or with an alternative offence of which she or he could have been convicted at trial, the court can grant leave only if it is satisfied on the balance of probabilities that either there is fresh and compelling evidence in relation to the new charge; or the acquittal is a tainted acquittal. "Fresh" means either that, firstly, despite the reasonable diligence of investigators, the evidence was not and could not have been made available to the prosecutor at the trial; or, secondly, it was available to the prosecutor at trial but was not or could not have been adduced at it. "Compelling" means in the context of the issues in dispute at the trial; it is highly probative of the new charge. It is irrelevant whether the evidence would actually have been admissible at the trial.

In addition to either one of these, the court must also be satisfied on the balance of probabilities that charging the acquitted accused of a new charge is in the interests of justice. The bill says that it is not in the interests of justice if a fair trial is unlikely having regard to the length of time that has passed since the offence was allegedly committed, or since the trial, and all other existing circumstances. The court must particularly have regard to whether, firstly, any police officer or prosecutor has failed to act with reasonable diligence or expedition in applying for leave; and, secondly, the objective seriousness of the facts of the new charge.

If the application seeks leave to charge the acquitted accused with an administration of justice offence allegedly committed in or in connection with the first trial, the court can grant leave only if it is satisfied on the balance of probabilities that this is in the interests of justice. The meaning of "interests of justice" in this context is the same as I have just described. Leave cannot be granted if a person was charged and acquitted outside of Western Australia under the law of that other place, and the law of that place does not have a similar exception to the law of double jeopardy. Leave also cannot be granted if this would be inconsistent with the commonwealth Constitution or a law of the commonwealth.

If leave is refused, the acquitted accused must be discharged. If leave is granted, then, subject to the Bail Act, the acquitted accused must be kept in custody until either the earlier of, firstly, his or her first court appearance in respect of the new charge, or, secondly, the expiration of the time for commencing the new prosecution. If leave is granted, only the person granted leave, or another authorised person—I note that "authorised person in this context is not defined"—can commence the prosecution of the new charge. There is a time limit of two months in which to bring the new charges unless the court extends that time. A time extension can be granted only if the person given leave is taking reasonable steps to commence the prosecution as quickly as possible and there is a good reason why a longer time should be allowed.

In the new prosecution, the court cannot stay the proceedings on the grounds of abuse of process as a result of double jeopardy, but it can still do so for unrelated reasons if applicable. The acquitted accused cannot claim as a defence that he or she has previously been acquitted, nor refer to his or her former acquittal during the new trial. Also, the prosecutor cannot refer to the Court of Appeal's findings or the fact that it granted leave to bring a new charge.

If the new charge ends in a conviction for the same, or substantially similar, charge on which the person was previously acquitted, then if the first trial was in Western Australia, the court dealing with the new charge must set aside the original acquittal. If the new charge ends in an acquittal, and leave was granted on the ground of there being fresh and compelling evidence, leave cannot be sought for charges to be laid a third time. No such restriction applies if leave was granted on the basis of the first acquittal having been a tainted acquittal.

Investigation of a serious offence or an administration of justice offence in the first place can take place only if, firstly, the Attorney General, Solicitor-General, State Solicitor or DPP authorises it. Such authorisation can be

given only if that person is satisfied that either, firstly, there is no legal requirement to stay it on the ground of abuse of process or section 17 of the Criminal Code, which provide a defence if the person has been previously acquitted, other than on unsoundness of mind; or, secondly, the investigation is likely to lead to evidence justifying a leave application and it is in the public interest to investigate the offence. Secondly, it can take place only if the law enforcement officer believes on reasonable grounds that the investigation must be done urgently to prevent it being substantially and irrevocably prejudiced and it is not reasonably practicable to get authorisation as above before doing the investigation.

The bill provides for restrictions on publication. Unless the Court of Appeal orders otherwise, a person must not publish any information identifying a person as subject to an application to investigate, an actual investigation, a leave application, a grant of leave, or a new charge laid pursuant to leave. The court can make such an order only if it is satisfied that it is in the interests of justice to do so and after giving the acquitted accused an opportunity to be heard. The order can be amended or cancelled by the court. Breach of the publication restriction is a contempt of the Supreme Court. The prohibition on publication ends when either the person cannot be charged and retried, or the retrial concludes.

This bill was first introduced into the Legislative Council, from where it was automatically referred to the Standing Committee on Uniform Legislation and Statutes Review on 8 September this year, pursuant to standing order 230A. The policy of the bill was not referred. The standing committee reported back on 1 November, and we have heard from the chair of the committee, Hon Adele Farina, with regard to the committee's findings. The report of the standing committee says that the double jeopardy rule has a long history. It was known to ancient Greek and Roman law and to twelfth-century ecclesiastical law. It became part of English law and thereafter part of Australian law, including section 17 of this state's Criminal Code. It is recognised in article 14(7) of the International Covenant on Civil and Political Rights, and it is entrenched in the constitutions of the United States, Canada, Germany, India, Japan and South Africa.

At the outset it is worth noting two things about the double jeopardy rule. Firstly, it is not absolute. When an appeal court sets aside a conviction and orders a retrial, that is an exception to the double jeopardy rule. Secondly, the double jeopardy rule has to date survived in Western Australia, notwithstanding the ever present possibility of new witnesses coming forward or new evidence being discovered after the trial is over, and improved forensic science such as fingerprint evidence and DNA testing.

Pages 22 to 24 of the standing committee report set out arguments for and against reform of the double jeopardy rule. One purpose of the double jeopardy rule is to protect acquitted accused from being retried repeatedly by the state, which has far greater financial and other resources at its disposal. This protects against tyranny, and one can well imagine a case of the state, to make a point, being willing to retry a person until it gets a conviction.

It brings in practical considerations such as the initial competency of investigators and prosecutors; structural discrimination within the criminal justice system—as experienced by minority groups; and the limited resources available to imprisoned accused to prepare their case. It is worth mentioning recommendation 22 of the recent report by the Inspector of Custodial Services on Bandyup Women's Prison, which is —

> Ensure Bandyup prisoners are provided with their legal entitlements in respect of access to legal resources and assistance to research their cases.

The report says that currently the prison does not provide access to key legislation, and although a case law compact disc was obtained, it could not be used because the library computer had not been functional for more than two years; the computers in the education centre are designated for educational purposes only. That is a recent example that highlights the point that people who are remanded in prison often have a limited capacity to prepare their cases.

Another purpose of the double jeopardy rule is to protect the integrity of judicial verdicts. This brings in considerations such as whether public confidence in the law is better served by treating court decisions as incontrovertible, or by having a mechanism that enables obvious wrongs or miscarriages of justice to be righted.

As stated in the second reading speech, the genesis of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 is a 2002 Queensland case—namely, R v Carroll. Mr Carroll was convicted of murdering a baby girl; he successfully appealed, and his conviction was set aside. Later, improvements in forensic odontology meant that a bite mark on the baby was matched with Mr Carroll's mouth. Because of the double jeopardy rule, the prosecution could not retry him for murder; he was, instead, tried for perjury because he had denied the allegation against him. He was convicted at first instance, then appealed to the Court of Appeal and was acquitted. The High Court upheld the Court of Appeal's decision on the ground that the double jeopardy rule had been contravened because the perjury trial was based on the same set of facts as the murder trial. The report of the standing committee refers to similar cases in Western Australia, New Zealand and the United Kingdom; page 5 of the report states —

> … every Australian jurisdiction has an *R v Carroll* equivalent.

Following the High Court's 2002 R v Carroll decision, Australian jurisdictions decided a nationally consistent reform was appropriate. In 2003, Queensland's Attorney General referred the matter to the Standing Committee of Attorneys-General, and SCAG referred the matter to the Model Criminal Law Officers Committee to consider possible reforms to address injustices resulting from strict application of the double jeopardy rule. MCLOC prepared a discussion paper that incorporated model provisions, and SCAG approved the release of that paper for public consultation.

In 2006, the Council of Australian Governments decided that reform of the double jeopardy rule was important and merited a nationally consistent approach. In 2007, the Double Jeopardy Law Reform Council of Australian Governments Working Group prepared recommendations, and COAG agreed that the jurisdictions would implement those recommendations, but that the scope of the reforms would vary between jurisdictions to reflect the different criminal law structures—some are common-law based with statute supplementation; some, including WA, are code based. The model agreed by COAG is a set of principles, not a model bill.

The standing committee report states that New South Wales was the first to legislate, in 2006; its legislation is retrospective and applies to three administration of justice offences, and offences that carry a penalty of 15 years' imprisonment or more, or life. It is worth noting that the Greens opposed that bill when it was debated in the New South Wales Parliament. Queensland introduced legislation in 2007 that was not retrospective and applies to offences that carry a penalty of 25 years or more of imprisonment. The Tasmanian legislation of 2008 is retrospective, as is South Australia's of the same year. Victoria is expected to introduce legislation this year. The commonwealth and Northern Territory are considering their positions, and I understand that the Australian Capital Territory does not intend to introduce legislation.

In 2006, WA introduced the Criminal Law and Evidence Amendment Bill, which contained a limited right of appeal for the prosecution against acquittal verdicts. This bill is WA's next reform, and it deals specifically with the double jeopardy rule. The bill does not entirely match the principles agreed by COAG. I note that page 7 of the standing committee's report sets out the differences, being the sorts of offences captured; the matters the Court of Appeal is required to consider before granting leave for a retrial; who can authorise police reinvestigation; publication restrictions; and the point at which a person can be re-charged. The bill, as I understand it, does not entirely match the legislation of other jurisdictions.

In seeking feedback on this bill, I consulted with a number of organisations—namely the Criminal Lawyers' Association, the Aboriginal Legal Service, the Australian Lawyers Alliance, and the Women's Law Centre. To summarise the feedback I received, there is support for the concept of reform. In its current form, the bill is not supported by five out of six submissions that express a view on the policy of the bill; they are published on the committee's website.

Hon Michael Mischin: Who did support it out of the six submissions?

Hon GIZ WATSON: Who did support it? I do not know. Perhaps the chair of the committee knows the answer to that. Did Hon Adele Farina have submissions to her committee on that?

Hon Adele Farina: I'm sorry; on what?

Hon GIZ WATSON: On the double jeopardy bill.

Hon Adele Farina: Yes, we did; we had nine that outlined —

Hon Liz Behjat: No—who supported it?

Hon GIZ WATSON: I think the question was who supported it.

Hon Adele Farina: All the submissions are on the website, if the member would like to have a look at them, and we did receive a couple in support. I remember one was from Mark Trowell.

The DEPUTY PRESIDENT (Hon Jon Ford): Order, members! I am sorry, it is not being recorded through the recording system, and I can barely hear you, and there is actually no provision for that. It may be that if we go into Committee of the Whole, then you can recite that reference.

Hon Michael Mischin: It was my fault, Mr Deputy President.

Hon GIZ WATSON: My apologies; I threw the question to somebody else, which is probably totally inappropriate.

The DEPUTY PRESIDENT: You must throw the question at me!

Hon GIZ WATSON: A number of issues were identified in the report of the Standing Committee on Uniform Legislation and Statutes Review, the first of which was alternative verdicts. For some offences a person can be acquitted of that offence but convicted of a lesser alternative charge; for example, a murder charge. The person may be acquitted of that charge but convicted of a lesser alternative charge such as manslaughter, dangerous driving causing death, or grievous bodily harm. The Acting Solicitor-General advised the committee that if a

person is charged with a serious offence as defined by the bill, and is acquitted not only of that offence, but also of all alternative charges, whether or not those alternative charges are serious offences as defined, then in the circumstances set out in the bill, court leave can be given for the person to be re-charged but only with a serious offence not a lesser offence. The committee asks whether, on the retrial for the serious offence, all the usual alternative verdicts would still be available, or would it only be alternative verdicts that are serious offences. The Acting Solicitor-General said that there is uncertainty on that point, and therefore the committee made recommendation 1, which is that the bill be amended to make this clear; we share the committee's concerns.

With regards to retrospectivity, finding 1 of the committee was that proposed section 46B(2) acts retrospectively. Legislation is normally prospective and not retrospective, and, in the absence of clear wording to the contrary, legislation is assumed to be prospective, not retrospective. In this case the retrospectivity is consistent with the principle agreed to by the Council of Australian Governments. Of the Australian jurisdictions that have introduced such legislation, all have made it retrospective except Queensland. Queensland, however, is the jurisdiction with a criminal law structure most similar to Western Australia. It is the only other jurisdiction that has a Criminal Code. Again, the committee's second recommendation —

Hon Michael Mischin: That is not strictly true. Tasmania has a Criminal Code as well. The Queensland code is known as the Griffith code; we picked up on that —

The DEPUTY PRESIDENT: Order, members! The parliamentary secretary will have a moment to respond. Try to avoid slipping into a conversation, please.

Hon GIZ WATSON: I look forward to the parliamentary secretary's clarification when he has the opportunity to respond. It will be useful.

There was a further recommendation from the committee, recommendation 2, that the government explain why it has taken a different position from Queensland.

With regards to amending or substituting charges, which is proposed section 46E, the committee said that after a person is initially charged, sometimes the charge is amended or substituted afterwards. For example, charges may be revised if a new witness comes forward. WA Police consider that the bill is unclear as to whether this can happen to a person re-charged under this legislation, because court leave for re-charging is granted in relation to a particular charge. The committee therefore recommended at recommendation 3 that the government amend the bill to make clear whether, and in what circumstances, new charges can be amended or substituted. Again, the Greens support the committee's recommendation.

As to the number of times a person can be retried, the Acting Solicitor-General advised the committee that proposed section 46E(2) permits one retrial only on the grounds of fresh and compelling evidence, but this restriction does not apply when the ground is a tainted acquittal. The committee found that the principles agreed by COAG make a similar distinction that the wording of this bill is unclear as to how many times a person can be retried, unlike the South Australian legislation which is very clear. The committee therefore recommended the government explain how many retrials are intended on the grounds of fresh and compelling evidence and tainted acquittal, the rationale for this, and that the bill should be amended to make the intent clear. That was at recommendations 4 and 5. Again, we support those two recommendations.

With regards to notice to the accused, the Acting Solicitor-General advised the committee that proposed section 46E permits the application of court leave for a person to be re-charged, to be made without giving notice to the accused. The committee found that this denies acquitted accused the right to be heard in circumstances where the right to personal liberty is at stake. In recommendation 6, the committee recommended the government provide justification for this.

With regards to restrictions on publication, proposed section 46L(2) prohibits publicising that a person is the subject of an investigation, leave application, grant of leave, or new charge pursuant to leave. The press will be able to report, but not to identify, the accused. Again, the principle agreed by COAG permits the court to prohibit publication of any matter if it would substantially risk prejudicing the new trial. The Western Australian Journalists' Association submitted to the committee that it had deep concerns about this because no rationale is provided in the explanatory memorandum, and the media plays an important role in exposing impropriety, wrongdoing and injustice. It also submitted that the restraint is unworkable in practice and would drive discussion underground. The committee found that the proposed subsection protects the identity of the acquitted accused and publication during a leave application, but this restraint is lifted if, at retrial, a court of appeal exercises its discretion under proposed section 46L(4) to authorise publicising some or all of the information protected under proposed section 46L(2). The court can only make that order if it is in the interests of justice. These proposed subsections will assist in a fair retrial of the acquitted accused.

With regards to who can commence prosecution of a new charge after leave is granted: proposed section 46M(1) states, in part, if court leave for retrial is granted —

> … only the person given leave, or another authorised person, may commence a prosecution of the new charge.

WA Police pointed out to the committee that "authorised person" is not defined in the bill, although "authorised officer" is. The police advised that the normal process is for police to lay charges in the Magistrates Court even if the charge is to eventually be heard in the Supreme Court. However, the Director of Public Prosecutions would clearly be heavily involved in cases brought under this legislation, so the police asked if it would be the DPP rather than police who would commence the prosecution. Again, the committee recommended at recommendation 7 that the government clarify who the government means, in the case of this bill, by "authorised person" and amend the bill accordingly.

With regards to impact on children, the Commissioner for Children and Young People queried whether a person who was a child at the time of the original trial and an adult at the time of retrial under this legislation would be retried as an adult or as a child. The Acting Solicitor-General said the Children's Court has jurisdiction over the trial of over-18s if the offence was allegedly committed when the accused was under 18 years of age. He also said that an acquitted accused minor could elect to be tried on indictment by the Supreme or District Court. If an acquitted accused is over 18 years of age at the date of the new charge, the Children's Court could transfer the prosecution notice to the Magistrates Court based on the seriousness of the offence. The committee considered this did not address the commissioner's concern as it did not clarify whether it was intended to apply to under-18s. It is stated at page 25 of the committee's report —

> The Committee draws to the attention of the House that arguably, it may be in the best interests of the child that the double jeopardy defence be retained for an acquitted accused child.

Committee recommendation 8 was that the government clarify whether the intention of the bill is to apply to under-18s; and, if so, explain the rationale, and amend the bill accordingly. It should also amend the bill to clearly show how the law will apply to an acquitted accused aged under 18 at the time of the original offence, who is later, as an adult, charged with a serious or administration of justice offence.

With regards to review, the bill contains no review clause at this point. The committee considered that the significant nature and scope of the reform warrants a review within a reasonable time. It is therefore recommended by the committee at recommendation 9 that there be a review after the legislation has been operational for five years and a report of review be laid before each house of Parliament within 18 months of that period. The committee may choose to move an amendment to that effect, which the Greens would wholeheartedly support.

With regards to the policy issues around double jeopardy, I would like to put Parliamentary Library staff in the spotlight by acknowledging them for the information they have provided on double jeopardy and the policy aspects of this bill. It is excellent, as Hon Adele Farina concurs. The Parliamentary Library has done a particularly good job in providing this information to members for this debate.

In relation to the question of justice delayed is justice denied, as Julian Burnside, QC, said in an article in *The Age* on 6 June this year, "Delay is the enemy of justice." Over time, evidence can disappear, witnesses' memories can fade, popular prejudices can replace knowledge, and physical evidence from previous trials that were never expected to be needed for retrial may have deteriorated or become contaminated. All of these things can detrimentally affect the reliability of evidence available at retrial. The bill addresses this by requiring a court of appeal to be satisfied on the balance of probabilities that the new charges are in the interests of justice.

As to the burden on the acquitted accused, a trial involves loss of standing, expense, time and stress for the accused person, particularly in matters pertaining to double jeopardy. A retrial would repeat this. Innocent people, as well as wrongdoers, may be caught by this bill. Nothing has been done to relieve this burden; for example, a guarantee that Legal Aid will be made available or that costs will be granted if the person is again acquitted following retrial. I reiterate that example from the recent report about Bandyup. There are people within that prison system who are having trouble accessing a copy of the statutes to prepare cases or to be aware of their rights and responsibilities.

As to publicity: despite the limitations the bill imposes on publicity, it is hard to see how an acquitted accused will have a fair retrial. It is likely that the first trial had publicity. As has been said by a number of members, these are likely to be contentious, high-profile trials; just a few of them. They will be ones that will have a particular level of public and media interest.

It is likely that the first trial will have had publicity, and this may well be followed by strong calls in the media for a retrial to occur to right a perceived wrongful acquittal. Indeed, in the Carroll case, *The Australian* went so far as to give the mother of the deceased money to explore her legal options, which was also duly publicised, thus becoming a stakeholder in, rather than the reporter on, the legal process. The family of the deceased were also the subject of an *Australian Story* piece on the ABC. In addition to the danger of publicity leading to politically motivated re-prosecutions, publicity may well also make it virtually impossible to prevent a jury at

retrial from feeling pressured to produce the verdict that it knows is expected by the public. The bill provides some protection in that if a Court of Appeal is not satisfied that to re-charge would be in the interests of justice, it can refuse to grant leave.

As to assumptions that obvious wrongdoings are readily identifiable, it is attractive to think that it is obvious which acquittals are valid and which are wrongful so that we can let the former stand and hold a retrial to correct the latter. However, in practice it is not so obvious. It is worth noting that in the Carroll perjury case, Justice Williams of the Court of Appeal, with whom the other two judges concurred, identified such problems with the odontic evidence. He said —

> Given all that I have said about the various odontological opinions in these reasons, I have come to the conclusion that a verdict that the appellant was responsible for the death of the child based on the odontological evidence given at the perjury trial was unsafe and unsatisfactory.

He also said —

> In my view the trial should have been stayed as an abuse of process. But in any event when the evidence is carefully considered I am of the view that the verdict returned by the jury was unsafe and unsatisfactory. On either ground the verdict should be set aside and an acquittal entered.

Also on the matter of hard cases making bad law, the million-dollar question is whether this reform will remedy some injustices by causing others. Hard cases, such as the Carroll case, make bad law. Our criminal justice system gives substantial protection to innocent people but not total protection—for example, the standard of proof is beyond reasonable doubt, but not beyond any doubt, for sensible reasons of course—and both the protection our system provides and the limitation of that protection are not fully appreciated until an innocent person is falsely accused. The Andrew Mallard case springs to mind. The legal process is not infallible. Our methods of fact finding are not perfect. The law needs to provide the safest solution that is compatible with our fallibility. Although I acknowledge the merit in seeking reform, on balance I am not convinced that this bill strikes the right balance.

Hon Michael Mischin: Is that a quote?

Hon GIZ WATSON: No. That last bit was not a quote; that was me.

Hon Michael Mischin: Who were you quoting? Sorry; I missed that.

Hon GIZ WATSON: I quoted paragraphs 62 and 72 of the decision of Justice Williams of the Court of Appeal in the Carroll perjury case.

In concluding my comments on this bill, the Greens (WA) wholeheartedly support the committee's proposed amendment to insert a review clause. We will support the second reading of the bill, but we will reserve our final position until after the Committee of the Whole and we have seen whether some of the issues with the bill raised by the Standing Committee on Uniform Legislation and Statutes Review have been addressed. I need to indicate that we have concerns about this bill in its current form on the grounds that we think the bill goes too far in a number of ways. The bill applies a broad range of offences, and the fresh and compelling evidence exception especially appears to apply to a much broader range of offences than COAG agreed to. The bill is retrospective. The bill appears to not limit the number of retrials for tainted acquittals. As I understand it, this is even though the taint may be through the behaviour of a third party—that is, the accused is not required to have been complicit. No steps appear to have been taken to reduce the burden of a retrial on the accused, who may be innocent—we must always remember that people are innocent until proven otherwise—despite that burden being one of the main reasons for the existence of the double jeopardy principle. Guaranteed legal aid, or costs if the accused is again acquitted, are worth at least considering. The bill also appears to apply to children as well as adults, which we have considerable concern about.

For those reasons, we will support the second reading of the bill, but we will await with interest the conclusion of the committee stage and then make a decision on whether we can support the bill.

HON LIZ BEHJAT (North Metropolitan) [3.05 pm]: I do not propose to prolong the debate any longer than necessary on the Criminal Appeals Amendment (Double Jeopardy) Bill 2011. However, it is an incredibly important piece of legislation. The report of the Standing Committee on Uniform Legislation and Statutes Review has been very well canvassed by the chair of that committee in this debate, so I do not propose to go much into that. However, with the house's indulgence, I would like to read into the record one of the submissions received during the course of that inquiry. As members know, I sit on that committee. I think it is important that when we get very good submissions on legislation that we put forward, we put them on the record. This submission was from quite a well-known QC around town, criminal barrister Mr Mark Trowell. Amazingly, it is quite a succinct submission. For those members who know Mr Trowell, he sometimes tends to err on the side of verbosity rather than brevity. He wrote to the committee on Friday, 30 September. I quote —

> Double jeopardy, or more accurately autrefois acquit or autrefois convict, is the ancient legal principle that a person cannot be tried twice for the same alleged crime. There was a sound basis for that principle because it meant that there was some finality in the legal process and it also prevented … the state from arbitrarily and repeatedly prosecuting a citizen despite that person having been previously acquitted or convicted of the same offence.
>
> These were things obviously in the public interest.
>
> However, in modern times the ability to solve crimes by using modern forensic science has meant that there are occasions when evidence, that could not have been known about at the time of an accused's trial, is found and calls into question the jury's verdict of acquittal. It may be compelling fresh evidence of a technical nature, such as DNA. The accused may have made a subsequent admission of guilt or a witness who was previously unknown comes forward with damning evidence against the accused. The trial might have been tainted by jury tampering or by the interference with witnesses.
>
> It could hardly be said that any of these situations offer finality or that it is in the public interest to respond merely by saying that it is just "too bad" because the law is absolute and that none of these things should have an effect on the legitimacy of an accused's acquittal. The community has every right to expect that justice is done. The fact that nothing can be done to correct an obvious wrong, simply holds the justice system up for ridicule. It weakens the community's confidence in the law.
>
> Finality in the law is desirable, but accused persons have the right to appeal both their conviction and sentence. Does that create uncertainty? Not really. There is finality, but only after an accused has exhausted his or her legal rights. That is as it should be.
>
> Lawyers traditionally resist change often arguing that to interfere with established legal principles effectively erodes the rights of citizens. There may be occasions when that is so, but the mere fact that something has been around for a long time doesn't mean that where appropriate it cannot be reformed.
>
> The law often reflects community expectations or at least what politicians believe the community wants. Lawyers tend to focus on the rights of an accused person, but the parliament must consider the rights of all members of the community. That's the way a democratic system should work. Politicians, elected by the community, make the laws and lawyers are charged with interpreting the legislature's intention and giving effect to those laws. The system doesn't intend that unelected lawyers impose their own views about what the laws should be. Of course, what lawyers think about reforms to the law should be respected and taken into account by the legislature, but ultimately these are decisions that only it can make.
>
> The proposed legislation sensibly does not abolish the rule, but provides only that there be exceptions to it. For example, where there is "fresh and compelling" evidence or in the case of tainted acquittals or where there is evidence of the commission of offences against the administration of justice during the course of the trial. At the same time, there are sufficient safeguards in the proposed legislation to ensure that there is no arbitrary exercise of the power to prosecute, including that a court must first determine whether it is in the interests of justice to prosecute.
>
> In my view, the proposed legislation is a sensible and timely reform of the law.

I totally agree with what he wrote in his submission, which is why I wanted to read it into the record.

HON LINDA SAVAGE (East Metropolitan) [3.10 pm]: I would also like to make some remarks about the Criminal Appeals Amendment (Double Jeopardy) Bill. I note that there has been a very comprehensive overview of the bill and of the report of the Standing Committee on Uniform Legislation and Statutes Review, of which I am a member, by both the chairman of that committee and other members. I would like to begin by acknowledging the work of the research officers and other committee staff who assist the Standing Committee on Uniform Legislation and Statutes Review. This is a very busy committee and one that I think very much fulfils its brief of providing a level of scrutiny to and examination of legislation that goes through the Legislative Council, which I think benefits the law-making processes. It is one reason that we have an upper house or bicameral system such as this.

The report produced by the Standing Committee on Uniform Legislation and Statutes Review on this occasion is particularly significant, dealing as it does with the changing of a longstanding principle of the legal system. In fact, I would go so far as to say that the report itself is a valuable historical document that will be of use to students, lawyers, policymakers and anyone who has an interest in the history of the law and particularly in the making of landmark laws. It really provides part of the paper trail that will, if there are ever any further changes to this area of law, be looked back on and be very useful. It is interesting that we, in Australia, are following what other countries have done in this area. For example, the United Kingdom brought in similar legislation in 2003. It is very significant, too, because a number of countries have described double jeopardy as a fundamental

legal right. This legal principle is covered by article 14 of the United Nations International Covenant on Civil and Political Rights, which states —

> 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Of course, it is also part of the United States Bill of Rights.

I am not going to reiterate all that has been said in the debate. I note that Hon Liz Behjat has read into the record a letter received from Mark Trowell, which provides an excellent summary of what double jeopardy has meant. I think he also outlined why a bill such as this is being introduced. For our committee, on balance, the bill reflects a change that is in keeping with the times in which we now live. The Carroll case was the springboard. There is a sense that there are situations in which there should be the opportunity for someone to face the courts again.

In supporting the bill, we have made a number of recommendations. Hon Adele Farina has already referred to them. I would just like to refer specifically to recommendation 5, which states —

> **The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**

Put simply, an application to try an acquitted accused on the basis of fresh and compelling evidence may arise, for example, when a new investigative technique or scientific process becomes available or someone perhaps comes forwards for the first time. Hon Michael Mischin has already speculated that the retrial of an acquitted accused would occur only rarely. Although it is unlikely, I will paint another scenario, which is why we have asked for clarification with regard to recommendation 5. It is not impossible to imagine that even after an acquitted accused has been retried and acquitted, fresh and compelling evidence could once again arise in the form of a person coming forward, new investigative techniques or the use of new scientific processes. That is unlikely, perhaps, but in considering that this bill will become law, and accepting that in the future new evidence or a new technique could become available, would this be enough for a further retrial of an acquitted accused to be accepted by the Court of Appeal? The scenario that recommendation 5 is seeking to clarify is whether, after one retrial, it would be possible to have another retrial. That is the basis of recommendation 5. As Hon Adele Farina has pointed out, some legislation explicitly states that it may be done only once.

That is really the extent of the comments I want to make, given that so much has already been covered. I will finish by saying that I had not before had the opportunity, as a member of a committee, to consider such a significant change to what has been a legal principle for centuries. As I said, I think the report itself will serve a purpose for years to come for anyone who is interested in this area.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [3.19 pm] — in reply: I thank honourable members for their contributions to the debate and for their indications of support for the Criminal Appeals Amendment (Double Jeopardy) Bill 2011. I have a few remarks to make to deal with the committee report. Perhaps by way of setting the scene, I will say that reference has been made to national conventions on human rights and fundamental principles of law and the like. Many longstanding principles of law are founded on sound public policy. It must be remembered where the roots of those principles are to be found. I am talking about principles that were established many centuries ago as a result of the tensions between the powers of the state and the potential for the oppression of an individual. The rule against double jeopardy is one manifestation of those principles to prevent the oppression of the citizenry by the state, which has greater resources, continuing to prosecute to the point of persecution on the same cause or matter. One of the other sound principles of public policy is that there ought to be some finality to litigation, whether by way of conviction or acquittal in criminal cases, or by verdict or judgement in civil cases. Of course, that principle itself has been qualified over the ages. The idea of an appeal against a criminal conviction is one example of that exception. It is only relatively recently in the late 1800s—about the 1880s—that there has been a right of appeal against a conviction. It is a creature of statute. It is only relatively recently in legal terms—from about the 1960s—that the prosecution in Western Australia has had an avenue of appeal against inadequate sentences. It is only relatively recently, about the same vintage possibly, that the prosecution has had the power of appeal against acquittals directed by a judge and so on and so forth.

That is why I read the opening paragraph of the executive summary of the committee report, repeated by Hon Adele Farina on a couple of occasions, with some surprise. The proposition put by Hon Adele Farina is that the Criminal Appeals Amendment (Double Jeopardy) Bill 2011 makes significant changes to the criminal law in Western Australia in a system of law that has lain substantially undisturbed for the past century; in this respect, possibly with the one qualification about an appeal against a directed acquittal. However, the criminal law in this state, in fact, has changed and developed very substantially over the past century. One need look only at reforms

to the sexual assault laws in 1986 to see that. Those reforms removed the crime of rape and replaced it with sexual assault, and further refinement of those laws to a greater or lesser extent has occurred about 12 times in the last 30 years. There have been reforms to the laws of burglary; refinement of section 23 of the Criminal Code regarding criminal responsibility; changes to section 27 on insanity; the development of various laws dealing with cybercrime and developments in technology; and significant reform of fraud laws back in about 2003 under the former government. The list is endless. The new Criminal Procedure Act was introduced by the former government, which act quite substantially modified and refined the criminal justice system in the state. There has been a variety of innovations and changes to the criminal appeals process. The very idea of evidence being heard by closed-circuit television —

Hon Adele Farina: We didn't say there wasn't any change. We said that this was a significant change.

Hon MICHAEL MISCHIN: No, the report refers to a system of law having lain substantively undisturbed for the past century.

Hon Adele Farina: Yes, in relation to the issue of double jeopardy.

Hon MICHAEL MISCHIN: No, that is not what the report says. I am sorry, that is not what the report says and it is not what Hon Adele Farina said.

The idea of evidence being heard remotely and the abolition of preliminary hearings by way of the introduction of optional hand-up briefs back in about the late 1960s through now to the entire abolition of preliminary hearings were major steps in the development of the criminal justice system. All these things have changed the system. I recall the debate on the substantive change to preliminary hearings, as I was involved in preparing a consultation draft for the Law Reform Commission on that question. Submissions were made that it was a person's fundamental right to have a preliminary hearing and that we should not get rid of it because it would cause all sorts of disasters, injustices and the like. Every significant reform of the criminal justice system has been met with submissions from those who represented one interest group or another claiming that fundamental rights and fundamental principles of the criminal law were being compromised.

It is true to say that autrefois convict and autrefois acquit are longstanding principles. As far as Western Australia is concerned, they have been encapsulated in our Criminal Code, originally in sections 16 and 17, since the 1913 code was introduced. There was some reform to the code more recently and the current provision is the definitive one. With respect to whatever judges might have said in Carroll's case and other cases, section 17 is the substantive provision that we are dealing with today. An avenue of appeal from that, in effect, allows the retrial of a charge of a serious nature so that justice can be done when it is plain from the emergence of further evidence or from evidence that there has been a tainted acquittal on that charge. It is true that a retrial will occur in very, very rare cases and will generally be in those controversial cases that either leave the public with some sense of unease or have been difficult to mount and establish in the first place. Carroll's case is an example of that, and I am sure there have been many others in the past. In fact, the very idea of injustices having been done is not unknown in popular entertainment. There was a terrific movie, I think in the 1950s, which could have had Charles Laughton as the prosecutor. The movie, called *Witness for the Prosecution*, based the whole plot, or theme, around someone charged with murder who manages to find a way of suborning the verdict and who then thinks he has gotten away scot-free. When he betrays the woman he has done it all for, she shoots him and she cannot be retried. I am sure there are other movies and books to the same effect.

Getting back to the matter in hand, I will deal with the report step-by-step, as that will be a convenient way of dealing with the several submissions that were made by honourable members. I will then try to address some of the more individual submissions. I should make the observation that the Standing Committee on Uniform Legislation and Statutes Review makes it quite plain that it was not required to and did not look into the policy of the bill. However, it has expressed tentative views in a number of places in the report on the policy and how it might be preferable to take one course or another. I note that many recommendations in the committee's report are framed in terms of wanting to know the rationale for various policy choices made by the government. It is a little curious to look at whether the bill fulfils the policy objectives and then to want to know the rationale for them.

Hon Adele Farina interjected.

The DEPUTY PRESIDENT (Hon Jon Ford): Order, members! When we go into the Committee of the Whole House there will be an opportunity to quiz the parliamentary secretary in detail; now is not the time to do it.

Hon MICHAEL MISCHIN: In any event, it may be that witnesses before the committee have questioned the policy decisions and raised doubts; that is all very well, but the committee's brief was not to look at or address the policy of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011, but to determine whether the bill, as framed, fulfils the policy objectives the government has for it. As I recall, the second reading speech was a quite comprehensive one, setting out the rationale for the bill and the objectives it was intended to meet. It is one thing to express doubt as to whether the bill gives effect to a particular view or whether the government has

clearly expressed its intent; but to inquire into the rationale for a decision being made seems to descend into the policy of the bill.

With regard to uniform legislation, the committee has identified at paragraph 3.1 that the bill does not precisely fit into any of the identified structures of uniform legislation. I suppose the best description of it is that the Standing Committee of Attorneys-General has articulated a desire to reform the area of law with which the bill is concerned, and set out some broad principles or touchstones for any reform and the objectives of any reform, and left it up to the states to distil something from those objectives that will suit the circumstances of those states. That is what is being done in this case in Western Australia. We are not the first jurisdiction to enact this type of legislation. It is one of the great benefits of the federation that we are able to sit back and see how other states have done this, pick the eyes out of their legislation, try to achieve something that will be suitable for our purposes, and hopefully improve on what other states have attempted. We think that we have achieved that in this case.

The committee, in section 6 of the report, identified a number of other cases apart from the Carroll case. I seem to recall that Hon Giz Watson referred to it as a Victorian case; in fact, it was a Queensland case and she quoted from the judgement of the Queensland Court of Appeal.

Hon Giz Watson: The Carroll case?

Hon MICHAEL MISCHIN: Yes. I may have misheard, but I thought she said it was Victorian.

In any event, a couple of cases were cited by the committee. It was always going to be difficult to find a precisely similar case; I note that the examples are close, although they are not quite on all fours with Carroll, but that is by the bye.

The similarities and departures from the COAG principles have been identified in the report. I was a little confused with one aspect of the report, and that is part 7, dealing with references to offences of an administration of justice nature from other jurisdictions. That is one of the two alternatives in proposed section 46A(1); one relates to administration of justice offences in Western Australia, but that part of the report focuses entirely on offences committed outside the state. The significant part of that analysis seems to be the suggestion that proposed section 46A(1)(b) denies an acquitted accused the opportunity to argue, before being summonsed or arrested, that the administration of justice offence is substantially dissimilar. Strictly speaking, it does not deny an accused anything. It has not removed any right that was there before; it simply does not provide an opportunity to be heard, but there is no jeopardisation of a person's liberty at that stage, anyway. It is an application to the court to issue either a summons or a warrant to bring the accused to court so that the substantive leave application can be heard on notice. It is a facility of the same type as the issuing of a summons by a police officer for an offence, or the issuing of a warrant for arrest by a Justice of the Peace; there is no opportunity for anyone to be heard at those stages, either as to the merits of the charge or, indeed, whether it is a charge known to law. There is no difference in approach here. There has to be something that initiates the process in order to bring someone before a court so that the person can be dealt with, and in these particular circumstances, this is it. There seems to be some sort of concern about the denial of an acquitted person the opportunity to raise something; it is just not an appropriate time, place or circumstance to raise anything. It will be raised once he or she is given notice of the fact that there is an application, and he or she will then have the opportunity to be heard when he or she knows when the substantive application is to be dealt with by the court. It may be just an infelicitous use of language, but it is important to make that clear.

I turn now to the recommendations of the report. For ease of reference, I will read out the recommendations so members are aware of what they say and are able to put them into some kind of context. It will be reflected in *Hansard* for anyone who is of a mind to look into this at a future time, so that they can understand the context in which my answers appear. Recommendation 1 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make it clear and put beyond doubt whether an alternative verdict for an offence, which was not a "*serious offence*", would be available on an indictment for a serious offence filed following the grant of leave.**

I do not propose to make any amendments in that regard. It must be understood what happens after the completion of the process of filtering, the granting of leave and the determination as to whether there ought to be a retrial in the circumstances.

What then happens is that the charge for which leave has been given is remanded to a court of competent jurisdiction, and that court is then seized of that charge. The principles and provisions in this bill then fall away; they are irrelevant. Once the court is seized of that charge, the charge proceeds in the same manner as any other charge would proceed. That is in accordance with the Criminal Procedure Act 2004, and the person would be tried for that serious offence, whether it be the original offence or another serious offence for which leave has

been given relating to that subject matter that the court is dealing with. It would be then governed by the provisions either in the Criminal Procedure Act or the Criminal Code.

The Criminal Code in part 1, chapter IIA, deals with alternative offences. These amendments, which I think were introduced more or less contemporaneously with the Criminal Procedure Act, by the previous Attorney General, set out the circumstances in which a charge for an offence under the code, for which a person is acquitted, can result in nevertheless a conviction for an alternative offence available under the code or some other statute. If we take section 10A of chapter IIA as an example, subsection (1) reads —

> A person charged with an offence cannot be convicted by the court dealing with the charge of any other offence instead of that offence unless —
>
> (a) the accused is charged with the other offence as an alternative to that offence; or
>
> (b) this Chapter provides otherwise.

It then sets out the circumstances in which an alternative is available. If we follow that through, apart from some of the more general provisions, we will see set out in the Criminal Code the circumstances in which one charge may result in an alternative conviction.

Given that what we are doing in this bill is providing, in a sense, an alternative or a further avenue of appeal—an appeal against acquittal, rather than an appeal against conviction, and an appeal against an acquittal on the merits of the charge, as opposed to an appeal against an acquittal by direction by a judge, which is already in the hands of the prosecution—all this is doing is finding a mechanism by which that can be done, and then putting a court back in the position of dealing with a serious offence, when the original serious offence, or an administration of justice offence, or some lesser serious offence is available as an alternative for which the court gives leave. Once that happens, the court deals with it and is in control of its own processes, and has regard to the principles of justice and the like and abuse of process and is able to make its decisions. So, the alternative verdicts that would be available would be those that would be available on the charge for which the court gives leave.

It may be that the Acting Solicitor-General had some concerns about that. The government has considered the issue and does not think that any amendment is necessary to achieve that end. Proposed section 46H of the bill provides that once leave is granted by the Court of Appeal, the court may order the accused to be either kept in custody, or released on bail, as the case may be, until their first appearance in the court in which the prosecution of the new charge is commenced, or the time for commencing prosecution of the new charges expires, whichever occurs first. So, there is the appearance in court, and the usual process would then take place as for the trial of the offence for which the accused has been remanded, and the other elements of the criminal law and other features of the system would come into play. No amendment is contemplated there. The government's view is that the process is sufficiently clear as to what will happen. There is nothing in the bill that would compromise the ability and the power to deliver an alternative verdict to the charge for which the accused is being retried.

I note the comment at paragraph 7.18 of the committee report that the Council for Civil Liberties has described the retrospective nature of the bill as repugnant. It does not go into it, and I do not think it quite understood what retrospectivity is. I notice also in paragraph 7.19 the comment that Western Australia and Queensland are the only code states—there is a comment that the only other code state is Queensland. That is not strictly true, as I tried to point out during the course of the debate. There are three code states, and one of them is Tasmania. Tasmania has its own peculiar code, although there are many elements of it that are not dissimilar to those in Western Australia.

Hon Adele Farina: Has it implemented the double jeopardy law? No, it has not.

Hon MICHAEL MISCHIN: Yes, it has, but I am not sure, to the extent that it has, whether it includes such a provision. This issue is dealt with in proposed section 46B(2), which provides —

> For the purposes of subsection (1) it does not matter if the acquittal occurred before or after the commencement of this Part.

In New South Wales and South Australia, and in fact also in Tasmania, the law applies to a person acquitted of offences both before and after the commencement of the legislation. In Queensland, it applies only to a person acquitted after the commencement of the provisions, although the offence for which the person was acquitted may concern conduct that occurred prior to the commencement of the provisions.

Some care has to be taken with respect to use of the term "retrospective". A retrospective law is usually regarded as a law which creates a new norm of conduct, and which applies that norm to conduct that occurred before the law was enacted, and provides new penalties for a breach of that law. For example, if we were to pass an act that created an offence that had not existed prior to the passage of the act, and that act said that conduct that fell within the ambit of that offence was punishable, that would be a retrospective law. In this case, all that is happening is a procedural change to allow for a further avenue of appeal.

Hon Adele Farina: With significant ramifications.

Hon MICHAEL MISCHIN: This bill is not such a law. It does not create any retrospective offences. Rather, the offence for which a person is being retried was an offence provided for by the law at the time.

Hon Adele Farina: But previously the person could not be retried for it.

Hon MICHAEL MISCHIN: But that is different. Relieving the person of a protection is not necessarily creating a new offence, and it is not making a retrospective law—in the same way as an avenue of appeal allowing the prosecution to appeal against a sentence, on the basis that a sentence was inadequate, was not a retrospective law when that was introduced, and anyone who fell within the time limits for an appeal would nevertheless have been subject to the potential for the prosecution to appeal against their sentence when that law was introduced. It is not a retrospective law; it is providing a new avenue of appeal or review of a decision.

The procedure has altered. Procedural laws dealing with the manner in which criminal charges are determined ordinarily apply to future trials of charges for offences alleged to have been committed prior to the enactment of the procedural law. By way of another illustration, if a person is this year charged with a sexual offence committed in the 1970s, they may be charged with the offence that was current at that time, not with an offence that is current at this time. They would be subject, by and large, to the penalties that were available at that time, provided that those penalties are still applicable at the time of his or her conviction. But the trial will not be conducted by 1970s rules, and the rights of appeal that the person and the prosecution would have would be the rights of appeal current at the time of conviction—that is, now—not what was available in 1970. There is no real retrospectivity involved in this law at all, and the point of proposed section 46B(2) is simply to make it clear and remove all doubt—to eliminate any argument or debate about this issue—that somehow there is an alteration to the law and that somehow these procedures should only apply to acquittals occurring after the passage of the Criminal Appeals Amendment (Double Jeopardy) Bill 2011.

To the extent that there is any question about the policy of any of that, we would suggest that the interests of justice require it. If we accept the proposition that there ought to be circumstances when someone ought to be retried for a serious offence once fresh and compelling evidence emerges, then there is no reason to draw a line at the date of passage of this bill as to whether that could happen. There certainly is not in the case of finding fresh and compelling evidence to set aside acquittals, and we would argue that in cases such as Carroll's, in which fresh and compelling evidence of guilt became available, drawing an arbitrary line as at the date of passage of this bill would simply cement the injustices that have occurred in the past.

The filtering processes that the court must engage in are quite stringent. An application can only be made to the Court of Appeal in relation to fresh and compelling evidence that was not available or could not have been adduced at the trial. Therefore, only new evidence that has become available since, which could not have been adduced at the trial and which any reasonable diligence by the authorities would not have disclosed, can be used. In that sense the bill is prospective. Proposed section 46B(2) makes it clear that the application can apply, so it removes any doubt about that issue.

The Court of Appeal is also required to consider whether there should be a new trial in the interests of justice; that is covered by proposed section 46K. One of the things the court is required to consider is the time that has passed since the first trial. That is, there has to be a public interest in bringing someone to a retrial, and that has to be balanced with the oppression that would occur if lengthy periods of time have passed. One of the things that would be weighed in that exercise is the seriousness of the charge and so forth. Although it might appear on its face that there is a great deal of latitude in this, in fact it would be in very infrequent—I hesitate to say rare—circumstances that the Court of Appeal would be likely to give leave to prosecute someone for an offence that had occurred any substantial time beforehand. It would have to be something pretty grievous or notorious for someone to be prosecuted, to use the example, for an offence that occurred in the 1970s.

In that context I forgot, and should now read, recommendation 2, which states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General explain the reason for the position taken with respect to retrospectivity in the Bill given the position taken by Queensland.**

Recommendation 3 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General amend the Bill to make clear and put beyond doubt, whether a further leave application is required in circumstances where a new charge requires amendment or substitution and the extent to which an amendment or substitution can be made.**

Again, the government has considered that and does not believe an amendment is necessary. The rules and law that would ordinarily apply to any charge of which a court is properly seized would apply to a charge for which leave has been given by the Court of Appeal. The decision as to whether an amendment or substitution ought to be allowed to that charge would be one for the trial judge. I would suggest that a trial judge would be very

conscious and sensitive to the fact that this was a retrial based on very narrow circumstances for which leave had been given by the Court of Appeal after it had been persuaded that all the criteria had been satisfied and the stringent requirements had been met, and it may be a charge that had already been further investigated, or should have been further investigated, for which further evidence had been provided or there had been some change in the circumstance. The court would be sensitive to all those matters, and sensitive as to whether the amendment or substitution of the charge would amount to an abuse of process in the circumstances. If it did amount to an abuse of process by the prosecution trying to slip in an alternative charge or, at the last minute, amending a charge having secured leave for a particular offence, appropriate orders could be made to stay those proceedings. There is nothing unusual about that process, and it is currently in place. There are other checks and balances beyond the procedure for obtaining leave for a retrial set out in this bill. The government is of the view that that is a necessary and inevitable consequence of a court of competent jurisdiction being seized with a charge on the basis of leave having been given, and no further elucidation of the ability to do that is necessary.

Recommendation 4 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of a tainted acquittal may result in more than one retrial. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.**

Two circumstances are contemplated and affected by the bill. One is a serious charge that has gone to trial, the person has been acquitted and subsequent fresh evidence and the like emerges. There is then a retrial, if leave is granted, on that charge. Another circumstance is an acquittal of a serious charge and, down the track, it emerges that it is the result of a tainted acquittal and an administration of justice offence is charged in respect of it. The reason for having the administration of justice offence option, like in Carroll, is that it may be the only available avenue to pursue. It may be, because of the tainted acquittal, that the prospects of re-prosecuting the original charge are lost because of the suborning of witnesses and the destruction of evidence. The proof of the original charge is impossible, but the only way to do justice is to look at whether perjury or some other administration of justice offence has been committed. In the way the act is structured, there can be only one retrial of the original offence. But, yes, theoretically, if that offence cannot be retried and an administration of justice offence avenue is pursued, then if there is an acquittal of that and fresh evidence emerges after that and the Court of Appeal is convinced that all the other stringent requirements are satisfied, that administration of justice offence can be the subject of retrial leave and recommittal. But I would suggest that the prospects of that happening are very, very remote and unlikely.

Hon Adele Farina: But if they are so remote, why make provision for them? This is one of the things that I struggle to understand because we are continually told by governments that it is never going to happen. If it is never going to happen, why is the provision there in the first place?

Hon MICHAEL MISCHIN: The provision is there in the first place for the reason I have explained. Theoretically, yes, it may be appropriate that there be a retrial on the administration of justice offence if some evidence emerges subsequent to that, or indeed if that person has suborned the second charge. We can argue about the merits of it; the likelihood of it happening is very unlikely but there may be circumstances in which it can arise. It will be a matter for the Court of Appeal of the day to decide whether a retrial is justified and whether the order will be permitted. Members have to remember that there is a several-stage process to this. There has to be an authorised officer giving leave to even investigate the matter once there has been a verdict of acquittal, let alone mounting an application for leave to charge someone with that offence and leave being granted. In terms of compromising the principles of double jeopardy, this legislation is about as stringent as we can get it and still retain the option of seeing that justice is done down the track for a serious matter.

[Leave granted for the member's speech to be continued at a later stage of the sitting.]

Debate adjourned until a later stage of the sitting, on motion by **Hon Norman Moore (Leader of the House)**.

[Continued on page 9311.]

EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Discharge of Order and Referral to Standing Committee on Procedure and Privileges — Motion

Resumed from an earlier stage of the sitting on the following motion moved by Hon Giz Watson —

(1) That order of the day 7, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, be discharged and referred to the Standing Committee on Procedure and Privileges for consideration of clause 5, proposed sections 20G to 20M, and to report not later than 8 March 2012.

(2) That the committee has the power to consider the policy of the bill.

Amendment to Motion

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [4.04 pm]: I move —

To amend the motion as follows —

(1) To insert after "20G to 20M" —

and their effect, if any, on parliamentary privilege

(2) To delete "8 March 2012" and substitute —

29 November 2011

(3) To delete paragraph (2).

It appears plain from the comments that have been made to date that the real concern is one of the effect of this bill, if any, on parliamentary privilege. It is the government's view that it is a very narrow issue which will require only evidence of a legal-opinion nature. That can be determined in a fairly short space of time by the Standing Committee on Procedure and Privileges so that this bill can proceed in the last week of the scheduled sittings of this chamber.

Clause 5 deals simply with the question of journalists' privilege, as it were. If the amendment to the motion is accepted, the procedure and privileges committee can focus on that question entirely and report back, the government believes, in a fairly short space of time, by 29 November, which will be the start of the last sitting week. Depending on the committee's conclusions and allowing enough time for members to consider the committee's report, there is a very good prospect that the bill can be disposed of at the Committee of the Whole stage in that week.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [4.07 pm]: I rise to indicate that we will be supporting the amendment to the motion. We intended to support Hon Giz Watson's original motion in any event. I have put on the record already that we support the policy of the bill; in fact, we all voted for that at the end of the second reading. However, I think there are a number of matters that go to why this house in particular should refer this bill to a committee. I want to quickly touch on that because I do not want to stop people from doing what they normally do at 4.15 pm, heaven forbid! I will make a few quick comments.

The bill has been introduced into this house in particular. It did not have to be introduced into this house but the government chose to introduce it into this house. This house has a particular role in respect to review. I made my point during the second reading debate that personally I do not describe myself as a parliamentary purist but I think that when it comes to questions of privilege, we have to be careful. The fact is that this bill has not been subject to any other debate, so no other issues have been canvassed in the other place, and issues have not been canvassed in public. There has not been an in-depth analysis of this bill, so I think it is appropriate that it be referred to a committee.

We are really talking about only one element of the bill—that is, the matter of privilege. So it is right that the inquiry be narrowed to proposed sections 20G to 20M. Because we are dealing with only one matter, it is appropriate that it also not be a lengthy consideration. It would not have hurt anyone to refer it to the committee in the terms as originally put by Hon Giz Watson, perhaps minus the matter of the consideration of the policy of the bill. I do not think it would have damaged the government's election commitment, because under the terms of that motion, the matter would have been dealt with before we resumed next year. The government would still have honoured its election commitment as long as the bill was passed before 9 March 2013. It would not have lost anything in that sense. As the house of review, I think we have an obligation in these particular circumstances in which there has not been a broad canvassing of all the issues as they affect the rights and obligations of Parliament. For all those reasons, it is appropriate that the bill be referred—full stop. The conditions outlined in the motion will ensure that the bill goes to the right committee in the first place—the Standing Committee on Procedure and Privileges. It is also a narrow reference and it provides for a relatively short period for consideration. I do not think that hurts anybody's obligations to the commitments that we have given to support the passing of the bill. With those comments, we support the amendment.

HON WENDY DUNCAN (Mining and Pastoral — Parliamentary Secretary) [4.11 pm]: The Nationals also support the policy of this bill. We are very pleased that the matter of privilege will be referred to a committee, if the house supports it. The Nationals certainly support the amendment. We believe that it is appropriate that the Standing Committee on Procedure and Privileges consider the issue of privilege. It does not need a long period of consideration because the issue is being dealt with.

Hon Max Trenorden: And the procedure and privileges committee is brilliantly led!

Hon WENDY DUNCAN: And the procedure and privileges committee is brilliantly led, as Hon Max Trenorden has interjected. With those comments, we support the amendment.

The PRESIDENT: I will give the call to Hon Max Trenorden if he wants it!

HON GIZ WATSON (North Metropolitan) [4.12 pm]: Obviously, this amendment will amend the referral motion as I first put it to the house. I am willing to accept these changes. I think we are setting ourselves a difficult task to deal with even this narrow matter in such a short time frame, but I recognise the need for a negotiated compromise to get this matter dealt with. I certainly hope that the committee can produce some useful advice to the house in that time frame. I indicate that we are willing to support the changes, if that is the will of the house. If the majority of the house wants the referral in these terms, we can live with that.

Amendment put and passed.

Motion, as Amended

Question put and passed.

The PRESIDENT: As the Chairman of the Standing Committee on Procedure and Privileges, I forewarn members of that committee to be prepared for a brief meeting immediately at the end of today's proceedings.

Sitting suspended from 4.15 to 4.30 pm

QUESTIONS WITHOUT NOTICE

HARDSHIP UTILITY GRANT SCHEME

1015. Hon SUE ELLERY to the Minister for Energy:

Does the minister agree with the view expressed today by the Western Australian Council of Social Service in its pre-budget submission entitled "Closing the Social Divide" that current hardship schemes including the hardship utility grant scheme, the Synergy and Horizon Power assistance schemes and AlintaCARE are all currently operating well below the existing level of demand?

Hon PETER COLLIER replied:

I thank the member for some notice of this question. Yes, I think a lot of people are struggling out there, to be perfectly honest. I do not think it is just those who are at the lower end of the spectrum; that is, those who are under extreme hardship and are eligible for the hardship utility grant scheme. The people who are struggling in addition to that cohort are single-income families with mortgages and a couple of kids, which is a significant proportion of the population. They are the people who are struggling to come to terms with shifts in utility costs. We are very cognisant of that. As a result, I have looked at the possibility of changing the tariff structure, as the member would be aware. Hon Kate Doust has had a briefing on this issue.

Hon Kate Doust: No, I haven't. You shut down those briefings.

Hon PETER COLLIER: No. Hon Kate Doust had a briefing with the Office of Energy and they went through this issue with her.

Hon Kate Doust: I will talk to you later about that.

Hon PETER COLLIER: Sure. That is what I was led to believe, anyway. I am always accommodating in that area.

What we are trying to do in terms of assisting that particular group within the community is to look at a more equitable tariff structure similar to that of the Water Corporation, whereby payments increase according to consumption. I will be perfectly honest; the models I have seen as a result of the review are not that impressive.

Hon Sue Ellery: Including that supported by WACOSS, for example?

Hon PETER COLLIER: I will get back to that. Therefore, I do not think it will necessarily assist that group within the community. What we have to do as a government is to ascertain how we can best assist those who are least able to pay. Yes, I am sure that there are members of the community who are really struggling and who do not fall within that gamut of hardship payments. That is what we will look at. We will certainly look at that as we move into the budgetary cycle. What needs to be remembered, and I say this constantly, is that we need to get to a situation in which, as a community, we are moving to much more of a user-pays system for electricity use. We have got to. Believe it or not, our electricity prices are still amongst the lowest in Australia, even given the significant increases in the last couple of years. We are still below the national average. That is a scary thought. I can tell members that the electricity generation charges, electricity network charges and electricity retail charges are not going to come down in the next 12 months, two years or three years.

Hon Sue Ellery: None of that cuts it with people who can't pay their bills.

Hon PETER COLLIER: No, but I am giving an explanation. It is not like we do not care. There is this misguided notion from the opposite side of the chamber that we just do not care; that we have made this heartless decision to go out and make life as difficult as possible for Western Australian households. That is simply not the case. We could go down the path of having a tariff freeze or a 10 per cent increase, which with all

due respect was the policy of those opposite. The direct implication of that sort of irresponsible attitude towards tariffs is that we would simply not have billions of dollars—and I mean billions of dollars—to spend in the service industries of health, education, aged care and mental health, for example. Those areas would directly miss out. Hon Sue Ellery, the Leader of the Opposition, has been in cabinet; she knows what it is like. If we went into the budgetary process and said that we wanted this, that and the other, we would be told that we could not have that because of the tariff freeze. What we would have to do is write out a cheque for a couple of billion dollars to pay for that subsidy. That is exactly what would have to happen.

Hon Sue Ellery: What is your operating surplus?

Hon Simon O'Brien: A darn sight less than the capital cost, as you well know.

The PRESIDENT: Order!

Hon PETER COLLIER: To get back to it, yes, we are always looking at ways in which we can assist those who are least able to pay—always. That is why we have injected around $80 million this year for hardship allowances. Yes, there will be some who will not fall within that gamut of eligibility for hardship payments. We will continue to look at ways in which we can assist that group. In addition, we will continue to look at ways in which we can perhaps have a more equitable tariff structure. Having said all of that, we simply cannot go down the path of continuing to bail out our corporations, because we are simply not paying for our electricity. The cold hard fact of the matter is that we are still not even close to paying for our electricity. There will be continued pressures on electricity price increases, in addition to a carbon tax, of which we will have no control and which will come in in July next year.

SIDNEY BRADY — ASSAULT

1016. Hon SUE ELLERY to the minister representing the Minister for Corrective Services:

I am asking this question on behalf of Hon Ed Dermer who is out of the house on urgent parliamentary business.

I refer to the two males recently arrested for the assault of Sidney Brady in Dianella.

(1) Are these males currently under any form of Department of Corrective Services or community justice supervision?

(2) If yes to (1), what is the nature of that supervision?

(3) If no to (1), has either male ever been under any form of Department of Corrective Services or community justice supervision or court order in the past; and, if so, what are the details of that supervision?

(4) Has either male ever been breached for failure to comply with any court order, sentence or obligation imposed by a community corrections or juvenile justice officer?

Hon SIMON O'BRIEN replied:

I thank the honourable member for notice of this question. However, this matter is currently before the courts. Therefore, standing order 140(b)(iii) precludes me from responding.

WESTERN POWER — MANAGEMENT OF ASSETS

1017. Hon KATE DOUST to the Minister for Energy:

Due to matters raised during the public hearings held yesterday by the Standing Committee on Public Administration as part of its ongoing inquiry into the electricity transmission and distribution management of Western Power and Horizon Power, do you have confidence in the competence of Mr Doug Aberle and Western Power's management of its assets?

Hon PETER COLLIER replied:

I thank the honourable member for the question. Yes. I will obviously not comment on what went on in yesterday's hearing. I will wait for the report of that committee before I make a comment. Certainly in terms of the management of Western Power, we have made some significant inroads over the past three years and over the past 18 months in particular. We have had a different board and a new chairman. We have seen pole maintenance come down from a backlog of around 100 000 in 2005–06 to around 80 000 in 2008 and down to a virtually negligible amount currently. There have been significant inroads there. There have been improvements in other areas. There still needs to be improvement. I have said this constantly to the management and board of Western Power over the last three years. I feel that there needs to be a cultural shift in Western Power, with much more emphasis on service delivery. That has improved. What needs to be remembered is that the Western Power network pretty much keeps the lights on 100 per cent of the time—it is around 99.96 per cent or 99.8 per cent of the time. They are doing something right, but there are issues that do need to be addressed. If issues arise from the findings of that committee, I will certainly address those issues at that time.

MENTAL HEALTH — PROJECT 50 INITIATIVE

1018. Hon SALLY TALBOT to the Minister for Mental Health:

I refer to the mental health accommodation project, known as Project 50, which is seeing the construction of unit accommodation in Mandurah for people with mental health conditions.

(1) How many units are being constructed as part of this program and where are they being constructed in Mandurah and the Peel region?

(2) Was the Mental Health Commission and the Mental Health Commissioner consulted about the design of these units and their location?

(3) Which other stakeholders in the local community were consulted about the design, location and model of operation for these units in Mandurah and the Peel region?

(4) Which model of operation will oversee the support of tenants in these units, and at what cost per tenant and by whom will these services be provided?

(5) What 24-hour support to tenants of these units will be provided, particularly if tenants experience episodes outside normal business hours?

Hon HELEN MORTON replied:

I thank the member for providing some notice of the question.

(1) This is a terrific program that is operating. Fifty individual dwelling units are allocated to this program at the following locations: of the 25 units in the south metropolitan area, two are at Wellard; six at Beeliar; one at Falcon; one at Yangebup; 10 at Mandurah; two at Hamilton Hill; and three at Orelia. Of the 25 units in the north metropolitan area, five are at Butler; three at Carramar; six at Clarkson; one at Midvale; six at Ellenbrook; two at Madeley; and two at Ridgewood.

(2)–(3) The individual supported accommodation Project 50 initiative was agreed to by the then Mental Health Division of the Department of Health prior to the establishment of the Mental Health Commission. The units were designed according to the Department of Housing universal design specifications for all new public housing dwellings. The location of the units was informed by the Department of Health's waitlist for supported accommodation for people with a mental illness. The model of operation was developed in accordance with the Department of Housing community disability housing program policy and the mental health housing strategy.

(4) Support for tenants is provided using a mobile psychosocial and recovery support model and involves families and friends. This service is delivered on an individual basis with professional support and group activities as required by an individual tenant. The number of direct hours for individuals will vary and is expected to be more intensive in the first weeks of settlement into their new property. The Mental Health Commission has allocated the non-government organisation Ruah Community Services a total of $241 233 for 2011–12 to provide these services. Due to the varied needs of the individual, a breakdown per tenant is not possible.

(5) Clinical services are provided outside business hours by the mental health emergency response line—MHERL—and the community emergency response teams—CERTs. In addition, each tenant has a care plan, which includes a crisis plan for accessing support after hours that is tailored to the needs of the individual.

DIRECTIONS 2031 — REMNANT BUSHLAND CONSERVATION

1019. Hon GIZ WATSON to the minister representing the Minister for Planning:

I refer to the strategic assessment of the matters of national environmental significance plan being prepared in conjunction with the "Directions 2031: Draft Spatial Framework for Perth and Peel" report.

(1) Will the minister ensure there is a moratorium on the rezoning of remnant bushland in the Perth and Peel regions while the strategic assessment is conducted?

(2) If no to (1), how will the minister ensure that there is not a rush of rezoning that would pre-empt the protection of the remnant bushland containing matters of national environmental significance?

Hon HELEN MORTON replied:

I thank the member for some notice of the question.

(1) No moratorium will be put in place on the rezoning of remnant bushland in the Perth and Peel regions while the strategic assessment is conducted. The across-government process being undertaken for the matters of national environmental significance plan—the MNES plan—is intended to ensure that the

strategic assessment and sub-regional structure plans are developed in a consistent and informed manner. The MNES plan will be released for public comment towards the end of 2012. Given the time frame required to adequately undertake a strategic assessment for the Perth and Peel regions, it is not considered appropriate for the strategic assessment to delay interim planning decisions.

(2) Considerable areas of regionally significant bushland are already protected through the conservation reserve system and Bush Forever. Any proposal for rezoning of remnant bushland not within the reserve system or a Bush Forever area will still have to follow due planning process whereby environmental issues are given due regard. Under division 2 of the Planning and Development Act 2005, proposed scheme amendments are required to be referred to the Environmental Protection Authority. Under section 48A of the Environmental Protection Act 1986, any rezoning proposal—scheme amendments—are referred to the EPA for the determination of the level of assessment required. All development proposals that impact on matters of national environmental significance need to be referred to the Australian government Department of Sustainability, Environment, Water, Population and Communities for assessment.

TAXIDRIVERS — PASSENGER COMPLAINTS

1020. Hon KEN TRAVERS to the minister representing the Minister for Transport:

(1) Does the minister consider it is appropriate to answer a parliamentary question by telling a member to google it?

(2) If no to (1), why did the minister answer question on notice 4713 by advising me that the phone number at the Department of Transport that passengers can call to make a complaint regarding taxidrivers can be obtained by searching for "Taxi complaints WA" on Google?

(3) Does the minister know what happens when he googles "Taxi complaints WA"?

The PRESIDENT: Is that question without notice to the Minister for Finance?

Hon KEN TRAVERS: That is correct, Mr President.

The PRESIDENT: I will call the Minister for Finance to answer the parts of that question that are relevant to his portfolio.

Hon SIMON O'BRIEN replied:

None of it is relevant to my portfolio, Mr President. The question on notice —

Hon Ken Travers: It's relevant to your answers!

Hon SIMON O'BRIEN: Shut up for one minute, you long streak of misery!

The PRESIDENT: Order!

Hon SIMON O'BRIEN: The questions on notice were asked of the Minister for Transport. Because the Minister for Transport is not in this place, the answers are provided by the Minister for Transport but delivered for inclusion in the record under my name. I actually do not think it is appropriate to answer a question like that by saying, "Just google it." I did not think it was appropriate when Hon Ken Travers's colleague Hon Ljiljanna Ravlich used to provide answers when she was a minister.

Several members interjected.

Hon SIMON O'BRIEN: I was not aware of this answer, and now new arrangements have been put in place as a result of that. I have already spoken behind the Chair with the honourable member, so I am surprised that he chooses to use the opposition's valuable question time on this sort of childish attempt at point scoring. I do not think that is an appropriate answer. As I have told the member before, if I had been drafting the answer—in future I will be—the number would have simply been provided. Okay; so there you have it!

Hon Ken Travers: And part (3): do you know what happens when you google it?

Hon SIMON O'BRIEN: Again, I am surprised that opposition members want to use their question time on pursuing this sort of pointless little exercise.

Hon Ken Travers: It's not pointless.

Hon SIMON O'BRIEN: It just shows the level of opposition that we have.

Hon Ken Travers: Complaints against taxidrivers is a very serious issue. That's what this is about.

The PRESIDENT: Order!

Hon SIMON O'BRIEN: It is all right if this is all that the honourable member can do. It is opposition members' question time and they can waste it as they see fit.

NORTHERN SHARK FISHERY

1021. Hon JON FORD to the Minister for Fisheries:

I note the recent publishing of the Department of Fisheries annual report and I ask in reference to the northern shark fishery —

(1) Where is this fishery and what are its boundaries?

(2) What sustainability issues, if any, need to be addressed in this fishery?

Hon NORMAN MOORE replied:

I thank the member for some notice of this question.

(1) The Western Australian northern shark fishery comprises two fisheries: the state jurisdiction Western Australian north coast fishery, which operates in waters east of 120 degrees east longitude and north of 18 degrees south latitude to Koolan Island. The remaining waters of the fishery, from North West Cape to 18 degrees south latitude, are closed; and the second fishery is the joint authority northern shark fishery, which operates in waters between Koolan Island and the Western Australia–Northern Territory border.

(2) The main sustainability issues that need to be addressed in WA's northern shark fisheries relate to: excessive catches of sandbar sharks taken by demersal longline in recent years; uncertainty surrounding the status of black-tip species taken by gillnet; and bycatch issues and the potential for interactions with protected species.

GENETICALLY MODIFIED CANOLA — CONTAMINATION — CUNDERDIN

1022. Hon LYNN MacLAREN to the minister representing the Minister for Agriculture and Food:

(1) Is the minister aware that the hail storm near Cunderdin last week resulted in around 100 tonnes of GM canola being knocked to the ground, with some of this running off onto the roadside verge and a neighbouring non-GM property?

(2) Is the minister aware that this GM canola has already started germinating along the roadside and drains?

(3) Who is responsible for the cleanup of the GM canola contamination?

(4) What action will the Department of Agriculture and Food take to ensure that the GM contamination is cleaned up?

(5) How many other incidents of GM canola contamination has the department been notified of so far this year?

Hon ROBYN McSWEENEY replied:

I thank the honourable member for some notice of the question. The Minister for Agriculture and Food has responded with the following answers —

(1) Yes, I am aware of these unconfirmed claims.

(2) No.

(3) As with the movement of any plant material between farms, if clean-up is required, the involved growers will need to liaise with each other to work out the best way to manage any GM canola that may have moved.

(4) The Department of Agriculture and Food will provide technical advice to the growers involved on management options that may be required.

(5) One.

MENTAL HEALTH — INVOLUNTARY PATIENTS — SMOKING BAN

1023. Hon LJILJANNA RAVLICH to the Minister for Mental Health:

I refer to the lifting of the smoking ban for involuntary patients in locked wards.

(1) How long will it take to have the ban lifted for involuntary patients?

(2) What kind of consultation will exist with front-line staff about how the lifting of the ban will be implemented?

(3) It is common to have wards that have both voluntary and involuntary patients at the same time; how will these situations be handled?

(4) Would the department consider, at each local level, having a full consultation process with staff members to explore whether they can consider having a mental health nurse who, on a voluntary basis, would be available for those who need to be escorted on a cigarette break?

Hon HELEN MORTON replied:

I thank the honourable member for some notice of this question.

(1)–(4) As I have previously indicated, an intense amount of work is taking place on this at the moment. The working group met yesterday or the day before. The group I referred to includes the Mental Health Commissioner, Eddie Bartnik; the head of the Council of Official Visitors, Deborah Colvin; the President of the Australian Council on Smoking and Health, Mike Daube; and representatives of the Director General of the Department of Health. The group has made substantial progress and is almost at the stage of being able to put the final plan into a cabinet submission, and people are determined that it will work. As Hon Liz Behjat said the other day, this is a work in progress. There have been significant levels of consultation with staff; it is not something that has just been dreamt up over the last week or two. Consultation has taken place at different levels and with different agencies across the state in both country and metropolitan areas. Almost everywhere I go, it is a topic of conversation with families and friends of people with a mental illness. There has been a significant amount of discussion around this with organisations that represent various groups of people, whether they are consumer groups, friends and family, carer groups or service organisations that are involved with providing involuntary care to people with a mental illness. A substantial amount of consultation has taken place.

I read in the press release that Hon Liz Behjat brought to our attention that Hon Ljiljanna Ravlich had hoped to claim credit for this work. I am sorry to disappoint her, but this work is nearly wrapped up, and she has come in right at the back end of it. Good on her for doing that; that is terrific, because it gave me an opportunity to make it absolutely clear that we have not only bipartisan but tripartisan support. That is a great outcome. It is pretty much final now, and I could almost not have imagined that I could have managed to make this happen so quickly. I am so thrilled that we have been able to do that. I do not know precisely when this will be wrapped up, but it is very close.

ALBANY HOSPITAL — MEDICAL STAFF — FLY IN, FLY OUT COSTS

1024. Hon MATT BENSON-LIDHOLM to the minister representing the Minister for Health:

I refer to the information provided by the minister to the Legislative Assembly on 22 September 2011, that the 12-month cost for fly in, fly out medical staff at Albany Hospital was $3 929 238.

(1) What is the length of contract for each of the personnel listed by the minister?

(2) What is the remuneration for each of the personnel listed by the minister?

(3) For the total cost as provided by the minister, what is the breakdown cost for —

(a) total remuneration for all personnel;

(b) airfares;

(c) accommodation;

(d) hire car; and

(e) agency fees?

Hon HELEN MORTON replied:

I thank the member for some notice of this question. The following information has been provided to me by the Minister for Health —

(1) All medical staff have a medical service agreement that expires on 30 September 2013. Fly in, fly out shifts are worked as per negotiation.

(2) Total fly in, fly out remuneration for the 12-month period ending 31 August 2011 is $1 736 231 for emergency department specialists and $1 928 794 for senior ED staff.

(3) The breakdown of emergency department costs is —

(a) For fly in, fly out ED specialists' remuneration, $1 736 231; for senior ED staff remuneration, $1 928 794; and for ED local general practitioners' remuneration, $325 533.

(b) Airfares, $153 997.

(c) Accommodation, $43 200.

(d) Hire car, $45 059.

(e) Agency fees, $21 957.

AUSTRALIAN MARITIME SAFETY AUTHORITY–WORKSAFE — MEMORANDUM OF UNDERSTANDING

1025. Hon ALISON XAMON to the Minister for Commerce:

I refer to work to update a memorandum of understanding between the WorkSafe division of the Department of Commerce and the Australian Maritime Safety Authority to resolve jurisdictional issues.

(1) Has this work been completed?

(2) If no to (1), why not?

(3) If yes to (1), when?

(4) If yes to (1), will the minister please table the new memorandum of understanding?

Hon SIMON O'BRIEN replied:

I thank the member for some notice of this question.

(1) No.

(2) The jurisdictional issues will be addressed once the commonwealth has made the necessary changes to marine orders part 32 issued under the commonwealth Navigation Act 1912. When this has occurred, the memorandum of understanding, which is proposed to set out guidelines under which WorkSafe and AMSA will respond to health and safety issues on ships and wharves in Western Australia, can be finalised.

(3)–(4) Not applicable.

SOUTH HEDLAND AND PUNDULMURRA TAFE CAMPUSES — BUILDING MOULD

1026. Hon HELEN BULLOCK to the Minister for Training and Workforce Development:

I refer to the answer to question without notice 975, asked on Thursday, 3 November 2011.

(1) Apart from the five claims given in the minister's answer, have any new workers' compensation claims, hazard or incident reports been received by the occupational health and safety management relating to the mould outbreak and remediation during October and November 2011; and, if so, how many, and what is the nature of those claims?

(2) Can the minister confirm that three of the five claims are related to the respiratory system; and, if so, does this warrant immediate and closer investigation?

(3) Why did testing by PureProtect in June, July and August 2011 not provide a breakdown of fungus types or test for aspergillus, when two strains of this fungus were identified in the March 2011 testing by Mycologia?

Hon PETER COLLIER replied:

I thank the member for some notice of this question.

(1) Pilbara Institute has advised that four incident reports were received in October and November. The three reports relate to respiratory symptoms as a result of alleged exposure, and one report relates to alleged exposure to the face and eyes of remediation chemicals. There have been no new workers' compensation claims.

(2) Pilbara Institute has advised that four of the five claims relate to the respiratory system. The institute is investigating these complaints as part of its occupational health and safety management procedure and taking all necessary actions. The claims are also being assessed by RiskCover.

(3) There is no requirement for reports to be broken down in the manner described. When any serious findings are made, these are communicated in the report by PureProtect.

DEPARTMENT OF ENVIRONMENT AND CONSERVATION EMPLOYEES — BROWSE LIQUEFIED NATURAL GAS PROPOSAL OPPOSITION

1027. Hon ROBIN CHAPPLE to the minister representing the Minister for Environment:

I refer to the Woodside and JV partners' Browse LNG proposal.

(1) Are employees of the Department of Environment and Conservation or their contractors permitted to sign petitions opposing the proposal if they do so in their own private time?

(2) Are employees of DEC or their contractors permitted to attend events that are organised in opposition to the proposal if they do so in their own private time?

(3) Are employees of DEC or their contractors permitted to display on their own private vehicles stickers and banners opposing the proposal?

(4) Have employees of DEC or their contractors been advised to inform the department if they are opposed to the Browse LNG proposal; and, if yes, how many employees of DEC or their contractors have done so?

Hon HELEN MORTON replied:

I thank the member for some notice of this question.

(1) Advice to employees and contractors on signing of petitions and making public comment is provided in the Department of Environment and Conservation code of conduct, which requires employees and contractors to identify any conflicts of interest, or perceived or potential conflicts of interest, and to disclose this using DEC's declaration–conflict of interest form. This disclosure is then assessed and advice given to the employee or contractor on whether the proposed activity is approved, and any conditions that apply.

(2) Attending an event in their own time opposing the proposal raises an actual or potential conflict of interest. Employees or contractors seeking to attend would be required to complete a declaration–conflict of interest form and receive DEC endorsement prior to attending. Restrictions may be placed on their level of involvement that may be dependent upon their role within DEC, with greater restriction on those directly involved in the assessment process for the site.

(3) DEC does not seek to control what employees or contractors display on their own private vehicles, noting in particular that such vehicles would often be for family use, not just that of the employee. However, dependent upon the role of the DEC employee or contractor, and their involvement in the assessment process for the site, a declaration of a conflict of interest, or perceived or potential conflict of interest, and the identification of appropriate management measures, may be the appropriate course of action.

(4) Staff have been advised through training on conflict of interest matters to formally declare to the department, by way of a declaration–conflict of interest form, any actual, potential or perceived conflict of interest and to put in place measures to manage the conflict of interest. To date, no declarations have been received concerning the Browse LNG proposal.

PEGASUS METALS — MINING ACTIVITY AT HORIZONTAL WATERFALLS

Question on Notice 4794 — Answer Advice

HON NORMAN MOORE (Mining and Pastoral — Leader of the House) [5.06 pm] Pursuant to standing order 138(d), I wish to inform the house that the answer to question on notice 4794, asked by Hon Robin Chapple on 28 September 2011 of the Leader of the House representing the Premier, will be provided on 22 November 2011.

QUESTIONS ON NOTICE 4779, 4785, AND 4755

Papers Tabled

Papers relating to answers to questions on notice were tabled by **Hon Helen Morton (Minister for Mental Health)**.

ADJOURNMENT OF THE HOUSE

Special

HON NORMAN MOORE (Mining and Pastoral — Leader of the House) [5.06 pm] — without notice: I move —

That the house at its rising adjourn until Tuesday, 22 November 2011 at 3.00 pm.

I wanted to get that in now so that I do not have to worry about it at the end of the day.

Question put and passed.

CRIMINAL APPEALS AMENDMENT (DOUBLE JEOPARDY) BILL 2011

Second Reading

Resumed from an earlier stage of the sitting.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [5.07 pm] — in reply: I was dealing with recommendation 4 of the report of the Standing Committee on Uniform Legislation and Statutes Review, in summary, regarding when leave is given to retry a person on the basis of a tainted acquittal. The

legislation does not prevent an application for leave to retry a third time. However, in practical terms, the Court of Appeal would be unlikely to grant leave to retry a person more than once. If it did so, it would, in the government's view, be done in very extreme circumstances. Additionally, as one of the checks in the system, an authorised officer would be very unlikely to apply for the third trial except in very extreme circumstances. The most obvious argument that an accused who has been acquitted would use would be that a third or subsequent trial would be an abuse of the process of the court and be oppressive in all the circumstances.

Recommendation 5 reads —

> The Committee recommends that that the Parliamentary Secretary representing the Attorney-General confirm whether it is the intent that an application to retry an acquitted accused on the basis of fresh and compelling evidence is only available once. If so, to explain the rationale. Further, to amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

As I indicated, the effect of proposed section 46E(2) is that, when leave is given to retry a person on the basis of fresh and compelling evidence, an application cannot be made for leave to retry the charge a third time. That is sufficiently clear from the terms of the section. However, this provision does not prevent an application for leave being made to retry, for a third time, a person who has been retried on the basis of a tainted acquittal. I suppose, strictly, that would be a second trial on the basis of the charge of an administration of justice offence, and it does not prevent the retrial of one of those offences. In practical terms, however, the Court of Appeal would be unlikely to grant leave to retry a person more than once. That would be, very arguably, an abuse of process.

Recommendation 6 relates to finding 2, and states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney-General provide justification for why an acquitted accused is denied the opportunity to attend the leave application in proposed subsection 46E(5).**

I think I have already covered the principles involved in that. The application for leave is simply to initiate the process, and it will be noted from proposed section 46F that as soon as practicable after a leave application is made, the Court of Appeal—without dealing with the merits of the application, and unless it is satisfied that the application is an abuse of process—must either issue a summons requiring the acquitted accused to attend court, or issue an arrest warrant to ensure that the acquitted accused is given notice of the leave application and is brought before the court. To the best of my recollection, that reflects the current practice in the case of an acquitted accused who is the subject of an appeal by the prosecution against a directed acquittal. There has to be some mechanism by which an accused is brought to the court and the process commenced. I may be wrong about that, but it is not dissimilar to the need to initiate something and get an accused to be brought along, so that he or she is aware of the proceedings. It is at that stage, after they are either arrested or summonsed, that they then have knowledge of the proceedings and are able to argue their case.

The first step in the process is for the authorised officer to make the application for leave, which may be done without giving notice to the accused. The merits of the application cannot be determined at that point; it is after the application is made that the Court of Appeal issues either the summons or the arrest warrant to have the acquitted accused brought before it under proposed section 46F. The court at no time deals with the merits of the matter without the accused being aware and having been given notice of it. When the acquitted accused is brought before a court following the issue of a summons or warrant, the court will consider whether the acquitted accused should be released unconditionally, granted bail, or kept in custody pursuant to proposed section 46F(4). The procedure is used in response to a concern expressed by the Director of Public Prosecutions, quite legitimately, that an acquitted accused might very well flee the jurisdiction on getting notice that an application has been made to issue a new charge. This is to ensure that he or she is brought within the control of the court.

Recommendation 7 states —

> **The Committee recommends that the Parliamentary Secretary representing the Attorney General:**
>
> **(1) confirm the persons that are intended to fall within the term "*authorised person*" in proposed subsection 46M(1); and**
>
> **(2) amend the Bill so as to make clear and put beyond doubt, the Executive's intent with respect to those persons.**

In this respect, the committee has identified an error which was meant to be addressed by parliamentary counsel but which slipped through the net. There is before the house a supplementary notice paper, issue 2, and in that supplementary notice paper is an amendment that proposes to amend proposed section 46M(1) by changing the reference from "authorised person" to "authorised officer" to then pick up the definition of "authorised officer" in proposed section 46A.

Recommendation 8 states —

The Committee recommends that the Parliamentary Secretary representing the Attorney General advise the Legislative Council whether it is the intent of the Executive to remove the double jeopardy defence for an acquitted accused under the age of 18. If so, explain the rationale and amend the Bill so as to make clear and put beyond doubt, the Executive's intent.

Furthermore that the Bill be amended to make clear and put beyond doubt, the Executive's intention with regard to how this law will be applied against an acquitted accused under the age of 18 at the time of the original offence who is later, as an adult, charged with a "*serious*" or "*administration of justice*" offence.

The exclusive criminal jurisdiction of the Children's Court of Western Australia extends to the trial of a person who has attained the age of 18 years in respect of an offence allegedly committed by the person before the age of 18. That is apparent from section 19(1) of the Children's Court of Western Australia Act. Section 19(2) of the Children's Court of Western Australia Act gives the various options available and will apply to a serious charge for which leave is given under the proposed act. As I have mentioned, once leave is given, the Court of Appeal remands the accused to a court of competent jurisdiction, and, as a matter of law, a charge against a person for an offence allegedly committed by that person when under the age of 18 is triable by the Children's Court of Western Australia unless certain exceptions apply. One such exception is that the child, or adult who was at the relevant time a child, charged with an indictable offence may elect to be tried on indictment by the Supreme Court or the District Court under section 19B of the Children's Court of Western Australia Act. I should add that that does happen from time to time. I recall having tried a case some years ago in Fremantle that involved a boy who stabbed to death his mother's partner after extreme provocation and elected a trial by jury in the Supreme Court. It does happen from time to time. Another circumstance in which the trial of a child on indictment in a superior court is appropriate is when a child and an adult are charged with the same offence, and the adult is indicted in the matter. Again, the child may be charged along with the adult in the superior court; otherwise two trials are going on in separate jurisdictions. Plainly, the adult, who has always been an adult, cannot and should not be tried in the Children's Court. It is appropriate in those circumstances that the proceedings be kept together, and it may occur in that case. Another possibility is when the person is over 18 years of age at the time of the charge, the court may order the transfer of the matter to the Magistrates Court having regard to the seriousness of the offence, the existence of an adult co-offender, the time since the offence occurred, or any other good cause. That possibility would be available under the act as well.

Debate adjourned, pursuant to temporary orders.

FORTESCUE METALS GROUP — YINDJIBARNDI LAND

Statement

HON SALLY TALBOT (South West) [5.20 pm]: I rise tonight to speak about a letter dated 5 November 2011 that is now on the public record. It was my intention today to raise it in question time but unfortunately I was not able to do that, for time reasons. This letter, as I say, is dated the beginning of November. It is from a company called Eureka Heritage History Archaeology. The claims in the letter are somewhat lengthy. If I have time, I will read the letter into the record. The claims are that Fortescue Metals Group has acted to remove sections of a heritage report containing information and analysis about the Yindjibarndi people's connection to country within and around FMG's Firetail mining lease. Very serious questions arise as a result of these claims, which have been made public in this letter. I think it is incumbent on the Minister for Indigenous Affairs to explain publicly what he intends to do to address these claims and allegations, what he has instructed his department to do and, indeed, what his instructions are to the registrar who has carriage of these matters.

The letter is from archaeologist Sue Singleton who has obviously been through a fairly difficult time in terms of her decision to write this letter and subsequently to agree to it being made public. Ms Singleton is the principal archaeologist for Eureka Heritage and is the co-author, with Rob Tickle—who works as the principal of Veritas Archaeology and History Service—of various reports, notices and applications relating to archaeological surveys conducted on the lease to which I just referred, the Firetail lease, being developed by Fortescue Metals Group Ltd. In her letter, Ms Singleton says the following —

> In October 2011, I became aware of correspondence forwarded from FMGL to the Registrar of Aboriginal Sites at the DIA, in relation to a s18 notice that Eureka and Veritas had prepared in December 2010.

It is important that we are talking about two different versions of the same report here. That was December 2010. The letter continues —

> Eureka wishes to clarify some issues in relation to the information provided by FMGL in support of a revised version of the report dated March 2011.
>
> Eureka considers that the following comments, excerpted from FMGL's letter to the Registrar of 15 March 2011, require clarification:

> *"Fortescue make it a policy not to interfere or dictate outcomes of reports prepared by consultants, however in this instance Fortescue can confirm that as Mr Tickle does not have any ethnographic training, he has been requested to remove these ethnographic assessments from the report as they easily mislead the reader to believe only minimal consultation and ethnographic assessment was undertaken for the purpose of these Notices.*
>
> *Fortescue is confident that the ethnographic significance of all areas has been adequately addressed and that no sites of significance have been identified on the Land due to the fact that there is no verified knowledge of any sites with ethnographic significance in this specific valley".*

Eureka was engaged by FMGL, independently of Veritas, to work collaboratively with Veritas to co-ordinate and conduct desktop research and field surveys. Information on the identification of Aboriginal cultural heritage sites was presented in reports for the purpose of notices made by FMGL for ministerial consent under section 18 and applications under section 16 of the Aboriginal Heritage Act 1972. The purpose of these reports was to provide sufficient information to assist the officers of the Department of Indigenous Affairs … and the Aboriginal Cultural Materials Committee (ACMC) in its task of assessing the cultural significance of the Study Area.

In July 2010, at the time of Eureka's engagement by FMGL, it was agreed that a team of appropriately qualified personnel would be assembled to carry out the tasks necessary for the preparation of anticipated s18 notices and s16 applications during 2011, and to collaborate with Veritas in report preparation.

To this end, —

Ms Singleton states she —

> … sub-contracted colleague Kath Beech to carry out background ethnographic research on the Study Area and to report on the ethnographic work that had been carried out for the purpose of the s18 notice preparation. Kath is a qualified anthropologist and holds a Masters degree in the field of anthropology and development. In addition, a number of other archaeologists offered to sub-contract to Eureka in order to fulfill s16 investigative excavation, on-going survey work and archaeological management during project works.

This is important because members will remember that FMG's letter referred to a Mr Tickle not having any ethnographic training. Clearly, this part of the report was not prepared by Mr Tickle but was prepared by Ms Beech. Ms Singleton continues —

> In December 2010, Veritas and Eureka produced a report entitled: *"Report of an Archaeological Assessment of 10 Aboriginal sites located within the proposed Firetail Priority Mine and Infrastructure Area"*. This was a "Final Report", and was dated "December 2010" … This report was submitted to the DIA in support of a s18 notice and underwent review by the Registrar. It is now our understanding that FMGL did not carry out an internal review of this version of the report prior to its submission to the DIA.
>
> The December 2010 Report, Section 4.3 — Ethnographic Context, contained the results of background research into the historical and contemporary ethnographic evidence relevant to the Study Area, and an analysis of the ethnographic work undertaken by anthropologist David Raftery. This section was compiled and written by Kath Beech, and not Rob Tickle, as stated by FMGL … The Raftery reports to which this section referred were made available by FMGL on request by Veritas/Eureka. It was our understanding, at the time of reporting, that there were no further ethnographic reports available or in planning.
>
> The ethnographic research undertaken by Kath Beech found that sworn evidence given to the Native Title Tribunal clearly demonstrated that there are members of the Yindjibarndi People who belong to the YAC and who are connected to the Study Area. These YAC members claim to hold relevant ethnographic information that would be material in the assessment of cultural heritage significance. In contrast David Raftery's reports on consultation with the members of Wirlu-murra Yindjibarndi Aboriginal Corporation demonstrated that they held little, if any ethnographic knowledge about the Study Area. Pointing out the deficiencies in consultation was intended to assist the ACMC in determining any requirement for further ethnographic investigation.

I will skip to another part of the letter. Both Veritas and Eureka were very concerned with the request from FMG that certain information be deleted from the December 2010 report and at first refused to comply. Ms Singleton states —

> However it soon became very clear that, if we did not comply, FMGL would withhold payment of our previous, outstanding and well overdue invoices on the basis that FMGL could not be expected to pay

> for a report that they could not use. At the time there were a number of invoices that were already overdue for payment, amounting, in Eureka's case to $70,000.00.
>
> Having already been dismissed from further work, Eureka considered there was little option other than to agree to the requested changes. We also considered that the remaining contents of the report still communicated (although not as explicitly) the issues with the ethnography. The amended report bore the same title as the December 2010 Report, but was dated "March 2011" …
>
> In addition, FMGL specified that the FMGL Heritage Department would take responsibility for reporting all sites to the Registrar, as required under s 15 of the Act. However, I am very concerned that this may not have happened as site cards were requested by the Registrar on submission of both a s16 application and the December s18 notice.

This is a four-page letter. It goes into a great deal of detail. It was made public a couple of days ago. I would be extremely surprised if the Minister for Indigenous Affairs has not had it brought to his attention. I ask the minister to make a public response to this letter. It is the latest in a series of very serious incidents involving FMG exploration in the Pilbara, and the government really needs to step in and take a role in resolving some of these difficulties. I repeat in this place what I have already put on the public record. I have spoken to all the parties involved in this dispute, and I can tell this house that not one party to the dispute wants to prevent the mining going ahead. That is a basic understanding that everybody coming to this dispute must keep at the front of their minds. Everybody wants this project to go ahead. The Yindjibarndi want it to go ahead and the other traditional owners in the area want it to go ahead. Of course FMG wants it to go ahead. The government must want it to go ahead, because it is clearly in the interests of all Western Australians for such an important project to get the green light. But we are constantly tripping over ourselves as we try to get this right. It has clearly gone very, very wrong over the past few months. This letter, which is now on the public record, is proof that there is trouble behind the scenes. It is incumbent on the government to get in there and sort it out.

GRAIN RAIL NETWORK

Statement

HON MIA DAVIES (Agricultural) [5.30 pm]: I rise tonight to speak further on the debate held during non-government business this morning on the grain rail network. Before I go any further, I would like to say that I thought Hon Ken Travers missed a number of opportunities earlier today to put the Labor Party's policy on grain rail on the record during the debate. Later when we were on the steps of Parliament House and he was receiving the petitions from Bill Cowan, I thought there were a number of opportunities for him to categorically promise that a future Labor government would invest $100 million in the tier 3 rail network and give the Wheatbelt people who were there some peace of mind. But he did not.

Hon Ken Travers: But the debate is about you honouring your promises from the last election. I'm not so worried about the next one.

Hon MIA DAVIES: No; I will get to what we have done, because our record is much better than the Labor Party's. The member did not do that because the Labor Party has absolutely no interest in the grain rail network. I know that the good people of the Wheatbelt will not be drawn into the feigned interest that has been on display in this place today, because they are too good for that. I know that they will place no store in the honourable member's rhetoric, because there is not one iota of evidence of a track record to speak of that demonstrates that the Labor Party will deliver for these communities. I know that they do put store in the parties that have delivered for regional communities. The Nationals in government have delivered and will continue to do so. The good people of the Wheatbelt will see right through Hon Ken Travers and his posturing on this issue.

Hon Simon O'Brien: At least they are transparent about something!

The PRESIDENT: Order! Let the member make her own speech. She is doing very well.

Hon MIA DAVIES: Thank you, Mr President.

The honourable member's motion today made it very clear to me that his real concern is for those people in the metropolitan area. I draw members' attention to the part of the motion that stated, "We believe this is a bad decision and it will result in thousands of additional trucks on Perth roads." Aside from being fundamentally wrong when he mentioned that 700 kilometres of rail has been closed—the rail lines have not been closed—— what we have seen today is the first glimpse of where the member's real intentions lie in this issue. The motion today revealed what we have always known: the Labor Party has no concern for anything beyond the boundaries of Perth. If Labor members ever find themselves on this side of the house, we can all rest assured that regional WA will return to being the afterthought that it was during the Carpenter and Gallop years. Hon Ken Travers failed to mention the investment that the Liberal–National government has made since coming to government in 2008. He failed to mention that the government has made the biggest investment in grain rail and road infrastructure in the past 20 years. The last upgrade to the grain rail network was made in the 1990s when the

Liberal Party and the National Party were in government. There is no high moral ground for the Labor Party to peer down at us from. It did nothing between 2001 and 2008. It paid no thought to regional WA, it paid no thought to the communities that were crying out for investment, and it paid no thought to the agricultural industry or its needs. The previous Labor government did not put forward a $187.9 million funding package, which was matched by federal government funding of $135 million, to re-sleeper the lines and upgrade rail sidings and roads in the Wheatbelt. We have done that. Hon Ken Travers conveniently overlooked the fact that this government has put more money into the grain rail network than any other government in the past 20 years.

Hon Ken Travers: So, how much have you put into rail as a state government?

Hon MIA DAVIES: I only have 10 minutes to speak; Hon Ken Travers had 45 minutes or so this morning. I was very disappointed not to be able to put my case this morning.

Hon Ken Travers: You are making figures up like your leader did in the other place.

Hon MIA DAVIES: We have the opposition feigning interest in the Wheatbelt, but in reality it is completely focused on the metropolitan area. I feel for the opposition's regional members such as Hon Matt Benson-Lidholm, because it must be incredibly difficult to make a point in the party room as a regional member of a party that is singularly focused on metropolitan Perth. What hope does a member representing the Agricultural Region have of progressing his issues when the Labor Party is singularly focused on metropolitan votes? I suggest that when a member works on an issue, one of the things they would do to seek to raise the profile of the issue is to put out a few media statements, and Hon Ken Travers did not miss the opportunity to do so today with the media on the steps of Parliament House. As we all know, media statements provide a written record for the member to point to and say, "I cared about your issue and here is what I have done." Hon Ken Travers, as shadow Minister for Transport, has issued, by my count, 59 media statements this year; he is very conscientious. But to me the content of these statements is an indication of a future Labor government that has no intention of investing in regional infrastructure, let alone grain rail infrastructure. Of the 59 media statements that he has issued, only nine of them deal with regional transport issues or matters. The Labor Party has absolutely no credibility, or record to stand on, when it comes to investing in regional transport infrastructure. I can point to the Perth–Mandurah rail line, which is the legacy of the previous Labor government, and good on it; it is a great service. I am sure Hon Max Trenorden, Hon Philip Gardiner and I would like to see another train out to the bustling town of Northam and to the Avon Valley; we would very much like to see that. Running the railway down the middle of the freeway in plain sight of all those hundreds of thousands of voters in marginal voter land was a very effective campaign tool. This singular focus on metropolitan Perth was the hallmark of the previous Labor government and if Hon Ken Travers's key areas in the transport portfolio are anything to go by, I suggest that the future Labor government will not be too different.

This government's track record is vastly different. I reiterate that we have already made the biggest investment in grain rail infrastructure in 20 years. I acknowledge that sections of the community would like to see further investment, specifically in those lines that are identified and categorised by Co-operative Bulk Handling Ltd as tier 3. Therefore, I return to the point I opened with—that if I was a member of those communities advocating additional investment, it is my contention that I would much rather have members sitting on the government side of the house, with a track record of delivering for regional communities, working on my behalf, because we are focused on getting the best outcome possible for regional communities. We are not using these communities to score cheap political points or to drive an agenda in the Perth metropolitan area.

Several members interjected.

Hon MIA DAVIES: The Labor Party is not remotely concerned about Wheatbelt roads or rail.

Several members interjected.

The PRESIDENT: Order, members!

Hon MIA DAVIES: As someone who spends a great deal of time driving on country roads, I am always conscious of road safety. I share the road with tourists, road trains, grain trucks and everything in between. My family shares the roads with those tourists, road trains and grain trucks and everything in between. It is not an academic exercise for me, Hon Max Trenorden, Hon Philip Gardiner, Hon Wendy Duncan, Hon Col Holt or any of our other regional members. This concerns our families, our friends, our colleagues and our communities, and this government has done something towards mitigating some of the damage that has been left to fester out there under the Labor government of 2001 to 2008, which had no interest in rail infrastructure while it had the opportunity to do something about it. We continue to work on getting a better outcome for the agricultural sector and the communities that will be impacted by the changes to the way CBH and individual operators choose to deliver their grain to port. The Labor Party has no high moral ground on this issue and contrary to the motion that was put this morning, no rail lines have been closed for this harvest. Growers have the option of delivering to bins on rail this harvest. Members on the government side of the house will work with industry to ensure the long-term viability of the agricultural sector. The opposition was on shaky ground when it suggested that we do

not consider the economic, social and environmental impacts of any project that we undertake in regional WA. In government, the Nationals have a singular focus on just that. Our track record says that we work to address the issues impacting regional communities. Our track record says that we put regional communities front and centre in our decision-making process. And our track record says that we do not fear to stand up for what is right. The opposition's track record says that it cares only about Perth. This motion says that and the Labor Party's record in government says that, too.

DISABILITY SERVICES COMMISSION — BEN'S ADMINISTRATION COMPANY

Statement

HON ALISON XAMON (East Metropolitan) [5.39 pm]: I rise tonight to talk about Ben, a young man with serious disabilities, and the experience of his family in its attempts to have more control over the use of respite payments from the Disability Services Commission. I know this is an issue that the minister is very much aware of. It is not a happy story; there have been no winners in this, but I hope that we can learn from the experience of Ben's family. Ben is severely disabled and he has two siblings who are also disabled. His parents are getting older—I spoke about the special challenges for older carers last night—and quite understandably want to put in place strategies to ensure that their children are taken care of when they are no longer able to care for them.

In 2009 Ben's parents established Ben's Administration Company and approached the Disability Services Commission with the proposal that Ben's Administration Company manage Ben's funds and supports. I am sure members would agree that on the face of it that proposal is very worthwhile, with the potential for all parties to win. Not only would Ben's family get more flexibility about how and when Ben's allowances are spent, but also, because there would be no third-party service provider administering the funds, the administration costs would be significantly lower and the funds would go substantially further to doing what they are meant to do—namely, providing services to a family that desperately needs them. Ben's parents estimate that under this model Ben could potentially receive between 800 to 1 000 more hours of respite care than under the usual model.

Ben's respite grant was paid directly to Ben's Administration Company for nine months under interim arrangements, while DSC service contracting and development staff and Ben's family tried to come to agreement on how the concept could be progressed as a formal project. They were not able to reach agreement and in March this year the trial was stopped and Ben's family was told that Ben's DSC-funded supports would, from now on, be funded only through an existing pre-qualified service provider. Ben's family still has many questions about why the DSC chose not to proceed. The family does not accept the reasons provided by DSC and is unhappy with the responses to questions seeking clarification, some of which I have asked on the family's behalf. Ben's family is also frustrated that there is no avenue for appeal against the DSC's decision and, as a result, is expressing its very deep concern and the feeling that it has been let down by the system.

I am sure that members are aware of what it can be like to be caught up in red tape and bureaucracy, and know that having to meet demands considered to be pointless, unreasonable or just plain incomprehensible can be extraordinarily frustrating. Ben's family says that it has been left completely exhausted by its efforts to comply with the system. It is important the minister take on board that this family is, right now, feeling fundamentally unsupported by the government.

Hon Helen Morton: I have met the family.

Hon ALISON XAMON: I am aware that the minister has made a point of being across the issues that I am raising.

We need to be realistic when we are talking about disabilities and personalised services, because we are not talking about businesses or large service providers. We are talking about families whose capacity levels are very different and whose fundamental and sole goal is the care of their loved one. I do not believe that Ben's family should have had to go through the distressing experience that it went through and am convinced that the matter could have been handled differently. I also recognise that it is a balancing act. We need to ensure that those who take responsibility for managing another person's money are not able to exploit that person. Obviously, that has to be at the forefront of these arrangements. I am absolutely aware of that. However, at the same time, we need to ensure that when we impose these sorts of arrangements or try to venture into these sorts of arrangements, carers are given some level of trust to perform their role. I understand that it is very difficult to get that balance right. Expectations have to be realistic and systems, relationships and communications must be set up with this in mind.

I also want to note my concern about one of the reasons given by the Disability Services Commission for its decision not to proceed with the project. I have seen this reason in writing. It said that one of the reasons was because Ben's family had publicly criticised the DSC. I must say that, as a reason, I think that is absolutely unacceptable. I imagine that other members of this place would certainly share that concern. I note that in answer to questions asked in Parliament about this issue, the minister acknowledged that complaints can improve services. However, I thought that there was an implication that complainants should only go through a complaint

process, rather than make a complaint public. If that is the case, I find that suggestion unacceptable. Government departments should be able to receive legitimate criticism from families and any of their advocates. People should be free to provide strong independent advocacy for their needs without fear of repercussion. Again, we must remember that we are talking about a family that has been fighting hard for decades for their children. They only want what is best for their children.

Those who receive funding, whether they be individuals, families, not-for-profit organisations or even for-profit organisations, should not feel that this means they will lose their right to frank and free speech. I have already voiced my concerns that the government's intention to increasingly outsource many community services to the not-for-profit sector runs the danger of impacting on these groups' abilities to act as strong independent voices for marginalised and vulnerable members of our community. We really need these voices. We know that many disability services consumers are simply not getting what they want from the system. lndividualised funding models that are truly individualised and flexible could go a significant way towards helping these people. That the Disability Services Commission is actively promoting models of self-directed services for people with disabilities across WA is a positive thing, but we need to start seeing improvements on the ground. The more personalised, flexible and tailored options that families have for support and to provide care for members with a disability, the better; and they must be able to be worked by the people who are trying to manage them. I want to acknowledge that the DSC clearly had good intentions in initially supporting this concept. Its willingness to try something new is obviously a positive thing, but it appears clear that there is significant room for improvement. I would imagine that the minister would probably agree with that as well. Hopefully, some lessons have been learnt through this experience and the next family to trial a program like this—I hope there will be more—will have a significantly better experience than Ben's family, because it has certainly left them feeling extraordinarily embittered.

ALMA STREET CENTRE — PATIENT DEATHS

Statement

HON LJILJANNA RAVLICH (East Metropolitan) [5.48 pm]: Mr President —

Hon Helen Morton: Mr President —

The PRESIDENT: I had noted Hon Ljiljanna Ravlich as she stood first and indicated that she wanted to speak. Unless there is some sort of agreement between the two members —

Hon LJILJANNA RAVLICH: I do not agree, Mr President.

Hon Helen Morton: I need to respond to the comments made.

Hon LJILJANNA RAVLICH: Oh, you are under pressure!

The PRESIDENT: I give the call to Hon Ljiljanna Ravlich.

Hon LJILJANNA RAVLICH: Thank you, Mr President. I will try not to take more than 10 minutes.

Hon Helen Morton: Ha, ha! Try five for once.

Hon LJILJANNA RAVLICH: Just very quickly, I want to make some points in relation to openness, accountability and transparency. Mr President, you would be aware that when the now Premier was in the Parliament in the lead-up to the last election, he went very strong, together with Hon Elizabeth Constable, the then accountability spokesperson, on open government and on accountability, transparency, so on and so forth. What we find, however, now that the Premier is in charge of the state, so to speak, is that there is no openness, accountability or transparency.

Yesterday the Leader of the Opposition asked the Premier a series of questions about the suicides at Alma Street. The Premier responded that he did not know much about the issue; he had not been briefed. He knew that it was a really serious matter and said that he would discuss the matter with the Minister for Mental Health. I then asked a series of questions of the Minister for Mental Health. I asked whether she had had discussions with the Premier; and, if so, when did she have them and so on. The minister in her response totally ignored the question about whether or not she had had a meeting with the Premier in relation to these suicides. She totally ignored any detail and did not give any additional information in relation to these suicides. She then went on to say that the Premier had been fully briefed on these issues; that he knows everything about them; and that he has also been given briefing notes, so he is right across it. There seemed to be a conflict of views, because the Premier said he did not know much about the issues, and the minister said that he technically should have, because she had given him all the information and had briefed him.

Today, the Leader of the Opposition once again asked the Premier for information about these suicides. I want to quote from the uncorrected proof, because this is how the Premier responded —

> As I remarked yesterday this is a tragic set of circumstances in which three patients have suicided following being released from that clinic. There is also another couple of cases of behaviour and serious consequences for two other patients.

Good on the Premier! He actually admitted there is a serious issue in relation to these suicides. I, for one, would like to know what are those other cases of behaviour and serious consequences for the two other patients. We do not have three other major issues down there; we have five, thanks to the information that has been divulged by the Premier.

There seems to be very strong opposition to a full coronial investigation into what is happening down at Alma Street. The Minister for Mental Health has directed two separate reviews to be conducted simultaneously. The Chief Psychiatrist, Dr Rowan Davidson, will be a part of the first one.

Hon Helen Morton: What's he going to do?

Hon LJILJANNA RAVLICH: I do not know what he is going to do. Then there is going to be another independent person. Irrespective of what he does, the Chief Psychiatrist is not independent. He is an employee of the Department of Health for goodness' sake.

I fear that the reason that the Minister for Mental Health and the Premier are not supportive of a full coronial inquiry is that they themselves are fearful of what will become public, because we know that the Fremantle Alma Street clinic is really the tip of the iceberg. The minister says that as part of these two reviews that will be conducted, one of them will look at the admission and discharge practices of the mental health service across Western Australia. In terms of the discharge practices and admissions, I know for a fact that the Department of Health produced a report in September 2011 on general admissions. I also know for a fact that draft processes for admissions and discharge are being developed for Fremantle Hospital, for Alma Street. It really begs the question of what all this is about. This is no more than window dressing. It simply is not good enough.

Hon Helen Morton interjected.

Hon LJILJANNA RAVLICH: We can hear a little voice over there; she gets herself pretty worked up. Take a couple of deep breaths. We need a full coronial investigation. The Premier says that the State Coroner has the power to investigate. I do not dispute that. However, as I said in this house yesterday, and I will say it again, the backlog at the coroner's office is such that he has about 250 cases before he even gets to the Ruby Nicholls-Diver or the Michael Thomas cases or the case of the 27-year-old who took his life. It is highly unlikely that those cases will be heard by the coroner for at least three years. None of them, as I understand, has been investigated by the police coronial investigations unit. It has to go through that process prior to it going to the coroner. This minister and the Premier are hoping that if they can brush me off and no more is said about this, it will be three years before any answers might emerge, in the event that there is a coronial investigation. That is a long way down the track.

It is a shocking reflection on this government that it does not support a full coronial investigation, but I am confident that as more information about the activities at the Alma Street clinic emerges, this government and this minister may eventually be embarrassed into ensuring that we get a coronial investigation.

The other problem I want to highlight is what is being proposed by the minister—that is, internal inquiries. I know from past inquiries that it is highly unlikely that families would be able to present and make a contribution on concerns about the treatment of their loved ones. I think that is exactly what families want. They want to know what has gone wrong. They want answers and they want to have input into how they think the system can be improved.

ALMA STREET CENTRE — PATIENT DEATHS

Statement

HON HELEN MORTON (East Metropolitan — Minister for Mental Health) [5.57 pm]: In my two minutes and 40 seconds I will try to give some information on some of the issues raised. Hon Ljiljanna Ravlich does not want to hear; she has quickly gone out.

Hon Jon Ford interjected.

[Quorum formed.]

Hon HELEN MORTON: I think the suggestion that somehow or other my getting up to speak on a couple of these issues is an abuse of the house is absolutely ridiculous.

Can I just say that there are a couple of issues, and I have about one minute and 33 seconds to make a couple of comments on them. But one of them is this ridiculous notion of Hon Ljiljanna Ravlich that somehow or other the two reviews that I have sought will not be independent. One of those reviews is being undertaken by the Chief Psychiatrist, who holds a statutory position appointed by the Governor, and who will be reporting on the clinical

decision making that took place around the people at Alma Street hospital in terms of people who have died over the last 12 months having had some contact with them.

The other review, which is an independent review—it is not being undertaken by the Department of Health or the Mental Health Commission; it is a review that the health department and the Mental Health Commission are paying for—is a review for me. That review will be undertaken by an independent person whom I am going to appoint to undertake that work. So, to suggest that somehow or other that makes it not independent is plainly ridiculous.

I will have an opportunity to speak about the issues around the complaint about Ben's Administration Company at another time. But I do want to say that I have bent over backwards to try to make that work. It was incredibly difficult. The family in the end were just unable to agree that there needed to be some form of governance around standards and monitoring for the services that they were going to be providing for their son. And unfortunately, at the end of the day, when that was not possible, we were unable to come to an agreement.

The PRESIDENT: Order, members. Just before the house adjourns, I would like to remind members, once again, of the Standing Committee on Procedure and Privileges, that there will be a brief meeting in the President's office immediately following the rising of the house.

House adjourned at 6.01 pm

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QUESTIONS ON NOTICE

Questions and answers are as supplied to Hansard.

PSYCHIATRIC HOSTELS — FUNDING

4639. Hon Alison Xamon to the Minister for Mental Health

I refer to the thirty–five private psychiatric hostels providing accommodation and support facilities for mentally ill people in Western Australia, and I ask —

(1) How much money was budgeted by the Western Australian Government to these Private psychiatric hostels in each of the financial years —

(a) 2008–2009;

(b) 2009–2010; and

(c) 2010–2011?

(2) How much money has the Western Australian Government budgeted for private psychiatric hostels in the 2011–2012 financial year?

(3) Can the Minister commit the Government to continuing the support for these private psychiatric hostels into the future?

Hon HELEN MORTON replied:

(1) (a) $3,503,995.

(b) $3,686,594.

(c) $3,875,982.

(2) $4,402,961.

(3) This Government is committed to providing the most appropriate supports and services to allow people with a mental illness to live a good life in the community. A range of accommodation options including private psychiatric hostels are available within the community.

Whilst the Mental Health Commission (MHC) is continuing to fund private psychiatric hostels and acknowledges the valuable contribution they make, it is appropriate to continuously examine what form of accommodation is provided and to explore ways to increasingly ensure that people with mental illness have the opportunity to enjoy the same sort of accommodation as the rest of the community. It is anticipated that over time, more people with mental illness will be able to live in individual accommodation rather than large congregate living arrangements. The MHC is committed to maintaining a close working relationship with the Private Psychiatric Hostels Association and hostel operators so that they are consulted and kept informed of future developments.

DISABILITY SECTOR — ACCOMMODATION AND SUPPORT SERVICES

4642. Hon Alison Xamon to the Minister for Disability Services

I refer to the outcome of the most recent round of Combined Application Process (CAP) Funding for people with disabilities, and I ask —

(1) Of the 394 (77 percent) applicants for accommodation support who did not receive the funding for which they applied, how many have been provided with assistance or accommodation support through some other means? Please describe the alternative assistance or support provided.

(2) Of the 394 persons referred to in (1), how many currently live in —

(a) accommodation that is privately owned, rented or sourced independently by the service user;

(b) mainstream housing authority rental housing;

(c) housing provided under the Community Disability Housing Program;

(d) hostels;

(e) Community Residential Living;

(f) accommodation provided under the Community Living Support Funding Strategy; and

(g) other?

Hon HELEN MORTON replied:

(1) In Round 1 of 2011, of the 394 applicants who did not receive Accommodation Support Funding (ASF), 313 received some level of assistance through other means.

Family assistance provided through Intensive Family Support (IFS), Family Living Initiative (FLI) and Flexible Family Support (FFS) provides funding support to people with disability to remain residing within their family unit. Support may include a carer coming into the home to provide personal care, opportunities for community inclusion and socialisation, while at the same time providing families a break from the caring role.

There are also block funded respite opportunities available for people with disability. These are managed by the disability sector organisations funded to provide this type of service.

Alternatives to Employment (ATE) services seeks to ensure that people with disability with high support needs who require an alternative to paid employment have access to a range of opportunities to develop their skills and participate within their community.

Community Living Initiative (CLI) offers people with disability a broader range of alternative community living arrangements outside the traditional models of accommodation. Community living allows a person to live in their own home and be a part of the various communities that are important to the individual.

(2) (a) 118 applicants have existing ASF and live in privately owned or independently sourced accommodation. These applicants are seeking additional ASF as a result of changing needs, mainly caused by the impact of the ageing process on the disability.

(b)–(e) The Combined Application Process (CAP) does not capture the information necessary to respond to this. The application form captures that information essential to assist with the decision making process. The people applying have requested that the application form captures essential information only.

(f) Four applicants are supported by Community Living Initiative (CLI) to live independently in the community.

(g) The number of applicants who receive other supports are as follows:

58 receive IFS support packages, nine receive support via FLI or the previously known funding FFS and 124 receive ATE, of which 46 receive ATE alone, while 78 receive other supports already noted above (such as IFS, ASF and FFS.)

MENTAL HEALTH — COMMUNITY SUPPORTED ACCOMMODATION

4644. Hon Alison Xamon to the Minister for Mental Health

I refer to the answers provided by the Minister for Mental Health to questions on notice Nos 4420–4434 and 4436–4441, and I ask —

(1) Can the Minister lease state the average number of people on the register of interest who are either yet to be considered for eligibility and compatibility or have been assessed and are considered eligible but have not been provided with a place in each of the years 2008, 2009, 2010 and currently, for each of the following services —

(a) Fusion (Aust) Ltd Community Supported Residential Units in Geraldton;

(b) Richmond Fellowship of Western Australia Community Supported Residential Units in Bunbury;

(c) Richmond Fellowship of Western Australia Community Supported Residential Units in Busselton;

(d) St Bartholomew's House Inc Community Supported Residential Units in Kelmscott;

(e) St Bartholomew's House Inc Community Supported Residential Units in Bentley;

(f) Albany Halfway House Association Community Supported Residential Units in Albany;

(g) Richmond Fellowship of Western Australia Community Supported Residential Units in Bunbury;

(h) Ngulla Mia supported accommodation in East Perth;

(i) Prospect Lodge residential rehabilitation service in Kalgoorlie;

(j) Intermediate care accommodation provided by Albany Halfway House in Albany;

(k) St Bartholomew's House Inc Community Supported Residential Units in Stirling;

(l) St Bartholomew's House Inc Community Supported Residential Units in Middle Swan;

(m) Ngatti House supported accommodation in Fremantle; and

(n) St Bartholomew's House Inc Community Supported Residential Units in Osborne Park?

(2) Can the Minister please state the average time it takes to fill vacancies when they occur at —

(a) Richmond Fellowship of Western Australia community supported housing in Kelmscott;

(b) Southern Cross Care community supported housing in Stirling;

(c) Southern Cross Care community supported housing in Bentley;

(d) Southern Cross Care community supported housing in Mt Claremont;

(e) Intermediate care accommodation provided by the Richmond Fellowship in Queens Park;

(f) Intermediate care accommodation provided by the Richmond Fellowship in East Fremantle;

(g) St Bartholomew's Crisis Accommodation in Cannington;

(h) St Bartholomew's Crisis Accommodation in Medina; and

(i) St Bartholomew's Crisis Accommodation in Midland?

Hon HELEN MORTON replied:

1. (a) 2008 — 4, 2009 — 2, 2010 — 8, 2011 — 2.

(b)–(c) Nil

(d) 2008 — nil, 2009 — nil, 2010 — nil, 2011 — 2.

(e) The data was not available for previous years; currently 2 females assessed awaiting a vacancy and 2 males awaiting assessment.

(f) The numbers expressed below refers to persons who have been assessed as eligible and compatible but have not been provided with a place in the relevant year. The information available is as follows:

2008: Nil
2009: Nil
2010: Nil
2011 (to date): Nil

(g)–(h) Nil

(i) 2008 — did not operate, 2009 — did not operate, 2010 — nil, 2011 — nil.

(j) The numbers expressed below refer to persons who have been assessed as eligible and compatible but have not been provided with a place in the relevant year. The information available is as follows:

2008: Nil
2009: Nil
2010: Nil
2011 (to date): Nil

(k) 2008 — nil, 2009 — nil, 2010 — 7, 2011 — 10.

(l) 2008 — nil, 2009 — nil, 2010 — nil, 2011 — 3.

(m) 2010 — nil, opened March 2010, 2011 — 3.

(n) Please note, this is actually the same accommodation as 1(k)

2. (a) In regard to this Community Options accommodation service in Kelmscott, Richmond Fellowship of Western Australia (RFWA) report that from September 2010 to September 2011 there was an average vacancy period of eight weeks, and in this 12 month period there has been one vacancy each for a female and a male. RFWA is reliant upon the Murchison Ward at Graylands for referrals. The complexity of the conditions (mental and physical disability) experienced by consumers at this site, make finding a replacement difficult. RFWA incurs a loss of rental income for any period in which there are vacancies at Kelmscott, therefore they are committed to filling vacancies as soon as is reasonably possible. However, RFWA balance this against considerations relating to an appropriate mix of clients at any given time.

(b) The Community Options accommodation service in Stirling commenced service provision in June 2010. Southern Cross Care WA report that on average vacancies at this site take six weeks to fill in which time meetings occur with the respective clinical team, the resident and their family. A case conference is also held prior to a transition period of approximately one week.

(c) The Community Options accommodation service in Bentley only commenced service provision in June 2011. Therefore, no reliable information can be provided in response to this question.

(d) The Community Options accommodation service in Mount Claremont commenced service provision in July 2009. Southern Cross Care WA report that on average vacancies at this site take six weeks to fill in which time meetings occur with the respective clinical team, the resident and their family. A case conference is also held prior to a transition period of approximately one week.

(e) RFWA report that from September 2010 to September 2011 there was an average vacancy period of three-weeks.

(f) RFWA report that from September 2010 to September 2011 there was an average vacancy period of two-weeks.

(g)–(i) Due to the nature of this crisis accommodation, the Service Provider is unable to calculate a meaningful average vacancy period. An unoccupied bed at one of these sites represents capacity in the system for crisis care, and not a vacancy in real terms. When a bed does become available, referral sources such as the local mental health service are immediately informed.

SUICIDE PREVENTION PROGRAMS — LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX COMMUNITIES

4698. Hon Lynn MacLaren to the Minister for Mental Health

(1) Is the Minister aware that suicide rates among lesbian, gay, bisexual, transgender and intersex (LGBTI) communities have been found to be 3.5 to 14 times higher than the general community?

(2) Will the Minister please provide details of any programs that her Government has funded that attempt to reduce the number of suicides in these communities?

(3) Has the Minister been advised by LGBTI advocates of the need for programs to lower the risk of youth suicide in these communities?

(4) Please provide advice of any programs in Western Australia targeted at LGBTI young people for the purpose of suicide prevention.

Hon HELEN MORTON replied:

(1)–(4) Yes, ABS data shows that the LGBTI community have a higher rate of suicide than the general community. I have been advised by LGBTI advocates of the need for programs to lower the risk of youth suicide in these communities.

The Mental Health Commission provides funding to the Western Australian AIDS Council for the Freedom Centre to deliver early intervention programs to LGBTI young people. This includes the collection of routine quality of life consumer outcome measures using consumer self-reports and questionnaires; internet forums and discussion panels to provide peer support and information relevant to the target group, and opportunity for young people to ask questions, in an anonymous and accessible manner;drop-in sessions each with a different focus to cater to the needs of the client group, such as Guyspace, Girlspace, Freespace, Outspace and GenderQ; and interactive workshops that cater to the needs of the clients.

The target group for this service is young people (aged 15 to 25) with same sex attraction and psychological, emotional and/or behavioural problems. Consumers can be referred to this service from health services, general practitioners, private psychiatrists and other health professionals. They must have ongoing clinical support guaranteed by a public mental health service, a private psychiatrist or a general practitioner.

The State Government has also funded a range of initiatives for suicide prevention which are inclusive of LGBTI communities, such as $13 million for the Statewide Suicide Prevention Strategy 2009–2013 (Strategy) — which includes funding for 0.5 FTE for three months as part of a specific LGBTI CAP; $1.2 million over four years to Youth Focus to help young people to overcome issues associated with

self-harm, depression and suicide; $500,000 to Lifeline to recruit and train additional crisis telephone counsellors; and almost $1million in 2010/11 for counselling and early intervention services, crisis lines and national initiatives such as beyondblue.

MENTAL HEALTH CONSUMERS — EMPLOYMENT OPPORTUNITIES

4703. Hon Ljiljanna Ravlich to the Minister for Mental Health

I refer to employment for recovering mental health consumers, and I ask —

(1) What initiatives are being undertaken to support new employment opportunities for those consumers engaged in recovery?

(2) How much funding is provided for each of those initiatives?

(3) If none to (1), why not;

Hon HELEN MORTON replied:

(1)–(2) The Commonwealth Department of Education, Employment and Workplace Relations (DEEWR) is the primary Government agency with responsibility for delivering employment assistance programs. These programs include providing individualised and tailored assistance to assist people with a disability find and keep employment; incentives to enhance employer participation and assist Disability Support Pension (DSP) recipients to engage with the workforce and developing participation plans, tailored to individual circumstances, which involve working with employment services to improve job readiness, searching for employment, undertaking training, volunteering or rehabilitation

In the Federal Government Budget for 2011–12, $2.4 million is allocated over five years on a number of specific measures to improve the capacity of employment services and to support employers to successfully recruit and retain employees with a mental illness.

The Federal Government has also announced $50 million to expand the Personal Helpers and Mentors (PHaMs) program, to assist people with mental illness who are engaged with employment services. This intensive support will help around 1,200 jobseekers with mental illness to look for work, or participate in education or training. Service providers are contracted directly by the Commonwealth.

However, the Mental Health Commission also funds employment-related initiatives such as PD Leading Enterprises Inc which provides pre-vocational training service through employment rehabilitation and work training opportunities within a packaging and sorting business. It provides a training program of 50 places for people with a mental illness in the Perth Metropolitan area. The service is located in Burswood. The indicative funding is $122,627 in 2011/12. A capacity-building grant of $27,000 was provided in June 2011 for the purchase of computer/office equipment, and chairs for the workers.

The State Government has also committed $25.18 million over four years to implement the Individualised Community Living Strategy for 100 individuals with severe mental illness. Funding can be used to assist people to access employment. The funding framework of the strategy has broad parameters to allow non government providers matched with individuals to provide, broker or purchase supports and services to meet the person's particular needs. If assistance for employment is one of the priority areas for a funded individual, and specific supports are not available through other means, the individualised funding can be utilised for this purpose.

(3) Not applicable.

MENTAL HEALTH PATIENTS — SPECIALIST CONSULTATION

4704. Hon Ljiljanna Ravlich to the Minister for Mental Health

I refer to each hospital that holds mental health consumers, and I ask —

(1) How often are mental health consumers seen by a psychiatrist during their stay in hospital?

(2) How long are the consultations with the psychiatrist?

(3) How often are the mental health consumers seen by a psychologist during their stay in hospital?

(4) How long are the consultations with the psychologist?

Hon HELEN MORTON replied:

(1) The frequency of psychiatrist reviews is dependant on the complexity of the clinical presentation and needs of the patient.

(2) The consultation length varies with the complexity of the clinical presentation and needs of the patient concerned.

(3) Patients may be referred to a psychologist for specialist psychological services dependant on the complexity of the clinical presentation and patient suitability. The frequency of review by the psychologist is dependent on the complexity of the clinical presentation and the agreed therapy.

(4) Psychologist consultations vary in length with the complexity of the clinical presentation and the needs of the patient.

ENVIRONMENT PORTFOLIO — AGENCY FEES AND CHARGES

4755. Hon Ken Travers to the Minister for Mental Health representing the Minister for Environment

For each agency in the Environment portfolio since 23 September 2008 —

(1) Has any tariff, fee or charge increased by an amount greater than the consumer price index for that year?

(2) If yes to (1) —

(a) what was the name and purpose of the tariff, fee or charge;

(b) on what date did the increase come into effect;

(c) what was the amount of the tariff, fee or charge prior to the increase;

(d) what was the amount of the tariff, fee or charge following the increase;

(e) what was the amount the tariff, fee or charge was above the consumer price index for that year;

(f) why was the increase above the consumer price index; and

(g) what is the current amount of the tariff, fee or charge?

Hon HELEN MORTON replied:

Department of Environment and Conservation, Perth Zoo & Botanic Gardens and Parks Authority

(1) Yes

(2) (a)–(g) [See paper 4075.]

Swan River Trust, Office of the Appeals Convenor & Office of the Environmental Protection Authority

(1) No tariff, fee or charge increases have been made.

(2) (a)–(g) Not applicable

SUICIDE PREVENTION STRATEGY — COMMUNITY ACTION PLAN

4779. Hon Alison Xamon to the Minister for Mental Health

I refer to the Suicide Prevention Strategy, and ask —

(1) How many community action plan (CAP) funding applications have been received?

(2) How many CAPs have now been approved?

(3) For each approved CAP please provide —

(a) the community or interest group being targeted;

(b) the name of the group or organisation responsible for delivering the CAP;

(c) how much funding that each group or organisation has received or will receive; and

(d) how many FTEs has each individual program or organisation been funded?

Hon HELEN MORTON replied:

(1) 22 CAP proposals have been received.

(2) 19 CAPs have been approved. These cover 58 individual locations, four state-wide plans and three plans specific to the Wheatbelt region.

(3) [See paper 4073.]

DISABILITY SERVICES COMMISSION — FOR-PROFIT SERVICE PROVIDERS

4785. Hon Sue Ellery to the Minister for Disability Services

(1) Which for-profit service providers are currently contracted by the Disability Services Commission?

(2) Which of those for-profit service providers provides —

(a) accommodation support;

(b) intensive family support;

(c) alternatives to employment; and

(d) therapy services?

(3) What is the dollar value and term of each contract?

Hon HELEN MORTON replied:

(1) [See paper 4074.]

PSYCHIATRIC HOSTELS — DAY CENTRE ATTENDANCE

4798. Hon Alison Xamon to the Minister for Mental Health

I refer to day centres for residents of psychiatric hostels, and I ask —

(1) Does the Government monitor attendance at day centres?

(2) If yes to (1), please provide the average number of people attending the day centre located at the Graylands Campus for each of the years —

(a) 2006;

(b) 2007;

(c) 2008;

(d) 2009;

(e) 2010; and

(f) 2011.

(3) What other day centre facilities are available to hostel residents within the Perth metropolitan area?

(4) What are the eligibility requirements for people to attend day centres?

(5) Are any new day centre facilities planned?

(6) If yes to (5), please provide details of any planned facilities.

Hon HELEN MORTON replied:

(1) Yes

(2) The number of people attending the day centres located at the Graylands Campus are —

(a) 2006; Data not available.

(b) 2007; 51

(c) 2008; 42

(d) 2009; 62

(e) 2010; 186 and

(f) 2011 (January–June) 127.

(3) The Mental Health Commission does not provide funding for day centres specifically for residents of psychiatric hostels.

Public community mental health services and non-government organisations provide a range of community services and supports for people with a mental illness funded by the Mental Health Commission which can be accessed by residents of psychiatric hostels.

These include the following public mental health based services:

Armadale Living Skills Centre
Armadale Adult Day Therapy
Bentley / Patricia St Drop in Centre
Bentley / Jarrah Road Day Centre
Fremantle / Alma Seniors Day Therapy
Fremantle Living Skills
Fremantle / Alma St Group Program
Peel and Rockingham–Kwinana / Rockingham Kwinana Seniors Community Day Therapy
Peel and Rockingham–Kwinana Intensive Day Therapy Unit
Peel and Rockingham–Kwinana / Peel Living Skills
Peel and Rockingham–Kwinana / Kwinana Living Skills Centre

Graylands / Selby Older Adult Psychiatry Day Hospital
Graylands / Reflections Art Studio
Graylands Creative Expression
Graylands Community Options Rehab Program
Inner City Acute Recovery Program
Inner City Intensive Day Program
Inner City Discharge Follow Up
North Metropolitan / Family Therapy Team
North Metropolitan Day Centre
North Metropolitan / Harrow Living Skills Centre
North Metropolitan / Joondalup Clarkson Day Therapy
Swan/ Viveash Rehabilitation Centre
Princess Margaret Hospital W4H Day Program

And the following non-government based services:

June O'Connor Centres (Rockingham; Subiaco; Joondalup; Fremantle; Mandurah)
Mental Illness Fellowship of WA (Lorikeet Rehabilitation Centre, West Leederville)
Hills Community Support Group (Drop In Centre, Middle Swan)

(4) While the specific criteria for each program varies they are generally available for people with a severe and persistent mental illness.

(5) The Mental Health Commission does not expect to be expanding the provision of community support services through the Day Centre model.

(6) Not applicable.

DISABILITY AWARENESS TRAINING — FUNDING

4799. Hon Alison Xamon to the Minister for Disability Services

I refer to the potential discrimination of people with a disability, and ask —

(1) Has any funding been budgeted to provide disability awareness training to people in customer service roles?

(2) If yes to (1), how much?

(3) If no to (1), will the Minister consider providing any funding to deliver disability awareness training to people in customer service roles?

(4) If no to (3), why not?

(5) Are any other programs or strategies being considered to protect from discrimination those individuals who have an impairment which manifests in speech or behaviours that might easily be confused with the effects of drug or alcohol misuse?

Hon HELEN MORTON replied:

1. The Disability Services Commission seeks to raise community awareness about the inclusion of people with disability. However, the Commission does not directly provide disability awareness training as government, business and community organisations are themselves responsible for training their staff. This includes any specific disability awareness training that may be deemed appropriate in the pursuit of inclusive customer service and in the context of Outcome 4 of the Disability Access and Inclusion Plans that over 230 WA public authorities are required to develop and implement under the Disability Services Act 1993; the WA Equal Opportunity Act 1984 and the national Disability Discrimination Act 1992.

   On its website the Commission provides a list of known disability awareness training providers.

   While not directly responsible for providing or funding disability awareness training, the Commission has developed the following resources which can assist organisations in undertaking their own disability awareness training:

   - A 'Disability Access and Inclusion Plan (DAIP) Training Package' to inform State and Local Government of the access and inclusion planning requirements of the Disability Services Act 1993. Part of this package examines DAIP Outcome 4 that 'people with disability receive the same level and quality of service from the staff of a public authority as other people receive from the staff of that public authority'.

- DVDs — 'You Can Make a Difference to Customer Relations for People with Disability for State and Local Government' and 'You Can Make a Difference to Customer Relations for People with Disability for Hospitality, Tourism, Retail and Entertainment Industries'.
- An 'Accessible Information Training Package' outlines how to provide information in a manner that makes it as accessible for as many people as possible. Key elements of customer service covered by this package include disability and appropriate language, communicating with people with disability, communication about people with disability, positive language and disability etiquette.

2. The total cost of producing these resources was $29,019.40 for the years 2008–09 and 2009–10.

3. The Commission will continue to examine opportunities for the inclusion of people with disability in community life through the implementation of the Count Me In strategy.

4. Not applicable.

5. In relation to licensed premises, this issue resides with the Racing, Gaming and Liquor portfolio.

   In relation to general State and Local Government services, facilities and information, the Disability Access and Inclusion Plan requirements of the Disability Services Act 1993 provide a framework to ensure that public authorities provide good customer service for people with disability.

   The Commission funds a range of advocacy organisations which can assist people with disability, their families and carers raise complaints which can include complaints based on claims of discrimination on the basis of disability.

   I encourage individuals to consider using all available options under discrimination proceedings if they feel that they have been discriminated against on the basis of disability.

WESTERN POWER — LOW ENERGY-USE STREETLIGHTS

4808. Hon Kate Doust to the Minister for Energy

I refer to Western Power's launch of low energy use streetlights in January, and ask —

(1) Since the launch, by local government, how many 42W Compact Fluorescent luminaires have been installed on the Western Power network?

(2) Of these, how many were replaced through local governments paying to upgrade working streetlights?

(3) How many 80W Mercury Vapour luminaires have been installed by Western Power since February 2011 in total, and for what reasons?

(4) How many 42W Compact Fluorescent luminaires have been installed by Western Power since February 2011 in total, and for what reasons?

Hon PETER COLLIER replied:

(1) Over 1,700 as at September 2011.

(2) One local government authority request was received by Western Power. This was to upgrade ten streetlights.

(3) 196 were installed while waiting for stock of 42W Compact Florescent luminaries to become widely available.

(4) Over 1,700 as at September 2011.

   Reasons for installation were as follows:

   - replacement during normal maintenance;
   - upgrades as part of the state undergrounding program;
   - new sub-division installations; and
   - the local government authority request.

SYNERGY — PRIVATE TAX RULING APPLICATION

4809. Hon Kate Doust to the Minister for Energy

(1) For what reason did Synergy not disclose to the Australian Taxation Office (ATO) in their application for a private tax ruling that rather than meter accuracy, the reason they use a total supply net calculation is due to a direction from the Office of Energy and the Western Australian Government?

(2) Does the Minister concede that by calculating net total supply without taking into consideration bi-directional flow, Synergy is in breach of clause 9.5 of the Commonwealth's *A New Tax System (Goods And Services Tax) Act 1999*?

(3) If no to (2), why not?

(4) Does the Minister stand by Synergy's statement to the ATO that import/export meters are not accurate and require a mathematical calculation to improve accuracy?

(5) If yes to (4), and these meters are not accurate, how does the swapping of one imported unit for one exported unit improve the accuracy?

(6) Does the Minister concede that all domestic single phase solar systems whether connected to a single or three phase supply all work in exactly the same way and can only export on a net of consumed basis?

(7) If no to (6), why not?

(8) Does the Minister concede that if a person owns a device that makes something, then that person owns the thing made?

(9) If yes to (8), why is this not being applied to electricity in the case of Western Australian homeowners with a renewable energy system?

(10) Does the Minister concede that a renewable system connected to a three phase supply does have bidirectional flow when production exceeds the load on the phase it is connected to?

(11) If no to (10), why not?

Hon PETER COLLIER replied:

(1) Synergy is not aware of any meter accuracy issues. Synergy understands the meters installed by Western Power are compliant with the Electricity Industry Metering Code 2005. In its application for a private ruling from the ATO in relation to the treatment of GST in specific metering arrangements where small scale renewable energy systems have been installed, Synergy clearly outlined its case in a transparent manner.

(2) No.

(3) Synergy has attained a private ruling from the ATO stating it is meeting its GST obligations with respect to the specific scenarios which were in question.

(4) In the information Synergy provided to the ATO, no claim was made in relation to the accuracy of meters installed. It was stated that in some cases a calculation would need to be performed within the meter to provide meter readings as required for billing purposes.

(5) Not applicable.

(6) No.

(7) Although all single phase solar systems work in the same way, it is of relevance if they are connected to a single phase or three phase power supply. For instance, if a qualified electrician were to connect a small scale renewable energy system to one of the three phases of a three phase power supply, and no other appliances were connected to that phase, the customer would in effect receive a gross feed-in tariff. Therefore a calculation is performed where three phase meters have a renewable energy system installed to ensure credits are only provided for exports of electricity on a net basis.

(8) This question is seeking a legal opinion on titles and ownership and should be referred to the Attorney General.

(9) Not applicable.

(10) Yes.

(11) Not applicable.

INDEPENDENT PUBLIC SCHOOLS

4812. Hon Alison Xamon to the Minister for Energy representing the Minister for Education

(1) Does the Minister expect all Western Australian government schools to be Independent Public Schools by 2013?

(2) If no to (1), what proportion of schools does the Minister expect will have Independent Public School status by the end of 2013?

Hon PETER COLLIER replied:

(1) No, each school community has the choice of whether to express an interest in becoming an Independent Public School.

(2) An independent selection panel recommends to the Director General of the Department of Education the schools which they determine to be ready to become Independent Public Schools, based on written expressions of interest and supported by the school community. It is not possible to predict how many more schools will submit an expression of interest for 2013, and how many schools the independent selection panel will recommend to the Director General to become Independent Public Schools.

SCHOOL SELECTION OF TEACHING STAFF

4813. Hon Alison Xamon to the Minister for Energy representing the Minister for Education

(1) How many schools currently use School Selection of Teaching Staff (School Select) to recruit teaching staff?

(2) How many schools does the Minister anticipate will use School Select by the end of 2013?

(3) How much extra funding is provided to schools choosing to appoint teaching staff through School Select?

Hon PETER COLLIER replied:

(1) All schools other than Independent Public Schools are designated School Select and in 2011 have had the option to select their own staff in Terms 2 and 3.

(2) By the end of 2013 all schools other than Independent Public Schools will have the option to use School Select. They will also be able to call upon central support to fill vacancies if required.

(3) No extra funding is required.

INDEPENDENT PUBLIC SCHOOLS — TEACHER RECRUITMENT

4814. Hon Alison Xamon to the Minister for Energy representing the Minister for Education

Will the introduction of the Independent Public Schools and School Select policies have any impact on the access of teaching staff to permanency or to the entitlements that come with being a permanent teacher?

Hon PETER COLLIER replied:

The provisions of the Teachers Public Sector Primary and Secondary Education Award 1993 and any General Agreement in force at the time have the same applicability to teaching staff and entitlement to permanency, irrespective of whether or not they are located in an Independent Public School and irrespective of the School Select policy.

SCHOOL STAFFING — SELECTION AND APPOINTMENT

4815. Hon Alison Xamon to the Minister for Energy representing the Minister for Education

I refer to the document *School Staffing Changes for 2011 — Questions and Answers*, available on the Department of Education website, and ask what further changes to the selection and appointment of school staff, as referred to in this document, are planned for 2012?

Hon PETER COLLIER replied:

Plans for 2012 improvements in staffing practice are under consideration.

TEACHERS — PLACEMENT TRANSFER POINTS

4816. Hon Alison Xamon to the Minister for Energy representing the Minister for Education

(1) Given the introduction of the Independent Public Schools and School Select policies, will transfer points still be used to provide priority transfer as an incentive for teachers who have taught at hard to staff schools?

(2) If yes to (1), what proportion of metropolitan teaching positions will be available for placement of these teachers under this scheme in 2012?

(3) Will redeployed teachers lose any transfer points they have accrued if they take up a position at an Independent Public School?

(4) Will teachers who have accrued a significant number of transfer points be given any guarantee of a metropolitan placement?

(5) What other supports or systems will be established to facilitate the placement of teachers returning to the metropolitan area from rural and remote schools?

(6) Given that the transfer points system is likely to be devalued under the new teacher recruitment and appointment policies, what new strategies are being considered to encourage and reward teachers working at hard to staff schools?

Hon PETER COLLIER replied:

(1) Yes. Transfer points will continue to be one factor for consideration in determining teacher priority for transfer. Other factors include location preferences and teaching areas.

(2) The number of positions available for transfer is dependent on teacher movement within the system and is difficult to project. I am advised that the Department of Education has never determined a proportion of positions for staff transfer.

(3) No.

(4) No, this has never been the case. As per the School Education Act Employees' (Teachers and Administrators) General Agreement 2008, the only staff guaranteed a metropolitan placement are those leaving the Remote Teaching Service.

(5) The conditions attached to the Remote Teaching Service and the Country Teaching Program will continue to be honoured. In addition teachers are able to apply for all advertised positions.

(6) The presumption in the question is wrong. The transfer points system will not be "devalued". Transfer points are only one strategy to encourage and reward teachers working at hard-to-staff schools. Others include permanent teacher status, financial incentives and return to the metropolitan area where possible. All of these strategies will continue.

BLACK PRINCE GOLD MINE — CLOSURE

4819. Hon Robin Chapple to the Minister for Mines and Petroleum

I refer to the old Black Prince gold mine-site in Exploration Lease 77/1966 in the shire of Kondinin, and ask —

(1) What was the date that the operator of this mine ceased operation?

(2) Who was the operator of this mine-site that left it in this condition?

(3) Is the site to be rehabilitated?

(4) If yes to (3), when?

(5) If yes to (3), by whom?

(6) If yes to (3), with what funds?

(7) Who is the lessee of Exploration Lease 77/1966 and what roll, if any, will they play in the rehabilitation of the old Black Prince gold mine-site?

(8) Was a bond held by the Department of Mines and Petroleum (DMP) over the old Black Prince gold mine-site?

(9) If no to (8), why not?

(10) If yes to (8), what was the extent of the bond?

(11) If yes to (8), will the bond cover the rehabilitation of the site?

(12) Were regular checks carried out by the DMP on this mine during its life?

(13) Why did the department allow this site to deteriorate to this condition during the life of the mine?

Hon NORMAN MOORE replied:

(1) The old Black Prince gold mine site was operated under Mining Lease M77/1014. M77/1014 was forfeited on 9 October 2009. The pending application for Exploration Licence 77/1966 was applied for on 3 June 2011 and includes all ground previously covered by M77/1014.

(2) Kairiki Energy Ltd was the tenement holder when M77/1014 was forfeited.

(3) The Department of Mines and Petroleum (DMP) is currently investigating the environmental liabilities associated with the site with the intent of determining the appropriate nature and costs of any rehabilitation. Once this investigation is complete DMP will be able to determine what rehabilitation is required, the costs and who will be undertaking and funding the rehabilitation.

(4)–(6) See answer (3).

(7) The applicant for Exploration Licence 77/1966 is Wirraway Metals and Mining Pty Ltd. There is no requirement for Wirraway Metals and Mining Pty Ltd to rehabilitate the existing mine disturbance on E77/1966 if this licence is granted.

(8) There was no bond held for the Mining Lease 77/1014.

(9) DMP processes at the time, over ten years ago, failed to pick up on the fact that mining had commenced, therefore no bond was requested.

(10)–(11)Not applicable.

(12) The site was inspected by Environmental Officers from the Department responsible for the Mining Act 1978, in 2001, 2007 and 2011.

(13) DMP had taken actions to improve the environmental performance on the mine site, including providing directions to the tenement holder and imposing additional environmental conditions on M77/1014. As a result of non-compliance DMP commenced forfeiture action against the tenement holder.

HOVEA-8 WELL — CASING CORROSION

4833. Hon Alison Xamon to the Minister for Mines and Petroleum

I refer to the casing corrosion in the Hovea-8 well, and I ask —

(1) How old was the casing around this well?

(2) Is this level of corrosion common in casings of this age?

(3) Was this well and casing correctly constructed in accordance with best practice?

(4) Had this well and casing been subject to any of the stresses that accompany the practice of fracking?

(5) Had acid been pumped down this well?

(6) Had this well and casing been subject to high-pressure similar to those used in hydraulic fracturing?

(7) What, if any, differences in well and casing construction are required for wells that will be subject to fracking?

Hon NORMAN MOORE replied:

(1) Construction of the Hovea 8 well was completed on 13 August 2003.

(2) No. Corrosion is a managed risk at any oil and gas production facility. Tubing replacement and work-overs are widely utilised as a remedy for corrosion. Well work-overs are covered under clause 630 of the Schedule of Onshore Petroleum Exploration and Production Requirements 1991.

Well tubing is the first line of defence for protecting casing. Corrosion of casing occurs from time to time, however there are well established methods to directly patch and repair casing.

(3) Yes.

(4) No.

(5) Yes, this well has previously been treated with an acetic acid, to remove carbonate scale that inhibits production.

(6) No.

(7) Wells that are subject to hydraulic fracture stimulation may require higher pressure rated well casing and casing cement specifications, along with more stringent monitoring and testing of the casing cement.

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