CRIMINAL INVESTIGATION (EXCEPTIONAL POWERS) AND FORTIFICATION REMOVAL BILL 2001

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 5: Delegation by Commissioner of Police -

Debate was interrupted after clause 5 had been partly considered.

Mrs EDWARDES: The Commissioner of Police may delegate to a deputy or assistant commissioner those powers in this legislation that are peculiar to the Commissioner of Police. That delegation must be in writing and signed by the Commissioner of Police. Such delegation provisions are contained in several other pieces of legislation, particularly in areas relating to prosecution.

Is any other area of police activity affected by a requirement for the delegation of powers by the Commissioner of Police to be in written form? I remember a potentially embarrassing situation when I was Minister for Labour Relations in which the proper delegation of the powers relating to prosecutions under the Occupational Safety and Health Act had not occurred. The Parliament needed to amend the legislation to ensure that matters before the court could not be tossed out on the technicality that delegation had not been done correctly. Is the requirement for a written delegation a regular occurrence, and does it happen in any other area of police activity? I am mindful of what happened under the Occupational Safety and Health Act.

Mr McGINTY: I am told that this provision is relatively rare. It limits the class of people beneath whom a delegation cannot be made. I last year debated this issue in the context of the Criminal Property Confiscation Bill. During the course of that debate I made the very point that is now covered by this legislation; that is, given the fairly extreme nature of some of the provisions in the legislation, the delegation powers of the police commissioner should be circumscribed. At the end of the day, they were not, and the ability to delegate powers to another police officer is contained in the Criminal Property Confiscation Act. This clause is unusual in that it limits the delegation of powers. I am told that it is common to give the Commissioner of Police power through legislation to delegate to another police officer. However, the limitation in this legislation, which will confine delegation to the very senior ranks of the Police Force, is unusual.

Clause put and passed.

Clause 6: Appointment of special commissioner -

Mrs EDWARDES: This is another important clause. It deals with the appointment of a special commissioner. It is proposed that a person will be appointed as a special commissioner for a period not exceeding four years. That person must either hold office as a judge of the Supreme or District Court or be a retired Supreme or District Court judge. During the second reading debate I highlighted concerns that had been raised about appointing members of the judiciary to carry out administrative functions. Those concerns related to the potential breach of the independence of the judiciary from the executive arm by asking a judicial officer to carry out the work of the executive. In this instance, a judicial officer would be involved in and/or help to facilitate the investigation of a criminal matter. Another concern is that the appointment of judicial officers to carry out administrative functions provides the potential for conflict with the judicial officers' other duties. With that as background, how will the appointment of the special commissioner occur? The Attorney General indicated in his response yesterday that he does not propose to set up another bureaucracy. Will the judge operate from the District or Supreme Court - whichever is the case - or will the Government set up another facility at which questioning will take place? Who will carry out the administrative functions? Someone must do the paperwork and the like. If a judge of either of the courts is appointed as a special commissioner, will the officers at the court or in the judge's office do that work? The Attorney General has indicated that a "person" will be appointed. Is it expected that only one judge will be appointed, who will be called on from time to time? The Attorney General has reiterated that the powers will not be exercised on a regular basis, so a judge will not be set aside to do nothing but be a special commissioner. If that is the case, where will the records be held? Could the Attorney General give the House an overview of how he sees the appointed judge operating?

Mr McGINTY: The intention is that we will use the facilities and perhaps the staff of either the Supreme Court or the District Court, purely for administrative ease and for no other reason. It was a difficult area because of the Kable case problems. We wanted to appoint only people of a particular status in the system. We had thought, for instance, that the special investigator-type provision from the Anti-Corruption Commission Act might have provided us with something of a model.

Mrs Edwardes: You have criticised it far too much, so you could not reproduce it.

Mr McGINTY: It presented very real consistency problems, if I may put it that way. Nonetheless, a special investigator, as I am sure the member is aware, is generally speaking a senior practitioner. It certainly applies to those of whom I am aware, such as Geoffrey Miller, who was a Queen's Counsel before he was appointed to the bench. I am aware that various officers at a senior level in the Crown Solicitor's Office have been special investigators on particular occasions. Senior practitioners seem to have been used generally for that purpose. They have the administrative backup of the Anti-Corruption Commission. The situation will need to be watched to monitor the frequency of use and the best administrative arrangements to underpin that. I imagine that more often than not a retired judge will be used because there may be some reluctance by serving members of the judiciary to accept an appointment of this nature. That being the case, a retired judge would overcome the Kable problems.

Mrs Edwardes: Could you remind me about the Kable case?

Mr McGINTY: It was a case in which an indefinite sentence was effectively imposed by the Parliament, which usurped the judicial function. The Act of the Victorian Parliament was ruled unconstitutional because it gave a non-judicial function to a body that might exercise federal judicial power. The decision was overruled on that basis. The issue here would be vesting a non-judicial investigative function in a member of the judiciary and court which might exercise federal constitutional judicial power, which could expose some vulnerability on that count. For that reason it is better to use other than serving members of the judiciary. We equally did not want to pitch it at the non-judicial level of senior practitioners, because the only basis upon which we could do that would be to appoint a serving lawyer. Given the nature of the powers, and the debate we have already had, we wanted this to work at a higher level than that. Notwithstanding that the legislation expressly states that if it is to be a serving judge, he must undertake the powers in his personal capacity rather than in his judicial capacity, he could use the courts and the court staff for administrative purposes. Similarly, I am sure that an administrative arrangement could be entered into to enable a retired judge to use the facilities that he or she once used. As for the appointment, I imagine that a panel of people would be appointed for a term. The term of four years is to enable them to deal with an ongoing matter. It also saves the need for an appointment to be made in a particular case. Depending on availability, if the matter was thought to take a week, at a practical level a judge might be used.

Mrs EDWARDES: I would like to hear the continuation of the Attorney General's comments.

Mr McGINTY: If it was seen to be an ongoing matter, as I am told is the nature of the National Crime Authority investigations, it might mean that somebody might need to be available over many months. That would obviously have a significant impact on the workload of serving judges in this State. It is a question of looking for somebody of a sufficiently high status in the legal and judicial profession and not running into the problems of conflict between a judge exercising administrative and judicial powers. That is what we are looking at doing here. I see several people being appointed. Depending on their availability and the nature of the matter to be investigated, one of them might have the application made to him or her. When the Bill is reviewed, that is one of the key matters that would need to be looked at to make sure that what was happening was beyond question. I have no doubt that the sort of people we intend to target, namely, organised crime figures, will seek to take every point they can to avoid scrutiny. That is one of the reasons, for instance, that we have excluded judicial review or an appeal process from the investigatory side. We have both seen in other areas QCs flying in from

Melbourne to take every point they can at a preliminary hearing, and then many months or years later the trial starting. We did not want the system frustrated in that way. Equally, we do not want to put in place a statutory provision that is susceptible to immediate challenge in the High Court. That is the sort of balance and those are the sorts of considerations that came into play when it came to the appointment of a special commissioner. If I may be allowed the indulgence of saying it, in many senses it would be preferable if the volume of work was such that it warranted someone of a sufficiently senior standing exercising investigatory functions to undertake this role; but that is not currently seen as feasible.

Mrs EDWARDES: I hope that the level of organised crime does not get to the stage in this State where we need a permanent person on a daily basis to deal with these exceptional powers. Now that the Attorney General has explained the situation to us I will go back over what we believe it might be. There is likely to be a panel of judges. The Attorney General's preference would be for retired judges as opposed to currently sitting judges. That may be because of some difficulty in convincing sitting judges that they should undertake this task. I do not know if the Attorney General has some people in mind.

Mr McGinty: No, I have not.

Mrs EDWARDES: The administrative function will be carried out by either the Supreme Court or the District Court, depending from which court the judge came if the judge is retired. Confidentiality and security are critical issues when dealing with organised crime. Major key elements are the storage of documentation, and computer systems that need to be totally isolated from other computer systems.

Although the Attorney General thinks he may be able to use the administrative functions of those courts, some special work needs to done to set aside an area purely for those people who are involved in this special commission function. Let us take the Anti-Corruption Commission as an example. We must be extremely vigilant about the type of information coming before the commission and in the course of dealing with transcripts and the like. Can the Attorney General expand his thoughts on using either one of those courts? If we use judges, one of whom is an ex-Supreme Court judge and the other an ex-District Court judge, we cannot have the commission operating from either of those courts. The Government must set aside a special area for this function.

Mr McGINTY: I hope that in the longer term we can link in with organisations like the National Crime Authority and perhaps the Anti-Corruption Commission in this State as alternatives to the courts and the court facilities. We have a range of options, and we have not worked through some of the administrative arrangements in detail. The member for Kingsley asked whether we had approached individuals to serve; the answer is no. We have dealt with this legislation fairly quickly as a response to the murder of Lou Lewis and Don Hancock. We are more interested in setting up the framework in which things will occur rather than at this stage attending to some of the intricate administrative details that are involved. We see that in the longer term these links can be built up with other bodies that have a somewhat analogous function and have expertise in that area. For instance, the issue of security for the forthcoming police royal commission has been at the forefront of our minds. That is in contrast with the Temby Royal Commission into the Finance Broking Industry where security was important, but is fundamentally different from dealing with allegations of corruption by public officers or, in the case of this legislation, with organised crime. It is a whole new standard for security, documentation, the processes and all of those sorts of matters. I am sure that we will be able to agree on some review mechanism to ensure that these matters are addressed in the light of the experience rather than trying to do something new for the first time, which is what we are trying to do here.

Ms QUIRK: Currently the Supreme Court and District Court have arrangements for the storage of documents under the Surveillance Devices Act that preserve the confidentiality of documents. Although I have not talked to the Attorney General about this, it should not be drawing too long a bow to extend those arrangements - certainly in the short term - to cover any applications and storage of documents under this Act.

Dr CONSTABLE: It seems that we are moving into a whole new area and we need to be clear about what we are doing and understand some of the principles at stake that are contained in clause 6. I agree with the Attorney that appointing retired judges or judges to the position of special commissioner is important. In agreeing with the Attorney I was mindful of his comments about having people of sufficiently high status and experience to do the task that is contained in this legislation. However, I have some concerns about the level of principle and I would like to hear the Attorney's comments. It seems that this could be interpreted quite easily as an attack on some basic principles relating to the independence of the judiciary.

I am sure that the Attorney is knowledgeable about the comments of the Law Society on this matter. The Law Society regards this move as unprecedented and a serious threat to judicial independence in so far as serving judges are concerned. The Law Society's particular concern is that the judges will be involved at the investigation stage of a police inquiry, and that crosses over a boundary that we should not allow to happen without examining this issue carefully. Why are we not going down the track of setting up a new authority or a system which utilises only retired judges rather than serving judges? To have serving judges in that investigative stage seems to compromise the judiciary, and, as the Law Society has pointed out, the separation between the judiciary and investigation has been carefully maintained until this point. We are taking a serious step and we have to be sure about what we are doing and why we are doing it.

Mr McGINTY: The point raised by the member for Churchlands is one that, quite apart from the concerns expressed by the Law Society, has occupied our minds a lot over the time this legislation was being drafted for the reasons the member has outlined. The Law Society is not totally accurate when it describes it as unprecedented. It is using a bit of poetic licence because in the Royal Commission into Commercial Activities of Government and Other Matters there was at least one serving judge. I am not sure whether Peter Brinsden was at that stage a serving judge.

Dr Constable: This is not a royal commission; this is a police investigation.

Mr McGINTY: A royal commission is not a judicial function; it is part of the executive arm of government. It is a matter of using judicial officers to pursue part of the executive function, in the same way that police

investigation is part of the executive function; it is not a judicial function. To use a judge for a non-judicial function is the issue. It was done in the WA Inc royal commission. I instance the WA Inc royal commission because I know that caused some concern at the time in judicial circles about using current judges for what is essentially an investigatory function - that is, the conduct of a royal commission. It is not something that the Supreme Court allowed to happen lightly. It was the gravity of the issues that were at stake at the WA Inc royal commission that prompted the chief justice to make available at least one if not two judges. I am not sure whether Peter Brinsden had retired then, but I think he was a serving judge. However, Geoff Kennedy was a serving judge; he retired only a few months ago. As a serving judge, he conducted the WA Inc royal commission. The same issue was at stake on that occasion. The Easton royal commission was headed by retired Judge Kenneth Marks and the more recent inquiry into finance brokers here was headed by one of the nation's most eminent Queen's Counsel Ian Temby, and before that retired Judge Ivan Gunning. It is not unprecedented to use judges from state courts for these sorts of things. Arguably, it is not something that should be done as a regular occurrence.

Of course, a Federal Court judge could not be used for something of this nature as it is contrary to the Australian Constitution. A Federal Court judge can exercise only judicial power. This will clearly not involve judicial power; it will involve executive power to investigate. A Federal Court judge could not be used for that purpose. We can, however, use a state judge and it has been done for this sort of thing. It is clearer when judges exercise only judicial functions and other people exercise administrative functions. I guess that is what the Law Society was saying. I took it as being a matter of emphasis rather than a matter of fact when it said it was unprecedented.

The National Crime Authority does not use serving judges for that purpose. I hope that in light of experience gained over the next few years, it can be reviewed and the position clarified. The forerunner of the Anti-Corruption Commission - the Official Corruption Commission - was presided over by retired Judge John Wickham. In many ways, that was a similar function.

Dr Constable: A retired judge is very different from a serving judge.

Mr McGINTY: That is correct. A retired judge is not a judge.

Dr Constable: But a retired judge is an experienced person who could bring a wealth of experience to bear in such a situation.

Mr McGINTY: Yes. I will provide one other illustration. When Daryl Williams, the federal Attorney General, was looking for a person to preside over a royal commission into the HIA Insurance collapse, he could not appoint a Federal Court judge for the reasons I have stated. He appointed a state Supreme Court judge - Neville Owen. He performs an executive function, not a judicial function. It is not unprecedented, but it is perhaps not highly desirable.

Mrs EDWARDES: Those commissioners have been given a specific task to be completed in a specific time frame. A judge will obviously also be involved in judicial functions at the same time that he or she is serving as the special commissioner. The judiciary's concern relates not only to the level of judicial independence from the executive arm of government but also, and more importantly, to the likely impact on the judiciary per se. It may lead to a loss of public confidence in the impartiality of judges. In criminal matters, the Crown takes the case against a defendant before a judge. If a sitting judge were appointed as the special commissioner, he or she would be moving in and out of that function. The perception of impartiality is the issue.

Ms QUIRK: This is not unprecedented in legislation in this State. Under the Surveillance Devices Act, issues come before a serving Supreme Court judge. The Telecommunications (Interception) Western Australia Act, which has application in this situation, requires that the Police Service apply to a judge, including judges of the Family Court, for a warrant. It is exceptional, but it does occur.

Clause put and passed.

Clause 7: Effect of appointment -

Mrs EDWARDES: This clause provides that a person may resign by notice in writing given to the Governor. However, the resignation does not have effect until it is accepted by the Governor. I cannot remember seeing that in any other piece of legislation, although it may be a common clause. What does the Attorney General have in mind?

Mr McGINTY: It is a common clause. Its purpose is to give certainty about the precise time at which a resignation takes effect. Is it when it is written, put in the post or received? This clarifies the end of the commission.

Clause put and passed.

Clause 8: Tenure of appointment of Judge -

Mrs EDWARDES: Some of the points we have raised about the appointment of the special commissioner go to the question of cost. Obviously, if a serving judge is appointed, no costs will be incurred. However, if a retired judge is appointed, funds will need to be expended. What funding has been set aside for this measure?

Mr McGINTY: The circumstances giving rise to this legislation occurred after the state budget was delivered. I have not approached the cabinet expenditure review committee nor has Cabinet set aside funds, for the simple reason that we have no idea what costs will be incurred. As I said, this is a concept; we have not examined the administrative detail. We may need to take a Dietrich-like approach to this issue. We have no idea how many Dietrich cases there might be. A trial involving a gang of Asian youths will involve a significant public allocation under the Dietrich principle. That will be recouped after the event when we know what costs have been incurred. In recent months, Cabinet has approved legal assistance for former Premier Richard Court, to cover the cost of defending a defamation action taken against him by Mr and Mrs Mickelberg, and the cost of legal proceedings involving former minister Doug Shave. Those people ceased their service to this place some months ago and the legal actions relate to incidents that occurred a long time ago. In each case, no budgetary allocation has been made. However, as often happens when dealing with the law, the cost will be recouped after the event.

Clause put and passed.

Clause 9: Scope of this Part -

Mrs EDWARDES: This is a very important clause, because it provides the checks and balances between public interest and the freedoms and rights of individuals. It relates to examinations before a special commissioner and refers to the facilitation of the investigation of a section 4 offence. The investigation of an offence includes the investigation of a suspicion that the offence has been or is being committed. The powers exercised by the special commissioner cannot be exercised until there are reasonable grounds for suspecting that a section 4 offence has been or is being committed, that there are reasonable grounds for suspecting that there might be evidence or other information relevant to the investigation of the offence that can be obtained under this part, and that there are reasonable grounds for believing that the use of powers given by this part would be in the public interest. Regard must be given to three issues when considering the use of the powers contained in the legislation: whether the suspected offence could be effectively investigated without using the powers; the extent to which the evidence or other information could be obtained otherwise and the likelihood of that happening; and the circumstances in which the information or evidence that is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained. I would not presume that only those three factors would be taken into account in the public interest test.

What other factors might be taken into account in determining the public interest?

Mr McGINTY: The member for Kingsley is correct when she describes clause 9 as an important part of this legislation, because it gives the special commissioner the discretion to determine whether to grant the exceptional powers that are contained in this legislation. Clause 9(3) provides that the powers of a special commissioner cannot be exercised unless he is satisfied that there are reasonable grounds for suspecting that a section 4 offence has been, or is being, committed; there are reasonable grounds for suspecting that there may be evidence or other information that can be obtained by using the powers under this part; and there are reasonable grounds for believing that the use of powers given by this part would be in the public interest. The public interest is not circumscribed. However, paragraphs (i), (ii) and (iii) of subclause (3)(c) provide that the public interest must have regard to whether the suspected offence could be effectively investigated without using these powers; the extent to which the evidence or other information that it is suspected might be obtained would assist in the investigation; and the circumstances in which the information or evidence that it is suspected might be obtained is suspected to have come into the possession of any person from whom it might be obtained. A range of factors would be taken into account, but the broad test is the public interest. The intent is that if the police were abusing their powers on a matter that was relatively minor but was technically within the ambit of this legislation, such as an armed robbery that resulted in death, the special commissioner could determine as a matter of discretion that the public interest did not warrant the invoking of those powers.

Mrs EDWARDES: I understand that the public interest test is broader than is outlined in paragraphs (i), (ii) and (iii) of subclause (3)(c). What other factors does the Attorney have in mind that would give some comfort to the community that the public interest test will provide a check and balance that these exceptional powers will not be abused?

Mr McGINTY: One factor that comes to mind immediately as constituting a component of the public interest test is the seriousness of the offence. We also need to rebut the presumption that when a crime has been committed, the ordinary powers of the police will be sufficient to investigate that crime, and say, "This crime is sufficiently serious as to warrant the invoking of these exceptional powers." On the other side of the seriousness argument, we also need to weigh up the extent to which we may be depriving citizens of their accepted rights. All of those thing that go to the legal framework for the rule of law would be relevant factors when dealing with matters of this nature. Another factor is the time that has elapsed since the offence has been committed and whether it can be demonstrated that the existing powers and investigative techniques have not worked . Another factor is whether the offence is at the heart of organised crime or is at the fringes. Those are the sorts of matters that will be relevant in determining whether it is in the public interest for the special commissioner to invoke these powers.

Dr CONSTABLE: Clause 9 is crucial, because if the special commissioner were to give the police these exceptional powers, the police would have the right to stop, detain and search without a warrant. Therefore, it is important to understand what we are doing in this clause. Can the Attorney give an example of the things that may come before the special commissioner and why it may be necessary to give the police these extraordinary powers of investigation? Can the Attorney also explain how the special commissioner will be able to be satisfied that there are reasonable grounds for suspecting that there may be evidence or other information relevant to the investigation of the offence?

Mr McGINTY: These powers are often cast in the form of a standard under which a police officer must attest to the fact that he has a reasonable belief that a certain crime has been committed or certain beliefs are true. We have pitched this beneath that standard to be a reasonable suspicion.

Mrs Edwardes: It is not a reasonable suspicion. It is reasonable grounds for suspecting, which is stronger than a reasonable suspicion.

Mr McGINTY: That is right. A reasonable suspicion would be about as low as we could get. The trigger here is reasonable grounds for suspecting. Objectively viewed, the police officer must be able to say that he had observed certain facts -

Dr Constable: Or someone had told him - hearsay.

Mr McGINTY: Yes. That could well be so.

Dr Constable: What if it was a mischief?

Mr McGINTY: That is one of the risks we run. If the police officer thought he had a reliable informant, in those circumstances he would have reasonable grounds for suspecting that an offence had been committed.

Dr Constable: One of the problems of the Anti-Corruption Commission is that often the informants are criminals.

Mr McGINTY: In that case, the Police Commissioner would say to the special commissioner, "This is the information that we have. In my view, there are reasonable grounds for suspecting that an offence has been committed."

The special commissioner will ask who gave the information and whether he is a known drug addict or criminal or whether he has convictions for dishonesty to determine whether reasonable grounds for suspecting that an offence has been committed exist. If it is demonstrable that someone is utterly unreliable and has no memory whatsoever, there would be no reasonable grounds for suspecting an offence has been committed. A special commissioner will be someone who has experience in these sorts of matters and will arguably have a lifetime's experience in dealing with such matters. A special commissioner will need to be satisfied that reasonable grounds exist for holding a suspicion. We did not want to pitch it too high and make it a hurdle impossible to jump over. The combination of requiring a special commissioner to be informed of reasonable grounds for suspicion and the character of a special commissioner and his experience in dealing with witnesses and criminal matters is a way of ensuring that the powers would not be invoked unnecessarily.

Mrs EDWARDES: I want to talk about reasonable grounds for suspicion and belief. A later clause deals with search and seizure. Clause 9 is connected to the powers that the police have. What is "suspicion" and what are "reasonable grounds"? We are discussing the suspicion that an offence has taken place. Clause 9(3)(b) refers to "reasonable grounds for suspecting". Clause 9(3)(c) refers to "there are reasonable grounds for believing that the use of powers given by this Part would be in the public interest". A suspicion exists if an offence has been committed or is about to be committed and there is evidence. There must also be a belief that the use of the powers is in the public interest.

A 1977 Western Australian legal case, Morse and Thompson v Harlock, deals with section 711 of the Criminal Code. That section pertains to warrants. It deals with reasonable grounds for suspicion and belief. Suspicion is less than belief. Belief includes or absorbs suspicion. Therefore, part 3 of the Bill is stronger than earlier parts. Part of the judgment of the case states -

> It is a prerequisite to the issue of a valid search warrant that the Justice must be satisfied on the sworn evidence before him, . . that there are reasonable grounds for suspecting . . .

Those words are listed in clause 9(3)(a) and (b). The police already have this power under section 711 of the Criminal Code. It continues -

> . . . the presence of the things sought in the place the object of the search . . .

The second point is -

> . . . that there are reasonable grounds for believing the same will afford evidence of the commission of the offence.

Clauses 9(1) and (2) are already picked up by section 711 of the Criminal Code. Clause 9(3) is stronger because it contains a new public interest test. I will talk about the powers later. The provisions of this Bill are far broader than those under section 711 of the Criminal Code. If one combined sections 711, 46, 26 and 24 of the Criminal Code with the Police Act, the Firearms Act and the Misuse of Drugs Act, one would have a good combination of police powers. The case determined that a police officer cannot ask a judge for a search warrant under section 711 on the basis of reasonable belief or suspicion. There must be reasonable grounds for such a belief. The officer must know where the offence has been committed or that it is suspected or believed that an offence has been, or will be, committed. The issue is whether the clause is strong enough when considering the extension of search and seizure powers as compared to a section 711 request. Another case, George v Rockett, refers to the word "suspicion". That case quoted Lord Devlin's judgment in another case -

> . . . in its ordinary meaning is a state of conjecture or surmise where proof is lacking . . .

Mr BARNETT: My extensive legal studies taught me that Lord Devlin was an English judge who I compare to Lord Denning. I would like to hear more on this matter.

Mrs EDWARDES: I have a great deal of respect for Lord Denning as well and I have many of his books. However, I am quoting from Lord Devlin. I continue -

> 'I suspect but I cannot prove'. The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

The concepts of reasonable suspicion and reasonable belief are clearly distinguished. It continues -

> "Reasonable suspicion" of guilt is not to be equated with *prima facie* proof of guilt.
>
> A "reasonable suspicion" need not be based solely on the type of material that will be admissible in evidence.

A reasonable suspicion must exist at the time an application is made. There is a difference between suspicion and belief. I will go into the topic far more deeply when we discuss the search and seizure powers and discuss the other powers that the police have that could be used to look for evidence and receive information and advice in order for them to complete their investigation.

Mr McGINTY: I thank the member for Kingsley for her erudite explanation of these difficult matters. What is contained in clause 9 of this Bill is somewhat tighter than the provisions of section 711 of the Criminal Code although similar words are used. The section relates to search warrants. It is a section of the Criminal Code that appears in the chapter of the code dedicated to the seizure and detention of property connected with offences, the custody of women unlawfully detained for immoral purposes and the restitution of property unlawfully acquired. Each of them use the phrase "reasonable grounds for suspecting". It is common to the Bill before the House and section 711 of the Criminal Code.

All that is required for a search warrant to be issued under section 711 of the Criminal Code is that it "must appear to a justice". The exact words are -

> If it appears to a justice -

Clause 9(3) of the Bill states -

> The powers of a special commissioner under this Part cannot be exercised unless the special commissioner is satisfied that -

That is significantly tighter than "if it appears to a justice". There is a prohibition on using the powers because the special commissioner must be satisfied about the existence of a certain state of affairs. Paragraphs (a) and (b) talk about reasonable grounds for suspecting certain things to exist. Under clause 9(3)(c), the test is upgraded to reasonable grounds for believing that the use of the powers will be in the public interest. Paragraphs (a) and (b) relate to whether the Commissioner of Police has been able to present sufficient material to satisfy a special commissioner about the existence of a certain state of affairs. However, paragraph (c) goes to the state of mind of the special commissioner. He must believe that it is in the public interest to do something. That test is toughened up along similar lines to the scheme outlined in section 711 of the code. The member for Kingsley has explained the important distinctions, as expressed by learned judges. I believe that what has been expressed in clause 9(3) is somewhat tighter than that which currently exists in the Criminal Code. The search and seizure powers contained in this legislation can be debated later.

Clause put and passed.

Clause 10: Offences for which a person stands charged -

Mrs EDWARDES: Clause 10 deals with the offences for which a person stands charged. I want to put my contribution on the record and for it to be confirmed by the Attorney General because, as I have said before, these debates are very important because they are referred to in the interpretation of what was meant at a particular time. Under this clause, I want to confirm that if a person is already charged, this legislation will not apply to him.

Mr McGINTY: This legislation is about the investigation of crimes and the gathering of evidence with a view to laying charges. If somebody has already been charged with an offence, these powers cannot be used to interrogate him on those matters. However, one should note the qualification at the end of the clause, which does not prevent any other person from being examined under this part about those matters. Once a person is charged, he cannot be called before a special investigator. A special investigator's powers cannot be used in that context. The clause states -

> A person cannot be examined under this Part about matters that may be relevant to an offence with which the person stands charged, . . .

Mrs Edwardes: Therefore, matters can be broader than the offence with which he is charged.

Mr McGINTY: Just because a person is charged with an offence does not mean that he cannot be examined on another offence.

Mrs Edwardes: Absolutely, I accept that. However, how broad are the matters when referring to the offence with which he is charged? If he is charged with a murder, a set of circumstances obviously led up to that, such as those included in the definition of organised crime. Can he be brought in and be led to talk about other matters and not necessarily about the murder?

Mr McGINTY: The test to be applied would be whether the subject matter of the examination would constitute admissible evidence against him in respect of the matter for which he has already been charged. If it would, that territory cannot be moved into.

Mrs Edwardes: Evidence given before a special commissioner is not admissible.

Mr McGINTY: No. I was not saying that it would be used, but that a person could not be examined about it if it could be relevant, and therefore admissible, to the matter on which the person is already charged. I did not mean that it would in itself be admissible.

Clause put and passed.

Clause 11: Summoning witnesses to attend and produce things -

Mrs EDWARDES: We are moving on to division 2, which deals with proceedings before a special commissioner. This clause is about summoning witnesses to attend and produce things. At this early stage, I advise that I do not intend to move the amendment to this clause that stands in my name on the Notice Paper. That amendment will be replaced with a further amendment, which will be more appropriately moved to clause 16. Clause 11 states -

(1) A special commissioner may, on the application of the Commissioner of Police, issue a signed summons and cause it to be served upon the person to whom it is addressed.

(2) Personal service of the summons is required.

(3) The summons may require the person to whom it is addressed to attend before the special commissioner, at a time and place named in the summons, and then and there to -

(a) give evidence;

(b) produce any document or other thing in the person's custody or control that is described in the summons; or

(c) do both of those things.

This clause is important because the summons will require the person to attend before the special commissioner to give evidence and to produce any documents that are required. Can the Attorney General outline the circumstances in which he believes this clause is likely to be used? As has been understood, to a certain extent, with some of the operations of the special commissioner, it might be something that could be done at very short notice. I was thinking about the sergeant with his team who comes across evidence of what might be an offence. He must go up the line to his division, then through to the assistant commissioner and/or the Commissioner of Police in order to get to the special commissioner, who can issue a signed summons and cause it to be personally served upon the individual. That could take a heck of a long time. Can the Attorney General outline some of the practical considerations for the time frame for the operation of this clause?

Mr McGINTY: Clause 11(2), which states that personal service of the summons is required, is an unusual provision. A summons is not normally required to be effected by way of personal service; however, given the subject matter involved here, that was considered to be an important protection. Otherwise, this would be the usual way in which the special commissioner would do his or her business. A summons would be used to get someone to attend, bring documents and to be subjected to examination. In that sense, it is no different from a summons to a witness to attend and tell what he knows about certain matters, or to produce particular documents. Although exceptional cases will require a degree of urgency, they would be in the minority. This is designed to be the ordinary way in which the special commissioner will conduct his or her business.

Mrs Edwardes: In a matter of urgency, how does one get around clause 11?

Mr McGINTY: One does not. Service of a summons will still be required. In the case of an emergency, a person might be required to present himself in one hour's time.

Mrs Edwardes: It has to be personal service? They have to be found.

Mr McGINTY: It is a mandatory requirement.

I think that should be the case. The provision was inserted for that very reason. Given the gravity of the consequences, it is a necessary protection. That seems to be the way things should operate to protect the individuals involved.

Mrs EDWARDES: Clause 20, arrest of witness failing to appear, states -

(1) If a person who has been served with a summons under section 11 fails to attend as required by the summons . . . the special commissioner may, on proof by a statement verified by statutory declaration that the summons was served -

This is in the instance that the summons is served -

issue a warrant for the apprehension of that person . . .

(3) The person executing the warrant may break and enter any place, building . . . for the purpose of executing the warrant.

No provision covers the event of non-service. The police might have grounds for reasonable suspicion of an offence having been committed and want to bring a person before the special commissioner, but they will not be able to do that if they cannot find him to serve the summons. The police must find the person to serve the summons, but they cannot break down his door to do so; they can break it down only if they have a warrant of apprehension. This could be an effective delaying tool of people endeavouring to escape the special commissioner's powers. They could simply head off over east.

I ask about the practical considerations. What arrangements would be put in place to counter that event? I imagine the police would cooperate with the National Crime Authority in an attempt to locate the particular individual and effect the personal service, and then send a police officer to escort him back.

Mr McGINTY: Personal service is mandatory. If the person to be examined cannot be found to be served with a summons, the Act cannot be activated. Although I have no personal experience of this, I understand that some process servers have quite ingenious ways of effecting service. I presume that they will be used in these cases to ensure personal service is effected. Given the nature of the organised crime and the serious offences involved, I imagine there would be a high level of cooperation between law enforcement agencies around the country to track down a person to effect service of a summons. If at the end of day service cannot be effected, a person cannot be hauled in for interrogation. It is as simple as that.

Clause put and passed.

Clause 12: Disclosure of summons may be prohibited -

Mrs EDWARDES: Section 12 deals with the fact that the summons referred to in clause 11 can include a notation prohibiting the disclosure of information about the summons. It is a long clause, so I will deal with it in bite-size chunks -

> (1) A summons . . . may include in it a notation to the effect that disclosure of information about the summons or about any official matter connected with it, is prohibited except in the circumstances, if any, specified in the notation.

A summons may not include a notation, in which case disclosure would be fine, but if a notation is included, the information cannot be disclosed -

> (2) The notation cannot be included unless subsection (3) requires it to be included or subsection (4) permits it to be included.
>
> (3) The notation is required to be included -

That is, the recipient of the summons cannot tell anybody about it -

> if the person issuing the summons is satisfied that failure to do so could reasonably be expected to prejudice -
>
> (a) the safety or reputation of a person;
>
> (b) the fair trial of a person who has been or may be charged with an offence; or
>
> (c) the effectiveness of an investigation.
>
> (4) The notation may be included if . . . failure to do so -
>
> (a) might prejudice -
>
> (i) the safety or reputation of a person;
>
> (ii) the fair trial of a person . . . or
>
> (iii) the effectiveness of an investigation;
>
> or
>
> (b) might otherwise be contrary to the public interest.

Subclause (3) requires a notation to be included if the person issuing the summons is satisfied that failure to do so could reasonably be expected to prejudice the safety or reputation of a person. To whose safety does the subclause refer? Does it deal with threats? Who is likely to be threatened or doing the threatening? Will the existence of threats be sufficient to establish a satisfaction as to the safety or reputation of a person? The interesting words are "expected to prejudice the safety or reputation of a person". I understand prejudice of the reputation or fair trial of a person, but I am not sure how the safety of a person could be prejudiced. It is an unusual way of describing the likelihood of a person being injured or otherwise dealt with. I suppose it could relate to a witness in protective custody, or a situation in which threats had already been made against a person. Are we talking about the witness or someone else? A summons could potentially relate to a bikie who is prepared to break the code of silence. He would certainly need to be put into the witness protection program.

Mr McGINTY: Clause 12 of the Bill requires a summons for a person to attend to be interrogated to contain a notation prohibiting publication if the special commissioner is satisfied that failure to insert the notation could reasonably be expected to prejudice the safety or reputation of a person etc. That person could be anyone. I am

sure the member remembers from her time as Attorney General that threats are not infrequently made against the -

Mrs Edwardes: The Attorney General. That is right; and they are usually made by colleagues on the other side of the House.

Mr McGINTY: They are occasionally made by colleagues on the Attorney General's side.

Threats against the safety of a person are made from time to time. They come from a variety of people and in a variety of situations. They could be made by someone who is aggrieved or has a delusion. The bikies believed to be implicated in the murder of Don Hancock made a threat against his life some months earlier, which was carried out in the time frame prescribed in that threat. Therefore, I can readily imagine circumstances in which somebody who is summoned to appear under the provisions of this Act and who is at liberty to talk about that summons is threatened with vengeance or sought to be silenced. We have seen a number of disturbing cases in this State in recent years whereby people who have been about to give evidence have been found dead in very strange circumstances.

Clare Garabedien was one and Andrew Petrelis was another. They both spring to mind without even thinking about it. It is a matter of looking at the consequences of word getting out that a summons has been issued.

Mrs Edwardes: The threat might not necessarily be to another person but may very well be to the witness, if it is found that a witness is to be called before the special commissioner.

Mr McGINTY: Yes. The commissioner might wish to include a notation that no publication of the summons is to be issued, in order to protect the person who is the subject of the summons. It covers literally any person. It is a wide power given to the special commissioner, if he is satisfied that the failure to limit publication could reasonably be expected to prejudice any person. If it is expected that there will be consequences - if I may put it in my language - the special commissioner is required to include a notation that it is not to be disclosed. This is one of the checks and balances we have sought to include in this legislation. Subclause (4) reads -

> The notation may be included if the person issuing the summons is satisfied that failure to do so -
>
> (a) might prejudice -
>
> (i) the safety or reputation of a person;

That is the lower standard of "might" as opposed to it being expected to prejudice, which is the requirement in subclause (3). The special commissioner has the discretion to determine in the circumstances of the case whether or not to do it.

Mrs EDWARDES: One of the other circumstances could be that the witness, if he was at liberty to say that he was before the special commissioner, may be fearful about not his life but the lives of his family. In other circumstances, the bikies, for example, might carry out the threat on another person not associated with the witness, merely for the sake of providing a warning.

Clause 12(3)(b) refers to the fair trial of a person who has been or may be charged with an offence. I can understand where factual matters of evidence might be raised. The notation means that people cannot disclose information about the summons or any official matter connected with it. Does that cover the evidence that is being given and the questions that are being asked of the witness in the special commission, which if widely known might very well affect the fair trial of a person who has been charged?

Mr McGINTY: A third party could be the one in jeopardy. That is very easily perceived. It could be that the girlfriend, boyfriend, family or other witnesses might be indirectly connected to the matter, or it could be a group of people who feel that their corporate existence is threatened. It is easy to imagine circumstances in which the safety or reputation of a person could be expected to be prejudiced. Similarly, the State's Anti-Corruption Commission Act contains a prohibition on reporting that a matter has been referred to the Anti-Corruption Commission. The reason is that when it is reported in the media or is known to the general public that someone is the subject of an investigation by the Anti-Corruption Commission, there is a stigma attached. The Parliament, in the context of that legislation, took the very firm step of saying that it cannot under any circumstances be reported to the public that a matter is under investigation by the Anti-Corruption Commission. However, I think the Anti-Corruption Commission provision goes too far.

Mrs Edwardes: Is that why you are looking at public hearings?

Mr McGINTY: Yes, and it has become a bit of a laughing matter around the place to refer to the fact that somebody "is being investigated by that body we cannot name". I believe that during the life of this Parliament we will have to address a range of those issues.

It is easy to see that a person's fair trial might be prejudiced by publicising that he is under investigation by a special investigator. If he were subsequently charged, and a lot of publicity surrounded the investigatory process, that could prejudice a fair trial. Again, it will be up to the special commissioner to ascertain those matters. Surprise is certainly an essential element of many an investigation. It is a case of getting to someone and nabbing him before others can make sure that their stories are consistent. If the word gets out that a witness has to front up the next day, he could well be paid a visit the night before, and in that way the ability to properly extract evidence from the witness could be compromised. They are all discretionary matters vested in the special commissioner so that he may come to a conclusion on those matters. In a case in which it is clear that prejudice is expected, it is mandatory to prohibit publication of the summons and matters connected with it. When there is simply a possibility, and this is covered by subclause (4), the special commissioner has discretion as to whether a notation is included on the summons which prevents any disclosure of the summons or matters related to it.

Mrs EDWARDES: Subclause (4) has a further element that could be included in the notation; that is, the failure to add a notation might otherwise be contrary to the public interest. Again, this subclause applies a public interest test. Has the Attorney General any information on the types of issues that could be incorporated into this public interest test?

Mr McGINTY: I cannot think of a hypothetical example to give the member. I am told that it is taken directly from another piece of Western Australian legislation, which may be the Criminal Property Confiscation Act, but I am not 100 per cent certain about that. If a copy of it is available, perhaps that could be confirmed in a fairly short time. It seems to me that the clause gives a discretion, should circumstances arise in which the public interest dictates that the notation be included. I am not currently capable of envisaging the circumstances. It has been suggested to me that the provision is to ensure that the investigation is kept secret. It might be that no great prejudice is likely to accrue to anyone as a result of publication, but it is thought for broad public interest reasons that it might be desirable to keep the investigation secret. It is possibly one way in which the matter might arise. The provision has been taken out of other legislation, and I hope that in a few minutes we will be able to confirm from where, but that is the basis upon which the legislation was drafted in this way.

Mrs EDWARDES: Subclause (5) states that if the notation is included, the summons must be accompanied by a written statement that describes the effect of clause 28, which is the offences provision with the appropriate penalties in the event of disclosure contrary to the notation on the summons. Does the Attorney General believe this notation will be complied with by the class of person about whom we are talking given their history? I do not think the code of silence applies between the State and that class of person. The code of silence might require them to pass on relevant information to one of their own, who may be under investigation or could be connected to the matters that are presently before the special commissioner.

Mr McGINTY: It was thought to be unfair to simply have a note on the summons saying they could not disclose the matter without a further accompanying note on the penalties. It is not intended to go any further than make sure everyone is aware of the consequences.

Mrs Edwardes: Three years and $60 000 is not really a lot.

Mr McGINTY: If the member for Kingsley's amendment is successful it will be $1 million and 20 years. This simply alerts people to the consequences of non-compliance.

The origin of the notation on a summons is the National Crime Authority (State Provisions) Act 1985, sections 18A and 18B. That seems an appropriate head piece of legislation from which to derive those provisions.

Mrs EDWARDES: I refer to subclause (6) that reads -

> The notation ceases to have effect if, after the conclusion of the investigation concerned -

When is that? We started to explore part of this when we were dealing with the records that the special commissioner may have. At what point would an investigation be considered to be completed? This clause indicates that is when -

> (a) no evidence of an offence has been obtained;
>
> (b) although evidence of an offence or offences has been obtained, it has been decided not to initiate any criminal proceedings . . . -

That might be referring to something at this stage, rather than a later time. To continue -

> (c) evidence of an offence or offences committed by only one person has been obtained and criminal proceedings have been initiated against that person; or -

I take it that that may even relate to different offences -

(d) evidence of an offence or offences committed by 2 or more persons has been obtained and -

(i) criminal proceedings have been initiated against all those persons . . .

(ii) . . . except any of them against whom it has been decided not to initiate criminal proceedings.

That does not help us to any great extent when we are considering the records of the special commissioner. There might be an issue with the wording, although this wording is "after the conclusion of the investigation", whereas the wording in clause 23 is "when the investigation is complete".

Will that be the same and will these elements of when an investigation is completed be the same? Some of this may take time - two, three or four years. We have heard of many investigations that have been ongoing. Is that the case, and will that notation be in effect for that length of time?

Mr McGINTY: The provision is taken from the National Crime Authority (State Provisions) Act and follows on from earlier provisions, which were also taken from that Act. The key provision is subclause (7), which essentially says -

. . . the Commissioner of Police must serve a written notice of that fact on each person who was served with the summons containing the notation.

The notation will cease to have effect if, after the conclusion of the investigation, certain circumstances have arisen, and it has effect from the day on which the police commissioner gives notice to that effect. That is my reading of subclause (7). I guess the inquiry would be brought to an end by the Commissioner of Police forwarding a written notice to each person who was served with a summons that contained the prohibition on publication.

The other possibility is under subclause (8), by which the special commissioner might get permission for publication to occur. In the absence of that permission, when someone is served with a summons containing a notation prohibiting publication, that will remain secret until the Commissioner of Police gives a written notice to the person saying that it has been lifted.

Mrs EDWARDES: To whom will the notation apply? Will it apply - perhaps it should not - only to the person who has been summonsed before the special commissioner?

Mr McGinty: Who else would know about it?

Mrs EDWARDES: The police and other people. To whom will the notation apply? For instance, the safety of that witness may be at issue. That witness, as the Attorney General indicated earlier, may never want it known that he gave evidence and wants the records of his evidence destroyed, and even his name deleted. Any of these instances might conclude the investigation, but the trial will not have occurred.. The witness may be in protective custody. It may be that his evidence leads to other evidence being gained, therefore, he would not be required to attend as a witness and he would have assumed a new life elsewhere. We know that our borders do not stop criminal activities. If a witness's life were under threat - potentially that was the reason for the notation - it would be an ongoing threat, even once the matter had concluded at trial and the person was convicted. That is not taken into account here. Police do make slips of the tongue. We heard from the member for Girrawheen about a lawyer who was going out with a member of the media. In this State we know of several police officers who have partners who are members of the media. I am not talking about the deliberate leaking of information but slips of the tongue that can occur and have occurred in the past. Does the notation relate only to the witness or does it involve everybody - administrative staff, the whole lot - as to the level of secrecy and confidentiality that is required for the safety and wellbeing of a person at risk?

Mr McGINTY: The summons will be directed to an individual and therefore will affect that individual. The starting point will be for the prohibition to be directed at that individual. That view is reinforced in clause 28(1), which clearly states that a person who is served with a summons containing a notation must not disclose any information. It is hard to say that somebody who inadvertently comes across something is liable to significant penalties if they disclosed information that was not directed to them. Subclause (2) allows for the disclosure of information, in certain circumstances, for the purpose of obtaining legal aid or a lawyer and things of that nature. A prohibition exists on those people to whom disclosure is made preventing them from disclosing further information. A certain class of people will be entitled to have disclosure made to them, but they will be then also bound by a secrecy provision. I draw attention to clause 29, not so much with regard to a summons, but to matters before the commission and the secrecy provisions that are a prohibition on any person publishing a matter that might be regarded as the private proceedings of the special commissioner. It essentially will affect the person against whom the summons is directed and then other people to whom that person is authorised to make a disclosure. However, there will be no general prohibition on, for instance, the person serving the

summons to maintain the secrecy of that as such, unless it is brought up by a more general provision. There is no express provision on that matter.

Mrs EDWARDES: I think the Attorney General is saying that clause 29 provides for the express provision of anyone. It will encompass the process server, the police officers, the administration staff and anyone who is likely to have knowledge of the matters or the proceedings.

Mr McGinty: I suspect that clause 29(b), which states that any information obtained in the course of the proceedings -

Mrs EDWARDES: It will be broad enough to encompass everything.

Mr McGinty: It is arguable enough to say that the proceedings will be initiated by a summons and, therefore, matters related to that will be picked up as a general prohibition.

Mrs EDWARDES: That will apply to who can attend and all the rest of it. There is no timeframe on that provision. In the other provision a witness who receives a letter stating that the investigation is complete can blab all he wants about having appeared before the special commissioner. If he does not receive a letter and blabs, he will get five years under clause 28, and the notation will automatically lapse. However, clause 29 provides no timeframe, which means that unless the special commissioner were to give permission to release that information by way of a public report or something else, at no time in the future could those proceedings or matters referred to be made public. Can the information be released once the commissioner gives permission?

Mr McGinty: Yes.

Mrs EDWARDES: If the Commissioner of Police were to write to the witness to say that the investigation was complete and the notation was no longer in effect, that would not release anybody else. The permission under clause 29 can be given only by the special commissioner. It cannot be public information, by virtue of clause 29 and the special commissioner, if just the Commissioner of Police were to write to the witness to say that the notation was no longer in effect.

Mr McGINTY: The notation, which is the matter contained on the summons, will prevent a person from detailing information about the summons or about any official matter connected with it. A letter from the Commissioner of Police saying that the investigations have been completed would mean that the witness was at liberty to disclose that he had received a summons or an official matter connected with the summons. However, he could not disclose other matters, such as the evidence he gave, or publish a copy of the transcript or anything of that nature, unless authorised to do so by the special commissioner. I was trying to think of a comparable provision in the Anti-Corruption Commission Act. I am not aware, other than through court proceedings, of anyone talking about what took place in the Anti-Corruption Commission after the investigation was complete. Although I am not concerned about this issue, I suspect that this is a provision somewhat comparable to that.

Mrs Edwardes: Between the police and the union, the Attorney General might find that some discussions have taken place and some letters have been written to the Premier of the day, of whatever Government.

Mr McGINTY: I suspect that is right and I suspect that would be in breach of the Act.

Clause put and passed.

Clause 13: Witness to attend while required -

Mrs EDWARDES: This clause requires that the person who has been served the summons under clause 11, unless excused by the special commissioner, must attend and report to the special commissioner from day to day until released. This is a common clause that is used on a regular basis and permits the special commissioner to make time arrangements and the like. However, unless those special arrangements are put in place for the individual, the summons will require him to attend unless he were excused by the special commissioner to do otherwise.

Clause put and passed.

Clause 14: Power to examine on oath -

Mrs EDWARDES: This clause is fairly similar to a provision in the Anti-Corruption Commission legislation. Therefore, we are dealing with a special commissioner who may require a witness to be examined and to take an oath, irrespective of whether he has been summonsed to attend or not. The question would then arise of why an oath would be administered to a witness who had just appeared before the special commissioner without being summonsed. Some people wish to give evidence, but in some instances they have not had a summons to attend. Concerns exist about police attending before a special investigator of the ACC, and, having been requested to

attend, not necessarily being summonsed, and in some instances being asked to be sworn in. That is of concern for the operation of the ACC, as it has been outlined to me, and may well be of similar concern given the process envisaged by this clause.

Mr McGINTY: This provision is taken from the Royal Commissions Act 1968, which states -

> **11. Power to examine on oath**
>
> A Commissioner may administer an oath to any person appearing as a witness before the Commission, whether the witness has been summoned or appears without being summoned, and may examine the witness on oath.

It is a power to administer the oath. That would be done as a matter of course for anyone giving evidence. The use of the word "may" suggests that it is not mandatory. That is the normal course adopted in these circumstances.

Mrs Edwardes: Not being told about being required to take an oath to give evidence has been a concern for people attending before the Anti-Corruption Commission.

Mr McGINTY: The special commissioner could say that he or she does not require a witness to take an oath or affirmation, but that the testimony will be heard in any event. That would be unusual. I have given evidence before two royal commissions, and on each occasion I appeared voluntarily, but I was sworn in before giving evidence.

Clause put and passed.

Clause 15 put and passed.

Clause 16: Legal representation -

Mrs EDWARDES: This is a very important clause. It deals with legal representation. Subclause (1) provides that the person being examined is entitled to legal representation at the examination. However, subclause (2) provides that the special commissioner may allow the examination of a person to proceed without that person having legal representation if the special commissioner considers that in the circumstances it would not be in the public interest to postpone the examination to enable the person to be legally represented. Subclause (3) provides that one legal practitioner cannot represent all defendants appearing before the special commissioner. We have had occasions on which one firm of lawyers has represented a group of defendants. That is a major question for the individuals concerned, and it is obviously a decision they make themselves. It is an all-in or all-out situation; if one is guilty, they are all guilty. Is the person seen to be the firm and/or the individual? Could a group of solicitors from one firm be refused permission to appear because they are from the one firm?

I refer members to subclause (2). Everyone has a fundamental right to be represented. Some commentators on this Bill have referred to this clause as representing the establishment of a Star Chamber. I put forward the theory yesterday during the second reading debate that people could indulge in delaying tactics. The public interest test might be that an individual could be endangered or an offence was likely to be committed if the examination were postponed. Why is this provision necessary? What is the public interest test? Why could the examination not be postponed? Obviously that picks up the public interest test. Why not provide for a state-appointed legal representative? Someone might claim that he did not have sufficient time to get a legal representative. He might have been required to appear in an hour or it might have been impossible to get legal representation at that time of the night. A person's lawyer might be overseas, in court, in Broome or whatever. Many excuses could be used to postpone an examination on the basis of lack of legal representation. However, when balancing the probability of its being a delaying tactic against the fundamental right to be represented, the public interest test must be very strong. There is no indication about the elements of the public interest test to which the special commissioner is likely to give consideration.

What if the special commissioner is confronted with a defendant who has special needs? That could be an Aboriginal, a person with a disability and so on. We are not talking about juveniles in this instance. This issue must be considered, because this legislation does not address the needs of people who may be vulnerable.

Dr CONSTABLE: I keep going back to the fundamentals of this legislation. Clearly, we are setting up a situation that will infringe on a number of principles of our justice system. We are removing the right to remain silent in certain circumstances, giving powers to the police to search premises without warrants and so on. On the one hand, we are providing the right to legal representation, but on the other we are taking it away on the basis that it could be in the public interest to do so. Legislation such as this must have checks and balances. One of the checks or balances should be to ensure that any person summonsed to give evidence or to be cross-

examined should have legal representation. I understand that the United Kingdom legislation, which provides similar exceptional powers, has been accompanied by the guarantee of legal representation. That would balance a number of the exceptional provisions in this legislation. Given the limited legal aid funding, that assistance would not be available to many people - perhaps none - in this situation. I agree with the member for Kingsley: we should be able to guarantee legal representation for people who find themselves in this situation.

Ms QUIRK: I refer to subclauses (2) and (3). There has been some debate over the past couple of days about the circumstances in which a special commissioner might refuse permission for a specific legal representative to appear. It might be useful to clarify the circumstances. The special commissioner might call a number of witnesses about a particular investigation. Although, the well-known practice of Chinese walls is prevalent in this fair city of ours, it is not particularly effective in the criminal milieu. In some circumstances, it is in the public interest that separate lawyers act for different witnesses in the same investigation. This is to ensure the integrity of the evidence and that there is no contamination. As the member for Kingsley said in another context, it is sometimes possible to inadvertently give information that is inappropriate. Therefore, even if a lawyer were to give an undertaking not to disclose evidence to more than one client, that would still be a possibility. Clause 16(1), which provides an entitlement to legal representation, should be the overriding principle in this clause, with the qualification that the special commissioner should have some discretion in order to preserve the integrity of the hearing. Clause 16(3) provides not that a person is not entitled to any legal representation but rather that a person must have separate legal representation. In those circumstances, the issues of fairness that the member for Churchlands raised will be minimised.

Ms SUE WALKER: As usual, the member for Girrawheen was very vague in what she said. She said that the overriding principle in clause 16(1) is that a person is entitled to legal representation. However, she said also that the commissioner must preserve the integrity of the hearing. As the Premier said in his second reading speech, this Bill will allow a police officer to bring before the special commissioner an ordinary person. During the third reading debate, the Attorney asked us to let him know if this Bill will affect ordinary citizens. That is what we have been doing, but the Attorney apparently does not like it. Under what circumstances will a person not be entitled to legal representation in order to preserve the integrity of the hearing?

Mr McGINTY: We have enshrined in this Bill, because of what it deals with, the right to legal representation for a person who is subject to an interrogation before the special commissioner. The Bill provides two exceptions. The first exception is if the special commissioner considers that it is not in the public interest, perhaps because of the nature of the crime, or because it is an emergency situation in which the person is seeking to flee the jurisdiction, to postpone the examination in order to enable the person to obtain legal representation. In a circumstance in which the person to be examined does not have his legal representative available and that will require an adjournment, the commissioner will have the discretion in the public interest to not postpone the examination; in other words, to proceed without legal representation.

The second exception - I think the members for Girrawheen and Kingsley have covered this matter - is a circumstance in which a number of people are represented by the same lawyer, because that person will be familiar with the nature of the interrogation or investigation and will have the opportunity to pass on that knowledge to his clients; or a circumstance in which the lawyer is involved in the matter that is the subject of the investigation. I do not regard that as a particular problem.

Ms Sue Walker: A person may appear before the special commissioner and not have legal representation, and if he does not answer a question he may be put inside indefinitely.

Mr McGINTY: Yes.

Ms Sue Walker: And under these provisions, he cannot appeal.

Mr McGINTY: If a person refuses to answer a question that he is required to answer, he will be dealt with before the Supreme Court.

Ms Sue Walker: With no legal representation and no right of appeal.

Mr McGINTY: That is right, but there will then be a hearing of the contempt matter, and in the course of those proceedings that submission will obviously be put. However, what the member has described is accurate.

Mrs Edwardes: The person will have legal representation when he appeals to the Supreme Court on that matter.

Mr McGINTY: I assume the person will arrange it at that stage, yes.

Mrs EDWARDES: I apologise if the Attorney addressed this aspect while I was having a quick conversation with the former Attorney General, but, in the circumstances of subclause (2), has the Attorney considered appointing a state legal representative for such a person in order to ensure that the lack of legal representation

cannot be used as a delaying tactic; or, in the event that the lack of legal representation is a real issue, the person is not without legal representation?

Mr McGINTY: We have not considered that. The special commissioners will be persons who have experience in dealing with unrepresented litigants and defendants. This will be an exceptional circumstance rather than the norm. The norm is that a person is entitled as of right to legal representation; and that is something that the special commissioner will accommodate. We do not want to create a situation in which the entitlement to legal representation may be used to frustrate the purpose of the Bill, which is to obtain evidence of illegal activity.

Mrs EDWARDES: In many instances, the reason that legal aid is given in a criminal matter is that the matter is serious or has serious consequences. The question that then arises is how we balance a person's entitlement to legal aid as opposed to a person's entitlement to obtain his own legal advice. I understand that debate, because that is the question that is raised in the case of Dietrich v The Queen, and we often go to great lengths to determine whether the person has the means to afford his own legal representation. The consequences of this clause are such that the evidence that is given cannot be used against the individual. However, the individual must produce documents and answer questions, and there is no judicial supervision of that; and in the event that the person does not do that, the person may be brought before the Supreme Court for contempt. I have no concerns about requiring these classes of people who had committed serious crimes being required to give evidence. I have no issue with the fact that if they do not they will be taken before the Supreme Court and charged with contempt. The issue is that exceptional powers are being granted for use in rare circumstances. It would be unreasonable to not - as similar to Dietrich - ensure that a state-appointed legal representative were made available. It could be like the public defender's office. It need not be someone of the accused's choosing; it could be someone of the State's choosing.

Mr McGINTY: The clause is fairly straightforward: there is a right to legal representation. The first exception is contained in subclause (2) -

> . . . if the special commissioner considers that in the circumstances it would not be in the public interest to postpone the examination to enable the person to be legally represented.

It is in the public interest that people to be interrogated by a special commissioner are legally represented, particularly when it is established in subclause (1) that people have a legal right to representation. The starting point is that it is in the public interest to have people represented.

Mrs Edwardes: The public interest test here is in determining whether to postpone an examination, not whether a person has legal representation.

Mr McGINTY: The public interest test is to postpone an examination to allow a person to be legally represented. It is doubly so because it is also a right under the legislation. In a normal case, other than an emergency, a special commissioner would adjourn the proceedings to allow for legal representation, whether it were through legal aid, a pro bono arrangement or to allow a Queen's Counsel to fly in from Victoria. Notwithstanding that it is in the public interest for a person to be represented, it should be established whether the circumstances of a particular case are such that the public interest is in the opposite direction, and that an examination should proceed. It may be that it is in the public interest to conduct an examination and override the rights of an individual to legal representation. That would occur only in an emergency. I cannot envisage it happening in any other situation. Examples of extraordinary circumstances are if someone is going to flee the jurisdiction at midnight or if poison is about to be put into Perth's water supply. Such emergency situations must relate to the nature of an offence or the conduct of an individual to be examined. I take comfort that the legislation contains the right to legal representation and that a special commissioner is someone with the status of a judge who would consider it a right in any event. He or she would consider it in the public interest for a person to have representation, given the consequences of not being represented and the penalties that flow from that. The provision is there to stop someone from saying that he has a right to representation but that he will wait until a particular QC from Melbourne is available and in the meantime he will not cooperate. If we were to broaden that exemption we would need to take away the right to legal representation and leave it as it is before a court. It would be left to common law. There is no simple answer, but the legislation tries to take away what are often used as delaying tactics. If it were only a matter of an adjournment until the next day it would be granted other than in an emergency. If someone said that his lawyer was not available for 12 months it would be clearly an attempt to frustrate the process. That is how I see the clause working. I am heartened that it is recognised to be in the public interest for people to have legal representation when they are examined.

Mrs EDWARDES: Did I mention yesterday that it was a common occurrence in the Star Chamber to cut off the ears of people?

Mr McGinty: Does the member want to move an amendment?

Mrs EDWARDES: Clause 16(3) states -

> The special commissioner may refuse to allow a person to be represented before the commissioner by a person who is already involved in the proceedings or is involved or suspected to be involved in a matter being investigated.

Can the definition of such a person be extended to his or her firm? The member for Girrawheen talked about lawyers in firms representing clients. I know that Chinese Walls are supposed to be established in some firms, but I do not believe in Chinese Walls, particularly in these instances. I would like to be comforted by the term "person" encompassing firms.

Mr McGINTY: I have referred to this provision as the second exemption to the general rule on legal representation but, in a sense, it is not. It is not to deny someone legal representation, it is to deny them a particular lawyer in the two circumstances described in subclause (3). The first is if the lawyer is already involved in the proceedings. That would be through representing another person - a co-witness. The second circumstance is if the lawyer is involved in the matter being investigated. It would stop a crooked lawyer fronting up to represent someone if he is subject to the investigation or involved in the proceedings. It is not an exception, it is just saying, "Not that lawyer, thank you. Find another one."

Clause 28(3) relates to disclosures and breaches of confidentiality within a firm of legal practitioners. If a legal practitioner discloses things about an investigation to another practitioner in his firm, the practitioner to whom things were disclosed cannot disclose those things to another practitioner in the same firm. It would be a serious breach, possibly one warranting action to debar someone from practising. There is certainly a duty not to disclose information to another lawyer in the same firm. We can presume it would not occur and the law would not be broken. It would not necessarily prevent a person from the same firm assuming that people respected the law and confidentiality.

Mrs Edwardes: What about the relationship between a legal practitioner and a person issued with a summons?

Mr McGINTY: Clause 28(2) makes provision for disclosure to a legal practitioner if a person receives a summons for the purpose of obtaining legal advice. It is expressed in terms of a "natural person". Given that it would be a crime for that legal practitioner to disclose to someone else in the firm a crime punishable by imprisonment and a fine, we need to proceed on the basis that it is the individual, rather than the firm, who is caught. It would depend on whether a conflict was seen to arise. That is possibly where the answer is to be found.

Mrs EDWARDES: I referred earlier to the conflict of the issue between the individual and the witness. In some instances involving classes of persons, those people will be all in or all out. Therefore, they will make sure that there will not be any potential conflict. Good firms will not represent more than one witness in a matter in the same way as they would not represent more than one codefendant unless there were good reasons to do so, such as in the case of husbands and wives. However, even in those instances, it might be a good decision for a legal practitioner to say that, given a person's circumstances, it would be better for that person's wife to receive separate legal representation. It might well be that she will be found to have committed the crime and that the husband just had information about the crime. Good firms and legal practitioners will do that. There have been circumstances in which Chinese Walls in firms were supposed to have been established. They have essentially been erected in corporate rather than criminal matters. Whether that is an appropriate practice for law firms has been the subject of some debate over the past decade.

I have confidence in the ability of the special commissioner to determine whether the person can be a person of the legal firm itself. That does not stop him from doing so, even though the two circumstances are already involved in the proceedings or suspected to be involved in a matter being investigated. There is no prerogative to question whether he is making the right decision in that instance. Obviously, if these powers are to be exercised, we need to get down to the crux of the matter. It might well be that particular legal firms might decide to abuse it and represent the whole class of witnesses or more than one. That might be appropriate. That is for the special commissioner to determine. It might be inappropriate for individual witnesses, or for the client, which is the whole class of persons being represented. What we are getting to is the fact that the class of person might pay for the legal representation rather than the witnesses who are being represented. Therefore, to whom is the allegiance? That is where this clause is getting to.

Mr McGINTY: I am so enthralled by what the member for Kingsley is saying that I would like to hear her again.

Mrs EDWARDES: I thank the Attorney General. I will send the Attorney General a copy of *Hansard*. I move -

> Page 9, after line 10 - To insert the following -

> (1) In making an application under section 11 or participating in proceedings before a special commissioner, the Commissioner of Police is to be represented by a legal practitioner within the meaning of the *Legal Practitioners Act 1893* instructed for that purpose, who may be assisted by others not so qualified but who are under the direct supervision of a legal practitioner.

This is an endeavour to ensure that under clause 17, which we are about to get to, a person representing the Commissioner of Police must be a legal practitioner. I know that to be the Attorney General's intention. This amendment will clarify that point. I have made sure that the investigating officer is able to be present at the same time as the legal practitioner, because they have different skills. Together, they should be able -

Mr Kucera: What would you do in an instance involving the current commissioner, who is a legal practitioner?

Mrs EDWARDES: He could represent himself. This amendment would not exclude that. However, most lawyers do not represent themselves. The Commissioner of Police would probably seek to use the services of another legal practitioner. The important element was to make sure that we did not exclude the appropriate services of the police, who have investigatory skills.

Ms QUIRK: I agree with the member for Kingsley. This is a sensible amendment. Although I believe that the situation she referred to is probably covered by clause 5(4), in the circumstances it does not hurt to clarify the issue. Although my colleague the member for Yokine makes the point that the current commissioner has a law degree, members know what is said about lawyers who act for themselves. It would probably be better if he had separate legal representation. This amendment clarifies that. In the interests of the smooth running of the application, it would be a sensible idea to enshrine it in the Bill to ensure that the applicant had a right to a legal practitioner.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 17: Examination of witnesses -

Mrs EDWARDES: Subclause (1) provides that -

> A person representing the Commissioner of Police may, so far as the special commissioner thinks proper, -

That was obviously covered with the amendment to clause 16 -

> examine, cross-examine, or re-examine any witness on any matter that the special commissioner considers relevant to the investigation.

The investigation is the matter referred to under clause 9(2), which states -

> The investigation of an offence includes the investigation of a suspicion that the offence has been, or is being, committed.

Under clause 17(2), a person representing any witness can similarly examine, cross-examine and re-examine, but under clause 17(3) it does not -

> . . . prevent the special commissioner from allowing any other examination, cross-examination, or re-examination of witnesses -

It does not refer to the ability of the special commissioner to examine, cross-examine or re-examine. In his response yesterday - it may have been by way of interjection - the Attorney General said that the special commissioner is there to facilitate an investigation. He will not carry out the investigation. That was one of the comments in relation to appointing a senior judicial officer. Does this prohibit the special commissioner from asking questions? I would like to see that. I do not think that anything will stop the special commissioner from asking a question. Therefore, I doubt that this will prohibit him from doing so. This power permits, not restricts. In the event that the special commissioner asks questions, he will do more than just facilitate the investigation of a matter; he will become part of the investigation team.

Mr McGINTY: The intention is that the Commissioner of Police will conduct the interrogation. The special commissioner is the facilitator; the equivalent of the chairman or Speaker. However, there is also no intention to prevent the special commissioner from asking questions. In fact, clause 24 refers to the ancillary powers of the special commissioner -

> The powers of a special commissioner include the power to do anything that is necessary or incidental to the performance of the special commissioner's functions under this Part.

Although the special commissioner will not conduct the investigation, that clause would enable him to pursue particular aspects of it.

Clause put and passed.

Clause 18: Examination to be private -

Mrs EDWARDES: This is another important clause relating to the operation of the special commissioner. It prescribes that the examination will not be open to the public; it is to be private. However, the special commissioner may make an order as to who may be present during the whole or part of the examination. Again, the concern is that the rights of the individual will be restricted. He cannot say anything to anybody, for obvious reason, in certain circumstances, and the hearing is to be conducted in private. The Attorney General has said that some of the provisions are taken from the Anti-Corruption Commission Act. We have had many years of debate about those investigations being conducted in private; that people do not have the ability to be heard in public and clear their name. The statement that something has been referred to a body that cannot be named immediately gives the impression that something serious has taken place. The member for Kalgoorlie on a previous occasion raised the concern that people's names are often published in advance of a conviction, and that once someone's name is published, he is automatically deemed to be guilty. There must be a balance between publicity and privacy. In this instance, we are leaning towards privacy for the protection of the individual and/or individuals, the investigation and possibly the evidence, especially in light of the classes of persons about whom we are talking.

Further, we are talking about criminal activity. Although corruption is a serious matter, it may not necessarily have the consequences that could result from matters before a special commissioner being made public. Again, there must be a balance between the concern that a matter will be heard in private and the protection of the individual in having the matter heard in public. We have gone through the issues relating to notation. If it is known that a person has been called before the special commissioner, that person could in some way be linked with the Claremont serial murders, the Hancock-Lewis murders or any other matter that is likely to go before the special commissioner. However, that may not be the case. The member for Innaloo gave an example yesterday of a person who was not the last to handle a detonator used in a bombing, but who had handed it to several other people. That person's admission led to charges being laid, although not against the witness. However, if it became known that that person was being investigated for such a matter by the special commissioner, he would be considered by the community as responsible for the bombing.

I am conscious of the dichotomy between the principle that demands that things be heard in public and the protection of the privacy of the individual.

Mr McGINTY: The special commission hearing will be part of the police investigation of an offence, and will relate to the police determining whether charges can be laid and gathering evidence for that purpose. Those investigations are normally conducted in private. They are certainly not public.

I see a distinction from Anti-Corruption Commission matters. I think there is an argument that an investigation into public officers who failed to perform their duties or behaved corruptly can in some circumstances be, for the public's benefit, conducted in public. That relates to the public nature of the duty that has been breached. However, cases before the special commissioner would be a matter of gathering evidence that might result in the laying of charges, which would then be heard in an open court. It is appropriate that such investigations be conducted in private.

Under the Anti-Corruption Commission Act, matters of public corruption can be heard only in private. My view is that that should change, but that is a matter for future debate in this House.

Clause put and passed.

Clause 19: Conduct of proceedings -

Mrs EDWARDES: This is one of the clauses dealing with the conduct of proceedings that has been likened to the Star Chamber because the rules of evidence will not apply. The rules of evidence have been developed over many years in an endeavour to provide protection for witnesses in court proceedings. This is of major concern. The Attorney General will say that the balance is that any evidence given may not be used against that person.

I should have raised the issue of cautions during an earlier clause; however, it is also appropriate to raise it now. When a police officer takes a person in for questioning - he has not been arrested - a strong procedure must be gone through, starting with the caution that the person is not obliged to say anything unless he wishes to do so but that whatever he does say will be recorded and may be given in evidence.

Mr McGinty: Evidence before a special commissioner cannot be given in evidence.

Mrs EDWARDES: No; special commission investigations cannot be used in evidence. That is the corresponding balance. However, the individual being questioned may leave whenever he wishes. He has not been arrested. At any time he can decide that the interview is over, and we have even gone to the point of videotaping interviews for that purpose. As soon as the person being questioned decides he wants legal representation, the interview must stop. The procedure through which the police must go in questioning a person at the local station house is extensive. The process of investigation before the special commissioner is of concern.

I am not sure whether the Attorney General responded to my question about vulnerable witnesses. Nothing in this Bill addresses what will be the procedure if the person brought before the special commissioner is a vulnerable witness.

Mr McGINTY: The response to the last point is that that matter would be determined by the special commissioner, who would take into account the status of the witness and the appropriate protections to then be afforded.

The analogy with the Star Chamber is interesting. It had the power to cut someone's ears off. This body will not have that power, because its role will be purely investigatory. I am not sure that the analogy is correct. This body conducts an examination procedure that cannot result in a finding of guilt or the imposition of a punishment for the commission of an offence. It certainly provides that people who refuse to give evidence can be punished, but it is not a Star Chamber. Maybe my historical recollection is not all that good, but it is not a Star Chamber in the sense of having a trial that would lead to a final outcome. When the police are interrogating a suspect they are not bound by the rules of evidence. This provision is to ensure that notwithstanding the formal arrangements, people do not get led down the path of thinking that it is a court of law where the rules of evidence apply. It is a matter of getting evidence from people who are suspected of being involved in the commission of very serious offences. The conduct of the proceedings, particularly being in the hands of someone of the status of a special commissioner, is the appropriate protection that needs to be in place.

Mrs EDWARDES: Knowing that his words will be used for interpretation, could the Attorney General put on the record the position of those classes of persons who would come before the special commissioner and are usually referred to as having impairments or as being Aboriginal or juveniles? Will the Attorney General confirm that the special commissioner is required to act in accordance with the ordinary processes that are now in place either under the judge's rules or referred to in the Sentencing Act or other statutes? I was a moment ago looking for the relevant section in the Criminal Code. Although a proceeding before the special commissioner may not be regarded as a formal court proceeding, it could be very much regarded as a judicial proceeding and not merely an investigation, as the Attorney General has referred to it, by virtue of how it has been established. Could the Attorney General confirm for the record that those classes of persons are to be treated in accordance with the normal requirements applying when they are before a court now?

Mr McGINTY: I am happy to do that. Clearly certain rights are prescribed in the legislation, such as the right to legal representation, the right to cross-examine and things of that nature. I expect, and it is certainly the intention with this legislation, that the special commissioner will respect those classes of vulnerable people, whether they be young people, people from a particular racial group or a particularly disadvantaged class of people, and make sure that their testimony is properly obtained by affording to them the sorts of special considerations that ensure that their evidence is properly adduced.

Clause put and passed.

Clause 20: Arrest of witness failing to appear -

Mrs EDWARDES: This clause applies when a witness who has been personally served with a summons fails to attend as required. The proof is that a statutory declaration has been served. The special commissioner can then issue a warrant for the apprehension of that person. The warrant "authorises any person to whom it is addressed or a member of the Police Force". I am not sure who is being referred to when the clause refers to "any person to whom it is addressed". Subclause (2) reads -

> (a) to apprehend the defaulter at any time and bring the defaulter before the special commissioner; and
>
> (b) for that purpose, to detain the defaulter in custody until released by order of the special commissioner or, on appeal, by order of the Full Court of the Supreme Court.

This is the first time that an appeal provision appears in the Bill. Interestingly, under the provisions of subclause (3), in order to execute the warrant to arrest the individual the person executing the warrant may break and enter any place for the purpose of doing so. I think that is similar to a section in the Criminal Code. Could the

Attorney General explain who is "any person to whom it is addressed" as opposed to a member of the Police Force? Could he highlight why there is provision for an appeal in this instance concerning the reason a person has not attended?

Mr McGINTY: Generally speaking, the warrant will be executed by a member of the Police Force. There may however be exceptional circumstances when a special commissioner decides it is to be executed by someone else. It may well be that the person against whom it is to be served might be a police officer.

Mrs Edwardes: Don't police officers serves summonses on police officers?

Mr McGINTY: They can, but it might be thought better not to give prior notice and to get someone else to execute the warrant.

Mrs Edwardes: You think they leak information to each other, do you?

Mr McGINTY: I would not say that. It could be a federal police officer. A range of persons could act in those circumstances, but one would expect in the normal course of events that it would be a police officer. The provision in question is taken from the Royal Commissions Act 1968, section 16 and particularly subsection (3). The clause picks up ideas that are contained in that section.

As to why for the first time there is provision for an appeal to the Full Court of the Supreme Court, we have sought to take away only those traditional rights that can be used to frustrate the process. The essence of the process is to be able to get in, get the evidence, get a statement from somebody who might be involved, and then get out. We did not want to have subject to appeal the serving of a summons, the giving of evidence and those sorts of issues. Once someone has refused to come along, it seems as though he has placed himself outside that process. Therefore, the normal proceedings and privileges would apply; that is, he would have a right to appeal to the Full Court of the Supreme Court. Those rights of appeal exist in other circumstances where timing is not of the essence when trying to gain evidence that can be used in subsequent court proceedings. Rights of appeal have been preserved except where they can be used and would be used to frustrate the process.

Clause put and passed.

Clause 21 put and passed.

Clause 22: Power of special commissioner in relation to things produced -

Mrs EDWARDES: I take it that the document referred to in this clause is not necessarily available in hard copy to be produced before the commissioner, but is available for inspection at another location, although that is not necessarily the case because the special commissioner may retain it for a reasonable period. Who is the person authorised in writing by a special commissioner to inspect "any document or other thing produced", and is the person authorised in writing the person who can retain it for a reasonable period and make copies of it or take extracts from it, or is it only the special commissioner who can retain it for a reasonable period and make copies of it?

Mr McGINTY: The provision in question is taken from the Royal Commissions Act 1968. Section 21 is headed "Power of Commission in relation to documents produced". The clause means whatever it means in the Royal Commissions Act, and it undoubtedly could have been drafted somewhat clearer.

Mrs EDWARDES: I could not find a similar section in the Criminal Code, so I wondered why it was needed here. The question could be raised whether the documents could be brought only before the special commissioner or, if anyone else is able to inspect the document or make copies of it, is it a person authorised by the special commissioner and in writing? That seems unwieldy for an administrative function. Could the minister clarify why we have had to go down that path?

Mr McGINTY: Frankly, no. Section 21 of the Royal Commissions Act is cast in somewhat different words but has the same effect. It reads -

> A Commission, a Commissioner, or a person thereto authorised in writing by the Chairman may inspect any documents, books, or writings produced before the Commission, and may retain them for such reasonable period as it or he thinks fit, and may make copies of such matter as is relevant to the inquiry or take extracts from them.

It is exactly the same notion, but expressed marginally differently. I cannot throw any additional light on that.

Clause put and passed.

Clause 23: Records of investigation -

Mrs EDWARDES: We started to debate this clause when an amendment was accepted to clause 3 for the incorporation of the definition of the State Records Commission to mean the commission established under section 57 of the State Records Act 2000. The member for South Perth indicated in the second reading debate that when the royal commissioners from the Royal Commission into Commercial Activities of Government and Other Matters wanted to destroy documents and they did not have the power to do so, this Parliament said it wanted an independent group of people to have that power. This is far broader than dealing with royal commission documents; it goes to the protection - which is an important word - of state documents however they may have been established in the first instance. I feel that it is part of our history and it is a valuable tool to protect state documents.

We are dealing with investigation matters, so to some extent it is different. However, I was heartened to learn from the Minister for Health yesterday that the Police Service process for this is very strong; it has received special awards and incorporates the process under the State Records Act. Therefore, there does not seem to be any reason that the State Records Act and the State Records Commission is not incorporated as the body to deal with the retention or otherwise - particularly the destruction - of state records. In this instance, it is the records of investigation, particularly when the investigation has been completed.

The Opposition posed several questions about the process. When is the investigation complete? In an earlier clause we talked about the Commissioner of Police and the notation no longer having effect, and I raised several points about when an investigation was completed. Therefore, the words are fairly similar. As the definition is used in all of those instances, there is a level of certainty about when the special commissioner may make a determination under subclause (2) about what needs to be dealt with in the records. In response, the Attorney referred to the fact that the Attorney General needed in some circumstances to have the right to deal with the documentation. I know from having held that role that certain documents, while not in the direct possession and/or custody of the Attorney General, belong to the Attorney General. I am not sure that is the situation in this instance, although I am aware of a time when documents were required by the Official Corruption Commission, but were held by the Director of Public Prosecutions having been referred by the Premier of the day in 1992 following the WA Inc royal commission. The Chairman of the OCC at the time insisted that he needed this documentation for an investigation. However, because the documentation had been given to the DPP by the Premier, the DPP would not give them directly to the OCC chairman; therefore as the Attorney General at the time - I think the current Attorney General criticised me for laying my hands on them - those documents passed through the Attorney's office. As such, the Attorney General was felt to be the appropriate conduit for the delivery of those records. Although no firm determination exists on the status of those documents or the documents that would be held by the special commissioner, I understand and accept that there will be instances in which the Attorney does and should quite properly have a role in determining what needs to happen to documents. I do not believe that it is appropriate for the Attorney to be involved in the destruction of the documents.

Mr DAY: The member for Kingsley and former Attorney General is making an interesting argument about this issue and I would like to hear what she has to say.

Mrs EDWARDES: I am not sure that the Attorney should be involved in the destruction of documents. If the witness has given evidence only on the basis that following completion of the investigation his evidence is destroyed and his name is removed from all records, the Attorney indicated that he may need to be the person to follow up on that. Under subclause (2) the special commissioner can make any order on how to deal with the records. If a witness requires documentation to be kept in a secure way and then destroyed upon completion of the investigation, surely the system of record keeping would allow that to be tagged and the special commissioner could make the determination? If we have a proper process, the Attorney should never have to make that decision. If there is a flaw in the system and a document is found in the filing system 15, 20 or 25 years later, it could still be referred to the State Records Commission. It would be clearly identified and could be sealed in such a way that even the State Records Commission would not have access to it. Given the security of the record-keeping system, there would be a need to identify and store those documents separately from the other documents. They could also be sealed. I accept that it might be an issue if the special commissioner has not directed evidence to the appropriate body and that the Attorney General might be required to act as a conduit in that situation. However, I am not sure we will get to that point.

We are talking about an investigation conducted by the Commissioner of Police; the special commissioner is only facilitating that investigation. As such, he or she would have copies or perhaps the originals of the documents. However, if the Commissioner of Police is to carry out and complete an investigation, he will need copies of the material, evidence or documentation that has been produced. How would he be able to conduct an investigation and bring the issue to court without it? Will the process involve the Commissioner of Police's making application to the special commissioner for the material because it is required in court or in an

investigation? If that were the case, there would be an automatic clean-out of the special commissioner's record system. The special commissioner should not be left with investigation files. He or she will have transcripts of proceedings and administrative documents. However, when an investigation is completed, documents pertaining to it need not be held by the special commissioner. What would be the purpose of the special commissioner's keeping them? If an investigation has been completed simply because no further action has been taken, the special commissioner may still have the documentation. That is one instance in which that might occur.

I am not sure in what circumstances the Attorney General should require the commission to destroy records or when he would act as a conduit. The custody of records legislation is the appropriate tool to deal with this situation.

Dr CONSTABLE: I oppose this clause for reasons similar to those put by the member for Kingsley. In 1992, this Parliament spoke very firmly about the destruction of documents and records when the Royal Commission into Commercial Activities of Government and Other Matters asked members to give it the power to destroy documents. It fell to the four Independents to look into the issue. The proceedings of this House were suspended while we were briefed about the reasons for the destruction of those documents. The Independents did not accept the arguments and had a great deal to say about the preservation of documents. The arguments used then apply now.

It is extraordinary that, if passed, this provision would allow the Attorney General, as a representative of the Executive, to interfere with information gathered during a criminal investigation. It is totally inappropriate to leave those matters in the hands of the Attorney General. I wholeheartedly agree with the member for Kingsley. I do not condone the destruction of documents, but these records should be clearly covered by the custody of records legislation.

This clause lacks transparency and accountability. It would allow an Attorney General to pick and choose which records would be destroyed. It is extraordinary that any Attorney General would want those powers. Matters could become politically embarrassing. Anything to do with the custody of records should be kept at arm's length from the Executive. This Parliament should reject this clause and not entertain for one moment any Attorney General having the power to destroy records.

Mr McGINTY: I agree with some of those sentiments and, for that reason, I will move an amendment to delete words from the clause. We must bear in mind that we are dealing primarily with organised crime rather than records of an investigation into the way in which state government departments and ministers conduct themselves. From time to time when dealing with organised crime, we will be confronted with very sensitive, life-and-death situations.

Dr Constable: That was the argument used in 1992.

Mr McGINTY: I do not remember people being threatened with murder if they made documents available.

Dr Constable: I and the other Independents received anonymous telephone calls from people telling us that their lives would be in danger if those records were not destroyed.

Mr McGINTY: Clause 23 provides that the special commissioner will make orders about how the records will be dealt with when an investigation is finalised. Subclause (3), which is the focus of the debate, deals with the default position if a question arises after an investigation is finalised that for some reason - generally speaking unbeknown to the special commissioner - the special commissioner has not made adequate provision by means of an order. We must give the power to someone to determine how those records should be handled. In my view, the State Records Commission is not the appropriate body to do that. The members of that body are fine people - they include the Auditor General, the Information Commissioner, the Ombudsman and a person appointed by the Governor who has experience in record keeping and who is not a public service officer within the meaning of the Public Sector Management Act. The decision that certain documents should be referred to a court, the Director of Public Prosecutions or some other prosecuting or investigating body is not appropriately made by a body that has expertise in the preservation of records. Such a body should not be required to make legal decisions about how those records should be handled. Therefore, I believe the wording of this clause is not appropriate, particularly the reference to the words "destroyed or otherwise disposed of", and those words should be deleted. I support the amendment that was moved by the member for Kingsley to add a new subclause (4) that will read -

> For the purpose of the *State Records Act 2000* any records transferred to the State Records Commission shall be treated by the Commission as restricted access archives unless the Attorney General requests otherwise.

The Government has no problem with that. Once any of those agencies to which I have just referred has determined that legal use can no longer be made of those documents, it is appropriate that they be dealt with by the State Records Commission. However, I have a concern about the wording of subclause (3). For that reason, I propose to move the following amendment-

> Page 11, line 24 - To delete "destroyed or otherwise disposed of or".

The SPEAKER: Does the Attorney's proposed amendment to delete those words in line 24 also include the insertion of proposed subclause (4)?

Mr McGINTY: No. That will be moved by the member for Kingsley subsequently.

The SPEAKER: Does the member for Kingsley propose not to proceed with her first amendment?

Mrs EDWARDES: I may do. I am still in the process of debate.

The SPEAKER: Because the member for Kingsley's proposed amendment appears in the Bill prior to the Attorney's amendment, we need to determine the status of that amendment before we vote on the Attorney General's amendment.

Mrs EDWARDES: In an endeavour to facilitate the debate, I move -

> Page 11, lines 23 and 25 - To delete "Attorney General" wherever it appears and substitute the following -
>
> > State Records Commission

The Attorney's argument has several flaws. The first flaw is that the Commissioner of Police is the investigatory body and the special commissioner is just the facilitator of the investigation. Therefore, at some point in time the documents must pass from the possession of the special commissioner to the possession of the Commissioner of Police so that he can complete his investigation.

The second flaw is that subclause (2) does not provide a mechanism by which the special commissioner can liaise with the Commissioner of Police about how the records will be dealt with when the investigation is complete. Subclause (2) states -

> A special commissioner may make any order considered to be appropriate as to how the records are to be dealt with when the investigation is complete.

I am not sure how that subclause will come into play. An investigation before the special commissioner may be complete, yet no charges have been laid. However, as we heard from the Minister for Health yesterday, in such a case the records will be held indefinitely by the Commissioner of Police, perhaps until such time as new forensic technology becomes available that may assist in the finalisation of the case; and if the matter is ongoing, we certainly do not want the records to go to the State Records Commission.

The third flaw is that there is no provision for the special commissioner, in making an order under subclause (2), to link in with the requirements of the State Records Act. The fourth flaw is that we are talking about an investigation that is complete. Therefore, the Attorney will not be making a decision about whether to send the matter to the Director of Public Prosecutions, the Anti-Corruption Commission or the courts in any event. The clause should probably be rewritten to take account of these matters. We may very well support the Attorney's proposed amendment, because it deals with some of the issues. I do not believe the Attorney General should be involved. I cannot see the purpose of that.

Mr McGINTY: The special commissioner has control of proceedings, whether they are undertaken, the way in which they are undertaken and control of the documents generated by the inquiry. They are not the documents of the Police Service; that is quite clear. The special commissioner is given the power to make an order as to how records will be dealt with after the investigation is complete. It is appropriate that these matters are dealt with by the special commissioner. It is only when he or she fails to make adequate provision that the clause comes into operation. A person is needed in the process other than someone who has expertise in records preservation to make decisions about whom to refer these matters to. Even though an investigation might be complete, the laying of charges and prosecution of offences may not be complete. That is why such records may be used as evidence. I do not particularly want to have the power to do this. I would be very happy for the Solicitor General to have the power. Under our system of law, the Attorney General is in the unique position of being a political office holder and the first law officer of the State. Like many others, that is a matter entrusted to the Attorney General, not wearing his political hat but wearing his legal hat on behalf of the State's public interest. It is appropriate. I do not agree that the legislation has defects. I do not think the Attorney General should be given the power to destroy or dispose of documents but he should have the ability to pass documents

on to appropriate authorities, including the State Records Commission. When documents are received by the commission they remain in its hands. Until such time as they arrive, no decision should be made about referring the documents to a legal body.

Mrs EDWARDES: I referred a question about clause 22 to the Attorney General. He said it was one under the control of the Anti-Corruption Commission. Is the person authorised in writing by a special commissioner, the Commissioner of Police or a member of an investigatory body? Is that who the clause refers to? The clause allows for the documents to be those of the special commissioner. I cannot see how an investigation can be completed if there is no access to the documentation.

Mr McGinty: It is a mechanism by which a copy of the documents can go to the Commissioner of Police.

Mrs EDWARDES: That was not made clear before. It is obviously one of the ways in which the Commissioner of Police can get copies of the investigation. The clause contains flaws and it may be that while the amendments are passed, we may have the opportunity to look at the provisions again before the legislation goes to the Legislative Council and how they will operate in practice to ensure that the process in place involves all the appropriate safeguards that the State has put in place through recommendations of this Parliament.

Amendment put and negatived.

Mr McGINTY: I move -

Page 11, line 24 - To delete the words "destroyed or otherwise disposed of or".

I have already discussed the reasons for my amendment.

Amendment put and passed.

Mrs EDWARDES: I wish to proceed with the second part of the amendment at line 25. However, I will move on to the other amendment standing in my name. I move -

Page 11, after line 26 - To insert the following -

(4) For the purpose of the *State Records Act 2000* any records transferred to the State Records Commission shall be treated by the Commission as restricted access archives unless the Attorney General requests otherwise.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 24 put and passed.

Clause 25: Proceedings for an offence -

Mrs EDWARDES: During the second reading debate we highlighted our concerns about the penalties, which we regard as soft in respect of the offences created by the Bill. If the Government is serious about ensuring compliance, the penalties need to be far stronger than the penalties outlined. As we go through each of the offences and penalties, we will compare them with similar offences and penalties contained in the Criminal Code and they will be seen to be far weaker. When dealing with organised crime, a tariff should be put onto each of the penalties. I move -

Page 12, after line 4 - To insert the following -

(2) Where in this Part an offence is created, then in the absence of any other specific penalty, the penalty shall be imprisonment for 20 years and a fine of $1,000,000.

(3) Despite subclause (2) the Supreme Court shall be entitled to imprison a contemnor until a contempt is purged in addition to any specific penalty for the offence.

(4) In imposing a penalty under this Part the Court shall take into account whether the act or omission leading to an offence is such that had the act or omission not occurred, evidence could have been given so that some person known or unknown is likely to have been convicted of a specific offence (the "offence under investigation") and if so satisfied as to that matter on the balance of probability the Court shall impose a penalty upon the defendant which is not less than the penalty that the Court would have imposed on a person found guilty of the offence under investigation.

Where an offence is created, the penalty shall be imprisonment for 20 years and a fine of $1 million. Concerns have been expressed about contempt of court. If a person is summonsed to appear before a special commissioner, he is required to answer questions and produce documents required by the special commissioner.

The Supreme Court will be able to add a specific penalty in cases of contempt of court. If reasonable suspicion exists that an offence being investigated has occurred, the penalty for that offence is one that a person found guilty of contempt of court should receive. That is quite reasonable, particularly if a person has evidence that would lead to the offender being brought to justice and by virtue of evidence or documents not being produced the person not complying should wear the offence and the penalty. The Opposition treats this very seriously. It believes that the penalties are fairly soft and will not necessarily lead to compliance in some instances. Some of the penalties are lower than those for comparative offences in other legislation, such as the Criminal Code.

Mr McGINTY: The amendment moved by the member for Kingsley seeks to provide a penalty of imprisonment of 20 years or a fine of $1 million. I guess that should be expressed as the maximum penalty, rather than what the penalty will be, which might tend towards mandatory sentencing. If that is taken as the intended maximum that will apply wherever an offence is created under the Bill, it is far more significant than anything proposed in this legislation. I mean that in a practical sense, because the power of the Supreme Court to punish a contempt is unlimited. Therefore, it is, theoretically, greater than the penalty proposed in the amendment moved by the Opposition. However, in a practical sense, the Opposition's amendment proposes a maximum penalty, which is far greater.

The second part of the amendment moved by the member for Kingsley means that, despite the imposition of the monetary and imprisonment penalty, the power of the Supreme Court is retained -

> . . . to imprison a contemnor until a contempt is purged in addition to any specific penalty for the offence.

Again, this is a drafting matter; it is not a contempt of court as such. The clause currently in the Bill would simply give the Supreme Court the power to punish the offence as if it were a contempt. That does not convert the person into a contemnor, nor does it make it a contempt of court.

Mrs Edwardes: I won't give up my day job.

Mr McGINTY: Nonetheless, I take it that it is intended to ensure that the power to punish as a contempt is retained. This scheme is different from that proposed in the Bill. The Government wanted a penalty that was designed to do one thing: to get people to talk and to get evidence. If that is achieved by the Supreme Court punishing a person, as it does from time to time by putting a person in jail until he talks and gives evidence, that is the objective of the exercise. Equally, if someone wilfully refuses to talk, he can be confronted with a significant penalty as an inducement to talk. One would hope that, whichever provision ends up in the legislation, there will be a powerful incentive for a person to talk and give evidence, because the basis of this Bill is that it is in the public interest for evidence or statements to be given, which can be used as evidence in subsequent proceedings. One way to go is the penalty prescribed in the amendment; the other is to leave it as a contempt provision. It is something to which considerable thought was given during the drafting of the legislation. Each case can be argued equally. Consideration was given to the imposition of a penalty and whether it should include a penalty plus punishment as a contempt. In the end it was decided, given that this is new legislation, to go for the simple proposition that a person be punished as being in contempt. An unlimited punishment can be inflicted. As a minimum, a person would almost certainly be looking at staying in jail until he talked and gave evidence. Each proposition can be argued. I do not wish to say that the amendment put forward by the member for Kingsley is not a good idea. The Government's preferred option is the one outlined in the Bill. On balance, the Government would prefer to go that way. That is the fairest description I can give.

Ms SUE WALKER: I support this amendment. The member for Innaloo said yesterday that it was with considerable pleasure and pride that he spoke on this Bill. He said that he supported the contempt of court proceedings on the basis that he had never heard of a witness not answering a question in the District or Supreme Court. The member for Innaloo has a short memory. I find it surprising that he is not in the Assembly when he has taken most of the credit for the creation of this Bill. The first time I came across the member for Innaloo was when he was defending a police officer in the Argyle Diamond case in the preliminary hearing in the Magistrates Court. When he was cross-examining a witness, the witness refused to answer the question. I say that he must have a short memory because it was a pretty hair-raising experience. He would remember the witness. However, that witness was not dealt with by way of contempt of court. His proposition that a witness in the District or Supreme Court would answer a question by a judge because it would result in swift action if he did not, is a fallacy. Witnesses are rarely asked questions by the judge in the District or the Supreme Court; they are usually cross-examined by defence counsel or the prosecution. When witnesses are asked a question by the judge or counsel, they do not face the proposition that people who are before the tribunal face, such as being kneecapped, blown up or beaten with iron bars if they give away information on organised crime. If witnesses in

the District or Supreme Court are faced with that proposition, the police will make sure that they get witness protection. There is no provision for witness protection for a person brought before the tribunal.

How will the contempt provisions work? What are the steps in the process to hold someone for contempt? The member for Innaloo said that the potency of the legislation involved dealing with silence as contempt, because the person would sit in front of a judge of the Supreme Court and would be held to be in contempt. How is that? The judge will not be sitting as a judge of the Supreme Court but as a special commissioner. What process will the special commissioner go through to deal with a person for a contempt of court? Will the contempt of court be dealt with as civil or criminal contempt? What is the standard of proof? Does the judge have to be satisfied of mens rea, as is normal in criminal contempt? If the Attorney General is saying that this will not be dealt with in the normal way, as criminal contempt, but that a judge of the Supreme Court is able to detain a person indefinitely, such as under the Governor's pleasure, the High Court will have a lot of difficulty with that. It is very difficult to detain people indefinitely in this State. Many decisions have been overturned. I would like to know how this would be dealt with before a judge of the Supreme Court. Will it be a civil or a criminal contempt and what is the standard of proof? If it is not a civil or criminal contempt, I would like to know whether it is just a cover-up of the Governor's pleasure penalty. How will the Attorney General get that past the High Court? That is why the penalty of up to 20 years imprisonment and a fine of $1 million is more realistic.

The special commissioner has the power to impose penalties under this Bill. He will have the power to act swiftly if someone does not speak, and will be able to have them imprisoned for short, sharp sentences or perhaps longer terms, depending on the circumstances. I would like the Attorney General to explain in detail how the contempt of court provision will work.

Mr McGINTY: The provision in question is taken almost directly from the Royal Commissions Act 1968. Royal Commissions that have been held in this State have had the power to proceed with an action, on the motion of the Attorney General, against anyone who fails to attend or answer a summons, to produce documents, to be sworn or to give evidence. The provision in this legislation is a direct take from the Royal Commissions Act -

> . . . on the motion of the Attorney General as if he were in contempt of the Supreme Court and the Supreme Court has jurisdiction accordingly.

The subsequent provisions are also taken almost directly from the Royal Commissions Act. The matter of legal validity arose out of an earlier discussion about this matter with the member for Kingsley. I think we could go either way. However, attention was drawn to an evidentiary problem. I intend to move an amendment to clause 43 to provide for a certificate provided by the special commissioner stating the relevant facts to be considered sufficient evidence of the facts stated. That should overcome any evidentiary problems that might arise. Such problems are seen to be very real.

The member for Nedlands said that punishment for contempt might have some difficulty getting past the High Court. I cannot think of a basis on which that could be said about an already existing power that is given to a state court. Another executive arm of government action - the conducting of a royal commission - has had that power for as long as living memory. I see a direct parallel between a royal commission and this particular investigatory procedure. They are both actions of the executive arm of government, and they both vest in the Supreme Court the power to punish a contempt of that court. It is a provision of long standing, and I cannot think of any basis upon which that might be able to be challenged in the state context. It might be able to be challenged in a federal judicial context; but its use here is purely within the state context and is a power of long standing. I cannot think of a recent example in which somebody has been punished as if in contempt of the Supreme Court for failure to appear before a royal commission. I would be surprised if that had not occurred over the years, but it has not happened in recent times. The power is long standing, and I cannot think of any constitutional basis upon which it could be challenged.

Ms Sue Walker: You said to the member for Kingsley that failure to appear will be dealt with not as a contempt of court, but as a penalty similar to contempt of court. Will it be a contempt of court?

Mr McGINTY: It will not be a contempt of court because the special commissioner hearing will not be a court. We are saying that, on the motion of the Attorney General, it may be dealt with as though it were a contempt of the Supreme Court.

Ms Sue Walker: Would all the normal threshold questions apply? Would the police have to prove the charge beyond reasonable doubt?

Mr McGINTY: Yes, and the amendment I will move later will go some way towards overcoming some of the evidentiary issues that would otherwise present difficulties.

Ms Sue Walker: Like what?

Mr McGINTY: That is contained in the amendment I described to the House two minutes ago.

Amendment put and negatived.

Clause put and passed.

Clause 26: Penalty for failing to attend or produce anything -

Mrs EDWARDES: I move -

> Page 12, lines 14 to 17 - To delete the lines.

We have referred to this clause. My amendment will remove the defence for not producing something before a hearing. Given the previous comments, I do not intend to move the first amendment on the Notice Paper standing in my name, which would have amended lines 11 to 13 on page 12.

The amendment I have moved is to delete subclause (2), which provides a defence for having failed without reasonable excuse to produce any document or other thing. As it stands, the defendant to the contempt proceedings could prove that the document is not relevant to the investigation. That would be a great delaying tactic. If a person could not produce a document or attend the hearing, and contempt proceedings were initiated, the person would have the defence that the document was not relevant, so he did not think he needed to attend. It is a classic delaying tactic. The onus of proof is to be shifted so that the defendant must prove that the document or thing is not relevant to the investigation. That is unusual. I do not believe there should be a defence for not producing a document. In normal circumstances, the defendant would have the opportunity to argue in subsequent court cases to not have those documents admitted. The non-provision of a document could be used as a strong delaying tactic.

Mr McGINTY: We will agree with the amendment because we are reasonable people.

Amendment put and passed.

Mrs EDWARDES: Members of the legal profession have raised concerns about subclause (3)(b). Subclause (3) refers to a reasonable excuse for not producing something. A reasonable excuse for the non-production of a document does not include that production could incriminate or render a person liable to penalty or would be in breach of an obligation of the person to not disclose that information. Legal professional privilege excluded by clause 38 is also not a reasonable excuse. Clause 38 reinforces the fact that legal professional privilege does not prevent a summons issued under clause 11 from requiring a person to produce a document. One can understand why the clause is in the Bill. If advice were sought from a lawyer on how to set up a business, that is the sort of document one would like to have before the special commissioner.

The concerns of the members of the legal profession tend to concentrate on the seeking of legal advice in the period before the appearance before the special commissioner. They are concerned that once a person gets a copy of a summons, he can obviously discuss it with his legal practitioner and receive advice. The summons would quite clearly identify the documents to be produced, because otherwise how would the witness know what to take to the commission hearing. I think that the legal advice on attending before the special commissioner - which is the legal advice to which the legal profession is referring - will not be the subject of documentation to be produced. The documentation is more likely to be of the nature of advice sought about the establishment of businesses and other matters. Obviously it is not limited at all to civil advice and could relate to criminal matters. Normal legal professional privilege related to criminal matters has never been included in this type of clause. Therefore, the clause is unique and is causing some concern to the legal profession. I am not sure that in all the instances the legal profession has raised that it has it exactly correct.

Mr McGINTY: I understand the point the member for Kingsley is making. She is right; it only relates to documents. Clause 26 provides for a penalty for failing to attend or to produce anything. It reads -

> A person who has been served with a summons under section 11 and fails, without reasonable excuse, to . . .
>
> (b) produce any document or other thing as required by the summons,

It clearly relates to not verbal advice but only a document. However, it could be a document relating to advice about criminal liability. Such a document does not attract legal professional privilege, regardless of the subject matter of the legal advice that is offered.

Mrs EDWARDES: Does legal professional privilege normally apply to criminal activities?

Mr McGinty: No. It would certainly relate to advice on defences that were available to a person. It does not apply at common law to protect transactions that were in furtherance of a crime or had a criminal purpose.

Mrs EDWARDES: The concerns that are being raised are real because a right is being taken away, but that is being done in an endeavour to get to the bottom of many of the activities of organised crime, and will probably successfully do so.

Mr McGinty: I would hope so.

Clause, as amended, put and passed.

Clause 27: Penalty for failing to be sworn or to give evidence -

Mrs EDWARDES: I do not propose to move the amendments standing in my name for the deletion of lines 15 to 17 on page 13, again because of the non-acceptance of the earlier amendment to clause 25.

Clause put and passed.

Clause 28: Offences of disclosure contrary to notation on summons -

Mrs EDWARDES: We have debated the reason for the notation. If the Attorney General is serious about protection and safety or likely injustice to anyone at a trial, the penalty contained in this clause is quite low, because it is three years imprisonment or a fine of $60 000. It obviously refers to a witness, because clause 29 deals with the offence of disclosure without the permission of a special commissioner, and the penalty is imprisonment for three years or a fine of $60 000. Clause 28 therefore would refer more to a witness than anyone else. The offence is that of a person who is served with a summons and who discloses it. If a life is threatened, the offence is only worth imprisonment for three years or a fine of $60 000. The penalty is pretty soft.

Mr McGINTY: I do not disagree with the member for Kingsley. We had some debate about this earlier today. I think there is a case to be made for increasing the penalties in the clause. Frankly, I am not sure to what level they should be increased. The suggestion of the member for Kingsley was a fine of $1 million or a maximum term of imprisonment for 20 years, which would seem to me to suffer from the same extreme problem. Perhaps the appropriate solution lies somewhere in between. For now, I would prefer to leave the penalty as it is. In the light of the strongly expressed view that the penalties need to be toughened up if the provisions are to be effective, it is certainly something that we will need to keep an eye on. Maybe the upper House will express a view on it. It may be something that will be picked up in the review. I do not disagree with the points that have been made.

Ms SUE WALKER: I wish to put on record that I concur with the member for Kingsley on the question of penalties. The Bill deals with organised crime and alarming offences in the community. Several provisions of the Bill relate to a person being served with a summons. Once the existence of the notation or anything relating to the summons is found out, the consequences can be heinous. These penalties increase by one-third, from $20 000 to $60 000, the terms of imprisonment and fines that were in place in comparable provisions under the National Crime Authority legislation. I believe the drafters of the legislation have looked at the penalties under the National Crime Authority legislation rather than at the damage that can be caused by the leaking of information.

Mrs EDWARDES: I do not propose to move the amendment standing in my name on the Notice Paper. We have made the point that we regard the penalties as soft. Having gone through the offences and penalties this evening, perhaps the Attorney, rather than waiting for the review, will give in and say that the Government will make an appropriate assessment and comparison, and will make the appropriate amendments before the Bill reaches the Legislative Council, so that this House does not leave everything to that other place. Subclause (7) defines "official matter" and paragraph (c) refers to court proceedings. Firstly, we have not referred to the hearings by the special commissioner as court proceedings. Secondly, if they are court proceedings, are they not already public? Paragraph (b) refers to hearings, so I do not understand why (c) is included.

Mr McGINTY: At first blush the purpose of the reference to court proceedings is not apparent, given that these are not judicial proceedings in any sense. This provision was drawn from the relevant National Crime Authority (State Provisions) Act and may refer to some of the bases upon which a limited appeal could go to the court, as a result of the exercise of some of these functions. It may be some proceedings for a penalty. They are the only possibilities I can think of. It is clear that we will not finish this legislation tonight. Is the member for Kingsley happy to proceed on the basis that I will obtain more detailed instructions on that point overnight, and we will resume this in the morning?

Mrs Edwardes: Clause 12(9) also refers to court proceedings, but this did not come to my attention as an issue until we started to deal with the penalty in the offence provisions and I wanted to know under what circumstances that would be the case. I am happy to take the Attorney's assurance that he will look at this overnight.

Mr McGINTY: If need be we can recommit that part to correct the matter. It could relate to the contempt proceedings which are part of the penalty, although I cannot see the relevance of being punished in open court. We will come back to that first thing in the morning.

Clause put and passed.

Clause 29: Breaching privacy of proceedings -

Mrs EDWARDES: This is similar to clause 28 in which a person discloses the notation on the summons, and our comment is exactly the same. Although this allows the special commissioner to publish those matters that are identified, the penalty for having publicised without permission is fairly soft and weak.

Clause put and passed.

Clause 30: Giving false testimony -

Mrs EDWARDES: Under this clause a witness before a special commissioner who knowingly gives false testimony is guilty of a crime and is liable to imprisonment for five years. Sections 124 and 125 of the Criminal Code relate to the offence of and penalty for perjury. I thought that perjury would be the same as giving false testimony. However, under the Criminal Code the penalty is imprisonment for 14 years, so the penalty in this clause seems to be fairly weak. Section 127 of the Criminal Code deals with giving false evidence before a royal commission. That is similar to this clause and picks up a lot of provisions of the Royal Commissions Act. The penalty is imprisonment for seven years, whereas in this clause it is five years.

Mr McGinty: Section 24 of the Royal Commissions Act has an offence of giving false testimony to a royal commission, in which the penalty is imprisonment for five years.

Mrs EDWARDES: Does the Criminal Code or the specific statute apply?

Mr McGinty: It depends on which one a person is charged under.

Mrs EDWARDES: Section 127 of the Criminal Code refers to imprisonment for seven years, so already there is an inconsistency between those two Acts, which needs to be picked up. It shows that a penalty of five years is too low. The criminal activities to which we have referred tonight are of such a serious nature that there should be a tariff on top of the penalty, and that should be increased markedly.

Ms SUE WALKER: I support the member for Kingsley. As I said in the second reading debate, the same argument applies to clauses 31, 34 and 35 in that these penalties are soft when one considers that similar provisions in the code carry much greater penalties.

Mrs EDWARDES: I do not propose to move the amendments standing in my name dealing with clauses 30 to 35.

Clause put and passed.

Clause 31: Bribery of witness -

Mrs EDWARDES: The penalty in this clause is imprisonment for five years. Section 130 of the Criminal Code deals with corruption of a witness, for which the penalty is seven years. There may be other clauses in the code that are be appropriate. For example, section 129 relates to fabrication of evidence with intent to mislead any tribunal or judicial proceeding. It is appropriate to increase that penalty to five years and pick up the penalty, not only under the Criminal Code but also as an added tariff to reflect the seriousness of the matter.

Mr McGINTY: I will comment generally about the penalties in these clauses. I have already indicated that I have some sympathy for the arguments. The Government's approach has been to base the offences and the penalties on the Royal Commissions Act. The member for Kingsley has already pointed out a discrepancy between the penalties in the Criminal Code for giving false testimony to a royal commission and the penalties in the Royal Commissions Act dealing with the same subject - the latter imposes a penalty of five years imprisonment and the former imposes a penalty of seven years imprisonment. The Government has lifted these penalties from the Royal Commissions Act because it provides a direct parallel in that it is part of the executive arm of government. The penalty for bribery of a witness is contained in section 25 of the Royal Commissions Act, and the offence is somewhat the same. Under that Act, a person who is guilty of that offence is guilty of a misdemeanour and is subject to imprisonment for five years. The Government has redrafted that to provide that

a person is guilty of a crime, but the penalty remains the same. It is arguable both ways. I suspect that it might be a little on the light side given that we are dealing with organised criminal activity, which is at the serious end of the scale. Nevertheless, the Royal Commissions Act is the model.

Mrs EDWARDES: I hope to hear the Attorney General say he will undertake a full review of the penalties before the legislation is debated in the other place. We do not need to wait for a review, nor can I believe that we would want to. I will continue to highlight the comparable provisions so that the Attorney General gets a clear idea that the penalties are out of kilter given the seriousness of this situation.

Mr McGINTY: If the member for Kingsley will desist from highlighting each provision, I will undertake to seek the views of the Crown Solicitor's Office and parliamentary counsel about this issue. I have some sympathy for the point of view that the member has put and acknowledge the relative lightness of the penalties in the Royal Commissions Act compared with the comparable offences in the Criminal Code given the subject matter. I will ensure that that is done. The point is well taken already, so the member need not press it any further.

Mrs EDWARDES: I thank the Attorney General for that commitment. I am sorry he will not have the benefit of my research. I will happily pass it to one of his officers so that he gets a feel for our position on these offences and penalties.

Clause put and passed.

Clauses 32 to 35 put and passed.

Clause 36: Dismissal by employers of witness -

Mrs EDWARDES: An employer who dismisses an employee from employment or prejudices an employee in employment on the basis that he or she has appeared as a witness before a special commissioner is addressed in this clause. Subclause (2) provides a defence in that the onus lies upon the employer to prove that the employee was dismissed or prejudiced for a reason other than the reason mentioned in subclause (1); that is, the fact that the employee was a witness before a special commissioner was not the reason for his dismissal or other prejudice in his employment. Although I have not checked that the clause is in the Royal Commissions Act, I will accept that it is. Why is that clause in this legislation? Has the issue been dealt with in the past?

Mr McGINTY: This provision is a substantial take from section 30 of the Royal Commissions Act. My first comment will reinforce the view of the member for Kingsley of the inadequacy of the penalties contained in the Royal Commissions Act that we are seeking to substantially reflect in this legislation.

Mrs Edwardes: It is a very important matter.

Mr McGINTY: It is indeed. Parliamentary counsel were taken aback by the fact that the penalty in the Royal Commissions Act is utterly inadequate. Currently, it provides for a fine of $1 000 or imprisonment for one year, and the offence is classified as a misdemeanour. Parliamentary counsel have departed from the general pattern of what I have described so far and have provided a penalty of imprisonment for five years and a fine of $100 000, which is a one hundred-fold increase in the penalty.

Mrs Edwardes: That is far worse than the notation.

Mr McGINTY: Exactly. I make that point in aid of the comments made by the member for Kingsley. Generally, the penalties in the Royal Commissions Act are not adequate to translate into legislation that deals with organised crime. I make and accept that point. The old Industrial Relations Act is the only other area that I am aware of in which provision of a comparable nature has been made. That provision related to the dismissal of workers by an employer on account of their union membership. However, that provision goes back some time; I do not think it has been in that Act for a good decade or more. I am not sure what the Act was called in those days, but today it is the Industrial Relations Act. The older Act must have disappeared under a conservative Government.

Under that provision, if an allegation was made that an employee had been dismissed because he was a union member or a union shop steward or something of that nature, the onus would be on the employer to prove that the employee was dismissed for reasons other than his membership of a union. This provision is comparable to the statutory provision in the old Industrial Relations Act, which no longer exists, according to the member for Kingsley. Again, it is a clear message to employers not to dismiss someone who is to give evidence before a royal commission or this body, because the onus will be on the employer to prove that the employee was dismissed for some other reason. Apart from the penalty, the provision is a direct take from the Royal Commissions Act.

Clause put and passed.

Clause 37: Judicial supervision excluded -

Mrs EDWARDES: Clause 37 receives my plain English award. It states -

> A prerogative writ cannot be issued and an injunction or a declaratory judgment cannot be given in respect of the performance of a function under this Part and proceedings cannot be brought seeking such a writ, injunction, or judgment.

One must read the clause several times.

Mr McGinty: It is all right.

Mrs EDWARDES: I probably read all the commas in the right place as I spoke. However, I am not sure why it is drafted in this way in this legislation. Probably it is a take from some poor draftsman's English and cannot be linked to the parliamentary counsel seated before us. That is no criticism of parliamentary counsel; they do a fantastic job.

This is a very important clause in the Bill as it stops the judicial proceedings of the special commissioner and potentially those of the police in carrying out matters authorised by the special commissioner. Ordinary prerogative writs cannot be sought. The legal profession proposed judicial supervision but not so much that it would stop proceedings. It was proposed to have just enough to ensure compliance with the requirements of the Act. It is an interesting idea. It meets the Government's needs in ensuring that delaying tactics will not be effective. People will not be able to go to the Supreme Court and get a writ of habeas corpus or one of the other prerogative writs. As such, it ensures that the provisions of the Act are being complied with as they were intended to be.

Mr McGINTY: This is an essential provision of the scheme and the member has rightly alluded to its objective: to prevent people who have assets and lawyers from frustrating the intended purpose of the legislation. The legislation requires people suspected of being associated with organised crime or murder to come forward and tell what they know of the matters. This is the mechanism by which the Government will stop those people from making a mockery of the proceedings and frustrating proceedings. It is a blunt instrument. Another way of doing it could be through judicial supervision, which would not act as a stay on proceedings. My concern is that people would find a way to ensure that a stay was achieved. While I appreciate the bluntness of this approach, there is a determination to ensure that an investigation and seizure of documents will not be impeded by judicial review. We are somewhat comforted in this by having as a special commissioner a person of the stature we are proposing. It will be someone who, although not infallible, will have considerable experience and who will ensure that the rules are applied to achieve the maximum possible level of fairness in circumstances in which there are no rights of appeal. Rights of appeal can often be used to frustrate the legal process. When appeal rights will not frustrate the process, we are happy to give people those rights, such as when they are dealt with by way of a penalty for not honouring a summons, when they are detained or when fortifications removals are in place. It will not apply to the central function of the collection of evidence. It is important that people in those circumstances not be able to tie up matters in court. I referred previously to white collar criminals who could arguably have been caught by this provision during their trials in the 1990s. Some individuals made a mockery of the psychiatric profession through their so-called mental condition. Some made unending appeals to frustrate legal provisions and others went to other countries to ensure they were never brought to justice. Those sorts of antics cannot be tolerated under any circumstances and that is the reason for this provision.

Clause put and passed.

Clause 38: Legal professional privilege -

Mrs EDWARDES: This clause relates to clause 11. Legal professional privilege does not prevent a summons under clause 11 from requiring a person to produce a document, and it cannot be used as a reasonable excuse for not producing a document. As I said before, this is a serious clause and the members of the legal profession regard it as serious. They go as far as to say that there is no empirical basis for the abolition of what they regard as a fundamental freedom. They referred to the case of Baker v Campbell which found that legal professional privilege is a freedom enjoyed by a client, not a lawyer, and when it does not apply to criminality, it should not apply in this legislation. However, as I indicated previously, the obvious example that comes to mind is advice on setting up businesses that are basically fronts for crime. That advice would be useful evidence in the finalisation of an investigation. I recognise the issues that have been raised by the members of the legal profession about this clause. However, I also recognise that it could relate to valuable evidence that would be likely to lead to a successful conclusion of investigations.

Mr McGINTY: I thank the member for Kingsley for those observations. I am convinced that if we are to deal with organised and white collar crime, it is necessary to attack the professional advisers without whose

assistance many scams that are put together, particularly in white collar crime, could not occur. I hold that view very strongly. Doctrines such as legal professional privilege provide a protection to law firms. The abuse of legal professional privilege by law firms, such as those that provided legal advice to Alan Bond in the 1980s, makes a mockery of the law because that doctrine is considered part of our legal system to the extent that it provides a shield for criminal activity. As I said, it is a view I hold strongly. I rate the law enforcement provisions in this State to deal with serious criminals as more important than the maintenance of a privilege. Although it is a client's privilege, it is a privilege enjoyed by professional advisers who often sail close to the wind, if not on the other side of the wind. This provision is necessary in this context to gain important evidence.

Clause put and passed.

Clause 39: Use of statements obtained -

Mrs EDWARDES: This is a valuable clause also. It provides that statements made before a special commissioner are not admissible in evidence against the person making the statement in any criminal proceedings or proceedings for the imposition of a penalty, other than contempt proceedings. The question is: what is the value of the information? The clause places a requirement on the police to build a case around that information to complete a successful investigation, and it provides them with a valuable tool. If a person incriminated himself in answer to a question, the police would need to build up a case around that statement but would not be able to use it. Section 21 of the Evidence Act allows a person in a witness box to be asked whether he has ever made a statement that is inconsistent with the evidence given to the court. That document can then be produced if they do not give the correct answer. The evidence they give in a trial may be different from that they gave before a special commissioner, and their answers might be inconsistent with a previous statement they have made. Therefore section 21 of the Evidence Act provides another tool for getting that information.

Mr McGINTY: I agree with that.

Clause put and passed.

Clause 40: Protection to special commissioner and others -

Mrs EDWARDES: How does subclause (2) fit? Section 120 of the Criminal Code refers to judicial proceedings as proceedings in which an oath is taken. Clearly in this instance an oath will be taken, but I wonder what was behind the inclusion of this clause with regard to issues such as the rights, freedoms and safeguards.

Mr McGINTY: Again this is a take from section 31 of the Royal Commissions Act which follows almost the same provisions; firstly, protection is extended to the royal commissioner as a judge; secondly, protection is extended to a witness, and that is expressed in, if not identical, substantially the same words; and, finally, a person appointed by the Attorney General to assist the commission is also then protected. This is a direct take from the Royal Commissions Act, which is probably the most comparable area. The particular question the member raises is whether the alterations to the accepted legal form, the removal of a right to silence, the removal of the privilege against self-incrimination, and things of that nature, make a difference. I do not think they do in terms of the protection substantially against affirmation, which is provided by these protections to the special commissioner, witnesses and people appointed to assist the commission.

Mrs Edwardes: But that is a protection. I am really highlighting the liabilities. We already have an offence which deals with contempt, and provisions dealing with perjury, although they are not referred to as that, so what other liabilities could be imposed?

Mr McGINTY: I am just thinking about the duty to attend pursuant to a summons, but that is covered; the requirement to answer a question put at the direction of a judge is also covered. Off the top of my head, I cannot think of another liability beyond those that are already covered. However, to the extent that there could be a liability, it reinforces the view that witnesses are to be treated in terms of protections and liabilities the same as a witness before the Supreme Court.

Clause put and passed.

Clause 41: Proceedings for defamation not to lie -

Mrs EDWARDES: This clause states that no action or proceeding, civil or criminal, will be taken against any minister or any person employed or engaged by the State in respect of the printing or publishing of a transcript of proceedings of a special commissioner. Does this clause get around the fact that a report must be brought into the Parliament and be tabled in order to attract privilege? Is that why this clause has been included? I am thinking particularly of local government inquiry reports. They readily come to mind as reports that need to be brought into the Parliament, and for a motion to be moved that they be published. However, other inquiry reports have had to be dealt with in a similar fashion. I wonder whether this clause gets around that. If the

Attorney General says that this comes from the Royal Commissions Act, what has happened to those reports? Were they not brought into the Parliament, and was it not moved that they be printed and published? I cannot remember what happened with the last two.

Mr McGINTY: I think the answer to the member's question is that this clause would overcome the need for a report to be brought to the Parliament in order to attract parliamentary privilege against defamation actions. Thinking back to 1992 - this is testing my memory - my recollection is that although those reports were debated extensively in Parliament, they were not brought to the Parliament for the purposes of securing protection.

Mrs Edwardes: I have visions of the Premier receiving the reports, but I cannot remember what happened with those public documents.

Mr McGINTY: I think that is right. Local government inquiry reports are brought to the Parliament for the purpose of attracting privilege. I am thinking of the forthcoming Temby royal commission report. I do not think that will be required to be tabled in the Parliament. I think that will be a report to the Premier. Because of this provision that appears in the Royal Commissions Act, it has appropriate protections.

Clause put and passed.

Clause 42 put and passed.

Clause 43: Facilitating proof of certain things -

Mr McGINTY: I move -

> Page 20, after line 19 - To insert the following subclause -
>
> (3) In contempt proceedings under section 26(1) or 27(1), a certificate of a special commissioner stating any fact relevant to those proceedings is sufficient evidence of the fact stated.

I will explain the reason for moving that amendment. I spoke with the member for Kingsley about how best to proceed with penalties - whether to treat the matter as though it were a contempt of court or whether to have an offence and a penalty in the more traditional way - and that gave rise to a discussion about some of the evidentiary requirements that are necessary when dealing with what is, in effect, a contempt of court. In discussions during the dinner break, it became apparent that it would expedite proceedings considerably if the special commissioner were to issue a certificate stating essentially the relevant facts that constituted the comparable contempt of court, and that that would be sufficient evidence of the facts stated. Without the amendment, any statement could be easily rebutted by someone saying that something did not occur or that the stated facts are not correct. The amendment will overcome significant evidentiary problems. Given the nature of the penalty for refusing to answer a question or be sworn, which is to treat such behaviour as though it is a contempt of court, a provision of this nature would facilitate the expeditious dealing of that contempt proceeding by the Supreme Court, and in that way enhance the penalty.

Amendment put and passed.

Clause, as amended, put and passed.

Debate adjourned, on motion by Mr McGinty (Attorney General).