CRIMINAL LAW (PROCEDURE) AMENDMENT BILL 2002

Consideration in Detail

Resumed from 9 May.

Debate was adjourned after clause 9 had been agreed to.

Clause 10: Sections 101B to 108 replaced by sections 102 to 106 -

Ms SUE WALKER: The Law Society of WA has given qualified support to the amendment contained in this clause. I note that the power to obtain depositions already exists in the Justices Act and that it allows the prosecution to gather evidence. That is normal because the Crown drives the prosecution; in fact, the Crown drives the trial. I note that under proposed section 102(1) and (2), the accused will not be a party to an examination, cannot cross-examine a witness and cannot address the justices. What is the penalty for non-attendance by a witness who is summonsed to attend and where is that contained? I note that the deposition must be taken in the form prescribed pursuant to section 73(1) of the Justices Act. As section 73(2) to (5) will be repealed, what happens to the safety provisions for the video evidence of a child witness for the purpose of the trial? Are those provisions preserved elsewhere; and, if so, in which Act?

Mr McGINTY: Section 77 of the Justices Act provides a penalty for not answering questions. In relation to the preservation of the safety provisions for child witnesses, although I do not have a copy of the Evidence Act, I understand that those provisions are preserved in that Act.

Ms SUE WALKER: Proposed section 102 refers to compulsory examination by the prosecution. Does the Justices Act limit that to the police or does it include the Director of Public Prosecutions? Is there a definition of that anywhere?

Mr McGinty: It is just the prosecution.

Ms SUE WALKER: It can be the police or the DPP.

Mr McGinty: Yes.

Ms SUE WALKER: Since I last spoke during the consideration in detail stage of this Bill, I have received a submission from the Law Society, which for some reason had not reached me so I sought it out. The Law Society would have liked this compulsory examination to extend to defence. I do not agree with that. The Law Society's submission was signed by its president, but I do not know whether a committee prepared the submission and who was on the committee. I cannot agree with the Law Society's submission to extend the compulsory examination to defence. I think we dealt with the contempt provision when we were last in consideration in detail on this Bill. Is that the only contempt offence that relates to this clause? I think there is another.

Mrs EDWARDES: Before the Attorney General rises, I would like to raise an issue about proposed section 102(4), which relates to the compulsory examination of potential witnesses to a trial. The defendant can be present; however, he is not a party to an examination and is not allowed to cross-examine a witness or in any way be involved. However, he is allowed to receive a copy of the deposition that is taken at the hearing. My concern is that proposed section 102(4) provides that nothing in that deposition can be printed, published, exhibited, sold, circulated, distributed or in any other manner made public. This is obviously a question of getting a balance between a fair trial for the defendant, in terms of the evidence of a witness being made public, and the freedom of the Press. An example is that of a witness in a high profile case that has already received considerable publicity. The media does not need to be aware that a person has given evidence before an almost secret inquiry such as this; however, the media might ask that person some questions. In answering those questions, the witness might be in contempt of the court, because he has disclosed certain information. Where will the line be drawn in proposed section 102(4) between the defendant getting a fair trial and the freedom of the Press? A person might innocently disclose information. Although a witness might not disclose the evidence, exact material or terminology in the deposition, his disclosure to the media might go to the substance of the evidence. I have a problem with the fact that people might be put in that position. It is common for the media to maintain a watching brief on high profile cases. A witness might be contacted on a weekly or monthly basis by the media to find out what is going on and whether he has heard anything more. We all know that. The media might contact a witness who had been called to a compulsory examination and the witness could find himself to be in contempt.

One recommendation in the Law Reform Commission report was to abolish preliminary hearings. The report also mentioned doing away with the contempt of the Supreme Court provision. Yet the provision from the Justices Act has been repeated in proposed section 104(5), which will replace section 101C. There is also a new

proposed section. Section 74 of the Justices Act already provides for an examination of witnesses; however, no previous reference was made to a requirement that information remain secret and confidential or that a person who disclosed that information would be in contempt of court. As such, significant issues arise. What is the public policy behind inserting this requirement as a proposed new section?

Mr QUIGLEY: I will speak on this subject for a moment because I have been involved in compulsory examinations on a number of occasions. One high profile case which the member for Kingsley might recall was the Connell preliminary hearing at which the jockey, Hobby, and the bag man, Peter Hannan, who placed the bets on Strike Softly down in the Bunbury ring, were both summonsed and later subjected to interviews outside the preliminary hearing process. Under the old scheme, no hand-up brief or deposition that was taken could be published in advance of a preliminary hearing. If a preliminary hearing was not held, there was a total ban on the publication of any of the depositions. That fact meant that many accused in controversial cases elected not to have preliminary hearings, because once they elected to have a preliminary hearing, the depositions could be published and widely reported during the course of that hearing.

The manner in which this has been interpreted by the courts, and my consistent experience of it, has been that if the witness were to leave the hearing room and repeat, publish or cause to be published facts that he alleged constituted his evidence before the compulsory inquiry, it could constitute an offence. Merely to relate facts about the case outside the court would not constitute the offence if it did not purport to constitute the evidence in the hearing room. Nonetheless, if published, it could constitute a contempt at large if the person had already been committed to trial. There are cases in which the media have published evidential matters leading up to a trial that were not or were not purported to have been contained in the depositions, but could still be statements that could tend to prejudice a fair hearing. In relation to evidence given at a compulsory hearing, it was never regarded that a statement made outside the hearing room that purported not to be the evidence would constitute that offence. To my knowledge, that is how it has been implemented and interpreted by the courts thus far.

Mrs EDWARDES: Although I do not wish to contradict the previous speaker in any way, in order to ensure that I get an answer to my questions I will refer them to the Attorney General. Section 101C, which is to be replaced, deals with proceedings in which the defendant elects not to have a preliminary hearing and thus goes to trial. That section is repeated in proposed section 104. The provision for a compulsory examination by the prosecution is totally new. It is referred to in section 74 of the Justices Act, but I can point to nothing in that Act to indicate that it would be a contempt of court if a witness were to disclose information. That provision has been used on a number of occasions, most recently with the bikies, who were subsequently charged. I cannot link a contempt of court provision to section 74 of the Justices Act. Proposed section 102 provides a whole new process.

Mr McGINTY: A compulsory examination by the prosecution is for the purpose of obtaining a deposition. Proposed new section 102(4) replaces section 101C(c) -

Mrs Edwardes: No, it does not.

Mr McGINTY: I am saying it does.

Mrs Edwardes: That refers to a time before the committal mention. It does not replace section 101C. It refers to committal mentions that have no preliminary hearings. That is totally different and entirely new. If the Attorney General can point out something different to me, I will be happy.

Mr McGINTY: No. I am saying that the procedure for obtaining a deposition is contained in proposed new section 102. It places a prohibition on publishing a deposition in the same way that section 101C(c) provides a prohibition on publication of a deposition under the existing provisions of the Justices Act. A committal mention therefore is not for the purpose of gaining a deposition or extracting evidence; the compulsory examination procedure is for that. To the extent that some of the elements of the committal procedure have been retained, this is an element of it and the means by which a deposition can be obtained. The same requirement of secrecy or confidentiality surrounds a deposition obtained under the old regime, as it will under the compulsory examination procedure which has the objective of gathering that evidence before the committal mention and obviously before the trial. The provision in proposed new section 102(4) is a direct substitution for section 101C(c) in respect of depositions.

I will briefly answer the question from the member for Nedlands. Similar provisions relating to prohibition constituting a contempt of court can be found in proposed new sections 104(5) and 105.

Ms SUE WALKER: I do not know whether that answers the member for Kingsley's question about the Law Reform Commission's recommendation that the contempt provisions be thoroughly overhauled. Given that the Attorney General said that the Law Reform Commission report No 92 is the blueprint for his reforms of the

criminal justice system, what does he say about the retention of the contempt provisions in the legislation? Will he examine the contempt provisions and were they considered in relation to this clause?

Mr McGINTY: They were considered in relation to this clause. At this stage we are making no change. Rather than taking two bites at once of the legislation, we are dealing in this legislation with preliminary or committal hearings. The question of how to deal with contempt is far broader than this legislation. When we deal with that matter, it will be on a comprehensive basis.

Mrs EDWARDES: I bring the Attorney General back to the same clause. When will a contempt be likely to take place? I contend that section 101C is different and proposed new section 104 replaces section 101C. This clause has nothing whatsoever to do with that section. It times the committal mention in respect of a trial and/or sentencing but it does not link in a point of time.

Mr McGINTY: The obtaining of a deposition, spelt out in proposed new section 102, will be by a compulsory examination procedure, which is similar to the existing preliminary or committal hearing at which evidence is obtained. There is no provision for obtaining evidence at the committal mention. I therefore do not see any parallel with proposed new section 104 and a committal hearing which was for the purpose of obtaining evidence. No evidence will be obtained at a committal mention. The committal mention will require the formal submission of existing statements, evidence and the like to be used at the mention but it is not a means of obtaining that evidence; that is the distinction as I see it. The publishing of anything from that compulsory examination proceeding would be a contempt until the information is made public, whether that be at the committal mention or the trial.

Mrs Edwardes: But it can't be mentioned publicly at the committal.

Mr McGINTY: If that is the case, it will be at the trial.

Mrs Edwardes: Why has that been left open? The existing section refers to trial or sentencing.

Mr McGINTY: I am told that there is no apparent reason for the words being there or not being there. When the matter is in open court it is not confidential any more.

Mrs Edwardes: But the hearing is open. Although the hearing cannot be published, both those stages are open.

Mr McGINTY: That is right; it cannot be published. Material tendered as evidence in open court at the trial can be published.

Ms SUE WALKER: This gets back to section 66 of the Justices Act that I mentioned, which appears to have been omitted in this legislation. That section refers to preliminary hearings, not open court hearings. As we all know, when a matter goes to trial it is conducted in open court until an order is made against it. That provision is contained in the Criminal Code. Interestingly, section 66 of the Justices Act, under the heading "Preliminary hearings not open court", states -

> The room or place in which justices take the examinations and statements of persons charged with indictable offences for the purpose of committal for trial and the depositions of the witnesses in that behalf shall not be deemed an open court, and the justices may order that no person shall be in such room or place without their permission; but they shall not make such order unless it appears to them that the ends of justice require them so to do.

Does the contempt provision in this clause tie in with that provision in section 66?

Mr McGINTY: My tentative view, when discussing this matter in relation to section 66, was that the wording in that is an important component. It is clear that the court is used for those purposes in matters before the trial, which would include compulsory examination by the prosecution not being in an open court. I am trying hard to follow where that then takes the member.

Ms Sue Walker: Is that related to the contempt provision? Now that the Attorney General has his proper advisers here, should section 66 have been dealt with in relation to this Bill?

Mr McGINTY: We are seeking advice on that; however, the thrust of it is that section 66 states that preliminary matters are not being heard in open court. That does not in any way affect the matter that we are discussing now because this provision is crystal clear; that is, if the evidence taken at a compulsory examination is published, a contempt of the Supreme Court has been committed and it does not matter about the status of the evidence.

Mrs EDWARDES: Members have been dealing with the reasons for publication or non-publication of details about any matter at trial. Obviously, pre-trial publicity can have an impact on the fairness or otherwise of the proceedings. The Law Society points out that it can have a detrimental effect. It referred to the case of R v Ilic on 19 December 2000. If the defendant had been made aware of some of the evidence and if he had had the opportunity to challenge it at the time, he would not have had to go through two trials. The case was sent back to

trial on appeal. Not allowing a defendant to cross-examine may result in a miscarriage of justice, as occurred in the Ilic case. The second point is addressed by the fact that the Director of Public Prosecutions must provide every piece of information. That overcomes what was regarded as a miscarriage of justice in R v Ilic.

Did the Attorney General consider that case when reviewing proposed new section 102? Although it might bring together sections of the Justices Act, this legislation creates a new process because preliminary hearings will be abolished.

Mr McGINTY: The purpose of a preliminary hearing was never to allow cross-examination by the defence. It was designed to allow the prosecution to establish that there was a case that could be put to a jury with a reasonable prospect of success.

Mrs Edwardes: There was an opportunity.

Mr McGINTY: Yes, but that was never the purpose. The point raised by the member goes to the philosophy behind what we are abolishing. I assume that that was taken into account by the draftsperson. The prosecution at a preliminary hearing has the discretion to decide whom to call to satisfy the magistrate to a certain level.

The Law Society is yearning for the days of old. Lawyers are clinging to the way things were done in the past. A number of eminent lawyers have made the same observation - it is the way they have always done things. They are conservative and cannot bring themselves to appreciate that they are living in a dynamic, changing world. They want to go back to the comfort and security of the way they have always done things. That will not be available in the future.

Mr QUIGLEY: Perhaps I have misunderstood the argument put by the member for Kingsley about the new procedure. The compulsory examination of a witness prior to an election date was always open to the prosecution. That was the point I was making about the Connell case. Prior to the service of the depositions upon the accused for the purpose of electing whether to have a preliminary hearing or to go to trial, it was always open to the prosecution to compel an uncooperative witness to attend before a magistrate at the Perth Court of Petty Sessions and there to compel him to give evidence. That evidence forms the body of the depositions served on an accused person for the purpose of making a preliminary hearing election. The compulsory examination procedure has always been with us, along with the prohibition on publication of what occurs in that examination. The magistrates have not allowed the defence to participate in those hearings, other than to attend.

Over the past several years, Queen's Counsel from the eastern States have sought to make inroads into that procedure. They said that, although they were not allowed to cross-examine a witness from whom a deposition was being taken, they wished to be present to object to leading questions. Some magistrates acceded to that, which was the crack in the door. They said that the taking of the deposition was not part of the trial or preliminary hearing process; it was a precursor to that and part of the inquiry process. In the case of Connell, the arresting officer - Senior Detective Graham Lienert, as he then was - having arrested Connell, was then faced with a scared and uncooperative witness called Peter Hannan, who was the person at trial said to have placed the bets on Strike Softly in the Bunbury ring. He would not cooperate for a number of reasons. He was brought before the court - as will occur under proposed new section 102 -

Several members interjected.

Mr QUIGLEY: I can well remember it; I was there.

Ms Sue Walker: I wish you were still there.

Mr QUIGLEY: That was yet another pathetic interjection from the member for Nedlands.

Hannan was brought before the court for the purpose of taking evidence under compulsion. The defence was not allowed to make a submission or to cross-examine. The section codified that practice with the words "and not a party to the proceeding". The draftsperson has shut that door because of the emerging practice, especially on the part of the eastern states lawyers - I do not say that parochially -

Several members interjected.

Mr QUIGLEY: I think it was Mr Shand. He was leading me in a case and said that he wanted to be at a hearing to object to leading questions, because leading questions should not be put to an accused person even in a police interview situation in Curtin House. I believed then that it was a flawed argument and still believe that. If the statement -

Ms Sue Walker interjected.

Mr QUIGLEY: I hear a grumble from the bushes. The member for Nedlands was not even aware of section 101C(c) of the legislation and was challenging the Attorney General's reasons for introducing this measure. No

wonder she got sick and had to leave the employ of the DPP. She could not understand the legislation under which she was operating. This procedure has always been in place.

Mr McRAE: The member for Innaloo is addressing a very important aspect of this legislation.

Mr McGinty: He is making a very good point.

Mr McRAE: It is important that we understand the issues raised by members opposite, who have zero knowledge of the application of this legislation. I would like to hear more.

Mrs Edwardes: I am sure the Attorney General would, too.

Mr McGinty: Indeed.

Mr QUIGLEY: As the member for Nedlands knows, there has always been the compulsory examination of a witness prior to the election date. There are always witnesses who will not cooperate with the police and dob in their mates.

Another very important reason also came into play. It was apposite in the Connell case and other cases. Some witnesses will not cooperate with the police in giving evidence against a suspect because something they have done along the way could incriminate them. When they appear before a magistrate for the compulsory taking of a deposition, prior to the election date - which is well in advance of the preliminary hearing - they can, as Hobby and Hannan did, say to the DPP officer undertaking the examination, "I decline to answer that question on the grounds that it may tend to incriminate me." The prosecution could then apply under section 11 of the Evidence Act for the witness to be directed to answer, and answer satisfactorily, and be given a certificate of immunity from the prosecution in respect of the answers he gives in that hearing. From that moment on, the witness could comfortably give the evidence - even though to some degree it involved him in the offence - free of the threat of being prosecuted, and that way be candid as to what the accused person had done.

This section clarifies the existing practice that the accused is not a party to a proceeding. This is not a proceeding; this is part of the investigation being conducted under compulsion in a court. There has always been, first, a strict prohibition on not participating in that hearing or the taking of that evidence and, secondly, a very strict compulsion on non-publication. Thereafter that evidence formed part of the depositions upon which the accused elected to have a preliminary hearing. This procedure does not change, in that there will be a process of compulsory taking of depositions. That will then be served and go forward with the papers to the committal mention date. That is what has always happened.

Ms SUE WALKER: I am sure the Attorney General has made himself a laughing stock with the rest of the criminal jurisdiction in Western Australia.

Mr McGinty: There is no need to be nasty.

Ms SUE WALKER: I am just being factually accurate. That letter was like manna from heaven. Some days we wake up and our days are full of joy, the sun in shining and someone drops a letter in our lap. Today is one of those days! We got the letter from John Quigley, who has changed his mind again. There is a good photo of him on the front. It is black; you cannot see him. I will return later to that letter.

I make my point again, because crown counsel, George Tannin, may look at this and set the record straight for the member for Innaloo and the Attorney General. The contempt provision has something to do with section 66 of the Justices Act and preliminary hearings. Depositions are taken in a closed court. The member for Kingsley referred to the trial. At trial everyone can come into the room and listen to the evidence; there is no general prohibition on persons going away and talking about the evidence. I just make that point.

Clause put and passed.

Clauses 11 to 15 put and passed.

Clause 16: Section 611B and 611C inserted -

Mrs EDWARDES: Clause 16 deals with proposed new section 611B, disclosure by the prosecution, and proposed new section 611C, disclosure by the accused person. The section relating to disclosure by the prosecution is in current practice under the DPP guidelines. I hope the Attorney General can assist. There is some confusion as to what is added over and above what is in the DPP guidelines. That confusion reigns among police, prosecutors and lawyers alike. Some will say that hardly anything has been added, other than perhaps a copy of the criminal history of the accused, although that is already on the brief; others will say a considerable amount has been added over and above what is already contained in the DPP guidelines, but has already been extended by the DPP in practical terms.

Ms SUE WALKER: Having assisted, with another professional assistant, in the drafting of the guidelines, I am fairly familiar with them. I refer to the *DPP Prosecution Policy and Guidelines 1999*. This is interesting. I will commence at paragraph 71, under the heading "Disclosure of Crown Case", which states -

> The Crown has a general duty to disclose the case in-chief for the prosecution to the defence.

Paragraph 72 states -

> Normally full disclosure of all relevant evidence will occur unless in exceptional circumstances full disclosure prior to the trial will undermine the administration of justice, or when such disclosure may endanger the life or safety of a witness.

Paragraph 73, under the heading "Disclosure of Information to the Defence", states -

> When information which may be exculpatory comes to the attention of a prosecutor and the prosecutor does not intend adducing that evidence, the prosecutor will disclose to the defence -
>
> (a) the nature of the information;
>
> (b) the identity of the person who possesses it; and
>
> (c) when known, the whereabouts of the person.

Paragraph 74 states -

> These details should be disclosed in good time.

Paragraph 75 states -

> If a prosecutor knows of a person who can give evidence which may be exculpatory, but forms the view that the person is not credible, the prosecutor is not obliged to call that witness.

Paragraph 76 states -

> In either case, the Crown, if requested by the defence, should subpoena the person.

Paragraph 77 states -

> If the prosecutor possesses such exculpatory information but forms the view that the statement is not credible or that the subject matter of the statement is contentious, the prosecutor is not obliged to disclose the contents of the statement to the defence, but should inform the defence of the existence of the information and its general nature.

I have read out these provisions because I am wondering what status these *DPP Prosecution Policy and Guidelines* will have, given that we have this new procedure in the code. Paragaph 78 states -

> However, if the prosecutor is of opinion that the statement is credible and not contentious, then a copy of that statement should be made available to the defence in good time.

Paragraph 79 states -

> When the prosecutor knows that a Crown witness is indemnified in respect of the matter before the court, that shall be revealed to the defence.

I note that in proposed section 611B, disclosure by the prosecution, subsection (3) provides that the court may order that a particular requirement of subsection (1) be dispensed with if, on an application by the prosecution, the court is satisfied that there is good reason for doing so and no miscarriage of justice will result. I note that the *DPP Prosecution Policy and Guidelines* refer to guidelines for disclosure of material additional to the crown case, but it refers to the obligations of the prosecution. Paragraph 4 of appendix 2 states -

> The prosecution, upon request by the defence, shall, subject to any claim for immunity on the grounds of public interest, disclose all such documentation, material or information either by making copies available or allowing inspection.

This is important because I want to ask the Attorney General what he believes are examples of when the prosecution will not be required to disclose. Paragraph 5 states -

> Some material, however, may raise for consideration the need to balance competing public interests. On the one hand there is a public interest in full disclosure to assist in maintaining the confidentiality of certain material, particularly material not directly relevant to the case.

Paragraph 6 states -

> A prosecutor may withhold or delay disclosure of specific material where the prosecutor is of opinion that, in the public interest, the material should be immune from disclosure.

Paragraph 7 refers to some of the factors that should be considered where -

> (a) the material is clearly irrelevant;
>
> (b) withholding is necessary to preserve the identity of an informant;
>
> (c) withholding is necessary to protect the safety or security, including protection from harassment, of persons who have supplied information to the police. . .

Mrs EDWARDES: I would like the member for Nedlands to continue her contribution to the debate.

Mr McGINTY: From which document is the member quoting?

Ms SUE WALKER: I am reading from Appendix 2 of the *DPP Prosecution Policy and Guidelines 1999*. Paragraph 7 continues -

> (d) the material is protected by legal professional privilege;
>
> (e) the material, if it became known, might facilitate the commission of other offences or alert a person to police investigations;
>
> (f) the material discloses some unusual form of surveillance or method of detecting crime;
>
> (g) the material is supplied to the police only on condition that the contents will not be disclosed;
>
> (h) the material contains details of private delicacy to the maker;
>
> (i) the material relates to the internal workings of the police force;
>
> (j) the material relates to national or State security.

Paragraph 8 states -

> Where the prosecutor declines to disclose material, or alternatively delays disclosure of material, the prosecutor should advise the defence that material has been withheld and claim an immunity against disclosure in respect of that material.

Paragraph 9 states -

> If a dispute arises as to the claim for immunity, the matter should be submitted to the court for resolution prior to trial.

Paragraph 11 refers to the Crown's duty of disclosure. I note that there is no continuing obligation in the Bill. Is this clause styled on parts 37 and 38 of the criminal practice rules, which are different? If so, why are not all the parts contained in proposed section 611B? What is the status of the DPP's guidelines? Was any consideration given by the drafters of the further guidelines to the withholding of information based on the criteria that I have outlined?

Mr QUIGLEY: The prosecution guidelines were a voluntary code published by the former Director of Public Prosecutions. The members of the legal bar knew that they were to be observed in their breach rather than in their practice. If lawyers went to court and came across materials that had not been disclosed, there was nothing they could do; it was a voluntary code. It was up to a case officer at the DPP to decide whether the code would be honoured. The code also included a discretion to withhold a statement if the prosecution believed that the maker of the statement was not telling the truth. That was the value judgment made by the DPP's office. The defence thought that this was quite unfair because it was not for the prosecution to withhold information on the basis that it did not believe in the integrity of the maker of the statement. Proposed section 611B(a) states -

> a copy of every statement or deposition, obtained by the prosecution, of any person who may be able to give relevant evidence. . .

I will use a case of sexual assault as an example. A victim of sexual assault will phone the police, after which time she will be attended by two police officers. A short statement will be taken before the victim is taken to the sexual assault referral centre, where another statement may be taken by an attending female officer. Within a day, she will be interviewed by detectives who, from my experience, will take a handwritten statement. This information is compiled, and the complainant is brought in to read the written statement and effect amendments. Once the amendments have been effected - this is usually done on the spot - the complainant signs off on the final version. The practice in Western Australia is for the final statement to be served upon the defence, and not the information that preceded it. Often a complainant's story evolves, and it is very important for the defence to track this evolution. In this way, if it believes that the complainant's story is untrue, it can determine how the

complainant came to the story by looking at every statement that was put forward by the prosecution or police. There is an obligation upon the prosecution to put forward every statement made by the accused. This is an enormous step forward for the defence. The disclosure provisions and the manner in which they were written addressed all my concerns, which I stated in my contribution to the second reading debate. It changed my straitjacketed position as a defence lawyer who focused on the accused's rights only, which was my professional responsibility, to one who looked at the wider community benefit of such disclosure. This is an enormous step forward for accused people. The disclosure regime was not on the table 18 months ago when I wrote to the Attorney General. After I saw the disclosure provisions and how they would work, I changed my opinion. At the moment, the criminal bar is in reaction and denial - it is thinking of the woe it will go through after losing preliminary hearings. However, this Bill provides a big step forward for all accused people. During the Argyle Diamond case, in which the member for Nedlands was involved as an articled clerk -

Ms Sue Walker: I was a junior counsel at the trial that we won.

Mr QUIGLEY: The member's team did not win - it gave up and threw in the towel. I have checked the transcript. Under instructions from the DPP, the member was not allowed to say one word during the case. It would be an improvement to this debate if the Leader of the Opposition were to impose a similar constraint upon the member for Nedlands.

As we moved into the indictable process, the extra documents caused the DPP to stop the prosecution forthwith.

Mr McGINTY: I will add a few words to those spoken by my learned friend, the member for Innaloo. In the 1999 report handed down by the Law Reform Commission, it was recommended that the law on pre-trial disclosure be implemented to introduce a statutory disclosure requirement for the prosecution, including police, along the lines of the DPP guidelines that were published on 4 December 1993. The legislation refers to the DPP guidelines, but we have extended them to the police. We have also changed the status of the guidelines, which are implemented pursuant to section 24(1) of the Director of Public Prosecutions Act 1991 to having full statutory force. The DDP will have to review these guidelines because many of the provisions will be ultra vires the provision if the legislation is passed by Parliament in this form. The only way there will be an exception to disclosure will be through an application to the court. That whole area referred to by the member for Nedlands as a reason for non-disclosure may contain criteria that will be considered by the court, but it will not come under the discretion of the DPP, and it will also extend to the police.

I refer the member to proposed sections 611B(3) and 611C(3), which make provision for disclosure by both the defence and the prosecution to be waived by order of the court only, and not at the discretion of the Director of Public Prosecutions. There will be a significant change in this whole area, which is why the member for Innaloo is right in saying that when the people involved in this matter appreciate the full extent of the disclosure requirements we will start to see the real benefits of this provision flowing through. There will now be a statutory consequence of failure to disclose, which is spelt out in proposed section 636A, coupled with the requirement that only a court can waive the disclosure requirement. It was recommended by the Law Reform Commission.

Ms SUE WALKER: I cannot agree with the Attorney General when he says that the member for Innaloo was right, and I will now demonstrate why he was not. I asked the Attorney General whether these provisions were styled on clauses 37 and 38 of the Criminal Procedure Rules 2000.

Mr McGinty: They are new provisions, designed to alter the current practice. The answer is no.

Ms SUE WALKER: Is the Attorney General aware that the judges make rules in relation to criminal practice procedure in this State, and that there are special rules in the Criminal Procedure Rules 2000 that the judges of the Supreme Court make? It is my understanding that these provisions were styled on rules 37 and 38 of the Criminal Procedure Rules 2000.

Mr McGinty: They were taken into account, but the proposed section was not styled on them.

Ms SUE WALKER: What were they styled on? Were they just made up?

Mr McGinty: They are new provisions.

Ms SUE WALKER: Is the Attorney General saying that crown counsel did not look at any other statutes?

Mr McGinty: I am not saying that.

Ms SUE WALKER: The Attorney General is not saying that! Okay. Where do the judges of the Supreme Court find themselves now on their criminal procedure rules?

Mr McGinty: They will need to revisit them.

Ms SUE WALKER: I will read them out if I may. Not only the Director of Public Prosecutions' guidelines need to be taken into account. I take issue with the comment by the member for Innaloo about their being breached more than followed. In my experience that is definitely not the case. I found that the Director of Public Prosecutions' office always goes to great pains and great lengths to give discovery to defence. I believe this proposed section was styled on the Criminal Procedure Rules 2000. An author's note in *Brown's Criminal Law* states that the power to make rules relating to criminal practice and procedure, including appeals to the court of criminal appeal, is conferred on the judges of the Supreme Court, or a majority of them, under section 747 of the Criminal Code. The judges' rules on pre-trial disclosures, begin at rule 37, which reads -

37. Pre-trial disclosure by the Crown

(1) If on being arraigned an accused enters any plea that necessitates an actual trial, the DPP must file, and serve on the accused -

(a) a copy of any statement, report or deposition of any person who may be able to give relevant evidence at the trial;

(b) notice of the name and, if known, the address of any person from whom no statement, report or deposition has been obtained but who may be able to give relevant evidence at the trial and a description of the relevant evidence concerned;

(c) notice of those of the persons referred to in paragraphs (a) and (b) whom the Crown proposes to call;

(d) a copy of any record that the Crown proposes to tender in evidence at the trial or, if it is not practicable to copy the record, a description of it and notice of where and when it can be inspected;

(e) a copy of the criminal history of the accused.

The Attorney General will see the similarity with proposed section 611B(1), which adds in a new paragraph the words "any other document prescribed by rules of the court". Rule 38 of the Criminal Procedure Rules 2000 deals with pre-trial disclosure of expert evidence, which is the subject I wished to raise with the Attorney General. Why has rule 38 in effect been incorporated into proposed section 611(B)? This proposed section does not refer to expert evidence, but the judges' rule, which would have to be looked at in addition to this, reads -

(1) If on being arraigned an accused enters any plea that necessitates an actual trial, the DPP and the accused must each file, and serve on the other -

(a) a copy of any statement, report or deposition of any person whom the party proposes to call to give expert evidence at the trial; and

(b) a copy of any record that the party proposes to tender in evidence at the trial or, if it is not practicable to copy the record, a description of it and notice of where and when it can be inspected.

Mrs EDWARDES: I would like to hear more from the member for Nedlands.

Ms SUE WALKER: The Law Society stipulates in its submission to the Attorney General that proposed section 611B has been styled on the rules set down by the judges of the Supreme Court. It is very important in the context of disclosure. The member for Innaloo did not refer to the Criminal Procedure Rules 2000, but clearly the court will be looking at them because it uses those rules in relation to disclosure for trial. Is it intended to include the pre-trial disclosure of expert evidence in proposed section 611(B)?

Mr McGinty: No; it is picked up by the existing provision.

Clause put and passed.

Clauses 17 to 32 put and passed.

Title put and passed.

Third Reading

MR McGINTY (Fremantle - Attorney General) [4.10 pm]: I move -

That the Bill be now read a third time.

I thank members for their contributions to the debate and for their support, notwithstanding the occasional barb that flew across the floor of the Chamber. This Bill represents a very important reform of our criminal justice

system, implementing, not in its entirety but in its substance, the recommendation of the 1999 report of the Law Reform Commission that preliminary or committal hearings be abolished.

The member for Nedlands raised two issues during the debate. The first related to the evidence of children. Reference was made to section 69(3) of the Justices Act 1902, which provides protection for the evidence of children in the following terms -

> Despite any other Act, where a person is charged with an indictable offence and the charge is not dealt with summarily, a statement of an affected child, as defined in section 106A of the Evidence Act 1906 -
>
> (a) may, on a preliminary hearing, be tendered to a court of summary jurisdiction in evidence and is admissible as evidence before it to the like extent as oral evidence to the like effect by that person; or
>
> (b) may, where there is no preliminary hearing, be tendered to a court of summary jurisdiction to be used in evidence for the purposes of the trial or sentencing of the defendant,

It then sets out certain provisos. The relevant provision that preserves that section is section 106T of the Evidence Act under the heading "Use of recordings made under ss. 106J, 106K and 106N". Section 106T provides -

> (1) Evidence of an affected child recorded on video-tape under section 106J, 106K or 106N in relation to a Schedule 7 proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the Court concerned.
>
> (2) Evidence of a special witness recorded on video-tape under section 106K or 106N in relation to a proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the Court concerned.

I think that answers the major issues raised.

The member for Nedlands also pointed to an issue relating to section 66 of the Justices Act. We are seeking the considered advice of crown counsel and parliamentary counsel on that matter. The interim view was that, although it did not refer to a preliminary hearing, it could be taken to refer to proceedings that are in substitution for a preliminary hearing; that is, the ability to be able to proceed by way of a compulsory examination of a witness by the prosecution or maybe in the committal mention proceedings. Nonetheless advice will be gained on that. Hopefully we will be able to clarify that matter to the necessary extent. If the member for Nedlands is proven correct, and amendments are necessary, I extend my thanks to her and the thanks of the parliamentary draftsperson for her having done an element of that job.

With those few words, I thank all members for their contributions. This is a significant change to the law, and I commend the Bill to the House.

MS SUE WALKER (Nedlands) [4.16 pm]: The Attorney General has put on record that he is using the Law Reform Commission report No 92 as a blueprint for this Bill and, as I understand it, for all legislative changes to the criminal justice system in this State.

At the outset I said that the Opposition supported this Bill. I said that the Bill represented an enormous shift in the criminal justice system. I also took credit on behalf of the former coalition Government for this Bill, in the sense that it is based upon the Law Reform Commission report commissioned by Hon Peter Foss, who was Attorney General at the time. I alluded to the statement by the Chairman of the Law Reform Commission, Wayne Martin, QC, who referred to Hon Peter Foss. He said -

> In September 1997, the Attorney General gave the Law Reform Commission of Western Australia the broadest reference in its 30 years of existence: to Review the Criminal and Civil Justice System.

The member for Innaloo has been the spokesperson for the Attorney General. During the second reading debate on this Bill there was some slapstick comedy. I will refer to the member for Innaloo's opening comments, not because they affected me in any way - his remarks speak more about his attitude towards women - but because, when we examine them, we can see the lack of logic in his reasoning. I refer to page 10179 of *Hansard* of Thursday, 9 May 2002. The member for Innaloo speaking on behalf of the Attorney General commenced his dissertation on this Bill in this way -

> I listened to the dissertation on the Bill by the member for Nedlands and her comments on how it will work. She made some comments about the previous Government that I regard as being dizzy, silly blonde moments - those things that bring blondes into disrepute. She said that in 1997, the former

> Attorney General commissioned the Law Reform Commission to review the civil and criminal justice procedure, and that the commission presented its report at the end of 1999.

Personal remarks were resorted to. I have a thick skin, but the truth is that sometimes when people cannot find an argument to oppose a fact, they resort to personal remarks. The member was dealt with rather appropriately.

During the second reading debate I outlined the reasons the Opposition supports this Bill. I want briefly to touch on those reasons. I alluded to the fact that the original purpose of preliminary hearings was to screen all cases that were committed for trial. Everybody went through a preliminary hearing before a magistrate who looked at the evidence. That procedure started in this State in 1850. When the procedure was inserted into the Justices Act 1902 it developed into a choice for the accused of a hand-up brief or a preliminary hearing. The procedure's screening purpose has waned; its use for discovery and other reasons has waxed.

Preliminary hearings are usually conducted only for charges against people accused of sexual assaults, assaults, illegal drug use and the like. The process is also used to badger witnesses. I think one member said that it was my only reason. The member for South Perth, who is not here, said that he had been a journalist in and around the courts, and that he knew something of the system. I have a lot of time and respect for the member for South Perth; he has been a member of this Parliament for quite a long time. During the past 10 years the number of sexual assault cases that the Office of the Director of Public Prosecutions has dealt with has exploded because the general policy of successive Governments has been to encourage victims of sexual assaults to come forward. Indeed, when I was a crown prosecutor, it was the biggest growth area.

I spoke of the distressing experience of sexual assault victims having to give evidence in open court, not once but twice. Quite often a Court of Petty Sessions can be packed with strangers, and a victim must recount quite horrifying details of a sexual attack in the most humiliating and degrading circumstances. I entered the criminal justice system long ago as a mature-age person with a fairly fresh outlook on the system. I have believed in my heart and mind for a long time that this has been wrong. I fully support the Bill for this reason.

One member said that my reasons were economically driven. That is only one of the many reasons I have mentioned. I referred to the statistics on page 852 of the Law Reform Commission report. They included the Director of Public Prosecutions' preliminary hearings statistics for 1997. There were 124 preliminary hearings, which covered 175.5 court days, or 36.6 per cent of the time assigned. Of those 124 hearings, only 66 proceeded. The courts, prosecution, police, witnesses and the legal bodies that participated in those hearings wasted time and resources. The Attorney General's second reading speech referred to the statistics for 2000-01. Only 14 per cent of the 3 295 accused elected to have a preliminary hearing. In a briefing given by the DPP the day before the second reading speech was made, he said that of the 209 matters listed in 2000-01, only four were discharged and three of those were ex officio indicted. I also referred to the defence delaying or frustrating the prosecution. In his second reading speech, the Attorney General gave reasons for pursuing this legislation, and I will not go into those again. However, they are broadly along the lines that I have expressed and as outlined in the Law Reform Commission report.

The Attorney General's spokesperson, the member for Innaloo, gave the reasons he believed the Government was pursuing this legislation. First, it was for discovery when the police did not give all the evidence to the accused. Secondly, it was because Brian Singleton, QC did not have a preliminary hearing for his celebrated trial. Thirdly, it was because Cannon Bowden and Co does not have them. The member's singling out Mike Bowden and Ron Cannon as reference points is unfair to other very fine defence counsel in this State. Fourthly, he said that he ran his successful cases past this legislation and it would have made no difference to their outcomes. He gave those reasons to Parliament on Thursday, 9 May. He was at pains to point out at the beginning of his speech at the second reading stage that he was supporting the legislation. He referred to a *Sunday Times* article in which he said that the Attorney General would be noted as a good, reforming Attorney General. He said that the Attorney General was not his factional colleague, so he was not sucking up to him. I asked some criminal lawyers why he had changed his spots. When the member for Kalgoorlie compared the comments made by the member for Innaloo since becoming a politician with the comments he made in 1992, he found that they were completely at odds with each other. The other day I spoke to a criminal defence lawyer who said that he could not understand why the member for Innaloo had changed his spots. When the criminal defence lawyer asked the member why he had changed his mind, the member said, "Power of Caucus, mate." Members can appreciate that, a day later, when I received the letter written by the member for Innaloo on 23 August 2001 -

Points of Order

Mr DEAN: No new substance may be brought into the third reading debate. I am not sure whether that letter was raised in the second reading debate. I seek your ruling on that, Mr Acting Speaker.

Mr JOHNSON: It is not a new item. The letter to which the member is referring was raised during the consideration in detail stage, not the second reading stage. If the member, who is walking out of the Chamber now and who obviously is not very interested in the point of order, had taken note during the consideration in detail stage, he would have known that.

The ACTING SPEAKER (Mr McRae): I was here for much of the second reading debate and the consideration in detail stage, and I do not recollect that. However, if the member says that she raised the matter during a previous stage, I will allow it. There is no point of order.

Debate Resumed

Ms SUE WALKER: In fact, the letter was raised by the member for Innaloo during the consideration in detail stage. I will read it because it gives the truth about what the member for Innaloo thinks about preliminary hearings. It is quite a pompous letter, but members will discover that when I read it. It states -

> Dear Sir
>
> **ABOLITION OF PRELIMINARY HEARINGS**
>
> Yesterday I had a discussion with the Attorney General for Western Australia who is determined to implement the report of the Law Reform Commission, which recommended the abolition of Preliminary Hearings in Western Australia.
>
> I believe that election of a Preliminary Hearing for some accused is no more than a ploy to delay committal, (I have experienced this many times myself), and often Preliminary Hearings are abandoned. In other cases a Preliminary Hearing is simply an opportunity to harass the prosecution.

I have raised those two points because they were not mentioned when the member for Innaloo gave his reasons for supporting the Bill. In fact, he said that his very good mate Brian Singleton, QC did not have a preliminary hearing, and Cannon and Bowden do not have them. He also looked at his very successful cases and this legislation would not pass the test. The letter continues -

> Nonetheless the total abolition of Preliminary Hearings concerns me greatly.
>
> I have explained to the Attorney General that I have myself experienced cases where the prosecution have failed to disclose all relevant documents and interview materials which have been damning to the prosecution case. I do not believe that in all cases legislation for discovery will remedy this . . .

However, the member for Innaloo has said in this Chamber that he thinks discovery will remedy the situation. I remind the member for Innaloo that when I first came into this House, he made a point of saying to me that I should tell the truth. I have not vacillated at all on my principles. Yet, twice this week the member has said that he supports something, when the reality is in this letter.

Mrs Edwardes: What is the date of the letter?

Ms SUE WALKER: It is dated 23 August 2001.

Mrs Edwardes: It is less than 12 months ago.

Ms SUE WALKER: It is less than 12 months ago. I will repeat the sentence I have just read because it leads into another point. It states -

> I do not believe that in all cases legislation for discovery will remedy this, as often it is not the DPP who has withheld documents . . .

Did I not hear just a few minutes ago the member bag the DPP's crown prosecutors? This letter has a very good photograph of the member - it is all black and we cannot see him. It continues -

> . . . often it is not the DPP who has withheld documents, but dishonest or malicious investigators hiding materials that leads to circumstances of grave injustice.

That refers to the Police Union (WA), from which the member has made a lot of money. The member for Innaloo has conducted many hearings for the Police Union. It had the money and he used it. His letter continues -

> Nevertheless, the Attorney General is determined to implement the recommendations of the Law Reform Commission and abolish Preliminary Hearings. I believe the recommendation will receive widespread support in the Legislative Assembly as -

Members on my side should listen to this -

> a former Liberal Government had previously mooted it.

There we are. I have been called a silly, dizzy blonde!

Mr Masters: No!

Ms SUE WALKER: Yes, member for Vasse; I have been called that. I was called that because I had the temerity to tell the truth. In his contribution to the second reading debate, the member for Innaloo stated -

> She said that in 1997, the former Attorney General commissioned the Law Reform Commission to review the civil and criminal justice procedure, and that the commission presented its report at the end of 1999.

What do we have here? The member for Innaloo agrees with me. He states -

> . . . a former Liberal Government had previously mooted it.

I thank the member for Innaloo. As I said before, on some days the sun shines when one walks outside. There is a God!

Mrs Edwardes interjected.

Ms SUE WALKER: That is right. This letter came shooting through the air and straight into the member for Innaloo and the Attorney General. The Attorney General said that the member for Innaloo was arguably the most knowledgeable person on criminal procedures. The judges of the Supreme Court will have something to say about that. I would have put them on the top of the list, over and above the member for Innaloo. The member knows in his heart that that is true. Why the Attorney General keeps pumping up the member for Innaloo is beyond me. The member for Innaloo has been an embarrassment to him. He is an embarrassment to the courts. The Labor Party is now lumbered with the member for Innaloo. His letter continues -

> For my part, however, I have been urging the Attorney General -

Mrs Edwardes: You did not say it quite right.

Ms SUE WALKER: No. Urging! I continue -

> to consider preserving the Preliminary Hearing in part.

I am experiencing great joy by going through this letter. Some days are just so joyful! The letter continues -

> That is, as a minimum, to implement legislative provisions as have been in South Australia, where the accused can seek leave of the Court to cross-examine particular prosecution witnesses at a committal level. Where an accused can demonstrate that it is either expedient or in the interests of justice that he be permitted to do so.

I must tell members that at the end of his speech at the second reading stage - page 10182 of *Hansard* - the member for Innaloo strongly commended the legislation. On page 10180 of *Hansard* he stated -

> I have come upon a new responsibility that criminal lawyers do not have.

Mr Quigley: Are you an experienced lawyer?

Ms SUE WALKER: The member for Innaloo does not share my experience. I have a 27-year background in politics.

Mr Quigley: You are not like the magistrate who is telling lies, are you? You said that you had been a lawyer for 12 years.

Ms SUE WALKER: I did not say that.

Mr Quigley: It is in *Hansard*.

Ms SUE WALKER: I ask the member for Innaloo to read it to me.

Mr Quigley: Page 6523 of *Hansard* states -

> I come from a very conservative background, but I have had the experience of working in the criminal justice system . . . for 12 years.

Ms SUE WALKER: That is true.

Mr Quigley: As a secretary?

Ms SUE WALKER: No; not at all - and the member should not belittle secretaries.

Mr Quigley: You have been admitted here for less than 12 years.

Ms SUE WALKER: I am happy to answer that.

Mr Quigley: You tried to mislead this House.

Ms SUE WALKER: I will put it on the record. At that stage I had been in the criminal justice system for 12 years as a research assistant to the Director of -

Ms Quirk: You said that you were a prosecutor.

Ms SUE WALKER: No, I did not. The member for Girrawheen should read *Hansard*. She was useless at the National Crime Authority and she is useless here. She should read *Hansard*. I said that I had been in the criminal justice system.

Ms Quirk: No. It said that you had been a prosecutor.

Ms SUE WALKER: May I have the *Hansard?* I will read it for the member for Girrawheen. The member is useless. She should get some glasses and read the *Hansard*. I am quite good at what I say.

Ms Quirk: If you don't correct the *Hansard*, that is your problem.

Ms SUE WALKER: I am a lot cleverer than the member for Girrawheen. That is why she used to send me her opinions to do. She could not read.

I will return to the member for Innaloo's speech at the second reading stage, in which he said -

> I have come upon a new responsibility that criminal lawyers do not have.

I am sure they would be pleased to read that! He has become a member of Parliament and of Caucus. I asked the Leader of the Opposition what I should name this letter: the "power of caucus letter" or the "pompous letter". I have not finished with it yet.

Mr Barnett: Or the "throw away your integrity when you join the Labor Party letter".

Ms SUE WALKER: Indeed! I am not sure what to call it, except that it is perfectly joyous.

The member for Innaloo's speech continued -

> Their responsibility is singular:

Further down he said -

> I want to say on the record, so that my colleagues -

That is, his old colleagues -

> who read the transcript will understand, that it is not Quigley standing in this place and running this argument bound by Labor Party caucus or a duty to Parliament to run the argument in the Chamber. I believe that preliminary hearings were necessary -

He goes on to give a string of drivelling reasons. The real reasons are contained in his letter, which is signed -

> JOHN QUIGLEY LLB MLA
>
> Dictated at Parliament House
>
> but signed by his Electorate Officer . . .

The letter states -

> The Attorney General approached me yesterday evening and said that he would be prepared to consider my proposals and how they might be implemented in the legislation, but that I only have until next week to make representations to him.
>
> I do not have Research Officers -

What happened to the member for Innaloo's research officer? Every politician has a research officer. The letter continues -

> and am currently heavily involved in the debates on amendments to the Electoral Act . . .

Did members on this side hear him heavily debate the electoral legislation?

Mr Masters: I cannot recall that he did.

Ms SUE WALKER: I cannot recall him even speaking. The letter continues -

> . . . I write to seek your Association's assistance in preparing a submission on how exceptions to the recommendations might be framed.

He wants them to do his work for him. I will pause because I might forget to correct the member for Innaloo, who keeps getting things wrong.

Mr Quigley: How many years were you a prosecutor. Was it 12 years?

Ms SUE WALKER: It was seven or eight years. I was in the criminal justice system for 12 years. That is why *Inside Cover* would not print the member for Innaloo's comments when he rang. I am not as stupid as the members for Innaloo and Girrawheen. I am not as dizzy as they are.

Mr Quigley: You misled this Parliament.

Ms SUE WALKER: The member for Innaloo should ring *Inside Cover* again. He rang them about getting into the third reading and probably also rang about his dizzy blonde comment. The member for Innaloo is a show pony. He wants to be a pop star. He is in the wrong profession.

Mr Quigley: Will you read the *Hansard* if I give it to you? Will you read out your lie?

Ms SUE WALKER: I thank the member for Innaloo. I will take the *Hansard*.

Mr Quigley interjected.

Point of Order

Mr BARNETT: Mr Acting Speaker (Mr McRae), you are in the Chair and perhaps were not looking. Clearly, the member for Innaloo addressed the Chair as he walked across the Chamber. That is totally unacceptable conduct. I draw that to your attention on the off-chance that you may have missed it.

The ACTING SPEAKER: Thank you, Leader of the Opposition.

Mr QUIGLEY: I apologise for speaking as I passed the document to the member for Nedlands. The member asked whether she could have the *Hansard* and I took it to her.

The ACTING SPEAKER: The Leader of the Opposition is absolutely correct. It is highly disorderly for a member to speak when out of his place. I call the member for Innaloo to order for the first time.

Debate Resumed

Ms SUE WALKER: I graciously accept the apology of the member for Innaloo for speaking when he was out of his seat.

I go back to the member for Innaloo's comment about not having a research officer, because that bit is important. His letter states -

> I do not have Research Officers and am currently heavily involved in the debates on amendments to the Electoral Act and other matters . . .

Why does he tell them that? It is because he said he seeks -

> . . . your Association's assistance in preparing a submission -

To the Attorney General -

> on how exceptions to the recommendations might be framed.

He wrote to the presidents of the Law Society of Western Australia, the Western Australian Bar Association and the Criminal Lawyers Association asking them to do his work for him. The member for Innaloo is not very good at law research, and he knows that. He was effective in court but he is not very good at law research. The letter continues -

> I think that as a minimum we need to look at the legislative provisions in each of the other States.

I pause here because I was interrupted. The member for Girrawheen took issue with me about the Argyle Diamonds trial in which I was junior counsel and led evidence. I am talking about a preliminary hearing. I am talking about the successful Argyle Diamonds trial, of which I was a part, which was a case of conspiracy to steal. That case was 100 per cent successful, which just goes to show that the member for Innaloo again does not know what he is talking about. In the letter, he said -

> Upon receipt of this letter would you kindly contact me at the Parliament on 9222 7222 and have me paged and I will take leave from the Chamber to speak with you as a matter of urgency.

Mr Pendal: He didn't say that, surely?

Ms SUE WALKER: He did, member for South Perth. He wants people to know how important he is and that is why he rings *Inside Cover* to let everybody know what he is doing all the time. The letter continues -

> I also intend to forward this letter under cover of an explanatory letter to Mr Ken Martin QC, the President of the Law Society and to Mr Eaton of the Bar Association . . .

He goes on -

> I look forward to hearing from you . . .

Mr Quigley: She has lied about her practice.

Withdrawal of Remark

Mr QUIGLEY: I withdraw.

Mr MASTERS: I defer to the member for Hillarys.

Mr JOHNSON: Mr Acting Speaker (Mr McRae) -

Mr QUIGLEY: I apologise for using that word.

Mr JOHNSON: The point of order is that the member for Innaloo has once again transgressed greatly the standing orders of this House when he accused the member for Nedlands of lying. I demand that he withdraw that remark and apologise.

The ACTING SPEAKER: Normally this would be a request of the Chair rather than a demand. The member for Hillarys is asking for a ruling from me.

Mr JOHNSON: I am asking that you, Mr Acting Speaker, demand the withdrawal of the remark.

The ACTING SPEAKER: I thank the member for Hillarys for that clarification. If the member for Innaloo said such a thing, I ask him to withdraw the remark.

Mr QUIGLEY: If I said such a thing as an aside to my friend, I withdraw it.

The ACTING SPEAKER: Member for Innaloo -

Mr QUIGLEY: I withdraw it unreservedly.

Debate Resumed

Ms SUE WALKER: In his letter, the member for Innaloo said -

> I look forward to hearing from you at your very earliest.

I do not know whether the recipients of that letter replied to the member for Innaloo; they certainly had a word with me. They are not very happy with the member for Innaloo. I was unaware of this letter when I made my contribution to the second reading debate on the Bill. I was aware only of complaints about the member for Innaloo from members of the Criminal Lawyers Association.

I think the member for Innaloo was telling the truth when he said that the power of Caucus made him change his mind about the Bill. I will say one thing about this side of the House: if I have a principle, my colleagues do not pressure me and I would not pressure them not to stand by their principles. There is no way that my colleagues would do that to me nor I to them. There is no way that I would change my principles for the sake of publicity. The truth is that the member for Innaloo is a big disappointment. I must say that I had a lot of time for him before he became a politician.

Mr Quigley: I don't have much for you.

Ms SUE WALKER: I must say in all honesty that he was an effective trial counsel. He did not have much up top in relation to law, but he was an effective trial counsel. For the record, I ask him to table a list of all the cases he conducted because we are sick of hearing about them. We will read them once and send them to *Inside Cover*. I must tell the member for Innaloo that he is in a different ball game in this place from the one he was in when he appeared in court and I will tell him why: he was used to standing and saying what he had to say without anybody challenging him. However, he must be careful about what he says in this place. He is in politics now. He is a novice to politics and could do with a lot of training.

I must say that I am disappointed also with the Attorney General. Our side of the House believed that the Attorney General was putting the member for Innaloo in charge of the third reading of the Bill, because the Attorney General has been a bit thrashed and a bit belted around the ears by me in the consideration in detail of other Bills. Our side believed that the Attorney General had set the member for Innaloo onto me to try to intimidate me. However, what has happened? It has backfired on him in a terrible way. The Opposition is

pleased that the member for Innaloo is not on its side of the House. I have to tell members, because it is relevant now, that when I was at the Office of the Director of Public Prosecutions and heard that he was a candidate for election as the member for Innaloo, my first thought was about the Liberal Party. We would have won that seat if our slogan had been "He's not the full quig".

MR PENDAL (South Perth) [4.45 pm]: I make some brief comments in the third reading to reiterate some of the remarks I made during the second reading debate, in particular as a member who said that the Government is making a serious mistake by abolishing preliminary or committal hearings in Western Australia. I will not refer to the reasons for that view because I referred to them in detail in my contribution to the second reading debate. However, I will say that it has always been regarded by historians that the greatest conversion in the past 2 000 years was the so-called damascene conversion of Saint Paul when riding on the road to Damascus; having spent a lifetime persecuting Christ, he suddenly became his best ally.

I doubt that there has been a bigger conversion in this Parliament, in the time that I have been in this place, than the conversion of the member for Innaloo who, in August last year and in the letter produced in the Parliament today, was passionate in his defence of retaining preliminary or committal hearings in Western Australia. Nine months later, that same member, whose credibility on that matter is now shot to pieces, has been revealed as having had a complete conversion. If I recall correctly, not only did he oppose committal hearings but also, as little as a week ago, he wanted the chance to have carriage of the Bill through the House, so passionate had his agreement with the Bill become.

Mr Graham: You wait until we have some debates on energy and you will see some changes, I'll tell you.

Mr PENDAL: Is there a bit more to come?

Mr Graham: You ain't seen nothing yet!

Mr PENDAL: We look forward to that. I was particularly affronted by some of the interjections I received at the time I read a letter from a barrister and solicitor, Ross Williamson, who I believe is now located in West Perth. In his letter he dealt with the issue of discovery of documents as a reason for the abolition of preliminary or committal hearings. The member for Innaloo dealt with that matter in the letter he sent last year to the Criminal Lawyers Association. He has had an enormous change of heart about the great principle involved in this Bill; that is, he was against ending committal hearings then, but is in favour of it now. He should now answer the question raised by a number of members. At least the Attorney General is consistent in these matters. In August last year the member for Innaloo said -

> I have explained to the Attorney General -

It is to Mr Bailey that he is saying this -

> that I have myself experienced cases where the prosecution have failed to disclose all relevant documents and interview materials which have been damning to the prosecution case. I do not believe that in all cases legislation for discovery will remedy this . . .

That is another change of heart. The member for Innaloo had a change of heart in the Parliament last week, either as a result of a damascene conversion in the Caucus or perhaps he thought that between August last year and May this year there was a chance of a cabinet vacancy. How much credibility can we give a member who makes that sort of turnaround on the principle of a Bill, including the key detail relating to the question of discovery?

I take a consistent view. I said that my law was learnt as a journalist years ago while I was covering committal hearings. One idea I picked up along the way was the notion that anything that takes a right from a defendant and gives it to the State must be scrutinised to the nth degree. We have been doing that consistently in this place for the past two years. Bit by bit, incrementally, almost imperceptibly, we have been taking a few little rights from ordinary people - who, generally speaking, are not super-empowered in this State - and giving them to the State of Western Australia. That alteration in the balance is happening imperceptibly. It has been done in one Bill after another, so we have not noticed the difference. After four or five Bills have been passed, the real pattern emerges.

All of this can be traced back to people in the Department of Justice or the Office of the Director of Public Prosecutions. I think the DPP has far too much influence on legislation introduced in this place. The role of the DPP was established in legislation in 1991. The fundamental principle was that the DPP would be kept at arms length and would take the prosecution role away from a simple state department and place it in the hands of a statutory office holder who was independent of the Attorney General. That independence has been compromised more and more often. It was compromised in the stunt involving the Harley-Davidson motorbike, which was an overt example.

One at a time, requests for legislation have come from the DPP. That suggests a degree of influence that is not good for this State. It has as its end result that to which I referred earlier - that incremental transfer of one little right after another. Those rights were once enjoyed by ordinary people who became defendants. They have been transferred to the State of Western Australia. The day will come when we will regret that. We are about to do the same again. I do not know what will follow this. The Attorney General takes pride in the notion that he is a reforming Attorney General. He is, but in a most reactionary way. Our rights are being taken away and broken down, and not in favour of ordinary men and women. More and more, the weight of power is falling to the Crown and the State of Western Australia.

That is why the member for Innaloo was right in August last year and immediately up to the point at which he made this amazing conversion. It would be interesting to know what it was - perhaps the opportunity to sponsor a Bill through this House - that made him do a 180-degree turn. I do not know. Whatever it was, he is now part of the process. He and the Government should rethink why they are party to this notion of loading power onto the Crown, which is already well endowed with powers that it can wield against individuals. Why have they so freely and incrementally transferred those rights away from individuals? That is what is at stake more than anything else. It is the reason that I oppose the abolition of committal proceedings in Western Australia. The reasons I expressed in my second reading contribution hold fast. I oppose the Bill.

MR QUIGLEY (Innaloo) [4.55 pm]: I will explain my conversion. I notice the member for Nedlands ran before I could quote *Hansard* to illustrate how she misled this House.

Ms Hodson-Thomas: She walked.

Mr QUIGLEY: No, she slithered.

Members will recall that during the third reading debate, I said the member for Nedlands was cribbing on her experience and trying to slide it by this House. I said that she misled the House by saying that she had been a prosecutor for 12 years. She responded to my interjection by denying that she said it. She explained that she said she had worked in the criminal justice system for 12 years. She thought members on this side would do what the Department of Justice did about Mrs Bennett-Borlase's application to become a magistrate and not worry about the years or the dates.

The member for Nedlands then demanded that I produce the *Hansard*. I read the quote as an interjection, so I walked across the Chamber and passed it to her. I will read it again -

> I come from a very conservative background, but I have had the experience of working in the criminal justice system -

Here it is -

> . . . as a prosecutor for 12 years.

The 2002 *Western Australian Law Almanac* has the member listed under her former name of Lightfoot. It states that she was admitted to practise on 23 December 1993. Therefore, when she spoke those misleading words in December 2001, she increased her experience by 50 per cent.

Several members interjected.

Mr QUIGLEY: She is spinning at the moment. When she comes into this Chamber and, using a shrill voice, tries to make the point that she never said she had been a prosecutor for 12 years, she is palpably misleading the House.

The member for South Perth said that at some time between August last year and the second reading debate I changed my mind. Indeed I did. I changed it through 180 degrees. On being elected to this place, members must examine propositions with an open mind. I came from a branch of a profession, as exhibited by the Criminal Lawyers Association -

Point of Order

Mr MASTERS: There is some confusion on this side of the House about the accuracy of the member's quote from *Hansard*. Is it appropriate that I ask him to table that page? He brought it over here and the member for Nedlands quickly read it.

The ACTING SPEAKER (Mr McRae): There is no point of order.

Debate Resumed

Mr QUIGLEY: I will ask a member of the chamber staff to assist the member for Vasse by delivering a copy of the quote to him so that he can check the accuracy of my quoting of the member for Nedlands' misleading statement. After he has checked it, he should be kind enough to confirm that the member for Nedlands misled

the House. I make this point to demonstrate that she should be taken with a pinch of salt. The salt would taste better.

I am glad that the Leader of the Opposition is in the Chamber. It will never be forgotten that the opposition spokesperson on justice sought to take the Attorney General to task for the inclusion of proposed section 102(4) in the legislation. Proposed section 102(4), as I pointed out during debate, contains exactly the words in section 101C(c) of the Justices Act, the primary legislation for summary justice in this State - the legislation under which the member for Nedlands worked not for 12 years but for seven-and-a-bit years. In those seven-and-a-bit years as a crown prosecutor she was unaware of section 101C(c). She was testing, just tricking; she had her hands behind her back, as she did when she told the House during the second reading debate that she had been a prosecutor for 12 years! I forgot the member for Nedlands knew how to do this. I have not lived in Nedlands for 45 years. We used to have our hands behind our back when we were playing chasey at Melvista Park. I remember. Doug Shave used to do it more often than anybody else. Whenever I went to touch him, Dougie would say, "I've got you", and have his hands behind his back. That is what the member for Nedlands is doing. The Leader of the Opposition only has to read *Hansard* at page 9955 to see that he has appointed as the opposition spokesperson for justice someone who does not have a fundamental understanding of the Justices Act as it was. I thought she was an articled clerk on the Argyle Diamonds case. I apologise. For eight months she never said a word. When I looked at the *Western Australia Law Almanac*, I saw that the member for Nedlands had been a practitioner for four months. I can understand why the Director of Public Prosecutions forbade her from saying a word. She was not junior counsel as she purports in this case; the junior counsel in that case was Mr Lloyd Rayney; she was the instructing solicitor.

I will now return to the point of discovery. As the instructing solicitor, she had responsibility for disclosure; and disclosure was not forthcoming in that case. The Argyle Diamonds case against Detective Sergeant Lloyd was dropped because, after the matter went on indictment, a number of subpoenas duces tecum and ad testificandum were issued, and she got from her handbag that which she would not reveal during the preliminary hearing. As soon as those documents were to hand -

Point of Order

Mr JOHNSON: The member for Innaloo is going off the rails again. This is not the sort of subject that he can introduce in the third reading. The third reading relates to the consideration in detail. He just wants to go on and on and do the play acting, but what he is doing is against our standing orders.

The ACTING SPEAKER (Mr McRae): I am not sure that the point of order is going to hold absolutely. However, the standing orders require that the third reading relate to either the consideration in detail or the second reading debate. I hope that the member will be able to tie in what he is saying with those two stages of this debate.

Withdrawal of Remark

Ms SUE WALKER: I thought I heard the member for Innaloo say that when I was instructing solicitor at the preliminary hearing some evidence dropped from my handbag. It is impugning my professional integrity to say that I was concealing evidence. I distinctly heard the member say that some evidence dropped from my handbag. I ask him to withdraw.

The ACTING SPEAKER: We are getting close to descending into some fairly direct personal reflections. Standing Order No 92 -

Ms Sue Walker: At long last.

The ACTING SPEAKER: I heard the member for Nedlands' interjection. Both the member for Nedlands and the member for Innaloo have been full and conscious parties to this interchange over the past 45 minutes that I have been sitting here.

Ms Sue Walker interjected.

The ACTING SPEAKER: Excuse me, member for Nedlands. I call you to order for the first time. I am giving you some direction so that this debate might continue and we can conclude in accordance with standing orders.

If the member for Innaloo suggested that the member for Nedlands had secreted evidence in the course of a trial, I ask the member for Innaloo to withdraw. That is not what I heard, but the member for Innaloo might wish to clarify that to the House.

Mr QUIGLEY: I was speaking figuratively, not biblically. I was sort of saying that in that case the prosecution generally withheld evidence, which it did; and it would not have been able to withhold that evidence under this legislation. Yes, I had a turnaround at the time I wrote that letter. The discovery procedures -

The ACTING SPEAKER: Member for Innaloo! I want a clarification on the request I put to you. I have not finished with the point of order.

Mr QUIGLEY: I am sorry, I thought you had, Mr Acting Speaker. You said, if I had done that, to withdraw it. I said, figuratively speaking, the prosecution withheld evidence. I said, figuratively, the handbag. I did not mean that it came out of her handbag. I withdraw that. It was a turn of phrase.

The ACTING SPEAKER: I ask the member for Innaloo to withdraw that phrase.

Mr QUIGLEY: I withdraw that comment.

Debate Resumed

Mr QUIGLEY: The prosecution in the Argyle Diamonds case, in which the member for Nedlands was a party for the prosecution, definitely withheld evidence. That is a matter of public record. When it got to the District Court and subpoenas were issued, the evidence was prised from the prosecution. The prosecution could not get down to court fast enough to file a nolle prosequi and abandon the case. What a colossal waste of money and court time. If these procedures had been in place at the time, there would have been a statutory obligation upon the Director of Public Prosecutions to disclose that evidence. Once I saw the detail of what was being proposed in the discovery provisions and ran those past the cases that I had done, I realised that my clients would have been more advantaged under this system than they were under the old system. I said this in the second reading debate and the Attorney General has alluded to it. Under the old system, only those who were wealthy enough to engage a lawyer for both the preliminary hearing and a trial could embark upon the process of discovery at the preliminary hearing. That would include very few people in the community. The vast majority had to get by with what the police or the prosecution gave them; they had no statutory right to any more. Under this procedure they do. I made this point earlier to my colleagues and to the Criminal Lawyers Association of Western Australia, who agreed wholeheartedly with me. Under this procedure, John Button would never have been convicted. The injustices suffered by John Button would not have occurred. On the prosecution brief, if members recall the appeal, there was an initial crash report by an investigator whose opinion was that Button's car was unlikely to have caused the injuries to the deceased. That document was never disclosed to the defence and never came to light until the investigations by Estelle Blackburn years later. Under this regime, the defence would have had that document before committal, which would have made a significant difference to that trial. That is why, when looking at this legislation -

Mr Pendal: That was withheld from not just the committal; it was withheld from the trial, the full court, the court of appeal and I think the High Court.

Mr QUIGLEY: Exactly.

Mr Pendal: You cannot blame that on the committal proceedings. You are throwing the baby out with the bathwater.

Mr QUIGLEY: The point I am making is that those documents would have come to light as early as the committal hearing and, at the latest, at the time of indictment. A grave injustice would have been avoided had the Labor Government's current legislation been in effect when Mr Button was taken before the courts. A person cannot bring experience to this Chamber; a person is berated for doing so. I changed my mind once I saw the detail of what the Attorney General had proposed. I then went back to the briefs that I had defended and tested the forensic task in those preliminary hearings against the provisions of the current legislation. My clients would have got exactly the same outcome of acquittal, at less expense, sooner. I did have a change of heart.

Mr Pendal: A St Paul like conversion!

Mr QUIGLEY: Does the member for South Perth seek to berate St Paul, one of the greatest teachers of our church, for changing his mind? He would deny me my conversion! I commend this Bill to the House.

Question put and passed.

Bill read a third time and transmitted to the Council.

House adjourned at 5.10 pm