MAGISTRATES COURT BILL 2003

Second Reading

Resumed from 4 December 2003.

MS S.E. WALKER (Nedlands) [3.00 pm]: The Opposition has concerns about certain aspects of this package of legislation, but generally supports the philosophy behind it. Some of the key issues with which the Opposition has concerns form part of the Magistrates Court Bill, which was described as the centrepiece of the legislation by the Attorney General in his second reading speech. During the term of the last coalition Government the former Attorney General asked the Law Reform Commission to undertake a complete review of the criminal and civil justice system in Western Australia. Interestingly, at the time that the Law Reform Commission brought down its report, a Magistrates Court Bill and a Magistrates Court (Consequential Provisions) Bill were being drafted. That is stated on page 16 of the report, titled "Review of the Criminal and Civil Justice System in Western Australia." I am not sure whether those draft Bills were the same as the Bills before us today. I note that in clause 2.14 on page 16 of the report, the authors state -

> The Attorney General -

That is, former Attorney General Hon Peter Foss -

> currently is considering a limited change to the existing court structure in Western Australia: the establishment of a Magistrates Court along the lines proposed in a Western Australian Law Reform Commission Report of 1988.

The point I want to make is that this package provides nothing new. It was recommended as long ago as 1988. The Law Reform Commission looked into the legislation further following instructions or a direction from the former Attorney General. What we have before us today is a package that has been in the system for quite some time. As with many pieces of legislation that have come into this House, the Government is riding on the back of what the former Government proposed to introduce or had put in place. I can think of many pieces of legislation for which this Government has come into this House and tried to take credit, when the work was done by the previous Government. This Government's time is running out after three years. For instance, last week we considered the Children and Community Development Bill and found that it was draft legislation of the previous Government. It had never been to the party or cabinet rooms, but it had been dusted off, polished up and brought into the Assembly. That demonstrates to me that there is no innovative thinking or vision by this Government on large areas of its responsibility.

This Bill was described by the Attorney General as the centrepiece of the legislative package for the reform of the lower courts in this State. It is instructive to look at the Law Reform Commission report and the costs of courts in this State. I refer to the section headed "The Justice System" and clause 2.11 on page 15 of the report, which states that in its research the Law Reform Commission found -

> The cost of court services to the Ministry of Justice in Western Australia in 1997/98 was $71,102,000 . . . These costs related to the operations of five levels of court presently in existence within Western Australia - the Supreme Court, District Court, Local Court or Court of Petty Sessions, Children's Court and Coroner's Court. Our Report focuses principally on the first three levels of court.

Putting aside the Children's Court and the Coroner's Court, this legislation is basically about the inferior courts of Western Australia - that is, the Local Court, created under the Local Courts Act, and the Court of Petty Sessions, enacted under the Justices Act - and relevant changes to the District Court, which is a superior court, along with the Supreme Court. The three courts have their own, different jurisdictions. That was simply and clearly outlined by the Law Reform Commission in its report at clause 2.12 -

> Magistrates in the Local Courts deal with simpler civil cases involving money claims of not more than $25,000.

Under this legislative package, that amount will be increased firstly to $50 000 and then, in 2009, to $75 000. The report states -

> Magistrates or justices of the peace in the Courts of Petty Sessions deal with criminal matters that can be decided summarily without a jury.

It is interesting that under the current system, the appointment, tenure and office of magistrates are dealt with under the Stipendiary Magistrates Act, whereas the provisions relating to the appointment and tenure of justices of the peace are found under the Justices Act. The provisions relating to JPs in the Justices Act will be repealed and replaced by the Justices of the Peace Bill, which forms part of this package. Interestingly, the Stipendiary

Magistrates Act will be repealed and provisions relating to magistrates subsumed by provisions in the Magistrates Court Bill. I do not really understand why many of the decisions on this reform have been made in the way that they have. This package was described to me yesterday by members of the legal profession as a shambles. I cannot understand some of the provisions and the way in which they have been put into or taken out of different Acts. Nevertheless, I have found my way around it. The Opposition will object quite strenuously to some issues, but will generally support most of the package.

Getting back to the Law Reform Commission report and the question of jurisdiction, it states -

> The District Court is the intermediate level of court and judges deal with civil disputes involving up to $250,000 and have unlimited jurisdiction for personal injury claims. The District Court also handles most indictable criminal offences, other than the very serious, through trial by judge and jury.

Under this package, the $250 000 will increase to $500 000, and then in January 2009 will go to $750 000. It is interesting that criminal jurisdiction has devolved downwards over a number of years. It was not so long ago that all serious sexual assault offences were dealt with by the Supreme Court. Senior counsel would appear in those matters before the Supreme Court. Not so long ago this Parliament decided that the jurisdiction in that area would be transferred to the District Court. The District Court now has a very heavy criminal jurisdiction workload on indictable matters. The highest level of court in the State is the Supreme Court, which has unlimited civil jurisdiction. Supreme Court judges, usually with juries, handle the most serious criminal matters that carry a sentence of up to life imprisonment. The jurisdiction of a court is normally defined by the legislation that has created the court. The best outline, therefore, of the jurisdiction of courts is, as I have described, from the Law Reform Commission report. The package of legislation before us is mostly about merging the civil and criminal jurisdictions in the Small Claims Tribunal, the Local Court and the Court of Petty Sessions to form a new Magistrates Court of Western Australia.

I have received a submission from the Stipendiary Magistrates' Society of Western Australia on this package of legislation, which raised some very serious concerns about issues such as judicial independence and political interference in the judiciary. I also received an extensive submission from the Law Society of Western Australia on not only matters about judicial independence but also a series of matters relating to civil proceedings and self-representation in the minor procedures court.

The Opposition will not support this Bill until amendments are made to it. Firstly, we seek to protect the principle of judicial independence. Secondly, we seek to protect the judiciary from political interference and corruption, particularly relating to the provisions in the Bill for the suspension and termination of the office of magistrate. We do not support what appears to be discrimination in the retirement age of magistrates in this State. We will be raising concerns about the content of judgments under clause 31, we will be raising issues related to self-represented parties under clause 30, and we will also raise an issue that I would like clarified about access to court records under clause 33(4)(b). The latter issue is not the most significant but, as it appears to me, it could be. In relation to access to a court's records, subclause (4) states -

> With the leave of the Court, a party to a case may -
>
> (a) listen to or view -
>
> (i) any electronic recording . . . or
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> . . .
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> (b) inspect or obtain a copy of any document held by the Court in relation to the case, unless the document has been tendered to the Court in confidence for the purpose of sentencing a party;

I am not sure whether that refers to psychological, psychiatric or pre-sentence reports, which normally can be viewed by a prosecutor and defence counsel. I am unsure whether that clause will preclude the reading of these reports.

I go now to a significant provision for the Opposition; that is, the tenure of office for magistrates. The District Court of Western Australia Act 1969 refers to appointments, qualifications and seniority of magistrates. Section 10(2) of the Act states that a person shall not be appointed a District Court judge unless he is or has been a barrister or solicitor of the Supreme Court of not less than eight years standing and practice or he is a practising barrister of the High Court of Australia of not less than eight years standing. On the tenure of office for a District Court judge, division 2, section 11(1) of the Act states -

> The commission of each District Court Judge shall continue in force during good behaviour but the Governor may, upon the address of both Houses of Parliament, remove any District Court Judge from his office and revoke his commission.

I could be wrong; there could be other provisions for District Court and Supreme Court judges, but I have not read them in the Act. Perhaps the Attorney General could let me know whether I am wrong about that.

Before I refer to the tenure of office for magistrates under the current Stipendiary Magistrates Act, I refer to clause 11 of the Bill, which refers to the criminal jurisdiction of the Court of Petty Sessions as follows -

> The Court has jurisdiction -
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> (a) to hear and determine a charge of a simple offence;
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> (b) to hear and determine a charge of an indictable offence that can be dealt with summarily;
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> (c) to commit a person charged with an indictable offence that is to be dealt with on indictment to the District Court or the Supreme Court for trial or sentence;
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> (d) to commit a person charged with an indictable offence that is to be dealt with summarily to the District Court or the Supreme Court for sentence; and
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> (e) to deal with any case that, under a written law, is to be dealt with by a court of summary jurisdiction.

I note also that, following passage of the Bill, the qualification of a magistrate, as noted in schedule 1, clause 2(2), will be -

> A person is qualified to be appointed as a magistrate of the Court if he or she -
>
> (a) is or has been a practising barrister of the High Court of Australia, or a legal practitioner; -

When a person is admitted to the Western Australian Supreme Court as a barrister and solicitor, that person can automatically apply to the High Court for admission; so that is not a huge difficulty -

> (b) has had at least 5 years' legal experience; . . .

I raise this issue because a District Court judge must have eight years legal experience and under the Bill a magistrate must have five years legal experience. Compare that with the Stipendiary Magistrates Act and it can be seen right away that the Bill will raise the benchmark for a person appointed as a magistrate. The Opposition has no problem with that.

Bearing in mind that there is a long history in the development of judicial officers in the Court of Petty Sessions and the Local Court, section 4 of the Stipendiary Magistrates Act for the appointment of a stipendiary magistrate states -

> The Governor may from time to time by warrant under his hand appoint fit and proper persons to be stipendiary magistrates.

Subsection (2) of that Act states -

> Notwithstanding the provisions of any other Act a person shall not be appointed a stipendiary magistrate unless -
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> (a) he is or has been a barrister or solicitor of the Supreme Court;
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> (b) he is or has been a barrister or solicitor of -
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> (i) a State or Territory of the Commonwealth;
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> (ii) the High Court of Australia; or
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> (iii) England or Northern Ireland;
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> or
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> (c) before the commencement of the *Stipendiary Magistrates Amendment Act 1986*, that person -
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> (i) has passed the prescribed examinations and fulfilled such other requirements as are prescribed; or
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> (ii) has passed or received a credit in respect of at least one of the prescribed examinations . . .

Those provisions show a history. I understand that magistrates could be appointed without any formal legal qualifications, such as a public servant who can sit for an examination and then become a magistrate. What appears to have happened in 1986 is that they needed to have a legal qualification. We now have the Magistrates Court Bill 2003 and find that they have to have at least five years standing. I agree with that. Magistrates have an enormous workload; jurisdictions flow down from the Supreme Court and District Court, which are off-

loading cases. Because it involves people's liberty, the standard of appointments to the judiciary should be high in any court dealing with criminal matters.

I am trying to point out the qualifications of a District Court judge and his removal from office, the qualifications currently required for a stipendiary magistrate and his removal from office - which I have not done yet, but I will - and what is envisaged under the Magistrates Court Bill. Concerning the removal from office, section 5 of the Stipendiary Magistrates Act, "Tenure of office", states that a magistrate can be removed in the following way -

> (1) Subject to this Act, all stipendiary magistrates shall hold their offices during good behaviour.

That term echoes the provision on good behaviour in the District Court of Western Australia Act. It continues -

> (2) The Governor may remove any stipendiary magistrate from office upon the address of both Houses of Parliament made at any time.

That means that the Parliament makes a decision on what is good behaviour. The reality is that it would never get that far if there were a question about a magistrate. I do not know; I have never been the Chief Justice and never aspired to the position. However, I am sure that if there were issues about a magistrate's behaviour, he would be called in and spoken to by the Chief Justice and that person would have an option. The section continues -

> (3) (a) The Governor may suspend any stipendiary magistrate on any allegation of misbehaviour made by the Attorney General, and in such a case the Attorney General shall report the allegation and suspension to the Chief Justice of Western Australia; and if the magistrate does not, in writing, admit the truth of the allegation made against him, the Chief Justice or a Judge nominated by the Chief Justice shall, in such manner as he shall think fit or as may be prescribed by Rules of Court, inquire into the truth of the allegation, and shall then report to the Governor his opinion thereon and his recommendation in regard to the case.
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> (b) On the recommendation of the Chief Justice or, where a Judge is nominated by the Chief Justice, then on the recommendation of that Judge, the Governor may confirm the suspension upon such terms as to salary since the date of suspension as may be recommended, and, if so recommended as aforesaid, may continue the suspension upon such terms as to future salary as the Governor thinks fit pending consideration of the removal of the magistrate under subsection (2).

I find the next provision quite astonishing. It is insulting to magistrates to retain it. It further states -

> (4) Where the Attorney General is of opinion that a stipendiary magistrate is physically or mentally unfit to discharge efficiently the duties of his office, the Attorney General may relieve him of his duties and constitute a medical board consisting of 3 qualified medical practitioners who, in such manner as the board shall think fit or as may be prescribed, shall inquire whether or not the magistrate is so unfit and shall report thereon to the Attorney General.

I find it astounding that it is in the Act. I could not find that sort of provision even for justices of the peace, although I see it has been snuck in under the Justices of the Peace Bill. It is a similar provision, although not as archaic or antiquated. I am surprised that the Attorney General is retaining the provision as he is always talking about modernising the law and fighting to change things. This is supposed to be making the legislation uniform. This reminds me of the days when there were lunatic asylums. That is what I thought when I read the provision. To think that, for some reason, these judicial officers have to have the Attorney General consider whether they are physically or mentally unfit to efficiently discharge the duties of their office is strange considering no other judicial officer in the court system of Western Australia is subject to the same provision. I remind the House that, under the relevant Act, District Court judges can be removed from office due to their behaviour only by Parliament. The provision continues -

> On the recommendation of the board, the Governor may reinstate the magistrate or may retire him from office. A retirement under this subsection shall be deemed to be a retirement through invalidity or physical or mental incapacity for the purposes of the *Superannuation and Family Benefits Act 1938*. Whilst relieved of his duties under this subsection, the magistrate shall not act as a magistrate or as a justice but shall be entitled to salary in full.

The Act also states that a magistrate shall be deemed to have vacated his office if he becomes bankrupt or insolvent. That provision applies also to other judges, but it is not in the District Court of Western Australia Act. Section 5B states -

(1) A stipendiary magistrate shall retire from office on the day on which he attains the age of 65 years but a stipendiary magistrate who, under the provisions of this Act as in force immediately before the date of the coming into operation of the *Stipendiary Magistrates Act Amendment Act 1979*, was entitled to continue in office until he attains the age of 70 years may, subject to this Act, continue in office until he attains the age of 70 years.

Clause 2(2) of schedule 1 of the Magistrates Court Bill 2003 states -

A person is qualified to be appointed as a magistrate of the Court if he or she -

(a) is or has been a practising barrister of the High Court of Australia, or a legal practitioner;

(b) has had at least 5 years' legal experience; and

(c) is under 65 years of age.

Concerning tenure of office, clause 11 of schedule 1 states -

(1) A person ceases to be a magistrate -

(a) when he or she reaches 65 years of age;

I am encountering difficulty here because under the Justices of the Peace Bill, a JP can retire at 65 years but can also stay until he is 70 or 75 years of age. I have not seen the relevant provision but I am led to believe that a District Court or Supreme Court judge can stay in office until he is 70 years of age. Is there discrimination against magistrates? Magistrates will now be appointed only if they have five years legal experience and District Court judges will need eight years. The way in which magistrates are being treated under this legislation concerning their removal from office is shameful.

Magistrates can be removed from office under this Bill and the Attorney General has power to intervene. It is the view of the Opposition that magistrates should not even be controlled by the current provisions affecting tenure under the Stipendiary Magistrates Act - it should be the same as the District Court of Western Australia Act. Having read the current provisions concerning removal from office to the House, I will read out the proposed suspension and termination provisions in this Bill. Clause 13 of schedule 1 states -

(1) If the Minister is of the opinion that a magistrate is incapable of performing satisfactorily his or her official functions due to physical or mental incapacity, other than due to a temporary illness, he or she may suspend the magistrate from office.

. . .

(3) If the Minister suspends a magistrate the Minister must establish a committee of the Chief Justice of Western Australia, or a Judge nominated by the Chief Justice, and 2 medical practitioners (within the meaning of the *Medical Act 1894*) to -

(a) inquire into and report to the Minister on whether the magistrate is mentally or physically incapable of carrying out satisfactorily the duties of office; and

(b) make recommendations to the Minister about the matter.

If a judge of the District Court or the Supreme Court is physically or mentally unfit, I wonder how it all works there. It is not set out. If it is, I would like the Attorney General to tell me. Currently, if a District Court or Supreme Court judge is mentally or physically unfit, how does it work? I believe it is insulting to put this into a Bill for one class of judicial officer.

The clause continues -

(4) The Minister may direct the magistrate to attend and be examined by and to cooperate with the reasonable requests of the committee.

(5) The magistrate must comply with such a direction.

(6) The committee is to determine the procedure governing its inquiry to the extent it is not prescribed by the regulations.

(7) In accordance with recommendations made under subclause (3) the Governor may -

(a) terminate the suspension; or

(b) terminate the magistrate's appointment.

(8) If the magistrate's appointment is terminated, it is deemed to be a retirement on the ground of total and permanent disablement for the purposes of the *State Superannuation Act 1999*.

That is not all the minister can do. However, I will deal with that. We should bear in mind how many cases are heard by the Court of Petty Sessions and the Local Court. This could involve a minister taking a dislike to a magistrate. I can see all sorts of issues that might arise with this. The appointment of medical practitioners could be biased. I am not trying to cast aspersions on medical practitioners. However, I can see right away that a mechanism is in place for a minister that could involve political interference and interference with judicial independence.

Clause 14 contains a new way in which the minister can suspend a magistrate. It is headed "Suspension from office due to substandard performance". There is no mention of substandard performance of a District Court or Supreme Court judge that I know of. However, the Attorney General will put me right on that. Clause 14 states -

(1) A proper reason for suspending a magistrate from office exists if the magistrate -

(a) has shown incompetence or neglect in performing his or her functions;

I query what is meant by incompetence or neglect. What happens if judges in the District Court or Supreme Court show incompetence or neglect? It continues -

(b) has misbehaved or engaged in any conduct that renders him or her unfit to hold office as a magistrate, whether or not the conduct relates to those functions;

(c) has contravened section 25(3) or 27(3) or clause 13(5);

I must admit to the Attorney General that I could not find those, but I am sure they are in the Bill somewhere. It continues -

(d) is bankrupt -

I would have thought that is obvious -

or has applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of salary for their benefit.

(2) If the Minister alleges that a proper reason exists for suspending a magistrate, the Minister may recommend to the Governor that the magistrate be suspended.

I see a lot of dangers in this. I do not know how this will work. Will the Chief Magistrate ring the AG and say that he has a management problem? We have all seen - it does not matter which organisation we are in - different groups or different factions take a dislike to certain people and use provisions to have someone removed from office. It is open to bias and is certainly open to political interference. The clause continues -

(3) On such a recommendation the Governor may suspend the magistrate from office.

(4) A magistrate who is suspended under subclause (3) is entitled to be remunerated while suspended unless and to the extent that the Governor determines otherwise.

(5) If the Governor suspends a magistrate the Minister must report the allegation and the suspension to the Chief Justice of Western Australia.

It then goes on to deal with what the Chief Justice or a judge nominated by the Chief Justice can do. He can inquire into and report to the minister about the truth of the allegation, unless the magistrate, in writing, admits the allegation. This is quite longwinded when one considers what the other judicial officers in this State have regarding their appointment. Subclause (6)(b) states -

following such an inquiry or admission, is to make recommendations to the Minister about the matter and as to whether and to what extent the magistrate should be remunerated while suspended, both under an order made under subclause (3) and under any order that may be made under subclause (8).

This whole thing sounds a bit like a Star Chamber to me. The clause continues -

(7) The person conducting an inquiry is to determine the procedure governing the inquiry to the extent it is not prescribed by the Supreme Court's rules of court.

(8) In accordance with recommendations made under subclause (6) the Governor may -

(a) terminate the suspension; or

(b) continue any suspension pending consideration under clause 15 of the removal of the magistrate,

and must determine whether and to what extent the magistrate is to be remunerated while suspended, including during any period of suspension ordered under subclause (3).

Clause 15, "Removal from office", states -

A magistrate holds office during good behaviour but the Governor may, upon the address of both Houses of Parliament, terminate a magistrate's appointment.

What is all this about? Is something going on at the Magistrates Court that we do not know about? Is there a problem there with management? I do not know. It seems to me as though provisions are being put into the Magistrates Court Bill for the control and domination of magistrates, who are judicial officers, that do not exist anywhere else for other judicial officers in Western Australia.

The Stipendiary Magistrates' Society of Western Australia has its own view on this. Before I go on to other pieces of research that I have, I will give the Stipendiary Magistrates' Society's view on this issue. A letter of 29 January 2004 to the Attorney General from the President of the Stipendiary Magistrates' Society, Miss Julie Wager, states -

The Stipendiary Magistrates Society on behalf of all magistrates in Western Australia is extremely concerned about significant aspects of the **Magistrates Court Bill (2003)** . . . which, if passed by Parliament, will substantially reduce judicial independence in this State.

She states -

It is not only the case that judicial independence is an acknowledged, fundamental, and long standing feature of all democratic societies. It is also the case that neither the Commonwealth nor a State can legislate in a way that might undermine the Constitutional scheme set up by Ch. 111 of the Commonwealth Constitution. In the case of State courts this means they must be independent and appear to be independent of their own State's legislature and executive government: *Kable v the Director of Public Prosecutions for the State of* NSW (1995-96) 189 CLR 52 . . .

In relation to suspension, she states - I will paraphrase -

. . . it is no answer to say the legislation preserves the independence of a magistrate by providing for inquiry by the Chief Justice . . . This simply confers an administrative function on the Chief Justice, or a nominated judge, namely, **after** suspension to conduct an inquiry and report to the Governor . . .

She states that the provisions in clauses 11 to 15, to which I have referred, substantially extend the grounds for suspension to include government assessment of a magistrate's work performance and issues of management that may arise between the Chief Magistrate and another magistrate. I asked my office to ring the office of the Chief Justice about this issue, but I have not received a response. Therefore, I do not know what the judges of the Supreme Court are thinking about this. If I were them, I would be a bit concerned, because it may be that the Parliament is starting from the bottom and working its way up in how it controls the judiciary. Therefore, I ask the Attorney General whether something is going on. Are there difficulties in the Magistrates Court? Has the Chief Stipendiary Magistrate or Deputy Chief Stipendiary Magistrate experienced problems in this area, and is that why this drafting has come into place? I do not know. The letter continues -

It is inconsistent with the fundamental principal of judicial independence and position of the judiciary as a separate and distinct branch of government in a democratic society that the executive government should have power to impose any sanctions on a magistrate especially sanctions based on the executive government's assessment of whether the performance of a magistrate is "substandard".

I presume that this will be conveyed to the Attorney General through the Chief Stipendiary Magistrate or somebody else from the Magistrates Court, or, depending on the level of integrity of the Attorney General at the time, his or her attention will be drawn to whether he or she should be intervening in the decisions made by a magistrate by suggesting that the magistrate is not conducting himself or herself in an appropriate manner. Miss Wager states -

The Society fully supports the principle that is the Chief Magistrate's function to assign the judicial and incidental duties to the magistrates and, where necessary or convenient for the efficient operation of the courts, to give administrative directions. This is and always has been the case and the Society sees no need for specific legislation to authorise the Chief Magistrate in this regard.

She also states that -

> The Society is unaware of a single example of any magistrate being suspended under section 5 of the current Act let alone being removed from office by Parliament.

I think that the Stipendiary Magistrates' Society of Western Australia wrote to the Attorney General and received a curt response with regard to suggestions to change this. If I am wrong, I will certainly retract that comment during the consideration in detail stage. However, the society states on behalf of all magistrates -

> Under this Bill it is apparent that any suspension is intended to operate as a de facto removal from office. The Bill ensures that a magistrate who is suspended by the Government will "go quietly and resign", or alternatively Parliament will simply endorse the Government decision to terminate regardless of the merits of any case alleged against the magistrate.

It states that nothing in the explanatory memorandum or any previous responses by the Attorney General justifies treating magistrates in Western Australia any differently from judges. The letter further states -

> . . . the circumstances in which the allegations of misbehaviour by a magistrate would render it inappropriate for the magistrate to continue to preside will be rare and can properly be handled by the magistrate voluntarily ceasing to preside in court or, if necessary, the Chief Magistrate exercising the authority vested in him or her to manage the business of the court.

I do not know of a reason for this provision. Is it a way of politically controlling magistrates? Is there some problem in the Magistrates Court about which we do not know? Is a power play going on there? That is no reflection at all on the Chief Stipendiary Magistrate, whom I do not know very well but who has always impressed me as a person with a high level of integrity.

The Law Society of Western Australia has raised some concerns about the Magistrates Court Bill. It states that -

> The Society notes some provisions in the Bill about the performance of magistrates. The Society appreciates the need to ensure efficiency and accountability of magistrates, but would be concerned at any measures which might be seen to interfere with judicial independence. The Society would wish to see issues of management and performance dealt with within the judicial hierarchy, -

As they are in other courts in this State -

> independently of the executive and instead with appropriate powers given to the Chief Stipendiary Magistrate and the Chief Justice.

Of course the Stipendiary Magistrates' Society has a vested interest. However, it feels that it is being discriminated against on several fronts, and the Opposition agrees. Judicial independence is an important principle.

In December 2003, a report was put out by Professor Peter Sallmann titled "The Judicial Conduct and Complaints System in Victoria". The report states -

> Peter Sallmann is Crown Counsel for Victoria. He was the inaugural Executive Director of the Australian Institute of Judicial Administration . . . and before that he taught criminal justice at La Trobe University, and was a full-time Commissioner with the Law Reform Commission of Victoria. Since 1986 he has been a Professorial Associate of the Law Faculty in The University of Melbourne. Before appointment as Crown Counsel, Professor Sallmann was Director of the Civil Justice Review Project in Victoria. He is a member of the Board of Directors of the Judicial College of Victoria . . . and also is a member of the Courts' Strategic Directions Working Group, a committee of senior judicial officers and others, which is currently examining the future directions of the Victorian court system.

Peter Sallmann's report considered the judicial conduct and complaints system in Victoria. I think that this Bill was introduced in December last year and it may be that the Attorney General did not have the benefit of Professor Sallmann's view in this area. However, the provision about which the Opposition is concerned is the importance of judicial independence. In this very professional and lengthy report, the professor talks about the importance of judicial independence and states -

> Mention has already been made of judicial independence. A primary consideration in the conduct of this review has been the independence of the judiciary as a separate and distinct branch of government in a democratic society. Judicial independence has many aspects but the main ones are the independence of each individual judicial officer in hearing and deciding cases and the institutional independence of the judiciary as a whole.

He then talks about misbehaviour, which I will come back to. However, he makes a recommendation on the removal of the office of magistrate and talks about the historical development of Magistrates Courts, how they have grown up and why it is that some of these provisions are still in place as opposed to those for the District and Supreme Courts. He states at page 37 that -

> . . . it can be argued that magistrates as full-time, legally qualified, professional, tenured judicial officers should enjoy the same system and protections as judges . . .
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> Whether the adjudication would be by Parliament, or as at present, by the Supreme Court is another question. There could be a system of removal of magistrates on the same grounds as the judges but by a different mechanism. Again, however, there is a strong argument for having all three tiers of the judiciary covered in the same way. Put another way, what is the justification at this stage in our history for distinguishing between the different levels of the hierarchy for the purpose of removal grounds and procedures?

A lawyer with eight years experience who works in the District Court can be removed only by both Houses of Parliament. However, another lawyer with five years experience would be subject to, in my view, quite humiliating, antiquated and archaic removals. They may as well be wrapped up in a white coat and carted off to an asylum. I cannot understand the reason for this unless there is a problem in the Magistrates Court about which the Attorney General has not told us. Are there power struggles going on there? I cannot fathom why the Attorney General always talks about modernising the system and getting rid of all the paraphernalia and wonderful traditions when he still wants to keep this in place. He will also be open to accusations that he is politicising the magistracy. Some comments have arisen about what misconduct actually is. Professor Sallmann looks at that, at page 21, at which he examines some cases. He writes -

> This aspect was touched on recently by Professor Tony Blackshield, a constitutional law expert, who had taken a strong interest in the Murphy case:
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> > "..... my own position throughout the 'Murphy affair' was that the meaning of 'proved misbehaviour' must rest solely on the Parliament's judgement in any given case, and that its potential meaning thus has no legal limits at all. No doubt this proposition is itself a legal proposition, and the High Court could be asked to say whether this proposition is correct. But, if it did so decide, it could then have nothing further to say.
> >
> > This does not mean that there are no limits on the Parliament's scope for the removal of judges. But it means that the limits are essentially political, not legal, in nature.

He goes on to discuss other areas in which misbehaviour has been looked at. I will not stop at considering Australia in relation to this issue. I refer to a report of a professional paper delivered in June 2003 by J. Clifford Wallace, a senior judge and former chief judge of the United States Ninth Circuit Court of Appeals. The report reads -

> Corruption in the judiciary, to Judge Wallace, is like cancer in the human body. Unattended, it will infect every organ of the state and destroy the rule of law and order in society.
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> . . .
>
> Judicial independence, he notes, is fundamental to the existence of basic human rights. For example, "Judicial independence ensures that powerful individuals must conform to the law; with an independent judiciary, no-one is above the law or below the law."

We are talking about the Opposition's values and beliefs here. We value very highly judicial independence and protecting our judicial officers from any political interference. Nothing has been put forward by the Attorney General to the society to explain why we should keep the antiquated requirement for an examination by three medical practitioners. That must be corrected. The Opposition will be seeking an amendment. We do not think magistrates should be discriminated against on the grounds of age, when justices of the peace can stay on and still keep conducting matters in the court with the approval of the Attorney General, while magistrates cannot. In relation to the removal from office of justices of the peace, any attempt by the Attorney General to say that two justices of the peace equals a magistrate is not on. There are no formal qualifications for justices of the peace, as there used not to be for magistrates. Over the years in Western Australia the benchmark has been increased with every amendment to the legislation. Currently, legal qualifications are required and, under this Bill, five years legal experience also will be necessary. At the moment the Attorney General can, at his discretion, remove a justice of the peace, under part II, section 7 of the Justices Act 1902. Justices of the peace do a wonderful job in this State, but I do not ascribe to any argument that two justices of the peace are equal to one magistrate.

That is the view of the Opposition on the Magistrates Court Bill 2003. We will be seeking amendments to this Bill. If they do not succeed, because of our values and beliefs on judicial independence, discrimination and political interference, we will be opposing this Bill.

MRS C.L. EDWARDES (Kingsley) [3.55 pm]: I will address two issues in relation to this Bill that have been raised by the member for Nedlands: that the retirement age for magistrates should be extended at least to the age of 70, instead of the current age of 65, and the question of the independence of the judiciary. That independence is being removed in two ways. Firstly, it is being removed by the clause dealing with directions to magistrates. Although failure to comply with such directions is not considered an offence, it is seen as a proper reason for suspension and subsequent dismissal. Secondly, their independence is under attack due to the ways in which the new procedures for suspension and dismissal have been put in place.

I will address first the issue of age, which may be the simpler of the arguments. All the work of surveys and research being made available indicates that we are remaining more healthy and living longer.

Mr M. McGowan: Why are you retiring then?

Mrs C.L. EDWARDES: Because I can move on. The member has not been a minister as yet.

A recent conference in Sydney highlighted that we are far more capable of dealing with much more complex issues later in life than would have been possible when the Stipendiary Magistrates Act was put in place in 1957. It is suggested that, in development of public policy for training and the like, Governments should be working on the basis that people in their working lives will have about five different career paths. They will change from full-time to part-time work, to subcontracting and to working for themselves in all different environments and fields. There is no reason for discriminating against magistrates by forcing them to retire at 65. Judges are able to work until the age of 70, so magistrates should be able to work until that age. I would even argue that, given the research available for the future, the determination of 70 as the retiring age should also be under scrutiny. Previously, when magistrates retired at 65, the Attorney General had the power to extend the term of a particular magistrate when a good reason was put forward. I exercised this power on a number of occasions when I held the office of Attorney General. Has that power been retained in the present Bill?

Mr J.A. McGinty: No.

Mrs C.L. EDWARDES: If a magistrate is involved in a case - in the Local Court, for example - that will be ongoing, that may be a particular issue.

Mr J.A. McGinty: There could be a provision for magistrates to stay on and conclude their business. However, with regard to the general extension of age, it is thought that the quality of people applying for these jobs has risen enormously in recent times and that there is no difficulty filling the jobs. Therefore, there is no need to extend the age to which a magistrate may stay in the job. Certainly to linger on and finish a job is one thing, but generally to expand it -

Mrs C.L. EDWARDES: Has the Government kept the power to do that?

Mr J.A. McGinty: I think it has.

Mrs C.L. EDWARDES: I would like the Attorney General to let me know about that when he responds in this debate. I do not disagree with the Attorney General that top-quality people are available to fill the positions. However, the Government is doing away with the experience that magistrates have obtained through all their years of working. There is no reason to discriminate against magistrates by making them retire at the age of 65. It is nonsense to keep that provision in the Act.

Another issue I will refer to is the attack on judicial independence. I have seen the Government's response to the concerns of the Stipendiary Magistrates' Society of Western Australia and the comparison that was made with the current process under the Stipendiary Magistrates Act that has been put forward to date. However, there is an extension, which deals with magistrates' directions. To attack the judicial independence of magistrates is a very serious issue. I will refer the Attorney General to some other authority on that matter.

The Bill makes provision for the Attorney General to dismiss a magistrate because he believes him to be incompetent. That begs the question: what is incompetence? Over the years many attacks have been made on decisions of magistrates, Presidents of the Children's Court and the like. It seems to many people in the community that sometimes sentencing is not being carried out in accordance with the will of the community. Yet often the community does not hear about the facts of the case - they are never fully and properly explained - or the fact that those decisions can be appealed and the fact that the majority of decisions have not been overturned. That makes one think that the questioning of those decisions is political in nature and a response to the attitude of the public rather than the independence of the judiciary. I have been very concerned at some public comments the Attorney General and others have made. I am concerned by the constant attacks on members of the judiciary.

When I was the Attorney General, I looked at whether a judicial commission similar to the one that exists in New South Wales should be set up to hear complaints by members of the community. It would be useful if the

public could make complaints about a magistrate's decision or behaviour, either on or outside the bench, to an independent body. I did quite a bit of work on that issue but, of course, it would have involved establishing another level of bureaucracy and at the time the Government was pooling the various departments of the Department of Justice. I urge the Attorney General to consider the establishment of an independent body as an alternative means of hearing complaints about members of the judiciary.

If a person wrote to the Attorney General and said that he was not happy with a decision of a magistrate, the Attorney General would write back and say that he could not get involved in the independence of the judiciary because the magistrate's decision can be appealed. That is true. The Attorney General cannot have it both ways; he cannot say that he cannot get involved in the decision-making process and also want to become involved in each decision. Does he want to become involved on every occasion? Of course he does not. When people write to the Attorney General and say that they are not happy with a decision of a magistrate or judge, the Attorney General tells them that there is a process of appeal. The Attorney General should not automatically comment on each decision. Potentially, this Bill provides that the Attorney General can comment on each decision. For example, he could comment on corruption in the Police Service, which is a current matter. It was a topical matter several years ago when the member for Innaloo represented police officers before the courts in his previous life before entering Parliament. What if that occurred in today's climate and a magistrate was convinced by the eloquence of the member for Innaloo, and a police officer was found not guilty of the charges made against him at a time when the Government of the day was saying that it would clamp down on corruption in the Police Service? Instead of blaming the Anti-Corruption Commission, as happened back then, today a complaint would be made against the magistrate who made the decision.

What is the definition of "incompetence"? Would a political decision be made that a magistrate was incompetent after one, two or three police officers had been found not guilty? Generally, police officers around the world get off the charges that have been laid against them. This Government or any Government - I am not talking about a specific Government - could be put under public pressure to clamp down on police corruption and a magistrate could decide to find the police officers not guilty. What would the Attorney General do under those circumstances? He could say that the magistrate must be incompetent, yet the magistrate who had been listening to the member for Innaloo could have been convinced by the member's eloquence. If the police officers were declared free to go, would the magistrate be considered incompetent, and would he be suspended?

A process could be put in place whereby the Chief Magistrate or the Chief Justice was declared mentally unwell by three doctors. That would be fine because that person would be dealt with. However, that type of incident could affect the judicial independence of the other magistrates. How would they determine how to make a decision on a case before them? Would they consider the way in which Justice Joe Bloggs had been suspended from the Magistrates Court because he had not been convicting police officers? Would they have to rethink how they looked at cases? The Attorney General may say that any conviction from then on was justified and that the magistrate made an independent decision. Did he? How would the Attorney General know that? How would the poor defendant ever know that the decision made against him was fair and independent and that the magistrate was not influenced by the suspension of another magistrate? The Attorney General will never be able to sell that. The administration of justice in this State will be severely impacted upon if the Attorney General allows a magistrate to be suspended for any reason that will, in all likelihood, have that type of impact.

During the late 1980s Palos Verdes was a case involving the then Minister for the Environment, Bob Pearce, who took action against a company for bulldozing a road. He said that his decision was based on grounds of pollution. I am sure that the mere fact that the company was proceeding with a defamation action against the minister had no influence at all on his action. I am sure the fact that the minister and the company had been publicly at loggerheads also had no influence. However, that was the public perception. That matter was heard before the Supreme Court, and the three judges who determined the case found against the Government of the day. The then Minister for the Environment publicly accused the judiciary of incompetence for not being able to read the legislation and determine what had been said in Parliament. Hang on, there is a statutory Interpretation Act! His comments at that time were purely politically motivated, because a big environmental protection issue was involved and the whole question of pollution was under scrutiny. Therefore, the attack by the then Minister for the Environment on the judiciary's independence and integrity was politically motivated. If that is taken away from the judges, it is brought down to the Magistrates Court. What if something similar come up under the Environmental Protection Act and involved a matter that was being determined by a magistrate, and what if a similar Minister for the Environment was involved? It could also involve another minister of the day. For instance, it might involve a fisheries matter. The Government of the day might be totally and absolutely supportive of commercial fishing because it adds value to the State's economy. Therefore, if recreational fishermen got in the way of the commercial fishermen, action would be taken against them. A magistrate in Geraldton might throw out that case and might keep on throwing out similar cases. The Government is often a player in the Magistrates Courts. What the Attorney General is opening himself up to as a member of the

Executive Government is creating the perception that the Executive Government is being unfair. The whole rule of law will be overturned by the perception of the Government being a player, and whether it will determine that magistrates are incompetent. The Attorney General regards himself as having great foresight. The legislation that has come forward is based on the 1965 Act. Therefore, by adding to that Act by including incompetence and provisions relating to magistrates not obeying the directions of the Chief Magistrate, the Government is attacking judicial independence far more than the Stipendiary Magistrates Act ever did. The Attorney General has told the stipendiary magistrates that no other Attorney General has felt the need to do that. There is no reason to say that that will not happen in the future.

[Leave granted for the member's time to be extended.]

Mrs C.L. EDWARDES: The level of attack on judicial independence has increased as the decades have gone by. It has been constantly under attack. Surely as a Parliament we must start to look at what we value most. Do we value the independence of the judiciary? I turn to some other authorities, so that I do not make my comments just as a member of this place or as a former Attorney General. There is real strength in some of the arguments that were put forward in the past. We must make sure that we protect magistrates in the future. I have no qualms in saying that I do not think that the Attorney General is ever likely to attack a magistrate as being incompetent for deciding against one of his ministers or him. However, can he look at me and honestly say that no Attorney General in the future is likely to do that? He does not know who future Attorneys General will be.

Mr J.A. McGinty: You can be fairly sure that the answer to that is no.

Mrs C.L. EDWARDES: No; the Attorney General cannot guarantee it. Therefore, the legislation before this Parliament should guarantee the independence of the judiciary, and for very good reasons, which I have broadly outlined. I refer to an article written by Sir Anthony Mason in 1990 and headed "Judicial Independence and the Separation of Powers - Some Problems Old and New". The article refers to remarks by Mr Justice Hope at his retirement in New South Wales. Sir Anthony Mason repeats Mr Justice Hope's concern about the erosion of community understanding about judicial independence in Australia in recent years. Perhaps there is a lack of understanding in this Parliament about the erosion of judicial independence if we are to pass this legislation. The article states -

> Challenges to, indeed attacks upon, the integrity, and at times the independence, of judges have increased significantly in the last ten years. Judges and the judicial system are, and indeed must be, sufficiently robust to be subjected to informed criticism. But the attrition of continual uninformed and unjustified criticism is not merely an irritant; it could, if not kept in check, cause great, even irreparable harm to the system itself. By tradition it is not answered. Perhaps a system should be devised by which, in some cases at least, the public could be informed of the facts.

That is a good reason for the judicial commission. It is also noted in this article that the New South Wales branch of the Australian Labor Party had proposed back in 1989 that judges should be elected. We would need to change our community values in Australia somewhat to go down that path.

I also mentioned the rule of law and that what is being proposed is an attack on the rule of law. I refer to a further article headed "The Meaning of the Rule of Law", which states -

> It implies freedom from interference by the executive, whether by way of threats or by way of blandishments such as the offering of the prospect of an exulted career.

I note that there has been some concern by the Stipendiary Magistrates' Society of Western Australia about someone being able to say to a magistrate that he can have an administrative job outside the judicial duties he is doing. That could be considered to be a blandishment and the prospect of an alternative, if not an exalted, career. The article quotes M.J.C. Vile on the importance of judicial independence -

> . . . the independence of the judge . . . should not be subject to pressure that would cause him to vary the meaning of the rules to suit the views of the persons affected by them, and that in ascertaining 'facts' he will not be influenced by considerations of expediency.

That has some value today. The Australian Bar Association was quite concerned about Mr Justice Staples and the reforming of the Industrial Relations Commission. Mr Justice Staples was subsequently not reappointed. The association was rather concerned that the legal profession had not done sufficient to secure the independence of the judiciary or to guard against that. The association produced a paper at that time, which has considerable relevance for the debate on the Bill before us today. The paper states -

> An independent judiciary is a keystone in the democratic arch. That keystone shows signs of stress. If it crumbles, democracy falls with it.

The paper also referred to the conditions for independence and in being able to maintain independence. It states -

> . . . judges must be appointed to office until a specified retirement age appropriate for the end of a career . . . they must be protected against removal except on the address of both Houses of Parliament -

Obviously, if a unicameral system were in place, different rules would apply. Although the paper referred to the Industrial Relations Commission, it also went far wider than that by dealing with federal and state courts and/or quasi-judicial commissions. One of the important points I attempted to make is outlined in the paper -

> We are here concerned with the public dimension of the wrong done by those who removed them. By that action, the ability of courts and tribunals to act, and be seen to act, impartially, is diminished.

For example, if a magistrate is suspended, there will be consequences for the decision making of the rest of that court.

The paper continues -

> The colleagues of those dismissed cannot but be mindful of what has happened. The vast majority of those remaining will have that moral fortitude which will not allow the relevant events to affect their judgment. There will be some who are not so robust. Even if all remain unaffected, a public perception of partiality will be encouraged. The losing litigant is likely to think that he or she has lost because the judge was influenced by fear of the consequences if judgment went the other way.

That is a critical element that must be considered in this legislation. In relation to a direction from the Chief Magistrate, the paper continues -

> An independent judiciary is a judiciary in which each individual judge is free from improper and inappropriate pressures.

Bear in mind that it is not an offence if the direction from the Chief Magistrate is not complied with; the Bill goes to some pains to state that it is not an offence. However, it can be regarded as a proper reason for dismissal. Therefore, an improper pressure would be put onto that magistrate to comply with a direction from the Chief Magistrate. The paper continues -

> It is incompatible with an independent judiciary that one judge -

One can read magistrate for judge -

> should be subject to the control of another in the execution of the duties of his or her office. This danger is reduced if the administration of the courts is the responsibility of the judges as a whole (or a representative committee of them) . . .

The responsibility to exercise that direction should therefore be taken away from one individual and given to the administration of the court as a whole, rather than to the head of the court or an unrepresentative committee. Therefore, back in 1990 - which I believe is the date of the paper - the Australian Bar Association identified clearly that a concern it had at that time was that a judge could be subject to direction from another member of the judiciary. More than that, the Attorney General in this Bill has provided for not only a direction from the Chief Magistrate to a magistrate but also a proper reason to dismiss a magistrate. It is improper, and I would say inappropriate, to put pressure on a magistrate to comply with the direction of the Chief Magistrate. I regard that absolutely and totally as an attack on the independence of the judiciary.

I urge the Attorney General to think carefully about what this Bill will do. The reasons for suspension and subsequent dismissal have been extended widely to include incompetence and the way in which incompetence will be determined. It will put huge pressure on the Government's public policy. A suspension may have an impact on the rest of the judiciary and litigants may not regard a decision of the court as independent. The Bill also includes a provision for a magistrate to be subject to the direction of the Chief Magistrate. I am not attacking individuals here; however, there have been cases in Victoria in which directions have been given to magistrates that we would regard as inappropriate. Such inappropriate directions would be of concern to a magistrate because they could lead to removal of the magistrate if he or she did not comply with the Chief Magistrate's direction. That is a huge extension of the provisions that should be properly applied to magistrates.

I again urge the Attorney General to consider extending the age of retirement to 70 years. There is no reason whatsoever and it is discriminatory to require a magistrate to retire at the age of 65. I am surprised that the Attorney General has defended his decision to retain an age for retirement in the current age and environment.

MR P.G. PENDAL (South Perth) [4.25 pm]: The Bill before us is an important one, if for no other reason than the Magistrates Court in Western Australia deals with much of the legal affairs that trouble the ordinary, average Western Australian. To that extent, the Bill is a good one and I support it.

Like some other members, I have been appraised of the concerns of a number of people, in particular the Stipendiary Magistrates' Society of Western Australia, which raises a number of key issues, one of which I intend to devote a couple of minutes to in my otherwise brief support of the Bill. I am aware, for example, that stipendiary magistrates have a concern with, I think, clause 6(3) of the Bill, in that they can be offered or induced to take a non-judicial appointment in such a way that they believe would undermine the independence of the magistracy. That is a concern that I share.

I have circulated an amendment to that extent. My recollection is that under the provisions of clause 6(3) a magistrate can receive an appointment of that kind that authorises the Executive Government to do certain things through the Governor but in such a way that the magistrate in question has no capacity to decline the appointment. Although I have circulated an amendment, in the meantime I have also been shown a letter sent by the Attorney General to another member of the House in which the Attorney General on one hand expressed surprise at the concerns raised but, on the other hand, also expressed the view that the concern will be met. I understand that an amendment will be circulated in the Attorney General's name. My amendment, which is now on the Notice Paper, will be to clause 6, page 4, line 15, to insert after the word "approval" the words "and the agreement of the magistrate in question".

I was a little surprised in the last few minutes to read the response of the Attorney General to the society because the Attorney General affects to not understand how this issue of the independence of magistrates might be undermined unless there is an amendment. Nonetheless, to his credit, I understand he is prepared to go along with an amendment that, importantly, gives the magistrate in question a chance to decline an appointment.

Mr J.A. McGinty: Without wishing to cut you short -

Mr P.G. PENDAL: Not at all.

Mr J.A. McGinty: I am proposing that a magistrate should not be able to decline to undertake particular judicial functions. However, if it is an appointment to a position that is not judicial in nature or an appointment in which the powers to be exercised are not judicial, a magistrate should have the power to decline, and it will require a magistrate's consent in that case. I will give you an example. For instance, if a magistrate attended a prison as a visiting justice - which is a function of a magistrate - he should not be able to say that he did not want to do that work. It is part of the judicial functions to be exercised by a magistrate. I am happy to draw the line between judicial and non-judicial functions and a magistrate should be able to decline work that does not involve any judicial functions.

Mr P.G. PENDAL: That partly clarifies it. Let me go down a parallel path, although we are almost at the stage of a consideration in detail debate. I am not sure that the Attorney General's proposed amendment will give the requested protection to a magistrate who is offered, for example, the role of a royal commissioner. I am not sure whether the amendment will cover that, but my amendment certainly would. Being a non-judicial appointment, not only would the approval of the Governor be required - I am happy with that - but also my amendment means that the agreement of the magistrate in question would be required. If the magistrate does not want to do that, the magistrate should and must have the right to say so. I will give an example. We are used to seeing the appointment of judges to royal commissions. In more recent years we have been inclined to import judges. The judge for the Easton royal commission was brought from the eastern States. The Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers was presided over by a retired judge. In those cases, we cannot claim there is any sense of the judicial independence of those officers being undermined. One is a retired judge - Justice Kennedy - and the other came from outside the jurisdiction. Nonetheless, magistrate Sue Gordon was appointed to a quasi-royal commission. I can well imagine, without developing too much of a conspiracy theory, a Government in a difficult position appointing a magistrate who has been handing down decisions that caused the Government some grief to a royal commission or a commission of inquiry in order to sideline the magistrate from his or her normal duties.

Mr J.A. McGinty: The Gordon inquiry and the police royal commission were not judicial in nature. A magistrate would have the power to decline such an appointment. Under the amendment I am proposing, a magistrate's consent would be required to be appointed. I am not talking about the way the Bill is drafted at present.

Mr P.G. PENDAL: The concern is that appointment to a non-judicial role, such as a royal commission or commission of inquiry, may well be a mechanism for diverting a magistrate. I am not suggesting that the Attorney General would do that. I can well imagine circumstances arising in which a Government under pressure, and an Attorney General who does not have the same view of the job as the minister, sidelines a magistrate in order to silence him. Indeed, the Government might take advantage of the knowledge that a magistrate has certain views on a subject. The Attorney General of the day may say, "Aha; this would be a good person to appoint as a royal commissioner or commissioner of inquiry." I am pleased to hear that the Attorney

General has responded in the way he has. I am still puzzled by the letter he sent to the Stipendiary Magistrates' Society of Western Australia in which he said he could not understand any circumstances under which that would occur. Maybe I am just old and grumpy and crotchety, but I can.

Mr J.A. McGinty: I would agree with that!

Mr P.G. PENDAL: Would you? As I have said to the Attorney General since he has been in this role, I have seen him sponsor all the pro Tory legislation imaginable. It has been left to old Tories like me to use our Rumpolean flair. I refer to legislation such as the confiscation of assets, which we dealt with under the previous Government and which has been taken advantage of by this Attorney General and the Director of Public Prosecutions. I am not suggesting that I have lost my faith in members opposite; I am just becoming a little more suspicious and a tiny bit paranoid the older I get. I do not have long to go in this place and I do not want to be part of a process of entrenching in law the sorts of things that will be entrenched if we pass clause 6(3) in its current form. I am not sure under the scheme of things whether my amendment will be dealt with first or whether the Attorney General's amendment will be. In any event, I want to make it clear that a magistrate and, I presume, a judge of the District Court or Supreme Court, should have the right to decline an appointment, even if it is not a statutory right. One imagines that if a justice of the Supreme Court were approached, he could tell David Malcolm on the quiet that he does not want to do it because he believes it is a rort or highly political or that he holds certain views and he would find an appointment very difficult because of a speech he made to the Law Society of WA. Under those conditions, a magistrate might find it difficult to do the State a service. I presume that, at an unofficial level, a judge of the Supreme Court or District Court has the capacity to decline an appointment. We are now endeavouring to treat magistrates in the same way. At least, that is what I am doing. If a person finds himself or herself on the wrong side of the law in Western Australia - or in most jurisdictions in Australia - the chances are that he or she will be confronted by a magistrate, not by a judge of the District Court or a higher court. The tendency that some people have to regard magistrates as being of lesser importance is, I think, a very serious error. The terminology we use in reference to the lower courts is terminology that we should just banish from our lexicon. Although they are courts of a different kind, they are courts that most Western Australians who find themselves in trouble will be before. I know that magistrate have other concerns. I have had the chance to read what they have had to say to the Attorney General. In no way do I try to make a judgment about that. In fact, most of those things make sense to a layman such as me. Of all the things the magistrates state, they make the point that they must have the right to decline an appointment for whatever reason. The reason might be that a magistrate has previously expressed views publicly or that the Government of the day is deliberately seeking to play on previously expressed attitudes of a magistrate. We are dealing with a very important piece of legislation. In the main, I think that the Government has got it right. However, it has not got it right with clause 6(3). I am pleased we will find some form of amendment. I hope it is the form that I presented to the House. Other than that, I support this Bill.

DR J.M. WOOLLARD (Alfred Cove) [4.39 pm]: As the Attorney General knows, when he has presented to this House other Bills that have emanated from recommendations of the WA Law Reform Commission, I have generally endorsed those Bills and questioned him on why he was implementing some of the Law Reform Commission's recommendations and not others. The Attorney General said in his second reading speech on the Magistrates Court Bill that "the Bills implement 221 recommendations of the WA Law Reform Commission". I wonder whether the Attorney General has a document that identifies which recommendation goes with each clause. I have a copy of the document to which the Attorney General referred in the second reading speech; that is, the report recommendations of the WA Law Reform Commission. However, that does not clearly identify where those recommendations came from, and I would like to compare the recommendations.

I have a couple of concerns with the Bill. One of them is about the constitution of the court. My concern is about the two or more justices of the peace. Clause 7(6)(b) states -

> the decision of the Court is the decision of the majority of them; but if they are equally divided, the case is to be adjourned to a place and date decided by them or, if they cannot agree, by the one who was first appointed as a JP;

I believe - I stand to be corrected - that the current procedure is that if there are two JPs and the decision is not unanimous, the case goes to a magistrate. I do not know whether the Attorney General is able to answer that.

Mr J.A. McGinty: Just keep going. I will respond later.

Dr J.M. WOOLLARD: All right. The concern that I have is that if there are currently two JPs and they are not united in their decision, the case will go to someone who possibly has more knowledge and skills. I have done the JP course. Why have two JPs if the senior JP will make the decisions? If the senior JP is assertive, the more

junior JP may go home feeling very disappointed about his participation in the process, and we could lose some good people who have applied to be JPs and have done the appropriate courses.

Clause 7 deals with the constitution of the court. Subclause (2) states -

> In circumstances prescribed by the regulations or by another written law, the Court may be constituted by -
>
> (a) 2 or more JPs; or
>
> (b) one JP.

I was under the impression that there would be one JP in regional areas, rather than in the metropolitan area. I wonder whether there will still be one JP for regional sittings or whether that will also be the case within the metropolitan area.

Mr J.A. McGinty: I will answer briefly. Section 26 of the current Justices Act states -

> One justice out of sessions may receive a complaint, and grant a summons or warrant thereon, and may issue his summons . . .

The power to do the preliminaries rests with one JP; the power to hear either a simple or even an indictable offence - although I doubt that that would occur much these days - is exercisable by two JPs. Therefore, the preliminaries are heard by one, and the trial is heard by two.

Dr J.M. WOOLLARD: Why is a trial heard by two JPs?

Mr J.A. McGinty: Because section 29 of the Justices Act states that it must be. A single justice of the peace cannot hear a complaint.

Dr J.M. WOOLLARD: Is not the procedure at the moment that if they are not united, it goes to a higher authority; and is that not being taken away in this Bill?

Mr J.A. McGinty: Section 30 of the Justices Act describes the procedure for what is to be done and what happens if they do not agree.

Dr J.M. WOOLLARD: I will have a copy of that Act in front of me before we move into consideration in detail so that I can check on that section, because I was under the impression that if they were in disagreement, no decision would be made, and the case would be returned to a higher court.

Mr J.A. McGinty: Not necessarily, no.

Dr J.M. WOOLLARD: I know that other concerns have been raised today, but the one in which I am particularly interested is the question of age. The federal Government has said that people will stay at work. This Bill states that once a person reaches 65 years of age, he is out the door. I believe that an age limit for JPs was to come in because some JPs do not put in the same amount of time as do other JPs. It would be sad to set the age limit at 65. If we set the age limit at 65 in this Parliament, several members in both this House and the other House would go home tomorrow. I believe those members play an important role. They bring background knowledge and experience to this Parliament, just as magistrates bring background knowledge and experience to their duties. I wonder whether it is because of magistrates' participation. If this Bill is not passed in the next few days, and if it goes to a committee to be reviewed, I wonder whether the age provision could be looked at in terms of participation, rather than a person being out the door when he reaches a certain age.

The other concern that I have with the Bill is about the cost for the court. The Attorney General said in his second reading speech on the Magistrates Court (Civil Proceedings) Bill 2003 -

> Under the Bill claimants with a claim of less than $7 500, who elect the general procedure, will have to pay their own solicitor's costs, even if they are successful.

Will this advantage those people who can afford to pay court costs and disadvantage those people who need assistance with the payment of their court costs and with representation? Will it disadvantage people from other backgrounds and other cultures - different ethnic groups? I am concerned that it appears that it will be across the board. I wonder whether the Attorney General has thought about whether some exemptions will be able to be applied if people are able to put forward a good case for why they need the support of a solicitor.

Mr J.A. McGinty: They can have a lawyer. An award of costs will not be made if it is under the $7 500 mark. However, there is the power to have a lawyer present if it is in the general division or the general jurisdiction.

Dr J.M. WOOLLARD: So they will still get that legal support if they need it?

Mr J.A. McGinty: If they go through the general procedure, they can be represented by a lawyer. That lawyer will not be able to seek an award of cost if the total amount is less than $7 500. That was negotiated through the Law Society.

Dr J.M. WOOLLARD: Thank you, minister. I misunderstood that and thought that the community would miss out.

Mr J.A. McGinty: It's the lawyers.

Dr J.M. WOOLLARD: I read the table of recommendations in the Western Australian Law Reform Commission's report. With regard to the Magistrates Court Bill, the summary recommendations state that the merged court should have the following divisions: an offences division, which comes under the Magistrates Court; a civil division and a small debts division, both of which come under the civil procedure court; an administrative law division; and a family law division. I can see where aspects of family law come under the Magistrates Court Bill, but where does the administrative law division come in under this legislation and why was the family law division not clearly identified within these Bills? I would appreciate an answer to those questions. I would also like to know how the recommendations fit within the various Bills that the Attorney General is presenting to Parliament.

MR J.A. McGINTY (Fremantle - Attorney General) [4.54 pm]: I thank members opposite for their support for this very important package of legislation. As has been observed, this package of legislation implements 221 recommendations made by the Law Reform Commission of Western Australia in respect of the Magistrates Courts and their jurisdiction. Therefore, this legislation before the House is an extremely important piece of legislation. It will significantly rewrite the law as it is practised in the lower courts in Western Australia. I take this opportunity to touch on a few of issues that have been raised by members opposite.

First, this legislation makes no change to the retirement age for magistrates, which is, by law, currently 65 years of age. I accept that judges of the Supreme Court and District Court have a statutory retirement age of 70 and that members of the community are, generally speaking, protected by age discrimination legislation, and that this legislation is discriminatory. I also observe that the initial decision to have the age set at 65 years was most probably a pragmatic decision. However, it is also a pragmatic decision to retain the existing provision. The pressures that exist on magistrates in the day-to-day discharge of their duties is such that, apart from an in principle, non-discriminatory provision, I do not think anyone would thank us for extending the age of retirement, notwithstanding the current debate that is occurring at a national level.

I refer to a letter of response - it has been referred to by other speakers - to Julie Wager, SM, President of the Stipendiary Magistrates' Society of Western Australia, about the issues raised by this Bill and how they affect magistrates. In doing so, I table a copy of the letter from the Attorney General to the President of the Stipendiary Magistrates' Society because it is germane to the debate that will proceed in detail on this matter.

[See paper No 2165.]

Ms S.E. Walker: Did the Law Reform Commission recommend all those new provisions about suspension?

Mr J.A. McGINTY: I do not think it did.

Ms S.E. Walker: So that's your initiative?

Mr J.A. McGINTY: Most of them are a continuation of the current law and practice -

Ms S.E. Walker: Hang on, did it recommend them or not? You don't think it did.

Mr J.A. McGINTY: I said no to the member's question.

Page 4 of the letter that I have just tabled under the heading of "Retirement Age - Schedule 1 - provisions about magistrates - clause 11" states -

> I have considered your submissions concerning clause 11, Schedule 1 relating to the retiring age for Magistrates. While I can see some force in your submissions, I am not persuaded that there should be any change to the statutory retiring age. As a general rule, Magistrates are appointed at a much younger age than Judges and I am firmly of the view that there is a limit to how long any individual can be expected to bear the burden of judicial office, particularly in a jurisdiction as taxing as that in the Magistrates Court.

It is an unashamedly pragmatic response and I acknowledge the in principle arguments. However, the retention of the existing provisions is appropriate.

The second matter relates to the question of the medical panel, which is continued under this legislation. If one were to look back to the Stipendiary Magistrates Act, one would see that in existing section 5(4) a provision is written in substantially the same terms and states -

> Where the Attorney General is of opinion that a stipendiary magistrate is physically or mentally unfit to discharge efficiently the duties of his office, the Attorney General may relieve him of his duties and constitute a medical board consisting of 3 qualified medical practitioners who, in such manner as the board shall think fit or as may be prescribed, shall inquire whether or not the magistrate is so unfit and shall report thereon to the Attorney General. On the recommendation of the board, the Governor may reinstate the magistrate or may retire him from office. A retirement under this subsection shall be deemed to be a retirement through invalidity or physical or mental incapacity for the purposes of the *Superannuation and Family Benefits Act 1938*.

The section continues beyond that. However, that is a provision for the benefit of magistrates and that is why it appears in the current legislation. Magistrates do not have the same pension scheme as that of other judicial officers. Magistrates are members of the general government superannuation scheme. The way in which magistrates can retire early and get their full benefits is by being declared medically unfit to continue to do the job, in the same way -

Mrs C.L. Edwardes: But under the superannuation scheme - I am glad you reminded me that they were under the same scheme - that is provided for within the scheme. You do not need to provide for it in the legislation.

Mr J.A. McGINTY: I do not know. It is provided under the current legislation for magistrates and it is continued in the same form. I presume there is a reason for it being here quite independently of the existence of the scheme. The member would know from her time as Attorney General that prison officers often come forward and say that they are unfit to continue working in prisons. They are then dealt with by a medical panel that may determine they should be retired early and get their full superannuation benefits. The same provision exists to enable magistrate to benefit from that arrangement -

Mrs C.L. Edwardes: I doubt that is needed it anymore.

Mr J.A. McGINTY: Perhaps not. I do not know the answer to that question but in the last six to nine months a magistrate took advantage of this exact provision. It was dealt with by a medical panel and he was retired on the basis of full superannuation benefits. It may or may not be necessary but it is there for the benefit of the magistrates. The provision enabling an early retirement on the basis of medical incapacity has been used during my time as Attorney General, and, I have no doubt, during the member's time as Attorney General. That is why it has not been changed in this legislation. There is no comparable clause dealing with Supreme Court or District Court judges because they are not members of the government superannuation scheme; therefore, the same issues do not arise.

Generally speaking, with regard to tenure of office - I think this question was posed by the member for Kingsley - under the Magistrates Court Bill, this is the ability for a magistrate to stay on until he has finished writing judgments, or dealing with matters before the court. In schedule 1 to the Bill clause 11(2) reads -

> A magistrate who ceases to be a magistrate under subclause (1)(a) -

That is, in the normal course of events, by reaching age 65 or whatever -

> or (b) is to finish dealing with any case that is then pending before him or her and for that purpose the magistrate's appointment is to be taken to be extended until he or she has done so.

This does not enable a general power to keep a magistrate on beyond age 65, because he is considered to be a good bloke. I gave the reason for that in response to the question from the member for Kingsley. A number of very good people want to take on these jobs. There is a capacity to continue someone's appointment beyond age 65 to complete a particular case.

I will now deal with the general issue of judicial independence. I refer to a number of the paragraphs contained in the letter I just tabled to the president of the Stipendiary Magistrates' Society. On page 1 of that letter, under the heading "Tenure of Office", I wrote to Magistrate Wager in the following terms -

> I readily accept that the principle of judicial independence applies with equal force to Magistrates as with other members of the judiciary. However, I do not believe the Bill in its present form poses any significant threat to the judicial independence of magistrates. Except in one respect, the provisions of the *Stipendiary Magistrates Act 1965* relating to the tenure of Magistrates and the circumstances under which suspension may occur do not differ significantly from those contained in the Bill. I think it can safely be said that those provisions have not in any way adversely affected judicial independence in the Magistracy in all the years they have been in force.

I will deal with that one aspect in a moment, but it basically deals with a question of competence.

Mrs C.L. Edwardes: It is not just a matter of incompetence; it is also an issue of a magistrate defying the direction of the Chief Magistrate being regarded as a proper reason for dismissal. That is also an extension.

Mr J.A. McGINTY: I will deal with that in a moment. We have here a clash between two concepts. The magistracy should not be immune from accountability. It is quite clear, that, while there should be no power to direct on judicial matters, the content of any judgments or anything of that nature, the directions that are able to be made are matters of an administrative nature. Practice directions apply at the moment, and I can see no reason the same rules should not be applicable throughout the judiciary.

Mrs C.L. Edwardes: Would you apply the same rules to the Supreme Court and the District Court? Would you make not complying with the direction of a chief judge or the Chief Justice, a proper reason for subsequent dismissal?

Mr J.A. McGINTY: That could be the case. If someone continually refused to come to work on time, or to comply with administrative directions to the extent that the whole operation of the court was disrupted, my view is that it should be so. Accountability requires exactly that.

Mrs C.L. Edwardes: Such as?

Mr J.A. McGINTY: I refer the member to the relevant provisions. Clause 27(1) reads -

> The Chief Magistrate may issue written directions (to be called administrative directions) about administrative matters and procedures for the effective and efficient operation of the Court.

One of the factors that has influenced me in recommending people for judicial appointment in recent times has been the capacity for that person to get on with the job. Quite apart from legal excellence, the efficiency with which a person can get on with the job and his or her ability to work with and develop procedures to deliver justice expeditiously in this State, have been factors weighing heavily on my mind. In the Supreme Court, particularly in the civil jurisdiction, waiting times are unacceptably long. Interestingly, there is no waiting time for civil matters to be heard in the District Court these days, which is no doubt partly due to the limited jurisdiction of that court. The District Court has a well-deserved reputation - particularly developed under Kevin Hammond when he was the chief judge and I am sure it will continue under Chief Judge Antoinette Kennedy - for getting on with the job and being ruthlessly efficient in the way in which it courteously dispenses justice in this State. I want to see that ethos of efficiency carried on in the courts. I see this as a mechanism to assist the head of a jurisdiction to achieve that, not in the area of judicial matters, but in administrative matters.

Ms S.E. Walker: What does the Chief Stipendiary Magistrate think of that?

Mr J.A. McGINTY: I do not wish to paraphrase in this Chamber the words of the Chief Stipendiary Magistrate.

Ms S.E. Walker: Have you consulted him and does he agree with this?

Mr J.A. McGINTY: Absolutely, we have consulted to death on this piece of legislation.

Ms S.E. Walker: The Stipendiary Magistrates' Society has written and said that all magistrates disagree with it.

Mr J.A. McGINTY: I shall later read to the member, if the question arises, from the advice I have received from the Chief Stipendiary Magistrate on this issue. This legislation will enhance the efficient operation of the court. That is its stated intent. Therefore, I do not particularly have a problem with that issue.

Ms S.E. Walker: If Judge Antoinette Kennedy cannot get on with the job like Judge Kevin Hammond, are you saying that you will assist her by putting in the same sorts of provisions as you are putting in place to assist Chief Stipendiary Magistrate Stephen Heath, who cannot seem to get on with the job like Judge Hammond. Is that what you are saying?

Mr J.A. McGINTY: Chief Stipendiary Magistrate Heath has done a remarkably good job, and is a very efficient person.

Ms S.E. Walker: Why, then, are you drafting this stuff up?

Mr J.A. McGINTY: That is a rhetorical question. I have already explained the reasons for drafting this legislation. I will continue on through the letter. I want to highlight here the three amendments the Government is proposing to move. They will not satisfy all of the concerns that have been raised by the Stipendiary Magistrates' Society, but will deal with some areas where I thought there was some merit in the proposals the society was putting forward. On page 2, in the third paragraph, the letter reads -

> I could not envisage a situation where an Attorney General would initiate the suspension process other than at the request of or after consultation with the Chief Magistrate and then only as a last resort. I am

> therefore prepared to put forward an amendment to Clause 14(2), Schedule 1 of the Bill to provide that the Minister will only act on the request of or after consultation with the Chief Magistrate. This, I believe, should allay any concerns you may have that the Minister might act arbitrarily and ensure that every attempt has been made by the Chief Magistrate to resolve the matter internally beforehand. I cannot see how there can be any objection to the Attorney General being the initiator of the process in such circumstances, particularly when it is appreciated that in terms of power it is only the Executive Government that could take such action.
>
> Contrary to the views you have articulated, I see the current suspension procedures and those provided for in Clause 14 as in fact providing an important safeguard against unwarranted suspension or removal from office, as opposed to a threat to judicial independence. They provide a process whereby indefinite suspension or removal can only take place for good cause after a judicial inquiry.
>
> It has always been open to the Executive to move both Houses of Parliament for the removal of a judicial officer from office on the ground of misbehaviour, however, as a general rule this has only been done following the findings or recommendations of a board of inquiry set up to inquire into the matter. What Clause 14 does is to guarantee that such an inquiry is held before any such drastic measure is taken.
>
> Neglect, misbehaviour, engaging in conduct rendering one unfit to hold office, failure or refusal to obey a lawful direction of the Chief Magistrate and insolvency have always been considered proper grounds upon which the Attorney General might act in initiating the suspension process.

For the benefit of the member for Kingsley, that provision deals with the concern that failure to obey a lawful direction of the Chief Magistrate is a new ground for disciplinary action to be taken. My advice is that it is not. I repeat -

> Neglect, misbehaviour, engaging in conduct rendering one unfit to hold office, failure or refusal to obey a lawful direction of the Chief Magistrate and insolvency have always been considered proper grounds upon which the Attorney General might act in initiating the suspension process.

The letter continues -

> What clause 14(1) of Schedule 1 of the Bill does is to spell this out so as to avoid any doubt and hence, argument.
>
> The one ground that may not in the past have been seen as sufficient to ground removal or suspension is incompetence. However, I believe it is now well accepted that incompetence should be regarded as a ground for removal or suspension from judicial office, provided that issue is determined objectively and fairly in the context of a judicial inquiry.
>
> Whether, in a particular case, the incompetence or other ground alleged will be of sufficient gravity to warrant a continuation of a suspension or ultimately removal from office will be for the Chief Justice or the Judge appointed to inquire into the matter to determine. The Governor may only act in accordance with the recommendation of the Chief Justice or the Judge appointed. To my mind, these provisions provide the ultimate safeguard against arbitrary or unwarranted suspension or removal from office and reinforce the judicial independence of the Magistracy.

The fourth paragraph on that page states -

> I note your concerns about clause 14(4), Schedule 1, which would enable the Governor to specify that a Magistrate suspended under clause 14(2) should not receive his or her normal remuneration pending the outcome of the inquiry. While I cannot envisage any circumstances where that would be done without good cause, I am persuaded by the submissions you have made that it would be more appropriate for Magistrates to continue to be paid pending a determination under clause 14(8), Schedule 1. I will therefore move an amendment to this effect.

That is the second amendment to which I have referred and given notice. The final amendment is referred to at the bottom of page 3 of the letter, which reads -

> Contrary to what you have suggested in your letter, there have been instances where doubts have been raised about whether Magistrates could be appointed to perform other functions, for example to fill positions under the *Native Title Act 1993* (Cth). I see clause 6(3), Schedule 1 as doing no more than providing the necessary authority to make such appointments and no more.
>
> However, I do not have any difficulty in it being made clear that no Magistrate may be appointed to what are clearly non-judicial positions, that do not involve any judicial functions, without his or her consent and I will move an amendment to that effect.

Those parts of the letter to which I have just referred cover the issues of concern that have been raised by members opposite. I again thank them for their contributions to this debate and I look forward to the expeditious passage of this legislation.

Question put and passed.

Bill read a second time.

Leave not granted to proceed to the third reading stage.

Consideration in Detail

Clause 1: Short title -

Dr J.M. WOOLLARD: In the second reading speech, the Attorney General said that these Bills would modernise the system of the State's lower courts by creating a new Magistrates Court, and that the Bill would implement 221 recommendations of the Law Reform Commission. During the second reading debate I asked the Attorney General whether each of those recommendations could be identified in the package of Bills he has presented. I am very pleased that the recommendations of the Law Reform Commission are being adopted. I would like to see which of those recommendations are going into which Bills.

I refer to the report of the tabled recommendations. The Law Reform Commission recommended that the single court should have an administrative law division and a family law division. What is happening to the administrative law division and the family law division? Will they be referred to in later Bills that come before the House?

Mr J.A. McGINTY: In the second reading speech on the Magistrates Court Bill, given on Thursday, 4 December, which is on page 14276 of *Hansard*, I tabled a copy of the 221 WA Law Reform Commission recommendations that will be implemented under these Bills. That document has more than 50 pages. I tabled it for the benefit of members so that at the beginning of the report they could see which reports from the Law Reform Commission have recommendations that are to be implemented by each of the Bills. For instance, in the Bill we are currently debating - the Magistrates Court Bill 2003 - there are listed three reports of the Law Reform Commission, which have recommendations which are implemented by this Bill. A summary of the recommendations is also set out. There is no cross-referencing to sections in the documentation that has been provided. The second question the member asked related to administrative law and family law divisions. This Bill will give the Chief Magistrate the power to create divisions within the court, should he so desire, rather than actually giving effect to them in the legislation.

Clause put and passed.

Clause 2: Commencement -

Mrs C.L. EDWARDES: This legislation repeals two Acts. Where is that referred to in the Bill?

Mr J.A. McGINTY: We have regarded this legislation as a package. The member will find the repeal in the Courts Legislation Amendment and Repeal Bill; it is not contained in this Bill. Various amendments and repeals are effected for each of the Bills in that Bill.

Mr P.G. PENDAL: I have a similar question. I privately asked the Attorney General whether this would be a cognate debate and was told that it would not. However, I notice that we are dealing with minor cases of less than $7 500. The minister referred to that matter in the second reading speech of this Bill. Am I to understand that that is dealt with in another Bill?

Mr J.A. McGinty: That provision is in the Magistrates Court (Civil Proceedings) Bill and not in this Bill.

Mr P.G. PENDAL: It is all a bit sloppy. That begs the question: why was reference made to minor jurisdictional matters in the second reading speech of the Magistrates Court Bill, which we are now dealing with, when they are not referred to in the Bill?

Mr J.A. McGinty: Were there any?

Mr P.G. PENDAL: I am referring to page 14275 of *Hansard*. In the second reading speech the minister spoke about minor cases of less than $7 500 and that there would be new procedures dealing with minor cases. I wanted to say a few things, but the minister told me privately that this would not be a cognate debate. If those matters are in another Bill, why was that issue referred to in the second reading speech of the Magistrates Court Bill?

Mr J.A. McGINTY: The simple answer is that I regard these seven Bills, and a few more that are still to come dealing with the criminal jurisdiction of the courts, as a package. That package deals generally with the matters

that have traditionally been dealt with by magistrates, the Local Court, the Court of Petty Sessions and the Justices Act. We have drafted the new provisions as they will apply and they effectively cover all the areas that were dealt with in the past. When we introduced the Bills last December I gave a bit of an overview of the package in the first speech on the key Bill. That is what the member is referring to. I then went on to narrow the debate to what is in the Magistrates Court Bill. I refer the member to halfway through page 14276. I wanted to give the flavour of the totality of the legislation, or the big picture. That is why it was done in that way.

Dr J.M. WOOLLARD: I have a copy of tabled paper No 1924, which the Attorney General referred to in his second reading speech. It did not cross-reference from there and I was looking for the cross-referencing. If that information is not in a document, it is not available. The Attorney General previously said that this Bill provides the power to form an administrative law division or a family law division. Would the administrative law division be a process of merit review of the system that will go through the Magistrates Court? If the administrative law division will be a form of merit review through the Magistrates Court, could the Attorney General please explain how this Bill gives those powers and what the process will be?

The ACTING SPEAKER (Mr A.P. O'Gorman): Members, there is a fair amount of discussion going on and it is making it rather difficult. I ask members to take their discussions outside.

Mr A.D. Marshall: I was wondering how the minister's daughter would look alongside him. There was a lovely photo in the paper.

Mr J.A. McGINTY: I thank the member for Dawesville.

Mr A.D. Marshall: My wife said you both had the same smile and twinkle in your eyes.

Mr J.A. McGINTY: The genes were obviously running strong when the photographer was there.

Clause 24(2) of the Magistrates Court Bill provides -

> For administrative purposes, the Chief Magistrate -
>
> (a) may establish and disestablish one or more divisions of the Court to deal with a specific class or classes of case, whether throughout the State or at a particular place; and
>
> (b) may designate and change the designation of any such division.

That is the enabling provision. I considered that to be directed more at specialist courts, which have so far been set up as pilots without having any statutory foundation. I am thinking particularly of the Drug Court and the Family Violence Court. There may well be a recommendation in the future. For instance, Professor D'Arcy Holman has suggested the establishment of a mental health court. There have also been suggestions for an Aboriginal court. They are all issues that this Bill will enable, if in the future it is thought to be desirable to go down that path. The legislation currently before the Legislative Council, which has already passed through this House, establishing the State Administrative Tribunal substantially takes up the administrative law area, so there would be no need to move in that area in the future.

Dr J.M. Woollard: Will there be a link between this Bill and the State Administrative Tribunal when that body comes into being?

Mr J.A. McGINTY: There are some provisions in the State Administrative Tribunal legislation, such as enabling magistrates to act as members of SAT in country areas. In fact, I think all magistrates will be able to exercise the powers of SAT. I think that is contained in the State Administrative Tribunal Bill. Apart from those specific power issues, there is no connection, because the decision we have made is that administrative law, which is what SAT is all about, is to be comprehensively covered in the State Administrative Tribunal legislation. There is not a linkage beyond the one I have just referred to, as best as I can recollect.

Dr J.M. Woollard: Would the State Administrative Tribunal automatically have coverage of any issues that arise in the Magistrates Court?

Mr J.A. McGINTY: Not at all. The State Administrative Tribunal will have clear and precise jurisdiction. It is unrelated to magistrates other than in two respects; firstly, a number of the appeals or matters that SAT will deal with were previously dealt with by magistrates. They will no longer be dealt with by magistrates; they will be dealt with by SAT. Secondly, the SAT legislation contains a provision to basically ensure that SAT extends throughout the length and breadth of the State by giving magistrates in country areas the power to exercise the jurisdiction of SAT. That is a completely separate issue from anything in this Bill.

Dr J.M. WOOLLARD: Can the Attorney General clarify that for me? The summary of recommendations of the Law Reform Commission states that the merged court should have an administrative law division and a family law division. The recommendation for an administrative law division has not been picked up in that form. Is

that because the State Administrative Tribunal Bills that were passed in the House last year mean that a separate entity is no longer needed within this Bill?

Mr J.A. McGINTY: That is right. What we have done instead is to generally enable the Chief Magistrate to administratively act to set up divisions when and if they are thought appropriate. In my view, as all the matters about which decisions were previously made by magistrates will be transferred to SAT, there will be no need to constitute an administrative law division of the Magistrates Court. We will possibly need something in the family law area because family law magistrates are still covered by this legislation, even though they are magistrates operating under the Family Court. Legislation will be introduced into this Parliament later this year to expand their jurisdiction. Over time those issues will wax and wane. Issues will emerge that will appeal to the Attorney General or the Government of the day. My predecessor established the Drug Court on a trial basis without statutory foundation. I thought it was excellent and have continued it. This Bill will enable it to continue with statutory foundation.

Ms S.E. WALKER: In relation to clause 2, which states that the Act will come into operation on a day fixed by proclamation, the Law Reform Commission report referred to a magistrates court Bill and a magistrates court consequential provisions Bill being drafted. Has the Attorney General seen those Bills and is the magistrates court Bill that was being drafted similar to the one we are dealing with now? Also, the report said that if the magistrates court Bills were passed, after being placed before Parliament, those Bills would establish the Magistrates Court, amend or repeal various Acts and provide transitional provisions for justices, magistrates, clerks and other court staff. The report goes on to say that the Local Courts Act will be renamed the "Magistrates Court (Civil Jurisdiction) Act", and the Justices Act 1902, which currently defines the criminal jurisdiction of the Court of Petty Sessions, will be renamed the "Criminal Procedure (Summary Proceedings) Act 1902".

There are many references to the "Criminal Procedure (Summary Proceedings) Act 1902" throughout this package of legislation. It is my understanding that that legislation is nowhere near being drafted and that it is at the committee stage.

Mr J.A. McGinty: Is the document you are referring to the 1999 Law Reform Commission report?

Ms S.E. WALKER: Yes. The Attorney General has made a lot of changes to the legislation and has made many references to the "Criminal Procedure (Summary Proceedings) Act 1902", which will be just a rebadging of the Justices Act following removal of the justice of the peace provisions etc. However, it is not even within cooee of being drafted, is it?

Mr J.A. McGINTY: The package of Bills that will ultimately comprehensively cover the Magistrates Court are the Bills in this place today, which will, first, establish the Magistrates Court and make some changes to it; secondly, establish the civil jurisdiction with all of its ramifications; thirdly, deal with oaths, justices of the peace and a number of ancillary things; and the fourth component of that package is the criminal law component. I hope to bring that legislation into the Parliament within a few months. It has significantly advanced and is not far away.

Ms S.E. Walker: Has it been prepared and drafted?

Mr J.A. McGINTY: It has been drafted.

Ms S.E. Walker: Is that the one we are dealing with or the one that the committee is currently considering?

Mr J.A. McGINTY: There are recommendations from the police royal commission that need to be picked up.

Ms S.E. Walker: Who is drafting it?

Mr J.A. McGINTY: Parliamentary counsel.

Ms S.E. Walker: But have you got a committee looking at it?

Mr J.A. McGINTY: Yes.

Ms S.E. Walker: Who are they?

Mr J.A. McGINTY: That has nothing to do with clause 2.

Ms S.E. Walker: It has actually, because it says it comes into operation -

Mr J.A. McGINTY: The criminal law component of this jurisdiction will be influenced by the police royal commission recommendations; by the Murray report of 1982 or 1983; and by a range of Law Reform Commission recommendations over time. Hopefully, we will be able to pick up those recommendations and bring legislation into the Parliament in the next few months.

Ms S.E. Walker: You did not answer my question about whether the magistrates Bill had been prepared and drafted. Is the Bill referred to in the 1999 Law Reform Commission report the same as this one?

Mr J.A. McGINTY: No, it is not.

Ms S.E. Walker: Is it completely different?

Mr J.A. McGINTY: No, it is different. Obviously the draft as it was at that stage has been overtaken, among other things, by a number of recommendations from that very Law Reform Commission report.

Clause put and passed.

The ACTING SPEAKER (Mr A.P. O'Gorman): I remind members that in consideration in detail questions must relate to a particular clause. A wide-ranging debate is not permitted.

Clause 3: Interpretation -

Ms S.E. WALKER: Why has the Attorney General, under the definition of "court officer", lumped together magistrates, JPs and registrars? Why are magistrates not defined as judicial officers?

Mr J.A. McGINTY: It is all for the purposes of clause 28 of the Bill, which will enable two things to happen, the first being that the court may delegate some of its functions to a registrar. I recall during the course of the drafting that issues were expressly raised as to how to give registrars the power to make decisions that are judicial in nature, whether they would be then regarded as decisions of the court, and whether on that basis they would be appealable. That was a series of issues from which consequences would flow and it was thought best to give the court the power to delegate certain of its functions to registrars. Magistrates who go to the country may not, in fact, be registrars, and this provision gives the registrars the power to exercise the function of a magistrate. It provides for internal flexibility in the way in which registrars will exercise their power when dealing with matters. It is clear that they will exercise the court's jurisdiction in a way that will not give rise to any other problems. It was just a device that was drawn up at the time.

Ms S.E. WALKER: It is not consistent with other legislation in the State. For example, the definition of a judge in the District Court of Western Australia Act means a judge of the court and a registrar means the principal registrar. That Act appears to delineate them without lumping together the judge and the registrar as court officers. It is also inconsistent with the Bail Act. The interpretation section of the Bail Act refers to an appropriate judicial officer, and states -

> subject to paragraphs (b) and (c), means a judicial officer who is empowered to exercise jurisdiction in the court before which the defendant is required to appear pursuant to his bail undertaking;

The provision on bail undertakings refers to a judicial officer as being part of a court, and lists the courts, one of which is the Court of Petty Sessions. The Attorney General has said he will modernise the legislation and it will all be uniform. However, it is wrong to call a magistrate a court officer. A lawyer is an officer of the court and there are other officers of the court. Is that not demeaning to a magistrate compared with those other Acts? Has any thought been given to that matter? The section I referred to in the Bail Act states that court means all the courts in which bail can be exercised, including the Court of Petty Sessions, the Supreme Court, the Full Court of the Supreme Court, the Court of Criminal Appeal etc.

Mr J.A. McGINTY: A lawyer might be an officer of the court, but for the purpose of this legislation, a court officer means those people who exercise the function and jurisdiction of the court; that is, a magistrate, a JP or a registrar under delegation under clause 28 of the Bill. It is therefore limited in that sense only.

Ms S.E. WALKER: Can a registrar not exercise the jurisdiction of the courts?

Mr J.A. McGINTY: No. Generally speaking, it is things of an interlocutory nature and some mediation as well as the power to issue orders arising from the mediation. Things of that nature are generally done by a registrar. It is when exercising those particular functions of the court.

Clause put and passed.

Clauses 4 and 5 put and passed.

Clause 6: Magistrates, functions of -

Mr P.G. PENDAL: I move -

> Page 4, line 15 - To insert after the word "approval" the following -
>
> and the agreement of the magistrate in question

This amendment will spell out early in the clause one of the principal functions of a magistrate. In one-line, simple terms it will state that, with the approval of the Governor and the magistrate in question, a magistrate may do certain other things; that is, hold other appointments. I am pleased to see that the Government has agreed with the principle of what I am arguing by foreshadowing its own amendment to the same clause. The Government's amendment will create a new subclause (4). The advantage created by passing my amendment rather than that of the Attorney General is that it will state unequivocally up-front that a magistrate has the capacity to decline an appointment. I admit there is not a lot in it. The slight disadvantage in the Attorney General's amendment is that the capacity to decline will be seen as an afterthought. In turn, that may be seen as a small signal that the independence of the magistracy is not all that important. I do not want to split hairs because I do not think there is a lot in that. The substantial point has been made by the acknowledgment of the Attorney General that something needs to be done. As amended, clause 6(3) will, without equivocation, spell out the right of a magistrate to decline an appointment for whatever reason he or she thinks fit. Accordingly, there is some value in the House supporting my form of the amendment as distinct from that of which the Attorney General has given notice. I commend my amendment to the House.

Mr J.A. McGINTY: I request that the House support my amendment for a very simple reason. In the recent past there have been two problems when magistrates have taken on particular functions of a judicial nature. When prisoners break the law, the Prisons Act states that they will be dealt with by a visiting justice. A visiting justice can be a justice of the peace or a magistrate. A very large number of magistrates have refused to sit as a magistrate in a prison and deal with alleged breaches of the Prisons Act or other criminal matters that have occurred in a prison. The member's amendment would enable a magistrate to refuse an appointment as a visiting justice to a prison. In other words, a magistrate may refuse to exercise what I, as the Attorney General, regard as a proper function of a magistrate; that is, to hear and determine criminal matters in a prison. I am not happy about a magistrate saying he will not do something if it is part of what a magistrate is appointed to do. In my view, being a visiting justice is part of what a magistrate is appointed to do. I know that because it has happened during my time as Attorney General. I am also told that - I do not know whether it has occurred in the past three years or earlier - from time to time, magistrates have refused to sit in the Small Claims Tribunal in the capacity of a referee. That problem will be overcome by the amalgamation of the tribunal into the jurisdiction of the Magistrates Court. In my view, a magistrate should not be in a position to decline to sit in a prison. I have been aware of situations in which magistrates have made it quite clear that they do not wish to be appointed to a particular court in the metropolitan area. Magistrates should not have the right of refusal. Accordingly, the difference between the member's amendment and my amendment is that matters and appointments of a judicial nature should be accepted by magistrates at the direction of the Chief Magistrate. I agree with the examples given by the member during his second reading debate speech. Frankly, it would be absurd for me to try to appoint a magistrate to an administrative or inquisitorial body if he or she did not want to accept that appointment, because we would not get a good-quality end result. It must be made clear that a magistrate has the right to refuse an appointment if it is not judicial and not part of his appointment. Anything that has a judicial quality should not be refused by a magistrate. That is why I prefer my amendment, which protects magistrates against the greater evil that the member has spoken about. It also protects me from magistrates who will not do the job they are employed to do.

Mr P.G. PENDAL: I know that we are pretty close on this but, in their expression of concern to the Attorney General, the magistrates were not talking about being appointed to other judicial functions. They were spelling out their concern about being made to do non-judicial functions. I imagine - correct me if I am wrong - that the prison duty to which the Attorney General referred is a judicial function, is it not?

Mr J.A. McGinty: Absolutely no question.

Mr P.G. PENDAL: I will read to the House what the magistrates have written to the Attorney General. I quote from page 7 of the letter -

> Clause 6(3) of the Bill which authorises the Executive Government, at its discretion, to appoint a magistrate to a non judicial office -

That is their concern. It is not to avoid, as I understand, the sort of duty in a prison the Attorney General is talking about. To continue -

> and which does not confer upon a magistrate the right to decline such appointment, is inconsistent with judicial independence.
>
> On the face of it the clause would authorise appointment to any public office or require the performance of any public function. This could potentially enable a government to sideline a magistrate whose decision or decisions the Government found politically objectionable . . .

They and the Attorney General are talking about the same thing. The Attorney General is drawing a separation that is just not in their minds.

Mr J.A. McGinty: Practically, it has been there for me to deal with in recent times.

Mr P.G. PENDAL: It may have been, but it is not precluded by my amendment. My amendment would not give them the opportunity to opt out of a requirement by the Attorney General to visit a prison. However, like Demtel, there is more. I am sure the Attorney General is aware of the following. The society states, for example, at page 8 -

> Contrary to what is stated in the explanatory memorandum to the Bill a magistrate is not required to relinquish magisterial appointment if invited to conduct an inquiry.

This changes the argument, and I am happy to do that, but it is still part of the same principle. Will the Attorney General explain to me why what we are told in the explanatory memorandum is contrary to what the magistrates believe to be the facts? Let me repeat their concern -

> Contrary to what is stated in the explanatory memorandum to the Bill a magistrate is not required to relinquish magisterial appointment if invited to conduct an inquiry.

I see it as a real problem if we are told argument A in an explanatory memorandum and the magistrates say that that is not true. The magistrates have said that in those plain, unambiguous terms.

I still want to pursue my original argument, which I will do, but I would appreciate an explanation from the Attorney General of how there can be such a contrary position between what the magistrates believe to be the facts and what is stated in the explanatory memorandum.

Mr J.A. McGinty: I do not quite understand the point of what the magistrates are saying is not factual in the explanatory memorandum.

Mr P.G. PENDAL: I will go back to their words. On the issue that we have both been speaking about - that is, whether magistrates have the right to decline or refuse appointment to a non-judicial office, and I used the example of the royal commission - we seem to agree that they should be allowed to do that.

Mr J.A. McGinty: Yes, absolutely.

Mr P.G. PENDAL: Secondly, no magistrate has said to me that magistrates should have the right to decline to do that prison activity to which the Attorney General has referred.

Mr J.A. McGinty: But they have in fact refused to do that in the past.

Mr P.G. PENDAL: Okay. However, for the purposes of this, we are talking only about whether the Attorney General's amendment does the job better or whether mine does. For the moment, let us put that aside. Under the same clause, the magistrates argue the following - and these are their words, not mine -

> Contrary to what is stated in the explanatory memorandum to the Bill a magistrate is not required to relinquish magisterial appointment if invited to conduct an inquiry.

Clearly, they are saying that the explanatory memorandum is wrong. Either the Attorney General is wrong in his explanatory memorandum or the magistrates are wrong in what they are telling me. I am really asking how the Parliament can get information from one side or the other that is clearly wrong.

Mr J.A. McGINTY: I will make two points. Page 2 of the explanatory memorandum reads as follows -

> . . . magistrates . . . will also have to perform other judicial and administrative duties such as Mining Warden, Children's Court magistrate, Family Court magistrate and visiting justice for prisons.

It goes on to say -

> It also enables a magistrate to be appointed to chair an enquiry without having to relinquish his or her magisterial appointment.

That is the current law and it is continued in the new law. Therefore, the explanatory memorandum is not wrong, unless the member reads it as stating that that is a significant new change, which the explanatory memorandum does not say. I suspect that a semantic point has been raised and not one of substance.

Mr P.G. Pendal: I disagree. It is more than a semantic point. Their argument is that - these are their words, not mine -

> Contrary to what is stated in the explanatory memorandum to the Bill a magistrate is not required to relinquish magisterial appointment if invited to conduct an inquiry.

Either they are wrong in saying that to me and you, or the explanatory memorandum is wrong. Both of those propositions cannot be right because they are challenging the view in the explanatory memorandum.

Mr J.A. McGINTY: The short answer to that point is that the explanatory memorandum does not say what the Stipendiary Magistrates' Society of Western Australia says it states. Literally, it states that it also enables a magistrate to be appointed to chair an inquiry without having to relinquish his or her magisterial appointment. To put it frankly, they are reading into it things that are not there.

I should put another qualification on the general description of what I have said about magistrates declining to undertake certain functions. I have no objection if a serious safety issue, for instance, is involved; that is, magistrates, either individually or collectively, say that it is unsafe to go to a certain prison because magistrates have been beaten up, and until such time as the Government provides adequate security, they will decline to undertake the function. I have no objection if it is put as an industrial issue. I am not talking about that. I perfectly understand that issue. I will give an example of a future issue. We are now in the process of appointing a second magistrate to Kalgoorlie. The current Kalgoorlie magistrate has an exceptionally heavy workload - arguably it is the heaviest workload of any magistrate in the State at the moment. The appointment of a second magistrate will relieve that workload and enable the magistrate to go on to some of the Aboriginal lands and have the court sit in those Aboriginal communities. I do not know whether that will happen, but it will certainly free up enough time to enable that to occur. Given the great interest in Aboriginal matters that the current magistrate, Stephen Sharratt, has, I expect he will do that. He was the initiator of the circle court at Yandeyarra when he was the magistrate in Port Hedland, and I expect that will continue.

However, there is an issue at the moment about the provision of adequate courthouse facilities in these remote Aboriginal communities. He may well say that the facilities are not adequate; therefore he cannot do it. That is quite different. I see that again as a quasi-industrial issue. I certainly do not object to magistrates raising the propriety of sitting in places in which there are safety issues or other broader issues of concern. However, I am raising a general denial of responsibility to exercise judicial functions. My short answer to the issue the member raised and the difference between our two formulations of this issue is that we agree on 99 per cent of the issue. I would like to make it clear that we have had a problem in the past with magistrates saying they would not do that. If it is a judicial function, in whole or in part, they should not be able to say that. I believe my amendment deals with that. If it is an appointment to an external body that is administrative in character, be it a royal commission, an inquiry or whatever, they should clearly have the power to say no. I believe my amendment achieves both those objectives. The member's amendment achieves only the second of those.

Mr P.G. PENDAL: I believe the Attorney General is perhaps now doing to the magistrates what he thought they might have been doing to him; that is, reading in things that are not there. I will give an example. I invite the Attorney General to re-read pages 7 and 8 of the society's letter to him, because in all respects they do not talk about those quasi-industrial relations issues. They are not trying to argue those matters at all.

Mr J.A. McGinty: Sorry, my point on that was that I would happily join with the magistrates in dealing with those matters as separate issues; and that is not the issue.

Mr P.G. PENDAL: I accept that. However, their argument is in its entirety confined to anything that is incompatible with exercising a judicial office - anything that undermines that. When I spoke to the people concerned, I said, "What are we talking about? Are we talking about appointments to royal commissions?" The answer was, "Yes." I said, "Are we talking about appointments to commissions of inquiry?" They said, "Yes." I said, "Why are we concerned about that? Is it because of the notion that a Government could choose a soft magistrate for an inquiry, knowing the sort of outcome it would get?" They said, "Yes, that sort of thing." They are concerned about the manipulative side of it. No-one has raised with me the issue of the industrial relations business or whether they should be compelled to go into a prison. Here is the proof of the pudding: the second last paragraph of the society's views on clause 6 states -

> The High Court has repeatedly struck down legislation which has sought to confer upon judicial officers functions which are incompatible with the performance of judicial functions . . .

That is the basis of the magistrates' argument. They are talking about independence and being seen to be independent. If we all agree on that and we all agree that they should not have the right to decline those prison duties to which the Attorney General has referred - I do not have a problem with what he has said - we come back to square one; that is, whether the Attorney General's amendment is better than mine. I will not pursue it beyond this: I ask the House to vote in support of my amendment. Why? My amendment is introduced to the clause up front. It is not there as an afterthought. Under the functions of magistrates in clause 6, we in this House would be committing ourselves to saying that, with the Governor's approval and the agreement of the magistrate, a magistrate could take on such an appointment. The Attorney General's amendment is an afterthought. It comes in as new subclause (4) whereby, as an afterthought, it gives the right to a magistrate to

decline an appointment to a royal commission. Therefore, I believe that my amendment, not just because I have moved it, is superior because it states up front what we expect of a magistrate and what his or her function is. The Attorney General's amendment is an afterthought. I respectfully suggest to the House that that is its weakness, and I ask the House to support my amendment.

Sitting suspended from 6.00 to 7.00 pm

Ms S.E. WALKER: The Opposition will support the member for South Perth's amendment. I would like clarification on the interchange between the Attorney General and the member for South Perth. The Magistrates Court Bill sets out the court's criminal jurisdiction in clause 11. Besides visiting the prisons, where is it stipulated that the magistrate has a judicial function to sit on the Small Claims Tribunal?

[Quorum formed.]

Ms S.E. WALKER: What other judicial functions does the Attorney General expect magistrates to perform?

Mr J.A. McGINTY: It is referred to as the minor cases procedure.

Ms S.E. Walker: Currently, but not in the new Bill.

Mr J.A. McGINTY: Yes, in the Bill.

Ms S.E. Walker: What legislation requires that magistrates sit on the Small Claims Tribunal?

Mr J.A. McGINTY: At the moment?

Ms S.E. Walker: Yes.

Mr J.A. McGINTY: The Small Claims Tribunals Act.

Ms S.E. Walker: Under what section?

Mr J.A. McGINTY: I do not have a copy of it.

Ms S.E. Walker: I know they sit there but I was wondering how they get to sit there. The Act refers to referees -

Mr J.A. McGINTY: Yes, that is right. Sections 5 and 7 of the Small Claims Tribunals Act interact and for somebody to hold an office of referee, he must be a legal practitioner; that is the essential qualification. Section 5 states -

> The Governor may appoint such number of referees of Small Claims Tribunals as he considers necessary . . .

The practice had been for magistrates to be appointed as referees in the Small Claims Tribunal.

Ms S.E. Walker interjected.

Mr J.A. McGINTY: I do not know.

The ACTING SPEAKER (Mr A.J. Dean): We are having trouble hearing you, Attorney General.

Mr J.A. McGINTY: I think that answers the two questions posed by the member for Nedlands. In future, the court's civil jurisdiction will be set out in the Magistrates Court (Civil Proceedings) Bill, which will be dealt with next as part of this package of Bills.

The ACTING SPEAKER: I draw the member for Nedlands's attention to the fact that we are speaking to the member for South Perth's amendment at the moment.

Ms S.E. WALKER: I do not know if you, Mr Acting Speaker, were here before the dinner break when there was an interchange between the member for South Perth and the Attorney General about the reasons for including this clause. The main reason the Attorney General put forward was that certain magistrates refuse to visit the prisons and to appear in the Small Claims Tribunal; hence, my questioning on this clause. I understand that magistrates are concerned about the lack of security, which has been an issue for them in the Small Claims Tribunal where they have to walk through a public area. I believe one magistrate was verbally abused when walking through there. I wonder whether this very controlling legislation, in relation to the magistrates, is not an overreaction to the issue.

The Opposition will support the member for South Perth's amendment. When I questioned the Attorney General about clause 6(3)(a), I asked in what other judicial offices, besides the prisons and the Small Claims Tribunal, it was envisaged that the magistrate would have to perform a function, and where that was laid down in law.

Mr J.A. McGINTY: An example is the Mining Warden. There has not been a problem there in the past, but that is an example.

Amendment put and a division taken with the following result -

Ayes (17)

Mr C.J. Barnett	Mrs C.L. Edwardes	Mr P.D. Omodei	Dr J.M. Woollard
Mr D.F. Barron-Sullivan	Mr J.P.D. Edwards	Mr P.G. Pendal	Mr J.L. Bradshaw *(Teller)*
Mr M.F. Board	Mr B.J. Grylls	Mr R.N. Sweetman	
Dr E. Constable	Mr M.G. House	Mr T.K. Waldron	
Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker	

Noes (23)

Mr P.W. Andrews	Mr S.R. Hill	Mr A.D. McRae	Mr E.S. Ripper
Mr J.J.M. Bowler	Mr J.N. Hyde	Mr N.R. Marlborough	Mrs M.H. Roberts
Mr C.M. Brown	Mr J.C. Kobelke	Mrs C.A. Martin	Mr D.A. Templeman
Mr J.B. D'Orazio	Mr F.M. Logan	Mr M.P. Murray	Mr M.P. Whitely
Dr J.M. Edwards	Mr J.A. McGinty	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mrs D.J. Guise	Mr M. McGowan	Ms J.A. Radisich	

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Mr A.D. Marshall	Mr J.R. Quigley
Mr W.J. McNee	Mr R.C. Kucera
Ms K. Hodson-Thomas	Dr G.I. Gallop

Amendment thus negatived.

Mr J.A. McGINTY: I move -

Page 4, after line 20 - To insert the following -

(4) A magistrate must not be appointed to an office that does not include any judicial functions without his or her consent.

The nature of the debate we have just had covers the arguments for this amendment.

Mr P.G. PENDAL: This is the second best amendment we might have got, but nonetheless it is an important amendment. More than just satisfying the Stipendiary Magistrates' Society, it also satisfies a wider principle that is at stake; that is, to underpin, as this House should, the independence of the magistracy. I am happy, therefore, having seen my amendment defeated, to see this one pass.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 7: Constitution of the Court -

Ms S.E. WALKER: Clause 7 reads, in part -

(1) The Court is to be constituted by one magistrate.

(2) In circumstances prescribed by the regulations or by another written law, the Court may be constituted by -

(a) 2 or more JPs; or

(b) one JP.

Have the functions or jurisdictions of justices of the peace been altered by this package?

Mr J.A. McGINTY: There is no express change to the function of justices of the peace in this legislation, but changes could flow as a consequence of this legislation; that is, as a result of the Chief Magistrate determining how the court will be constituted to deal with particular matters. The Chief Magistrate might well determine, for instance, whether justices of the peace in Perth should seek to deal with restraining orders. That might be something that flows as a result of enabling the Chief Magistrate to determine how the court will be constituted, but it is not expressed in this legislation.

Clause put and passed.

Clauses 8 to 10 put and passed.

Clause 11: Criminal jurisdiction -

Ms S.E. WALKER: Has there been any change to the criminal jurisdiction, or is any change anticipated, to enable the off-loading of work from the District Court?

Mr J.A. McGINTY: The Legislative Council will hopefully today - although I said this on most days last week - pass the Criminal Code Amendment Bill 2003, which will enable either-way offences to be dealt with by magistrates. Such offences will be required to be dealt with by a magistrate, unless the magistrate determined that the circumstances are such that it should go to the District Court. In other words, the Bill takes away the election of offenders. That Bill has passed through this House. It will have a profound effect on both the District Court and the Magistrates Court. It will take a lot of pressure off the District Court, which is where the real pressure is in waiting times for criminal trials. It takes away two things. First of all, aggravated burglaries in company were not previously considered either-way offences, but will be under the legislation being considered by the upper House. Quite a number of those offenders are on trial in the District Court. They will be able to be, and in fact will be required to be, dealt with by magistrates, unless there are good reasons for sending them up. The second is the general removal of the right of the defendant to elect a jury trial for either-way offences, which is also in that Bill. Magistrates will be required to deal with those cases, which will add to their workloads and will hopefully relieve the pressure on the District Court. It is a matter of balance and compensation to try to relieve the pressure in the most pressing area, which is the District Court.

Ms S.E. Walker: Why has the Government included the provision that a magistrate must have five years experience? Does that have anything to do with jurisdiction?

Mr J.A. McGINTY: No

Clause put and passed.

Clauses 12 to 14 put and passed.

Clause 15: Contempts of the Court -

Ms S.E. WALKER: Was this provision in the Justices Act? Is it any different from other contempt of court provisions in other courts?

Mr J.A. McGINTY: I am told that this provision comes from the District Court of Western Australia Act. I will give the member a more comprehensive answer with regard to the current provisions if she is happy for me to respond after I have sought some advice. It is a similar provision to section 63 of the District Court of Western Australia Act. I am aware of magistrates acting to punish for contempt. I need to ascertain exactly where that comes from.

Ms S.E. WALKER: I have the District Court of Western Australia Act in front of me. Under the Magistrates Court Bill, a person who is found guilty of contempt is liable to a fine of not more than $12 000 or imprisonment for not more than 12 months, or both. Under section 63(1)(f) of the District Court of Western Australia Act there is a penalty for contempt of a term of imprisonment not exceeding five years or a fine of $50 000. How was the penalty in this Bill arrived at? It is interesting that when a person is in contempt of a court there is an escalation, when really the act is the contempt in the face of the court. It is interesting conceptually. Is that contempt provision in the Justices Act?

Mr J.A. McGinty: I indicated earlier to the member that I would seek further information and then respond.

Clause put and passed.

Clauses 16 to 24 put and passed.

Clause 25: Chief Magistrate may assign duties to magistrates -

Ms S.E. WALKER: This must be a new clause because it is not in the Justices Act. It refers to the Chief Magistrate assigning duties to magistrates. Once again this as an example of controlling magistrates and getting them to do the duties that they have not been doing, according to the Attorney General. Clause 25(1) states -

> The Chief Magistrate, by directions given from time to time to a person who is a magistrate, may -
>
> (a) specify which case or cases, or class or classes of case, the person is to deal with or in which division of the Court the person is to sit;

I presume that either the deputy chief magistrate or someone who is appointed by the court does that, which is not new. Clause 25(1) further states that the Chief Magistrate may -

(b) specify which class or classes of the judicial functions that the person has under written laws, whether as a magistrate or otherwise, the person is to perform for the time being;

(c) specify which administrative duties the person is to perform for the time being;

What types of administrative duties does a magistrate perform?

Mr J.A. McGINTY: An example of an administrative duty is the signing of a warrant, which is not regarded as a judicial function. I also refer the member to section 10 of the Stipendiary Magistrates Act, which refers to the assignment of duties and touches in part on the issues that are raised in this clause. It is not directly comparable, but it covers the same area concerning the assignment of duties to magistrates.

The ACTING SPEAKER (Mr A.J. Dean): The member for Nedlands has an amendment on the Notice Paper.

Ms S.E. WALKER: Yes, I do. I will be moving it shortly. I had a meeting yesterday with representatives of some legal bodies and I asked them whether they thought a magistrate had quasi-administrative functions and they did not think that was the case, but there is something in their commission about administrative issues. This is relevant to clause 25, where it states "specify which administrative duties". The form of commission they have to take states that the office of magistrate is a judicial office with administrative functions. Is signing a warrant an administrative function? What other administrative functions do they have?

Mr J.A. McGINTY: Another example might be some of the functions of the Mining Warden in respect of the making of recommendations under that Act. That is something that would be categorised as administrative. Other questions that might relate to the administration of the court in a general administrative sense -

Ms S.E. Walker: The same as the District Court or Supreme Court? How are they different from the District Court or Supreme Court? What administrative functions do they have as judicial officers that a judge in another jurisdiction may not have?

Mr J.A. McGINTY: The various country magistrates - it is their court - have to administer the court.

Ms S.E. Walker: So does a judge of the Supreme Court.

Mr J.A. McGINTY: No, he does not, because the judges of the Supreme Court are not permanently located in country areas.

Ms S.E. Walker: No, but they have control of their own court.

Mr J.A. McGINTY: That is the point I am making. Take the magistrate in Carnarvon: there are a range of courthouses in her magisterial district for which she is responsible that she would assume administrative responsibility for. Those sorts of functions are designed to be covered in this clause, by way of example.

Ms S.E. Walker: But is that not delegated to another person?

Mr J.A. McGINTY: I am not sure.

Ms S.E. WALKER: In relation to country magistrates, what sort of administrative functions is the Attorney General talking about specifically? It is all very well for the Attorney to say they perform administrative functions, but what administrative functions do they perform?

Mr J.A. McGINTY: Country magistrates run the administration and business of the court, the listing of matters to appear before courts, and things of that nature.

Ms S.E. Walker: They do not do that.

Mr J.A. McGINTY: They are the sorts of administrative functions that take place.

Ms S.E. WALKER: Magistrates do not do that. They have a whole body of people to do that.

Mr J.A. McGinty: Is that right?

Ms S.E. WALKER: Yes, they do. Is the Attorney saying that they sit down and do all that themselves? What specific tasks do they perform? The Attorney cannot give me a list of what they do. That is what I am trying to find out. What is it they actually do in country areas by way of administrative functions? The Attorney gives me a general sort of picture, but I am asking for specifics. Basically he says they have administrative functions in the Warden's Court, but can he tell me specifically what administrative functions?

Mr J.A. McGinty: The making of recommendations as distinct from determining matters in a judicial sense, which is an example I have already given.

Ms S.E. WALKER: I move -

Page 15, lines 5 and 6 - To delete the lines.

I seek the deletion of subclause (4), because if subclause (3) is deleted there will be no need for subclause (4). It is highly insulting to put in this Bill - it is not in any other Act dealing with judicial officers - that a magistrate must comply with a direction from the Chief Stipendiary Magistrate and then to stipulate that it is not an offence. That would be like putting into the Supreme Court Act that the Chief Justice can give directions and the judges of the Supreme Court must comply, but not to do so is not an offence. Does the Attorney not trust his judicial officers? It appears they have been given no respect. I do not mean that in a high-handed way, but it seems the Attorney General has a complete lack of respect for and trust in his magistracy. I do not think it needs to be there. There seems to be a movement in the enacting of this Bill that it will apply to legal practitioners of five years standing.

Amendment put and a division taken with the following result -

Ayes (16)

Mr R.A. Ainsworth	Mr M.F. Board	Mr M.G. House	Mr T.K. Waldron
Mr C.J. Barnett	Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr P.D. Omodei	Dr J.M. Woollard
Mr M.J. Birney	Mr J.P.D. Edwards	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*

Noes (25)

Mr P.W. Andrews	Mr S.R. Hill	Mr N.R. Marlborough	Mr D.A. Templeman
Mr J.J.M. Bowler	Mr J.N. Hyde	Mrs C.A. Martin	Mr P.B. Watson
Mr C.M. Brown	Mr J.C. Kobelke	Mr M.P. Murray	Mr M.P. Whitely
Mr A.J. Carpenter	Mr F.M. Logan	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mr J.B. D'Orazio	Mr J.A. McGinty	Ms J.A. Radisich	
Dr J.M. Edwards	Mr M. McGowan	Mr E.S. Ripper	
Mrs D.J. Guise	Mr A.D. McRae	Mrs M.H. Roberts	

Pairs

Mr A.D. Marshall	Mr J.R. Quigley
Mr W.J. McNee	Mr R.C. Kucera
Ms K. Hodson-Thomas	Dr G.I. Gallop

Independent Pairs

Dr E. Constable
Mr P.G. Pendal

Amendment thus negatived.

Mr J.A. McGINTY: I had indicated to the member for Nedlands that I would do my best to ascertain the current provision with regard to contempts in the Magistrates Court. It is found, strangely enough, not under the heading of contempts, which is what threw me initially, but in section 41 of the Justices Act. That section is headed "Penalty for insulting or interrupting justices", which I presume is the equivalent of a contempt, and the penalty for that offence is imprisonment for 12 months or a fine not exceeding $5 000. In contemporary sentencing there is an equation between time and money, so in this Bill the penalty is imprisonment for one year or a fine of $12 000, which is effectively inserting the contemporary expression of that amount of $5 000.

Ms S.E. WALKER: The submission from the Law Society states - I do not know whether the Attorney General has moved on from when the Law Society wrote to him - that there should be a separate Act to deal with contempt. Is that still in the pipeline?

Mr J.A. McGINTY: The Law Reform Commission made a recommendation last year dealing with contempts generally. That is not part of the package with which we are dealing now. That is something that we will leave -

Ms S.E. Walker: That is something that we can bring in when we are in government next year.

Mr J.A. McGINTY: Perhaps not next year; perhaps some time in the new millennium.

Ms S.E. Walker: You will leave something for us. That is good.

Mr J.A. McGINTY: Yes.

Clause put and passed.

Clause 26: Administrative staff -

Ms S.E. WALKER: What administrative staff do country magistrates have?

Mr J.A. McGINTY: The clerk of courts, who under this legislation will in future be referred to as a registrar, the supervising court officer, the senior court officer, court officers, judicial support officers and a regional manager.

Ms S.E. Walker: How many court officers are there?

Mr J.A. McGINTY: It depends on the size of the court. It ranges from two to 13. In Perth there are more than 100.

Ms S.E. Walker: How many staff are there in Northam, for example, to support the magistrate?

Mr J.A. McGINTY: Three, I am told.

Ms S.E. WALKER: My point is that surely the magistrates have administrative staff to deal with administrative matters, because that is what this Bill is all about. For instance, in the District Court, the judge does not sign off on a bail application; that is done by the clerk of courts or his associate. The Attorney General said that magistrates in country areas have to do all of the administrative work. Surely the administrative staff would do that.

Mr J.A. McGinty: They do, but under the direction and supervision of the magistrate.

Ms S.E. WALKER: Come on! That would also be the case with the magistrates in town and the judges in the District and Supreme Courts. It seems to me that there is an attempt in this Bill to demean magistrates and bring them under control. I do not know what is behind that. It has obviously been driven by the Attorney General personally because it is not part of any Law Reform Commission recommendation, the magistrates do not agree with it, and it does not seem to have the support of the District or Supreme Court judiciary as I understand it. Does the Chief Justice agree with this Bill?

Mr J.A. McGinty: That is a question you would need to put to the Chief Justice.

Ms S.E. WALKER: I am asking the Attorney General whether he has consulted the Chief Justice on this Bill.

Mr J.A. McGinty: We have consulted widely on all aspects of the Bill.

Ms S.E. WALKER: Has the Attorney General consulted with the Chief Justice?

Mr J.A. McGinty: I do not intend to speak to represent the Chief Justice.

Ms S.E. WALKER: There was a time, I think when the Attorney General was in opposition, when he said in this Chamber that there was an all-time low in the relationship between the then Attorney General and the then Government and the judiciary.

Mr J.A. McGinty: There was!

Ms S.E. WALKER: I would have thought, given that comment, that the Attorney General would have spoken to the Chief Justice on this issue, particularly when the Stipendiary Magistrates' Society has been saying for some months that this Bill will affect judicial independence. The Attorney General has not even consulted the Chief Justice on this Bill. Clause 26 damages the Attorney General's argument that the magistrates perform administrative functions. They perform judicial functions, and they are given support staff to perform the administrative functions.

Mr J.A. McGINTY: As the member for Nedlands has rightly said, this Bill and issues with regard to Magistrates Courts have been some time in their gestation. I remember being approached by magistrates in, I think, 1999 - the member for Kingsley may remember more accurately than I - who objected to the then formulation of the description of a magistrate. In fact, the warrant that was then proposed described magistrates as administrative officers with judicial functions. That was the view put forward then by Hon Peter Foss, who went for what I would regard as significantly more control over magistrates than that contained in the Bill before the House. The way legislation was formulated by the previous Government has been directly reversed by this Government. Clause 2 of schedule 2 reads -

> That the office of a magistrate is a judicial office with administrative functions.

Ms S.E. Walker: Why not get it right first time?

Mr J.A. McGINTY: Why not ask that of Hon Peter Foss? He does not agree with that approach.

Mrs C.L. Edwardes: You're the Attorney General.

Mr J.A. McGINTY: I know I am. I think we will get it right now.

Ms S.E. Walker: We may not have been right in the past, but we expect it to be right now. We've waited long enough.

Mr J.A. McGINTY: I think we have it right. As the member for Kingsley knows, in the formulation proposed four years ago, Hon Peter Foss demanded a far greater level of accountability from magistrates to the Chief Magistrate than I propose in the Bill before the House.

Ms S.E. WALKER: This modern accountability -

Mr J.A. McGinty: Don't you agree with it?

Ms S.E. WALKER: I love your spin. What can I say?

Mr J.A. McGinty: Thank you.

Ms S.E. WALKER: I have learnt a lot from the Attorney General since I have been here. Oh, to be glib! I have never seen anything like it in my life!

Mr J.A. McGinty: I think that's a compliment - isn't it?

Mrs C.L. Edwardes: I would take it as one.

Ms S.E. WALKER: I can learn a lot from someone: I can learn how I do not want to be. The Attorney General has a silver tongue; his use of it is getting worse. There is no modern accountability in the Supreme Court or District Court. The Chief Stipendiary Magistrate of the Court of Petty Sessions and the Local Court must be hopeless at getting magistrates to do what he wants. Is this just some power thing by which some Attorneys General get to have a go at, and control, the judiciary? That is how it seems to me.

The Attorney General said he consulted stakeholders. These are the judges of the Supreme and District Courts and the magistracy. The Attorney knows they are all against this measure. Now is the apposite time to quote Steven Heath, the Chief Stipendiary Magistrate, whom the Attorney said he would quote in support of the Bill. That would give us some confidence that someone out in the land of the judiciary supports this Bill.

Mr J.A. McGINTY: In discussing the views of senior judicial officers and heads of jurisdictions, we must ensure we are correct. After the issue was raised earlier this evening, instructing officers at the Table contacted the Chief Stipendiary Magistrate to raise two issues. First, suspending magistrates from duty, and he said he had no problem with how that provision was formulated. Second, he fully supported the power to direct magistrates, the matter under discussion.

Ms S.E. WALKER: I will stand here and defend magistrates. I remember being in the Magistrates Court for a long time in the preliminary hearing of the Argyle Diamonds case. Magistrates are not only administrative officers. Anyone who has been to the Magistrates Court would know that to be the case. Anyone can sit in the Magistrates Court to see what they do. They make decisions on a range of serious indictable matters that involve serious bail applications for quite evil predators. They make decisions on quite complex matters. Often the issues involved in a small trial can be complex. It is not only a matter of the duration of a trial because a simple indictable matter often can be complex. I will stand here and praise magistrates for their work and their turnover. The second reading speech delivered by the Attorney General on this package of Bills indicated that 160 000 matters went before magistrates in the past year. They have an enormous workload. To suggest they are somehow quasi-judicial administrative officers is very demeaning.

Mr J.A. McGINTY: To give a broad perspective, we were influenced a little in putting together this legislation by comparable legislation in South Australia governing magistrates. The South Australian Magistrates Act, in sections 7 and 8, is very similar to that proposed in the WA legislation. Section 7 reads -

> (1) The Chief Magistrate is responsible . . . for the administration of the magistracy.

The relevant part of section 8 of the South Australia legislation, under the heading "Responsibility of magistrates to the Chief Magistrate", reads -

(1) A magistrate . . . is responsible to the Chief Magistrate in relation to administrative matters and, in particular, is subject to direction by the Chief Magistrate as to the duties to be performed by him and the times and places at which those duties are to be performed.

(2) A magistrate . . . is responsible to the Chief Magistrate in relation to administrative matters related to the performance of magisterial functions that he has consented to perform and, in particular, is subject to direction by the Chief Magistrate as to the duties to be performed by him in connection with those functions and the times and places at which those duties are to be performed.

Mrs C.L. Edwardes: That does not require that the magistrate must comply with the direction.

Mr J.A. McGINTY: I think it does in the terms I read out.

Mrs C.L. Edwardes: It does not.

Mr J.A. McGINTY: There is no separate provision, but I think it does so. I simply raise that example. It is not as though this State is bound by what happens in South Australia, but the measure before us is not as unprecedented as might be suggested.

Ms S.E. WALKER: It is very disappointing that the Attorney General did not read the New South Wales or Victorian Acts.

Mr J.A. McGinty: We wish to finish the debate some time tonight.

Ms S.E. WALKER: I stand here on behalf of magistrates and judicial independence to ensure that the judiciary in this State stays independent. I will take no notice of the Attorney's direction. He might try to direct magistrates, but he cannot direct me. In relation to the South Australian Act, if the Attorney General wants to modernise and bring the Magistrates Court into the twenty-first century, why is he lifting the benchmark in relation to qualification but not how magistrates will be treated? He is treating them in an authoritarian and dictatorial manner. It is very disappointing. Maybe it says more about the Attorney General than it says about the stakeholders.

Clause put and passed.

Clause 27: Administrative directions -

Ms S.E. WALKER: I have an amendment on this clause relating to administrative directions. The Chief Justice of the Supreme Court also has administrative functions, but Supreme Court judges are not told that they must comply. It is assumed that as a result of who they are, their professional qualifications and disciplines, and the fact they have achieved their office they know how to conduct themselves; otherwise, they would not have been chosen for the role. The clause reads -

(1) The Chief Magistrate may issue written directions (to be called administration directions) about administrative matters and procedures for the effective and efficient operation of the Court.

(2) The directions must not limit the judicial independence of magistrates.

I am not sure what that means. It continues -

(3) A magistrate must comply with the directions.

(4) A contravention of subsection (3) is not an offence.

It is not an offence but the punishment is quite severe; it can result in a magistrate losing his job. For the same reason as I moved an amendment to clause 25, I move -

Page 16, lines 24 and 25 - To delete the lines.

Mrs C.L. EDWARDES: I support the amendment for all the reasons I outlined in my speech during the second reading debate. This Bill is a major attack on the independence of judicial officers. The Stipendiary Magistrates Act provides for the duty of a stipendiary magistrate to act in accordance with the arrangements and assignments made by the Chief Stipendiary Magistrate under the relevant section. It does not stipulate that the magistrate must comply with such a direction. Why is contravention of that not an offence? The words are superfluous. Clause 14 of schedule 1 provides that a proper reason for suspending a magistrate is if he contravenes either section 25(3) or 27(3). If a magistrate does not comply with a direction from the Chief Magistrate, he will lose his job. That non-compliance is regarded as a proper reason for dismissal.

For all the reasons I pointed out during the second reading debate, this is one of the worst attacks of which I know on the judiciary's independence. It is nonsense to argue accountability. We asked whether the South Australian legislation required that a magistrate must comply. It did not use those words. The words the Attorney General read out might have nicely rephrased section 10 of the Stipendiary Magistrates Act in language easier to read. However, they do not provide that if a magistrate does not comply with a direction, that is a proper reason for suspension.

I support the amendment. I urge the Attorney General to delete this clause because it is not essential for the proper running of the Magistrates Court. It functions very well. In fact, it is one of the best operating courts in Western Australia. I said "one of the best" because I consider that the District Court is a real success story.

Mr J.A. McGinty: It is outstanding.

Mrs C.L. EDWARDES: The Attorney General has given no reason for this clause. Why is it necessary to provide that the magistrate must comply with a direction whether it be administrative or a duty that the Chief Magistrate will assign? That requirement could be stipulated in the magistrates' job specification. The legislation should not provide that if they do not comply with a direction, it will be grounds for suspension and dismissal. That is an attack on the independence of the judiciary. As I said earlier, it will interfere with the opportunity for justice to be seen to be working in that court. Once that happens to a magistrate it will be presumed to be on the basis of a decision not to the liking of the Government of the day or even the Chief Magistrate for whatever reason. As the member for Nedlands said, they could be sent to head a review, a task force or a royal commission. What message will it give to the other magistrates? It will tell them to watch what they do. As the Attorney General said, some of them are appointed at a very young age. I have no doubt that most of them will have the moral fortitude to resist taking into account suspension or otherwise of another magistrate because he did not comply with a direction from the Chief Magistrate. A magistrate might be supporting five children at school and not be able to afford to lose his position. I have no doubt that is unlikely to be a conscious thought, but it will impact on his decision making.

What will be the position of defendants? They will not know whether they have received justice. A defendant will not know whether the magistrate has made a decision based on the possibility that the Government might suspend the magistrate because he has not complied with the direction of the Chief Magistrate.

Dr J.M. WOOLLARD: I have listened to the member for Kingsley. I agree that it would be a good idea to remove lines 24 and 25 from clause 27. For the reasons expressed by the member for Kingsley, the lines give the impression that Parliament is seeking to interfere with judicial powers. That is not what Parliament should do and it should not be the purpose of this Bill. Therefore those two lines should be removed. I would like to know why the Attorney General is not willing to delete them and why he does not consider that their inclusion could mean that the Government will be seen to be interfering with judicial powers.

Ms S.E. WALKER: I think this provision will lower the morale in the Magistrates Court. I am not sure whether it is in this Bill, but I believe there is provision in legislation for more than one deputy chief magistrate. A situation arose in New South Wales in which a magistrate became spiteful and vicious and took it out on a fellow magistrate, and was jailed.

Mr J.A. McGinty: That was in Queensland.

Mr T.K. Waldron: It was in Queensland and it was a woman.

Ms S.E. WALKER: It is very unusual for a woman to be spiteful and vicious. I have seen men behave in that way. Most of us have been in professions or served on committees or in other areas of our lives where we have seen self-interest play a part in causing people to do all sorts of things and give paybacks. The provision has very dangerous implications, particularly in courts, because there are a number of deputy chief magistrates. A magistrate could be assigned all the menial work in the Small Claims Tribunal or be sent to prisons regularly and become disgruntled. The Chief Magistrate or a deputy chief magistrate could phone the Attorney General and say that someone is not behaving properly and should be suspended. I am not saying that this Attorney General or any other Attorney General would be party to that if it were not appropriate. However, we do not know what stories will be told by the people dishing out the jobs. All sorts of games can be played and situations manipulated. I think the Attorney General is making a big error internally and it will lower the morale of the court.

Mr J.A. McGINTY: The first thing that needs to be recognised is that the written directions are to be made by the Chief Magistrate. I could completely understand the views that have been put if the Attorney General of the day could issue the written instructions. Even though it does not relate to the judicial functioning, it would

constitute an unacceptable interference in the administration of the courts. However, we are talking about the Chief Magistrate and his relationship with the other magistrates.

The second point is that it is confined to administrative matters. There is no power for the Chief Magistrate to issue any written directives on judicial matters, the contents of judgments or anything of that nature. This is purely about administrative matters.

Ms S.E. Walker: What about when you said just now that he can direct on judicial matters?

Mr J.A. McGINTY: I do not think I did.

Ms S.E. Walker: Going to prisons, going to the Small Claims Tribunal. This is not just about administrative matters.

Mrs C.L. Edwardes: Issuing warrants, not issuing warrants. You are talking about administrative functions.

Mr J.A. McGINTY: There should not be any argument about the ability of the Chief Magistrate to allocate the work among the magistrates.

Ms S.E. Walker: No, there isn't. The point is that you should not have to put the fact that they must comply. It will lower morale. The consequence of it is that you will find people manipulate these provisions for their own personal agendas, motives and paybacks.

Mr J.A. McGINTY: That is the member's point of view. My point of view is that it is about giving the Chief Magistrate the power to properly run the court.

Ms S.E. Walker: Has he complained?

Mr J.A. McGINTY: He solidly supports this issue.

Ms S.E. Walker: Has he complained about his fellow magistrates?

Mr J.A. McGINTY: The member should ask him whether he has complained. All I am saying is that he supports these provisions as necessary to give him the power to efficiently run the court. It is about his relationship with the other magistrates over administrative matters -

Mrs C.L. Edwardes: He believes he needs the power for his colleagues to comply with his direction. Isn't there something to be said about leadership?

Mr J.A. McGINTY: Indeed, there is. I cannot take it much further, other than to say that it is about the internal operations of the court in administrative matters only. If it were about external involvement of the court in judicial matters, I would share the member's concerns. I do not share her concerns about administrative matters.

Amendment put and a division taken with the following result -

Ayes (17)

Mr R.A. Ainsworth	Mr J.H.D. Day	Mr R.F. Johnson	Dr J.M. Woollard
Mr C.J. Barnett	Mrs C.L. Edwardes	Mr P.D. Omodei	Mr J.L. Bradshaw *(Teller)*
Mr D.F. Barron-Sullivan	Mr J.P.D. Edwards	Mr R.N. Sweetman	
Mr M.J. Birney	Mr B.J. Grylls	Mr T.K. Waldron	
Mr M.F. Board	Mr M.G. House	Ms S.E. Walker	

Noes (26)

Mr J.J.M. Bowler	Mr S.R. Hill	Mr A.D. McRae	Mrs M.H. Roberts
Mr C.M. Brown	Mr J.N. Hyde	Mr N.R. Marlborough	Mr D.A. Templeman
Mr A.J. Carpenter	Mr J.C. Kobelke	Mrs C.A. Martin	Mr P.B. Watson
Mr A.J. Dean	Mr F.M. Logan	Mr M.P. Murray	Mr M.P. Whitely
Mr J.B. D'Orazio	Ms A.J. MacTiernan	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Mr J.A. McGinty	Ms J.A. Radisich	
Mrs D.J. Guise	Mr M. McGowan	Mr E.S. Ripper	

Pairs

Mr A.D. Marshall	Ms S.M. McHale
Ms K. Hodson-Thomas	Mr R.C. Kucera
Mr W.J. McNee	Dr G.I. Gallop

Independent Pairs

Dr E. Constable
Mr P.G. Pendal

Amendment thus negatived.

Clause put and passed.

Clauses 28 to 30 put and passed.

Clause 31: Judgments, content of -

Ms S.E. WALKER: Is this provision in the Justices Act or is this something new? Does this abbreviate the normal content of judgments for a judicial officer?

Mr J.A. McGINTY: I am told that the content of this provision, in marginally different form, was in one of the very early drafts that were worked on during the 1990s. It has survived the ongoing processes of analysis and consultation. I guess it is saying that the court must deal with just the issues before it and should feel under no obligation to comment on everything that is said during the trial, but only on those things that are germane to the resolution of the matter before the court. I thought that was commonsense, so, frankly, I am not sure why we need to spell it out in the legislation, which is the import of the member's question, is it not?

Ms S.E. Walker: Subclause (1)(d) states that the court's reasons need not canvass all the factual and legal arguments or issues arising in the case. I thought that would have been absolutely important. The Law Society says that it will not allow for the development of a body of law in which the court elects not to canvass all the legal arguments or issues arising in a particular case. The Law Society also says that given the certainty that the monetary jurisdiction of the Magistrates Court will be significantly increased, when matters of substance come before the Magistrates Court parties to litigation will have a not unreasonable expectation that the court will address the legal arguments in handing down its reasons for judgment. I would have thought that in criminal matters the court should address all the issues arising in the case. I am a bit concerned about this clause.

Mr J.A. McGINTY: Clearly the courts should address every legal argument.

Ms S.E. Walker: Or relevant issue.

Mr J.A. McGINTY: Yes, and not just all the arguments that might be put. For instance, submissions might be put in the alternative. If the first submission is upheld, there may be no need to address the alternative submissions that would have been put. That is the way in which I read this clause. Anything that is relevant should clearly be dealt with.

Ms S.E. Walker: I guess we will probably hear in due course if there are any difficulties, but it would seem to me curtailing.

Mr J.A. McGINTY: I hope that would not be the effect, but the clause was in the Bill during the consultation process for a long time. I understand that adjustments were made relatively recently in the light of feedback from the Chief Justice. Frankly, I am not in a position to take this much further forward than that.

Clause put and passed.

Clause 32 put and passed.

Clause 33: Court's records, access to -

Ms S.E. WALKER: I raised this during the second reading debate: I am concerned about the situation in which a magistrate in the criminal jurisdiction adjourns after a conviction to obtain a psychology, psychiatric or pre-sentence report to examine the sentencing options. I am also concerned about bail applications in which the prosecution puts forward a strong argument to keep a person in prison based on reports. Subclause (4) reads -

> With the leave of the Court, a party to a case may -
>
> > . . . obtain a copy of any document held by the Court in relation to the case, unless the document has been tendered to the Court in confidence for the purpose of sentencing a party;

What happens in the superior courts - this provision would come under this - is that victim impact statements and psychological and psychiatric reports do not leave the court. The defence and the prosecution are allowed to look at them in the body of the court, but they must hand them back. However, this clause seems to prevent them from doing that. What is behind it? It seems to me that this clause would prevent the prosecution or the defence having a look at these documents; that is, the defence would be prohibited from looking at the victim impact statement and the prosecution would be prohibited from looking at the psychological and psychiatric reports.

Mr J.A. McGinty: Subclause (5) relates to criminal proceedings and refers to who is entitled to obtain a copy of any document. It seems to me to cover most of the people. I am finding it hard to follow your argument about who is prevented from looking at such reports.

Ms S.E. WALKER: Paragraph (b) refers to sentencing a party, but sentencing is only carried out in a criminal jurisdiction, is it not? I suppose a person could be sentenced under a civil jurisdiction if he does not pay a debt.

Mr J.A. McGinty: I do not know whether that would be a sentence. I would certainly see a sentence in a criminal context.

Ms S.E. WALKER: That is what I cannot understand.

Mr J.A. McGinty: Are you talking about a civil or a criminal context?

Ms S.E. WALKER: Subclause (4)(b) appears to be in a criminal context, because it refers to sentencing. It refers to sentencing a party, so maybe that does not refer to sentencing an accused. I am happy to postpone debate on this clause and come back to this point.

Mr J.A. McGinty: Are you saying that a currently available psychological report would be prohibited from being made available under this provision?

Ms S.E. WALKER: Yes, but maybe this merely relates to sentencing a party under the Civil Judgments Enforcement Bill.

Mr J.A. McGinty: I do not think so.

Ms S.E. WALKER: Currently, when a person is convicted, pre-sentence reports, psychological reports and victim impact statements are referred to. The defence and the prosecution turn up for the sentencing, when they can still make submissions. They therefore must be able to look at the reports. I was hoping that the Attorney General could explain this, because under this provision it would appear that the defence would be denied the victim impact statements and the prosecution the psychological and psychiatric reports. The prosecution and the defence would have to see the documents on which the court is sentencing. There may be something behind this provision.

Mr J.A. McGINTY: Paragraph (b) does tend to me to read that there is a total prohibition on access by parties to material that was tendered in confidence for the purposes of sentencing. If I may take the member up on her kind offer that would enable us to get some more advice, I will do so. I doubt whether the member's interpretation is what was intended. However, if we proceed on the basis that the provision will be recommitted at the end rather than postponing it at this stage, that would probably be the most convenient administrative way of proceeding. I give an undertaking to recommit this particular clause when the information is to hand, if that is acceptable.

Ms S.E. Walker: We will be voting against the Bill in any event.

Mr J.A. McGINTY: Before we get to that point -

Ms S.E. Walker: We may get to that point sooner than you think.

Mr J.A. McGINTY: I may want to come back and revisit the clause in consideration in detail in the light of information we may get on the issue.

Ms S.E. Walker: If it were the case, you would not be supporting it, would you?

Mr J.A. McGINTY: I would need information on it. On the surface, it does not appear to be what should be happening.

Ms S.E. Walker: How could a prosecutor make proper sentencing submissions?

Mr J.A. McGINTY: I understand the member's point. That is why I want to seek further advice.

Clause put and passed.

Clauses 34 to 38 put and passed.

Clause 39: Rules of court, making -

Ms S.E. WALKER: We have heard a little bit about the rules of court. How will the rules of court be different from practice directions in clause 38? Are any rules of court currently in place? Is there currently any provision like this under the Justices Act?

Mr J.A. McGINTY: The court does not make any rules of court, as such, which is what is envisaged here. It is intended that the regulations that are made under the Justices Act will become the subject matter of the rules of court. The local court rules are currently made by the Governor and not the court. The court will make those rules as rules of court. It essentially covers those two subject matters.

Ms S.E. WALKER: I wonder how this came about. It is interesting that the clause stipulates who will make the rules. It will be not just the Chief Magistrate but the Chief Magistrate and three other magistrates, one of whom will be a deputy chief magistrate. What is the reason behind that? Of interest to me is that I believe there have been 12 drafts of this Bill. This matter has been on foot for quite some while. My second question is: why have the rules of court not already been created?

Mr J.A. McGINTY: Essentially, the idea is that a rules committee of the Magistrates Court, consisting of the Chief Magistrate, deputy chief magistrate and two other magistrates, would be formed. That is regarded as a sufficiently broad cross-section to ensure that there is sufficient input to the making of the rules. We cannot form a rules committee or promulgate the rules as proposed until this legislation has been passed. The process will involve consultation with at least four magistrates. Once this legislation is passed, that body will be formed and the appropriate drafting got under way.

Ms S.E. WALKER: That is interesting. Clause 40(3) - this is relevant to clause 39 - is about the drafting of the rules. It states in part -

> The rules of court must not be inconsistent with -
>
> . . .
>
> (b) the *Criminal Procedures (Summary) Act 1902*;

I presume that the rules cannot be drafted until that Act has been created.

Mr J.A. McGinty: Yes. Again, it will all be done post the passage of the legislation. That may change as it makes its way through the Parliament.

Ms S.E. WALKER: Could it be months off?

Mr J.A. McGinty: Yes.

Ms S.E. WALKER: I am new. Why will the rules of court come before each House of Parliament? Do the District and Supreme Courts have any rules of court, and do they come before Parliament? Do we have to approve their rules?

Mr J.A. McGINTY: Yes. Generally speaking, rules made by the court are disallowable instruments. I guess the view that has been taken here is that although it is up to the court to make its rules, they should be regarded as subordinate legislation and be disallowable in the ordinary course. It is not a proposition with which I find any problem. It is up to the Parliament to give consideration to the rules and to move a disallowance motion in the ordinary course. It is unusual, but I do not see a problem with it.

Clause put and passed.

Clause 40: Rules of court, content -

Ms S.E. WALKER: Does the Attorney General think that it was an error to include reference to the Criminal Procedure (Summary) Act? If this Bill and the package were passed soon, would the reference to that Act be the only thing that stopped the Magistrates Court creating rules? I understand that those changes are a long way off.

Mr J.A. McGINTY: The intention is that both the criminal and civil jurisdiction provisions - others might have a different view - be proclaimed at about the same time. Otherwise, we would proclaim what is passed by the Parliament in a particular order that would enable this to be given full effect. It is right that this Parliament will need to deal with the Criminal Procedure (Summary) Act before the rules of court can be made. It is our intention that all these matters be progressed together. We have managed to get a start on the civil jurisdiction of the Magistrates Court, which is essentially what we are dealing with in this package. The criminal jurisdiction legislation is not that far away.

Clause put and passed.

Clauses 41 and 42 put and passed.

Schedule 1: Provisions about magistrates -

Dr J.M. WOOLLARD: I have proposed some amendments to this Bill. These are -

Page 28, line 22 - To delete the line.

Page 31, lines 23 to 25 - To delete the lines.

Page 31, lines 27 and 28 - To delete -

but the period must not extend beyond when the appointee reaches 70 years of age;

Page 33, line 22 - To delete the line.

I can address all these points at once as they all relate to age. I would like to bring to the Attorney General's attention the fact that under the Constitution -

The ACTING SPEAKER (Mr P.W. Andrews): Member for Alfred Cove, could you explain what you are moving at this stage?

Dr J.M. WOOLLARD: It is basically to remove the upper age limit from this schedule; that is, to delete lines on pages 28 and 31. I have circulated -

The ACTING SPEAKER: I have in front of me proposed amendments to delete line 22 from page 28 and lines 23 to 25 from page 31.

Dr J.M. WOOLLARD: Yes, I was saying, in introduction, that all these amendments relate to the deletion of -

The ACTING SPEAKER: I am sorry, member. I have four proposed amendments in front of me. Are you saying that you are about to speak to all four amendments?

Dr J.M. WOOLLARD: I will speak to the first amendment, but they are all similar.

Mr J.A. McGinty: Can I make a suggestion? If it is permissible, we would be agreeable to all four amendments being discussed together.

The ACTING SPEAKER: We can do the first three amendments.

Dr J.M. WOOLLARD: I would like to bring to the Attorney General's attention the Constitution Acts Amendment Act 1899. Section 7, "Qualification of members of Legislative Council", states -

> Subject as hereinafter provided, any person who has resided in Western Australia for one year shall be qualified to be elected a member of the Legislative Council, if such person is of the full age of eighteen years, and not subject to any legal incapacity, . . .

Section 20 of that Act refers to the qualification of members of the Legislative Assembly and is a similar provision -

> Subject as hereinafter provided any person who has resided in Western Australia for 12 months shall be qualified to be elected a member of the Legislative Assembly, if such person is the full age of eighteen years and not subject to any legal incapacity, . . .

When the Attorney General tabled the Electoral and Constitution Amendment Bill 2003 last year, he did not make any changes. He did not put an upper age limit on members of Parliament retiring at age 65. If such an amendment were to come in, it would affect the member for Moore, the member for Dawesville, Hon Bill Stretch, Hon Bruce Donaldson, Hon Barbara Scott and Hon Ray Halligan. In fact four of those members would be out the door now and two would be out the door come the end of August this year. Why are we applying a double standard in this legislation? Why is there one standard for members of Parliament and another standard for magistrates? People can see on television and in the newspapers that the federal Government is encouraging elderly people to continue working, yet this legislation is doing the exact opposite. It is stating that once a person reaches the age of 65 he or she can no longer contribute to society. The Attorney commented earlier that magistrates had a very heavy workload. Their workload is no heavier than that of High Court judges, and I am sure their workload is no heavier than that of a lot of members of this Parliament. If the Attorney included some of the changes to the Electoral and Constitution Amendment Bill - I would argue against it and include an age limit - there would be some uniformity. However, he is saying that there is one rule for us as members of Parliament and one rule for magistrates. This is wrong. People over the age of 65 should not have a use-by date. I know lots of people who are 65-plus who are very active in my community and who play a very active role in local issues. There are lots of businesspeople and lots of professional people 65 years plus who are still playing

a major role in society. If it were still 1964, I could understand this clause being included; however, I do not think it should be included in the current Bill.

The ACTING SPEAKER (Mr P.W. Andrews): There are a couple of problems, member for Alfred Cove. On the piece of paper you have given me you refer to page 28, line 23. I think you mean line 22.

Dr J.M. WOOLLARD: Sorry, Mr Acting Speaker. That is a typographical error; my apologies.

The ACTING SPEAKER: I will now provide you with some assistance. Will you seek the leave of the House to move simultaneously the first three amendments standing in your name?

Dr J.M. WOOLLARD: Thank you, Mr Acting Speaker. I seek the leave of the House to move simultaneously the first three amendments standing in my name.

Leave granted.

Dr J.M. WOOLLARD: I now formally move the first three amendments -

> Page 28, line 22 - To delete the line.
>
> Page 31, lines 23 to 25 - To delete the lines.
>
> Page 31, lines 27 and 28 - To delete "but the period must not extend beyond when the appointee reaches 70 years of age;".

Ms S.E. WALKER: I had considered some of the member for Alfred Cove's amendments. On the supplementary notice paper I had moved to delete "65", in clause 11 of schedule 1, at page 33, line 22, and insert instead "70". The member for Alfred Cove's first amendment refers to the qualifications for appointment in paragraph (c). I suppose we really have to start somewhere. I do not know whether there is anything like that in the District Court Act. I do not suppose much hangs on it, but with the greatest respect to those parliamentarians who do work hard, I think judicial officers are required to be intellectually consistent and enduring throughout their terms of office, and, frankly, some of the debate from parliamentarians does not fall into that level of expertise. I do not know whether the position of parliamentarian can be equated with that of magistrate or other judicial officer. Having said that, I know most parliamentarians work very hard, but it is a completely different job. I do not really have a problem supporting the first amendment of the member for Alfred Cove.

The second amendment relates to acting magistrates. Clause 9(2)(c) states -

> a person who ceased to be a magistrate on reaching 65 years of age and who is under 70 years of age.

The member obviously believes there should be an age limit of 70, because she has moved that amendment.

Dr J.M. Woollard: I do not believe there should be an upper age limit.

Ms S.E. WALKER: Then I could not support that amendment, because I am moving that it should be in line with the District Court. The Opposition will move that the magistrates' tenure of office and age be the same as for the District Court.

Dr J.M. WOOLLARD: I hope the Attorney General will respond if he is going to refuse to take out the upper age limit, otherwise it is a double standard. He said himself during his right of reply that he believed it was inappropriate that there be an upper age limit in this Bill. If he stands by what he said earlier, why is he allowing this clause to remain in the Bill?

Mr J.A. McGINTY: Notwithstanding advice to the contrary, this is a discriminatory provision which is a pragmatic response to the issues contained in legislation. Therefore, I join with my good friend the member for Nedlands in opposing the complete lifting of all age restrictions. I take that opportunity; it does not arise very often.

Ms S.E. WALKER: I thank the Attorney General. Having filled the role, not of a judicial officer, obviously, but of a prosecutor and having to do trials, I can say that it requires intense concentration all the time one is in court. As parliamentarians we do not need to concentrate all the time - except, of course, for the person in the Chair. The job of a parliamentarian is quite demanding, but it is different from that of a judge. Therefore on this occasion I cannot support the member for Alfred Cove.

Dr J.M. WOOLLARD: I point out to the Attorney General that it is not all ages that I want to have removed. Clause 2(1) of schedule 1 provides -

> A person is qualified to be appointed as a magistrate of the court if he or she -

(a) is or has been a practising barrister of the High Court of Australia, or a legal practitioner;

(b) has had at least 5 years' legal experience; and . . .

That is the minimum qualification. The Constitution Acts Amendment Act provides that the minimum qualification is that a person be 18 years of age. I am objecting to the upper age limit in this Bill. There are members of both this House and the other House who would not have been elected had we had an upper age limit at the last election. There are several members of this Parliament who would not be able to stand for election at the next election if we had an upper age limit. The community has endorsed those candidates. We should consider the qualities and skills of the individual. People who have reached the age of 65 have not suddenly lost all their marbles. The Attorney General is implying in this Bill that people who have reached the age of 65 can no longer contribute to society. A person may have been a legal practitioner for 20 or 30 years, but once that person has reached the age of 65 it seems that he or she is not considered suitable to be a magistrate. People who are aged 64 can contribute and play a valuable role, but suddenly when they reach the age of 65 they are out the door. That is wrong.

Ms S.E. WALKER: That has made me think about the role of the Speaker and a judge. When the Speaker is in the Chair, he needs to focus, but he can ask parliamentarians such as yourself, Mr Acting Speaker (Mr P.W. Andrews), to act in that role and that relieves him of the need to concentrate all the time. However, a judge needs to concentrate the whole time. Some judges probably go off and have a snooze from time to time, but others are used to concentrating for long periods because they have been there for quite a while. We cannot equate the role of the Speaker with the role of a judge. A judge has an extremely solemn role, because he is dealing with the potential loss of a person's liberty. Although I understand where the member for Alfred Cove is coming from, and although I usually support most of what the member for Alfred Cove has to say, I regret that I cannot support these amendments.

Amendments put and negatived.

Mr J.A. McGINTY: I move -

Page 31, after line 33 - To insert the following -

(4) The remuneration of an acting magistrate must not be less than that of a magistrate appointed under clause 3 whose conditions of service (other than remuneration) are the same as those of the acting magistrate.

This new subclause is inserted to clarify that the intent of the Bill is that acting magistrates will have their remuneration determined in the same manner as a magistrate. The amendment addresses a concern that was raised by the Chief Judge of the Family Court.

Amendment put and passed.

Dr J.M. WOOLLARD: As my previous amendments were lost, I will not proceed with my proposed amendment to page 33, line 22.

Ms S.E. WALKER: Is it contemplated under clause 9 that acting magistrates can be up to 70 years of age?

Mr J.A. McGinty: Seemingly.

Ms S.E. WALKER: There we are! It is a shambles, as usual. I was waiting for the Attorney General to say formally that an acting magistrate can be up to 70 years of age, and that these provisions are inconsistent with the rest of the Bill, but he is obviously not going to do that. I move -

Page 33, line 22 - To delete "65" and substitute "70".

This issue is very important to us, because we believe that magistrates should not be discriminated against. I would be happy to adjourn this part as well if the Attorney wanted to have a rethink and come back to us.

Mr J.A. McGinty: I think I know this one!

Ms S.E. WALKER: When the Attorney General has had a couple of nights sleep he will think the member for Nedlands is right on this clause. I have already given my reasons for moving the amendment.

Mr J.A. McGINTY: There is clearly an argument for consistency at all levels of the judiciary. I have never denied that. One of the other amendments in this Bill is that, in future, magistrates will be called Your Honour rather than Your Worship. Again that is for the purpose of consistency and to do away with an archaic terminology so that people who front up to a Magistrates Court are not confused about what to call the

magistrate. One of my very good friends once fronted up before the industrial magistrate to prosecute an employer for underpaying wages, and he got a bit confused about what to call the magistrate and ended up referring to him as Your Majesty. I must say he won the prosecution; flattery always works! It is just a matter of consistency and uniformity. There is undeniably a case to be put, as the member for Nedlands and others have put as part of this discussion. However, in my view this is not the time to move to standardise the age of retirement for two classes of judicial officer - magistrate and judge. There is no doubt that the time will come for that, but we are not prepared to support that just yet.

Amendment put and a division taken with the following result -

Ayes (15)

Mr C.J. Barnett	Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr P.D. Omodei	Dr J.M. Woollard
Mr M.J. Birney	Mr J.P.D. Edwards	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*
Mr M.F. Board	Mr M.G. House	Mr T.K. Waldron	

Noes (26)

Mr J.J.M. Bowler	Mr S.R. Hill	Mr A.D. McRae	Mrs M.H. Roberts
Mr C.M. Brown	Mr J.N. Hyde	Mr N.R. Marlborough	Mr D.A. Templeman
Mr A.J. Carpenter	Mr J.C. Kobelke	Mrs C.A. Martin	Mr P.B. Watson
Mr A.J. Dean	Mr F.M. Logan	Mr M.P. Murray	Mr M.P. Whitely
Mr J.B. D'Orazio	Ms A.J. MacTiernan	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Dr J.M. Edwards	Mr J.A. McGinty	Ms J.A. Radisich	
Mrs D.J. Guise	Mr M. McGowan	Mr E.S. Ripper	

Pairs

Mr A.D. Marshall	Ms S.M. McHale
Mr W.J. McNee	Mr R.C. Kucera
Ms K. Hodson-Thomas	Dr G.I. Gallop

Independent Pairs

Dr E. Constable
Mr P.G. Pendal

Amendment thus negatived.

Ms S.E. WALKER: For some reason, wires have been crossed and the Liberal Opposition's next amendment does not appear on the supplementary notice paper. The Opposition seeks to delete clauses 13 and 14 from schedule 1 of the Bill. Clause 15, "Removal from office", would be retained; it reads -

> A magistrate holds office during good behaviour but the Governor may, upon the address of both Houses of Parliament, terminate a magistrate's appointment.

That would bring the tenure of office for a magistrate in line with that of a District Court judge under the District Court of Western Australia Act, section 11 of which reads -

> (1) The commission of each District Court Judge shall continue in force during good behaviour but Her Majesty may, upon the address of both Houses of Parliament, remove any District Court Judge from his office and revoke his commission.

The Opposition has strong values and beliefs regarding judicial independence, and therein lies the distinction between the Opposition and the Government. I went into this area in depth during my contribution to the second reading debate.

I thought the Attorney General was saying something nasty behind my back there.

Mr J.A. McGinty: Not at all.

Ms S.E. WALKER: I was trying to pick up what he was saying.

Mr R.F. Johnson: I wouldn't have let him get away with it, member for Nedlands.

Ms S.E. WALKER: My colleague and I are just like that!

Mr R.F. Johnson: We are as one!

Ms S.E. WALKER: As one.

It is getting late, but this is a serious issue for the Opposition. The Bill provides an opportunity for an Attorney General to intervene in the judicial process. There are many Magistrates Courts in the regions, and many matters go before the Magistrates Court. I think 160 000 was the figure touted earlier. I am getting a nod from the adviser. That is an enormous number of matters. The Opposition thinks the inclusion of these clauses in schedule 1 is a backward move by the Attorney General. At every drop of the hat he has spoken about modernising the law and about being a visionary. These provisions will take us back to the time we put people in straitjackets and padded cells and threw away the key. It is a disgrace and an outrage to say that a person appointed under this Bill who is a legal practitioner with five years standing can be suspended by a minister who can order an inquiry into his or her physical and mental wellbeing. I question the Attorney General's claim that the present situation is used in a manipulative or devious way by magistrates so that they can retire from office. If that is the case, should the provision be in the Bill? The magistrates do not want the clause in the Bill. They would like their conditions to be on par with those of District Court judges and enjoy the same tenure of office as Supreme Court judges enjoy. As I pointed out, Professor Sallmann found in Victoria in December 2003 that magistrates should hold the same tenure of office as Supreme Court judges. There is no way that the Attorney General or any other minister has power to intervene in the judicial independence of a District Court judge or a Supreme Court judge. The Attorney General should have modernised the provisions in the Stipendiary Magistrates Act. However, he has expanded them in a backward move. He has created a mechanism for him or another Attorney General to intervene in the magistrates' judicial independence. The Opposition feels very strongly about that. Magistrates should be on a par with other judges. It is a value the Opposition holds very strongly.

Mr J.A. McGINTY: The Government does not support the amendment moved by the member for Nedlands.

The DEPUTY SPEAKER: It has not been formally moved yet. It has been anticipated.

Mr J.A. McGINTY: Clause 13 of schedule 1 is headed "Suspension and termination due to illness". That is an existing provision, which has been included for the benefit of the magistrates. In my opinion, it has not been in any sense abused but there is a superannuation benefit to a magistrate whose employment is terminated due to ill health. That is why it is in the present Act and included in this Bill.

In relation to clause 14 of schedule 1, "Suspension from office due to substandard performance", incompetence in the performance of office should be a ground that can lead to review by the Chief Justice and a recommendation to this Parliament to remove a magistrate from office. We believe they are two clauses that should be supported and will be strongly supported, at least in the Legislative Council.

Ms S.E. WALKER: The magistrates say that they do not want this provision that is supposed to provide them with a benefit. However, for want of a better phrase, the Attorney General is shoving it down their throats. If they do not want it, why is it being retained? Is the Attorney General being somewhat pig headed? Magistrates want to be treated exactly the same as other judges; yet, in his authoritarian and paternalistic way he is saying he knows what is good for them. As he said in a letter he handed me this morning - I think someone else wrote it - which he signed and read later, in his view, magistrates should retire at a particular age because he thinks he knows best that the workload might be too much for them. That is a very shallow explanation for inclusion of a provision. It is unbelievable that he is doing this for the "good of magistrates" so that they can retire and get some benefit.

Mr R.F. Johnson: It is patronising.

Ms S.E. WALKER: It is patronising and authoritarian.

Mr J.N. Hyde: Tedious repetition.

Ms S.E. WALKER: Thank you, member for Perth. At least I make a contribution in this Parliament rather than act like a buffoon.

Mr J.N. Hyde: You were not ready; you wasted 10 minutes.

Ms S.E. WALKER: At least I make an intellectual contribution, which is more than what he does. He should go back to wherever he came from.

The DEPUTY SPEAKER: Order, members!

Mr J.N. Hyde interjected.

Ms S.E. Walker: Off he goes.

The DEPUTY SPEAKER: Order, member for Perth! I need someone to stand up otherwise I will put the vote. I will ignore the fact that the member for Nedlands sat down and she can continue from where she left off.

Ms S.E. WALKER: I have been debating this Bill for a number of hours. The member for Perth has just drifted in from nowhere to make some buffoonish comments. These issues are very serious. He does not know what he is talking about.

Mr J.N. Hyde: Good; I want you to ignore me - all three of you.

The DEPUTY SPEAKER: Order, member for Perth!

Ms S.E. WALKER: Other paragraphs that the Opposition finds galling are as follows -

(a) has shown incompetence or neglect in performing his or her functions;

There is no definition of "incompetence" or "neglect" -

(b) has misbehaved or engaged in any conduct that renders him or her unfit . . .

If we delete clauses 14 and 13, we would retain clause 15. I therefore move -

Page 34, line 9 to page 36, line 16 - To delete the lines.

The DEPUTY SPEAKER: This is a test vote because the Attorney General has an amendment that will affect page 35, lines 17 to 19. To preserve the right of both members to move their amendments I propose to move the first part of the member for Nedlands' amendment. Should her first part be successful, we can move to the second part. That will preserve the right of the Attorney General to move his amendment. The question is that the words to be deleted be deleted.

Mrs C.L. EDWARDES: I support the amendment for all the reasons that have been outlined in this place tonight. Who will decide what is "substandard performance", contained in clause 14 of schedule 1? At the end of the day it will be up to the Attorney General, the minister of the day, to determine what is substandard performance. The areas not included in the Stipendiary Magistrates Act are "incompetence" and contravention of clauses 25(3) and 27(3), which we debated earlier tonight concerning non-compliance with a direction or an order of the Chief Magistrate in clause 13(5) of the schedule.

Earlier tonight in his response to the second reading debate, the Attorney General said that the medical panel was there for the benefit of the magistrate. If it is there for the benefit of the magistrate, why is there a clause in the schedule that provides that the minister may direct the magistrate to attend and be examined by and to cooperate with the reasonable requests of the committee? It is either for the benefit of the magistrate or it is not. If a magistrate does not attend and is not examined and does not cooperate with the reasonable requests of the committee, under clause 14 of the schedule he can then be suspended, because it would fall within the definition of proper reason for dismissal. Again, this is clearly an attack on the independence of the judiciary. There are two new reasons for suspending a magistrate. The first reason is incompetence, and who will determine that? The second reason, under clauses 25(3) and 27(3), is noncompliance with the directions of the Chief Magistrate, as well as noncompliance with a ministerial order to attend and be examined by a medical committee, which is presumably there for the magistrate's benefit. This is clearly wrong. It is a further extension of the provisions in the Stipendiary Magistrates Act, and I do not believe it is in any other legislation in Australia, otherwise the Attorney General would have told us.

Dr J.M. WOOLLARD: For the sake of the record, can the Attorney General tell me whether the table of recommendations in relation to age, to which he referred earlier, came from the Law Reform Commission?

Mr J.A. McGinty: No.

Dr J.M. WOOLLARD: It has simply come from the Government; it has not come from the Law Reform Commission.

Mr J.A. McGinty: Yes.

Amendment put and a division taken with the following result -

Ayes (16)

Mr R.A. Ainsworth	Mr M.F. Board	Mr B.J. Grylls	Mr T.K. Waldron
Mr C.J. Barnett	Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr P.D. Omodei	Dr J.M. Woollard
Mr M.J. Birney	Mr J.P.D. Edwards	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*

Noes (26)

Mr P.W. Andrews	Mr S.R. Hill	Mr A.D. McRae	Mrs M.H. Roberts
Mr J.J.M. Bowler	Mr J.N. Hyde	Mr N.R. Marlborough	Mr D.A. Templeman
Mr C.M. Brown	Mr J.C. Kobelke	Mrs C.A. Martin	Mr P.B. Watson
Mr A.J. Carpenter	Mr F.M. Logan	Mr M.P. Murray	Mr M.P. Whitely
Mr A.J. Dean	Ms A.J. MacTiernan	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mr J.B. D'Orazio	Mr J.A. McGinty	Ms J.A. Radisich	
Dr J.M. Edwards	Mr M. McGowan	Mr E.S. Ripper	

Pairs

Mr A.D. Marshall	Ms S.M. McHale
Mr W.J. McNee	Mr R.C. Kucera
Ms K. Hodson-Thomas	Dr G.I. Gallop

Independent Pairs

Dr E. Constable
Mr P.G. Pendal

Amendment thus negatived.

Mr J.A. McGINTY: I move -

Page 35, lines 17 to 19 - To delete the lines and substitute the following -

(2) The Minister may recommend to the Governor that a magistrate be suspended if -

(a) in the case of the Chief Magistrate - the Minister, after consulting the Chief Justice of Western Australia, alleges that a proper reason exists for suspending the Chief Magistrate; or

(b) in the case of any other magistrate - the Minister, after consulting the Chief Magistrate, alleges that a proper reason exists for suspending the magistrate.

Basically the amendment is to provide not as much protection as members opposite or the magistrates would like, but a greater measure of protection when suspension of either the Chief Magistrate or another magistrate is proposed. It was foreshadowed in the letter I wrote to the magistrates' society.

Mrs C.L. EDWARDES: In his amendment, the Attorney General is attempting to soften the fact that he will be the one making the decision to suspend a magistrate. He will do it with this amendment after consultation. There is consultation and then there is consultation.

Mr J.A. McGinty: That is right.

Mrs C.L. EDWARDES: I have no doubt that if it suited the Attorney General, there would be extensive consultation and probably even dialogue, repartee and the like. However, if it does not suit him - I am not personalising this; I am talking about the office holder of Attorney General - he does not have to enter into any form of real discussion about the matter. Magistrate Bloggs could be suspended as of five o'clock tonight. Will that be regarded as consulting, or does the Attorney General think there is wider terminology for that? He must allege that a proper reason exists for suspending a magistrate. We have already talked about the clauses. A magistrate must have failed to comply with a direction of the Chief Magistrate administratively in any of his duties. A magistrate might have failed to go to the medical committee when somebody has alleged that he is not of good health and therefore cannot carry out his functions and role. The proper reasons are pretty easy for the Attorney General to list. They would include the points covered in clauses 25(3), 27(3) or 13(5), and that would be the end of the story; it would be incompetence. We have dealt with the basis of what could be incompetence. The real problem is how justice will be seen to be delivered in the future. We do not support the amendment

because it is a sop to make the Attorney General look better. We believe that the Stipendiary Magistrates' Society of Western Australia would not support it either.

Ms S.E. WALKER: I am surprised that caning, flogging and the birch have not been brought back.

Mrs C.L. Edwardes: Do not encourage him, member for Nedlands.

Ms S.E. WALKER: I am sure we will get them soon. The Attorney General may now recommend to the Governor that a magistrate be suspended. In the case of the Chief Magistrate, the Attorney General, after consulting the Chief Justice of Western Australia, could allege that a proper reason exists for suspending the Chief Magistrate. Who does the Attorney General consult when he considers that the Chief Justice should be suspended?

Mrs C.L. Edwardes: Me, myself!

Ms S.E. WALKER: That is right, he consults himself. I presume that the Chief Stipendiary Magistrate takes on the more serious cases in Western Australia. He takes on a heavy workload. I find it galling that the Attorney General will be able to suspend the Chief Magistrate and interfere. We do not support this amendment. We think it is archaic and smacks of interference with the judiciary. Therefore, we will be voting against this amendment.

Amendment put and a division taken with the following result -

Ayes (26)

Mr P.W. Andrews	Mr S.R. Hill	Mr A.D. McRae	Mrs M.H. Roberts
Mr J.J.M. Bowler	Mr J.N. Hyde	Mr N.R. Marlborough	Mr D.A. Templeman
Mr C.M. Brown	Mr J.C. Kobelke	Mrs C.A. Martin	Mr P.B. Watson
Mr A.J. Carpenter	Mr F.M. Logan	Mr M.P. Murray	Mr M.P. Whitely
Mr A.J. Dean	Ms A.J. MacTiernan	Mr A.P. O'Gorman	Ms M.M. Quirk *(Teller)*
Mr J.B. D'Orazio	Mr J.A. McGinty	Ms J.A. Radisich	
Dr J.M. Edwards	Mr M. McGowan	Mr E.S. Ripper	

Noes (16)

Mr R.A. Ainsworth	Mr M.F. Board	Mr B.J. Grylls	Mr T.K. Waldron
Mr C.J. Barnett	Mr J.H.D. Day	Mr R.F. Johnson	Ms S.E. Walker
Mr D.F. Barron-Sullivan	Mrs C.L. Edwardes	Mr P.D. Omodei	Dr J.M. Woollard
Mr M.J. Birney	Mr J.P.D. Edwards	Mr R.N. Sweetman	Mr J.L. Bradshaw *(Teller)*

Pairs

Ms S.M. McHale	Mr A.D. Marshall
Mr R.C. Kucera	Mr W.J. McNee
Dr G.I. Gallop	Ms K. Hodson-Thomas

Independent Pairs

Dr E. Constable
Mr P.G. Pendal

Amendment thus passed.

Mr J.A. McGINTY: I have three amendments to pages 35 and 36 of the Bill. I seek leave to have them considered together as they are really on one subject matter, which is the removal of the power to suspend a magistrate without pay. We want it to be clear that if a magistrate is suspended, it is on full pay.

Leave granted.

Mr J.A. McGINTY: I move -

> Page 35, lines 23 and 24 - To delete "unless and to the extent that the Governor determines otherwise" and substitute the following -
>
> > until an order is made under subclause (8)
>
> Page 36, line 1 - To delete ", both under an order made under subclause (3) and".
>
> Page 36, line 3 - To delete "subclause (8)" and substitute "subclause (8)(b)".

Amendments put and passed.

Mr J.A. McGINTY: The next amendment again relates to taking out of the Bill the power to suspend a magistrate without pay. The final amendment on the Notice Paper is to the same effect. I seek leave to move those two amendments together, given that they relate to the same subject matter as the last amendments that I moved. The Bill currently says that a magistrate can be suspended without pay. We are taking out that power to suspend without pay, so anyone who is suspended as a result of these amendments will be on full pay.

Mrs C.L. Edwardes: It is at your determination. You can decide whether they get paid.

Mr J.A. McGINTY: Currently a suspension can be without pay. It is proposed that the initial suspension always be on full pay. Once the Chief Justice has conducted his inquiry, the Governor can determine whether, pending the matter being dealt with by the House - which is really stage 2 of the process - to what extent the magistrate is to be remunerated during the continued extension.

Mrs C.L. Edwardes: Why is that being added?

Mr J.A. McGINTY: Because we thought it was important. If the Chief Justice recommends removal and there is an address to both House of Parliament, the Governor should have an option of determining that it should be with or without pay or under what conditions, but until the point that the Chief Justice has found sufficient grounds to warrant removal, we think there should be no power to suspend without pay and that it should continue for that period. That is the effect of the amendment.

The ACTING SPEAKER (Mrs D.J. Guise): Is there agreement to deal with these two amendments together?

Leave granted.

Mr J.A. McGINTY: I move -

> Page 36, lines 12 to 14 - To delete the lines.
>
> Page 36, lines 15 and 16 - To delete the lines and substitute the following -
>
> (9) If under subclause (8)(b) the Governor continues any suspension of a magistrate, the Governor must determine whether and to what extent the magistrate is to be remunerated during the continued suspension.

Amendments put and passed.

Schedule, as amended, put and passed.

Schedule 2: Form of commission -

Ms S.E. WALKER: I will not move an amendment to this schedule, but I would like to speak on behalf of the magistrates in Western Australia who object to this form of commission. In a letter to the Attorney General, which he has snubbed his nose at, the magistrates say -

> The reference to administrative functions in clause 2, Schedule 2 should be deleted. There is no such reference in the Commission appointing judges. The only administrative functions which a magistrate is required to perform are those which are incidental to judicial functions or those which have been specifically conferred by particular legislation and therefore no commission is or ever has been required to perform such functions.
>
> It is not the role of a judicial officer to participate in the function of the government. The reference to assisting and promoting good government in the State is not contained in the commission appointing a judge. Similarly is quite inappropriate in this Bill.
>
> The Society submits that there is no case for treating one tier of the judiciary in relation to the issues referred to above any differently from the other tiers and that, consistent with the fundamental principle of judicial independence, this should be reflected in any new legislation.

I have three questions. Firstly, was it just laziness? I think the Attorney General said the old drafting had the office of magistrate as administrative with judicial functions attached, and it was swapped around. Is there anything like this in the Stipendiary Magistrates Act? Why is the form of commission for magistrates different from those for a District Court or Supreme Court judge? Why is there a reference to them maintaining the peace, order and good government of the State? Is that the same for District or Supreme Court judges?

Mr J.A. McGINTY: In the letter that I wrote to the Stipendiary Magistrates' Society of Western Australia I said -

> I cannot see any foundation for your concerns about the form of Commission. As you acknowledge, Magistrates do perform administrative functions, such as the issue of warrants, and therefore, it seems quite unexceptional to refer to those functions in the form of Commission.
>
> I would not accept for one moment that the judiciary does not have a role to play in ensuring the peace, order and good government of the State.

In my view, the original formulation was provocative. I think what we now have is a formulation that accurately reflects the role of the magistrates.

Schedule put and passed.

Schedule 3: Oath and affirmation of office -

Ms S.E. WALKER: I will have more to say about the changing of the oath in this schedule, but I will refer to the Stipendiary Magistrates Act. Currently, the oath for a stipendiary magistrate is -

> I, do swear that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second, Her Heirs and Successors, according to law in the office of stipendiary magistrate and I will do right to all manner of people after the laws and usages of this State, without fear or favour, affection or illwill.
>
> So help me God.

Regardless of whether or not the Attorney wants to be a republican, the Queen or the Crown forms part of the Constitution, but where is the oath of office for a District Court judge?

Mr J.A. McGINTY: Unless I am mistaken, it is to be found in the first schedule of the District Court Act.

Ms S.E. WALKER: I have a copy of the District Court Act but I do not have a copy of the schedule.

Mr J.A. McGinty: Is there a schedule at the back of it?

Ms S.E. WALKER: Yes, I have found it. I think I have just been too efficient. I pulled it out last night and it has disappeared. The District Court Act refers to "faithfully and impartially serving the people of the State of Western Australia". I wonder why that impartiality was not included. Did the Attorney General's people, when they were drafting this legislation, look at the other roles of judicial officers?

Mr J.A. McGINTY: An endeavour is being made to standardise the oaths and affirmations of office for the various classes of judicial officer. The notion of impartiality is conveyed in the new standard wording that will appear in each of the Acts relating to judicial officers, particularly in the words of the proposed amendment to schedule 1 of the District Court Act, which reads "and I will do right to all manner of people according to law, without fear or favour, affection or illwill." That carries forward the notion of impartiality and gives some idea of what is involved there.

Ms S.E. Walker: It is not uniform across the judiciary. It is higgledy-piggledy and all over the place.

Mr J.A. McGINTY: That is all I can offer on that matter.

Ms S.E. Walker: I just thought I would raise it.

Schedule put and passed.

Title put and passed.

Recommittal

On motion by Mr J.A. McGinty (Attorney General) resolved -

> That the Bill be recommitted for the further consideration of clause 33.

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