Hearing commenced at 10.06 am

COCK, MR ROBERT
Director of Public Prosecutions, examined:

FOX, MS ANNETTE
Research Assistant to the Director of Public Prosecutions, examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the meeting. Thank you for attending to assist the committee with its inquiries. There are a few formalities that I will quickly address before our discussions commence.

You would have signed a document entitled “Information for Witnesses”. Have you read and understood that document?

Mr COCK: Yes, I have.

Ms FOX: I have read it.

The CHAIR: Today’s discussions are public. They are being recorded and a copy of the transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that the premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask that the committee consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue. I will explain to you how we intend to proceed. I believe you have appeared before parliamentary committees like this in the past, Mr Cock.

Mr COCK: Yes, I have had that pleasure.

The CHAIR: You are probably reasonably familiar with the process. I will invite you to make an opening statement and then I will ask members to raise their particular issues with you. I have some questions that, as chairman, I will put to you after that on behalf of the committee. At this point I invite you to make your opening remarks to the committee.

Mr COCK: Certainly. The Criminal Law and Evidence Amendment Bill 2006 was prepared on the instructions of the Attorney General. I was asked to be the drafting officer. Some of the initiatives within it did not emanate from my office; some did. The process by which the draft instructions were prepared was that the Attorney had for some time received memoranda from me and other justice agencies recommending a number of changes; some to the substantive law and some of a remedial nature, bearing in mind the rapid passage of earlier amendments to criminal law in the past few years. Some oversights were subsequently identified and some initiatives were progressed by the Department of the Attorney General. Because of the wide-ranging nature of them, the Attorney decided to have one person as the instructing officer and it was determined that the appropriate person was to be me. I instructed parliamentary counsel on the amendments, consistent with the approval that the Attorney had received from cabinet to progress a number of separate pieces of legislation.

I will go through each part of the bill to give some background and await questions before I go into detail. Part 1 is self-explanatory. Part 2 arises as a consequence of a report I prepared for government some time ago following widespread criticism by a number of police officers that
courts were not adequately protecting police officers who were exposed to violent offences. I prepared a written report to the Minister for Police and Emergency Services and the Attorney General after inquiring into the concerns that principally had been brought to my attention by police officers. As I said, mainly their concerns were that courts were not acting appropriately to the offences on their members. I found that there was probably some concern about the consistency of sentencing and recommended that there be some better analysis and evidence prepared and records kept relating to sentences. That has happened. More fundamentally, I found that the offences of grievous bodily harm and assaulting police officers were really in need of improvement by way of penalty, and gradation of penalty.

Other amendments to the Criminal Code were also, at the time, identified - that is, in addition to my report on punishment for persons assaulting policemen. That concerned the racial vilification amendments of 2004 where this Parliament had enacted amendments to the penalty provisions, but because there was a subsequent amendment to a number of the sections, the amendments that the Parliament had intended could not, in fact, be made because they depended upon old language of the statute. By the time the commencement of the racial vilification amendments were to take effect, the provisions they were to replace were no longer there. Logically, they simply could not be incorporated into the law. The racial vilification amendments do no more than go back to the position that Parliament had intended in 2004, and nothing more than that.

About this time the Department of the Attorney General was also developing proposals to improve the criminal justice response to sexual assault against children and it had identified a number of inadequacies in section 321A of the code, which have also been addressed. They are principal amendments to the code. Amendments under part 3 of the act predominantly address omissions, oversights and small glitches in the statute that was enacted in 2004, although there are some small developments of the law predominantly having arisen from recommendations from the courts.

[10.10 am]

Part 4 - the Criminal Appeals Act - is concerned with amendments to provide a limited right of prosecution appeal and those indictable offences in which judicial error may have tainted the jury verdict. It is limited in a sense that they do not apply to all jury trials; they apply only to those in which the offence on which the accused was acquitted carries a maximum penalty of 14 years or more. As I say, that was an initiative of the Attorney designed to provide higher public confidence in the criminal justice system by seeking to satisfy those occasional concerns that the system is not sufficiently accurate to ensure appropriate convictions and appropriate acquittals. By that I mean that there has been an occasional concern that some persons charged with serious offences have escaped responsibility because of judicial error, which has led the jury into misunderstanding or not correctly applying the legal principles. But for this provision, there would be no right by the prosecution to try to correct that.

Part 5 - the Evidence Act amendments - extends present policy that provides for quite innovative methods for witnesses under disability to give evidence, and also provides for and adopts an Australian Law Reform Commission recommendation to allow the court to introduce and hear evidence from experts dealing with child behaviour. As I say, this particular proposal is complementary to the initiative to amend section 321A to better enable the courts to prosecute offences against young victims. Part 6 deals exclusively with minor amendments, as does part 7. That is my overview.

Hon DONNA FARAGHER: I have three areas of question. The first relates to assaults against public officers. I note that, in addition to those aspects relating to the longer periods of imprisonment outlined in the bill, the bill includes ambulance officers, who are in effect private officers. Was consideration given to actually extending it to those other officers that are private officers but essentially provide a public service. For example, private nurses, private doctors
Legislation Wednesday, 18 April 2007 Page 3

essentially provide the same service as their public service counterparts. Why were they not included in the bill?

Mr COCK: It was not my recommendation to include anyone other than ambulance officers because my inquiry was principally concerned with police officers, people in a quasi-law enforcement circumstance, whose primary function really brought them in contact with persons who are likely to be charged with other offences. They are somewhat of a special category. The amendments, of course, picked up the definition of “public officer”; so, despite the narrow scope of my inquiry, my recommendations were to provide these additional penalties not simply for police officers but for all public officers. I paid some regard to the extent to which that was appropriate. I felt it was appropriate because persons performing public duties are, by and large, on some constraints with respect to their employment remuneration; whereas persons in the private sector, by and large, have greater flexibility to seek remuneration, and may pursue work in that area for less than the motivations that operate in relation to public officers. I acknowledge, however, that dichotomy is breaking down as society develops. About the time of my inquiry, there was a very savage assault on an ambulance officer in Rockingham. There was considerable public concern and disquiet about the absence of proper and adequate punishment available for those effecting that particular assault. My inquiries around Australia revealed that all ambulance officers, except those in Western Australia, are in fact public officers. All other states of Australia employ ambulance officers in the public service.

[10.20 am]

We are unique. I felt a very strong case therefore existed to extend the protections of these assault provisions to the ambulance officers, because they were, in a sense, front line in their duties and responsibilities, and, as I say, because of the national perspective, it was really perhaps for historical reasons more than for any substantive reason that they were denied the protection of the benefits of the provisions designed to protect public officers. I then paid some regard to the extent to which other persons in a public-type industry, although employed in the public sector, should also receive protection. A couple of categories immediately came to mind. First, there were the officers working in the private prisons, who are obviously working somewhat in the front line, as in my police and ambulance analogy, and also there were the mental health nurses, in particular, in the nursing area, where there is some real exposure to potentially violent individuals. I discussed these with colleagues and the Attorney, and it was felt that there was not a sufficiently strong case to extend the protection to these private sector employees, other than the ambulance officers, for the reasons I have expressed.

Other states of Australia do have private sector health workers and private sector prison officers who are not under their regimes covered by the protection of the public officer provisions of the Criminal Codes in those other states, and I think our philosophy has always been to try to maintain some consistency nationally in relation to our criminal laws. I know that there is a model criminal code project that has been going for some years, which is trying to in fact create uniformity of criminal law across Australia. Whether that happens in due course is for others to assess, but, from my perspective, I was desirous of achieving, insofar as was possible, some similar provisions, and to try to cover a larger group of private sector workers and ambulance officers was to go beyond what the other states are presently doing, and I felt was really not sufficiently justified.

Hon DONNA FARAGHER: In saying that, though, would it present any difficulties if it were extended to private nurses, private prison officers or mental health nurses? Would it actually present any difficulty if the legislation were extended to that group?

Mr COCK: No, not at all. You could readily identify different groups and extend the definition of public officer, for the purpose of these particular provisions, to cover them, and if we prosecuted a person for assaulting them, and the person was convicted, he would be exposed to the higher penalty regime. It was entirely a matter of judgement based upon some national consistency, but if
the Parliament was of the view that it was appropriate to cover these different groups, there would be no trouble in doing that.

Hon SALLY TALBOT: Would you be concerned at all about the slippery slope argument or opening the doors to some greyer areas than those that we have covered so far in this discussion; for example, security guards or people who drive armoured cars?

Mr COCK: I think it is critical that the criminal law of all our laws is clear and unambiguous. Obviously, it is important that we ensure clarity in the provisions we draft, but there is no principled reason that particular groups may not receive the protections that are presently designed for the public sector employees. I am not troubled if we increase all our penalties. That is simply a matter for Parliament. However, I had not seen, and there was nothing brought to my attention, that these groups require the additional protection. There have been, as you know, some quite well-known cases of assault on public sector health nurses, and those matters have been prosecuted by my office very successfully. There was no problem, of course, with the penalty regime, because this person, the one who was assaulted some time ago, was a public sector health nurse. There were no examples brought to my attention whereby the law was seen to be inadequate. Whilst I have been the Director of Public Prosecutions, there has been no occasion on which any sector other than the police officers have made public a concern about inadequate sentences to protect them for assaults.

Hon GIZ WATSON: I have a further question that relates to these amendments; that is, I understand that the amendments will also give these high penalties for an assault against someone who has been assaulted in the knowledge that he is a public officer, even if he is not actually performing that duty at the time. That brought to my mind the issue that the person who perpetrated the offence could argue that he did not know the person was a public officer. How does that interact? Was any thought given to whether a person accused of committing GBH against a public officer should be able to identify the victim as a public officer?

Mr COCK: There is a question of proof. We need to establish beyond reasonable doubt that the assault was because of the fact that the person assaulted was in fact a public officer, and that was the motivation for the assault. There are one or two examples of police officers who have been targeted off duty deliberately by persons whom they had arrested because they were known. The evidence has to be clear that it was not an accidental victim; it was a deliberate assault upon a person because of that person’s role, although at the time he was assaulted he was on holidays or something like that; so we would have to prove it.

Hon GIZ WATSON: Sorry; the threshold was beyond reasonable doubt?

Mr COCK: Yes.

The CHAIR: And that was the key, was it not; that that was the motivation for the assault?

Mr COCK: Absolutely. Unless they are performing their public duties, they are just like any citizen, unless it can be established that they were assaulted because of their public officer status.

Hon DONNA FARAGHER: I would now like to go to those sections relating to the prosecution’s right of appeal.

Mr COCK: Sure.

Hon DONNA FARAGHER: Some suggestion has been made that the provisions within this bill relax the double jeopardy rule. Can you perhaps just make some comments on that? I understood
that it was, if I can use the term, small steps in relation to that. Could you perhaps just clarify that for us?

Mr COCK: The debate about double jeopardy depends very much upon what the definition of double jeopardy is to start with. If your view of double jeopardy is that the state has one opportunity to bring a charge, and once you have brought it, regardless of how that is disposed of, you cannot do it again, then clearly this infringes double jeopardy; but if your theory is that it means once a person has been acquitted - validly acquitted - after a proper prosecution, then this does not infringe double jeopardy, because this is not a proper prosecution. All the cases that we are seeking to capture - the few cases, in fact, it will be - are cases in which there is an acquittal because of an error of law in the way in which the case was determined. Therefore, in my definition of double jeopardy, there has not been a valid acquittal; the acquittal is vitiated because of an erroneous process. It just seems to me, as a matter of confidence in the judicial system, that if invalid and erroneous verdicts of acquittal give rise to double jeopardy, we really are giving a benefit to persons because of errors in the system. As I say, it is an issue that requires one to define precisely what one means by double jeopardy. Now, on my understanding of double jeopardy, which is the understanding, I think, that is generally accepted, that one is free from further prosecution after a valid acquittal, this does not infringe double jeopardy. You may be aware of the New South Wales initiatives - and the Parliament in New South Wales last year introduced amendments of its own - that actually do infringe double jeopardy. They say that even if you have been validly acquitted, if new evidence of substance comes to light to justify a further prosecution of you, subject to a process, you can be re-prosecuted. Now, that confronts double jeopardy very directly. In my view, I support the New South Wales law, but it certainly does erode double jeopardy principles. However, it is my submission to you that this does not infringe double jeopardy on the understanding that it means a valid acquittal, not just any old acquittal.

[10.30 am]

Hon DONNA FARAGHER: Is the New South Wales legislation a response to discussions that have been occurring for some time with the Standing Committee of the Attorneys-General?

Mr COCK: Absolutely right, yes. The New South Wales Parliament was the first one to enact the recommendations of the Standing Committee of Attorneys-General regarding the curtailment of double jeopardy, in limited circumstances, in cases of serious offences. The committee may understand that that arose from the case R v Carroll that arose in Queensland some years ago, in which a man was unsuccessfully prosecuted for murder. He was acquitted, but during the trial perjured himself, so the Queensland Director of Public Prosecutions recognised that he could not be retried for murder and tried him for perjury, and he was convicted. However, the High Court said no; that it would infringe double jeopardy. Once the man has had a trial according to law, it does not matter if he has perjured himself. As long as the law was applied correctly, he is entitled to an acquittal and to prosecute him for perjury during a trial on something that affects his acquittal is in fact double jeopardy. In fact, his conviction was set aside.

The CHAIR: How on earth could there then be convictions for perjury?

Mr COCK: That is right; that caused such a stink that the standing committee was up in arms. The condition of perjury would be assumed if it was not the accused but somebody else in the trial who was being prosecuted. If the accused’s mate came along and supported the accused’s false story, I could prosecute his mate for perjury, but not prosecute the accused person himself.

Hon DONNA FARAGHER: In terms of judicial error or what would actually come under the provisions of these clauses, could you give the committee an example of what type of judicial error could occur that would enable these provisions to take place?

Mr COCK: Sure. If I am prosecuting a man for killing his wife on a charge of wilful murder, and it transpires during evidence given in the trial that two days before the wife swore at him very badly
and the judge was to say to the jury, “Members of the jury, you have heard this evidence of her swearing at him,” and the judge then said that it justified his killing her two days later and left that as provocation, which would be a defence to murder, and the jury then acquitted the man of wilful murder, that would be an error of law, because that sort of provocation two days before would not be sufficient to justify the legal application of provocation. That would be the sort of case I would be looking at; one in which there has been a clear error in the way in which the judge has invited the jury to decide the case, and there has been an acquittal. I would say that there should be a retrial, because it simply is not available as provocation as a matter of law, and I would argue my case at the Court of Appeal. If the Court of Appeal agreed with me and said that there was no provocation legally available in the case whatsoever, there would have to be a retrial.

Hon DONNA FARAGHER: In terms of those areas on which terms of imprisonment for 14 years or more rely, can you provide the committee with a list of offences that would attract this clause?

Mr COCK: I can do so later if you wish, but in essence they are the most serious offences or the offences capable of being tried in the Supreme Court, which are armed robbery, murder and wilful murder. They are the offences, really, in the Supreme Court. In the District Court they would be manslaughter, some serious drug offences not involving cannabis, some burglary offences and some serious stealing offences.

The CHAIR: Could you provide us with that list?

Mr COCK: I am very happy to do so.

The CHAIR: Thank you.

Hon DONNA FARAGHER: In terms of the limit on the number of times that this can occur, how many times can it occur? Is it only on one occasion that you can ask for a retrial? Is there a limit?

Mr COCK: If, in the case of one individual, there was a trial that was vitiated by serious error, then I could seek an appeal and seek a retrial. If the retrial was also vitiated by serious error, I could keep going as a matter of principle. However, under prosecution policy and guidelines, I do not prosecute someone more than three times for the same offence. Sometimes I do it only twice; it depends upon the circumstances and the significance of the case.

Hon SALLY TALBOT: As a point of clarification, can you compare the situation you have just described, in which provocation is used inadmissibly or invalidly, with what would happen under the existing system? The Attorney General can still refer to the Court of Appeal.

Mr COCK: Under the existing law, if in fact the judge misdirected the jury about something being a provocation when in fact it is not, the person is acquitted and there can be no retrial. If the Attorney General wanted to, he could refer it to the Court of Appeal to determine a question of law as to whether it was validly left as provocation, and the court would say it was not. I have to pay the costs to the accused person to make their submissions in that process, and their name is not to be published under the present processes, and I will simply have another judgement in the Law Reports to say that this is not provocation. I would probably not even bother; it would just be a waste of money, because it would be a clear case in which the judge has got it wrong and there is no bonus or benefit to me in clarifying it. It would simply be a waste of resources, so I often do not even pursue those sorts of cases as errors of law. Sometimes, if there is some real debate about whether or not it is provocation - if it was a marginal case and there has been some debate that I have not been able to clarify through another appellate process - I would ask the Attorney General to refer the case and have it determined as a question of law for the guidance of judges in the future. However, if it was just a blatant error, I would not waste my resources.

Hon DONNA FARAGHER: Are these provisions similar in respect of this issue to what New South Wales is also proposing, or does New South Wales already have this provision in place? I think I recall that Tasmania has a similar provision.
Mr COCK: Tasmania has for many years had a complete right of prosecution appeal in this area, not limited to offences over 14 years. All indictable offences in Tasmania, under its criminal code, may produce an appeal by the prosecution on a jury trial, if there is an error. My colleague in Tasmania tells me he has not argued one of those for several years, so it is not common to use it, but he tells me that he finds that it influences the way in which judges determine matters, in the sense that some judges might be somewhat nervous about appeal processes. If a point can be decided one way or another and one way provides the potential for appeal and another way does not, he suggests that there is the potential for some judges to err on the side that does not produce an appeal. However, he tells me that in Tasmania, because both parties can appeal, he thinks that judges get it right more frequently, because there is no bias that enables them to avoid an appeal. However, as I say, it is a smaller jurisdiction and I am speaking only from anecdotal information, although I have checked and I cannot find any recent appeals in Tasmania under these provisions. New South Wales does not have this provision. Its approach is a full-frontal attack on double jeopardy and it is really, I think, related to the Carroll case.

Hon DONNA FARAGHER: I ask a question with respect to expert evidence relating to childhood development.

The CHAIR: Can we go onto that in a minute?

Hon GIZ WATSON: I ask a question on the same matter. Is it possible for you to give the committee an example from Western Australia in which a judge has made an error of law which could be said to have resulted in the acquittal of the accused?

Mr COCK: There are several. The Director of Public Prosecutions does a couple of Attorney General references every year. Perhaps that oversteps it; some years we do a couple, some years we do not do any. We did one recently that was a drug case, in which the judge misdirected the jury about what possession meant. The accused man had travelled from the eastern states with a truck, and on the back of the truck was a parcel in which there was a substantial amount of cannabis. In essence, the judge directed the jury about the level of knowledge that had to be established by the prosecution to enable a conviction. The judge directed the jury, in our view, wrongly, and overstated the level of knowledge needed. The man was acquitted. We lodged an Attorney General reference and the Court of Appeal found that the judge had, indeed, wrongly expressed the law in relation to knowledge and that there was in fact a lower level of knowledge required. Our submission was that had that man been retried, he would have been convicted. Of course, there was no right of retrial. That is one example. I also know of a false pretence trial in Port Hedland in which the judge told the jury that there were five elements of false pretences and that the crown has to establish each of the five. It turned out that there are only four elements and that the fifth one was not a legal element. The man was acquitted. The Director of Public Prosecutions did an Attorney General reference and the Court of Appeal agreed that there were only four elements for that offence rather than five, and that the judge was wrong. Again, there was no retrial.

[10.40 am]

The CHAIR: Did that offence carry a penalty of 14 years?

Mr COCK: I cannot remember the maximum penalty for that one. It may or may not have, I am not sure.

Hon PETER COLLIER: Did you say there was a retrial?

Mr COCK: There was no retrial; there cannot be a retrial at the moment. I do not exercise the opportunity to ask the Attorney General to lodge an Attorney reference every time there is an error for the reasons I have already explained; namely, it is often a waste of resources, particularly in the more clear cases, and is simply pointless. There is no point in making points. I am about doing my work, rather than making points.
Hon GIZ WATSON: I refer to the submission given by the Criminal Lawyers’ Association of Western Australia, which states -

In our submission there is no need for any further right of appeal by the prosecution. If a judge is seen to have made a mistake, the prosecution would have had the opportunity to persuade the judge to a contrary position prior to the jury’s retirement. If the perceived error is not corrected at that stage by the Judge, then the State can have the matter referred to the Court of Appeal for resolution on an Attorney-General’s Reference. Whilst this will not mean the perceived perpetrator is retried or even punished, it will mean that the mistake is never replicated or perpetrated.

The Criminal Lawyers’ Association of Western Australia has suggested that that remedy deal with issues of errors of law rather than, in its view, transgressing issues that relate to double jeopardy. Do you have a response to that?

Mr COCK: Certainly. It is somewhat correct in that if I was to bring proceedings by way of an Attorney General’s reference, that particular error would be exposed. There are two problems with that. Firstly, there are the resource implications, because I have to pay both my costs and the accused’s costs. Secondly, it has no immediate benefit in the sense that the victim who was the subject of that particular offence will not receive justice because there is no retrial. The victim lives forever in a state of dissatisfaction that the system has let him or her down. I have to balance what I am getting out of correcting it. As I say, I do not often take these matters to the court. I have done so only once every couple of years. Every couple of years I may do it twice or I may not do it at all. I do not do it for every case, because it does not help the victim one little bit. It does not guarantee that a judge will not make the same error. It is entirely correct that lawyers are able to debate before a judge, before the jury has determined its verdict whether the judge got it right. However, the cases about which I am concerned are those in which the judge gets it wrong. If we get it wrong, there is no guarantee that the fact that there is another court of appeal decision to add to our list of authorities that he or she will get it right next time. It is not a complete panacea. As I say, it provides no justice to victims ever, and there is no guarantee that it will be corrected in any event.

Hon GIZ WATSON: Although I suggest that the example that you gave about the transportation of drugs is not a case in which there was clearly a victim.

Mr COCK: The drug case is a victims of crime, but the false pretence charge to which I referred was clearly a victim crime.

Hon GIZ WATSON: If the policy objective is to ensure that a victim of crime has a sense of justice and conclusion, this could be limited to those cases rather than making it a broader opportunity to continue to bring cases to retrial. It seems to me that there is no limit on the number of times a matter can be brought up for retrial.

Mr COCK: You are absolutely right; there is no limit. As I have explained, my prosecution guidelines set out a principle that generally I will not retry a person more than three times for any offence. It may be useful for you to know that the particular initiative that the Attorney General asked me to implement through this provision was brought to his attention by members of the Homicide Victims Support Group. He met with them, I think, two years ago. I was not at the meeting but I understand from the public debate that followed that members of the group expressed reservations that some of its members were feeling quite let down by the system because they felt that in some serious cases errors made by judges could not be corrected. The prosecutor had simply said to them, words to the effect, “I am very sorry; there is no appeal. That’s all there is to it. You just have to accept it.” They brought that to the Attorney General’s attention at a meeting and the Attorney responded positively and said that he thought that the system may let people in those circumstances down and that it would be a valuable initiative to ensure there was a right for an appeal in cases of homicides. Of course, they are in the category of the more than 14-year penalty.
Hon GIZ WATSON: Was consideration given to limiting the opportunities for appeal to those in which a victim or victims sought a retrial? It seems to me that that would be a more specific remedy to a perceived problem, rather than making a retrial possible for any offence that incurs a penalty of more than 14 years.

Mr COCK: All offences in this category have victims, except the drug offences.

Hon GIZ WATSON: In the cases that you are aware of; is that what you are saying?

Mr COCK: They are robberies. They are either serious offences against a person or murders or drug offences. It is only the drug offences that can sometimes be described as victims of crime. That is somewhat of a misconception, because there are numerous victims of those offences.

Hon GIZ WATSON: Perhaps not an identifiable victim.

Mr COCK: You are right; there is no specific person. It is personified as the one victim as there is in other types of offences. My position, if it is of interest to you, is that all indictable offences should be available for this provision because, as you may know, with respect to some reoffences there is a full right of prosecution appeal. All charges dealt before magistrates have a full right of prosecution appeal on errors of law or errors of fact. It seemed to me to be somewhat anomalous to say that any magistrate can make a decision and because we recognise that they may make errors, we will give both the prosecution and the defence the opportunity to have that corrected. However, in respect of indictable offences - the ones in the middle, the ones that are too serious for magistrates but not serious enough to have 14 years penalty - there is no appeal and for those of 14 years upwards there is an appeal. That is a misconceived policy. I argued strongly with the Attorney General about that. His response - I am sure he would be pleased for you to know of it - was that he thought it was a matter of policy and that there should be a limited right of appeal in the most serious cases, because of the substantial change to the law that the government is seeking to introduce. I told him that that was his right. I do not know whether he analysed it in terms of victims or non-victims, but he was very strong when he went to cabinet. He came back to me and said that the cabinet had agreed to limit it to 14 years. That is what I was told to implement. I do not know whether cabinet considered the issue of drug offences as a separate category. If it had, my submission would have been that drug offenders are the very ones that we need to worry about. They are the ones who are perpetrating serious evil in our community. It is an absolute disgrace in my view if a drug offender escapes punishment because a judge makes an error. That is outrageous.

Hon GIZ WATSON: I refer to the fact that new section 24(2)(da) does not limit the number of times a prosecutor can return to the Court of Appeal to challenge the acquittal. However, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General protective principle number 2 “retrial of the original or similar offences where there is fresh and compelling evidence” states that the crown is permitted only one retrial application in relation to a particular acquittal. What is the rationale for having no limit given Justice McHugh’s comment in R v Carroll that the main rationale for the principle of double jeopardy is that it prevents the unwarranted harassment of the accused by multiple prosecutions.

Mr COCK: There was no error by the judge in the Carroll case. As long as Justice McHugh was referring to infringement of the double jeopardy principle, which is what the Model Criminal Code Officers Committee is talking about. It is not talking about whether there has been an error in the judicial process. It is saying, “Have a second bite at the cherry,” which is the New South Wales approach. With great respect, the Criminal Lawyers’ Association of Western Australia is seeking to use an argument that has validity in double jeopardy against a provision in which we are saying if there has been an error by the judge that has vitiated the outcome, a person has not had a first trial at all or a trial according to law. I embrace what Justice McHugh says in Carroll. I well understand the principle that if you have a second bite of the cherry, where a person has already been validly acquitted and you have new evidence, you have only one shot; and that is the case in the United Kingdom too where they have introduced that type of approach. Our bill does not do that. Our bill
is merely saying that if you have an erroneous verdict, justice and the victims are entitled to have a proper verdict, and that is all I am seeking.

[10.50 am]

The CHAIR: I have just probably a more general observation, Mr Cock, about the phrase “restricted circumstances and serious crimes”. The categorisation in the second reading speech states -

an error of law or fact by the trial judge or a decision to wrongly exclude admissible evidence or wrongly admit inadmissible evidence.

That does not sound very restricted to me at all; it sounds very broad. Do you think “restricted cases” is the appropriate description?

Mr COCK: It is restricted in the sense that you need to show an error of fact or an error of law or a decision to exclude, to deny the prosecution the right to introduce relevant evidence or to allow irrelevant evidence. So, in my view those are all cases where there has been an error that has vitiated the fairness of the trial.

The CHAIR: I understand that. I suppose what I am saying is there is not much left that you would identify with, is there?

Mr COCK: There is, with great respect.

The CHAIR: Yes, that is what I am asking you.

Mr COCK: I would love to be able to go down, like an accused does, and argue that on the proper evaluation of the evidence it was a wrong verdict because the case just was not strong enough.

The CHAIR: Right.

Mr COCK: I have had many cases, which I have regarded personally as very strong, on which there have been acquittals by the jury. I would just love to be able to go and retry those cases and put them up, but obviously this stops me doing that. If an accused person felt that they were wrongly convicted on a weak case, they can pursue an appeal, even if there is no legal error by the judge. This stops me doing that. That is why I say I am restricted. There have been some notorious cases over the last two years, several of which have been prominent in our local newspaper, where I have been personally very angered by the outcome, and this does not give me a right of appeal there. That is the restriction upon me.

The CHAIR: We still stay on clause 34 of the bill for the moment.

Hon GIZ WATSON: If the prosecution argues successfully for a retrial, will that retrial be heard by a judge and jury or a judge alone?

Mr COCK: It would be heard by a judge and jury. There is already a right of appeal. If on indictment on any charge where the accused person elects to be dealt with by a judge, if the judge makes an error of law or fact, I can already exercise a right of appeal, and that is unchanged. This new provision extends it to jury trials where there is a judicial error and there is a maximum penalty of 14 years.

Hon GIZ WATSON: Also it is intended that this new section will operate retrospectively?

Mr COCK: No.

Hon GIZ WATSON: That is new section 24(da).

Hon DONNA FARAGHER: As I said, I just want to go back to the expert evidence on child behaviour.

Mr COCK: Yes.

Hon DONNA FARAGHER: Clause 43(1) states -
(2) Evidence by an expert on the subject of child behaviour about any or all of the following -

(a) child development and behaviour generally;
(b) child development and behaviour in cases where children have been the victims of sexual offences,

As I understand it, the New Zealand legislation - although I seem to recall that they are in the process of amending their legislation or have just recently done it - actually specifies what constitutes an expert with respect to child behaviour; that is, they are either a child psychologist or a child psychiatrist. Can you tell me whether consideration was given to including that sort of specific inclusion of what constitutes an expert within this bill? Do you look at an expert being determined by the judge, much like in any other case; say, a traffic expert, a road safety expert or something like that, in a more general sense? Was consideration to be more specific? What was the reason for not including that?

Mr COCK: Yes, it was considered whether it was appropriate to seek to define the class of person who may give this opinion evidence. In legal principle, the only persons who may give evidence of opinion are experts. No other person at the trial may say more than what they heard, saw or witnessed. An expert, however, is able to give an opinion as to something that they neither saw nor witnessed but have heard about, and they may express an opinion, as a forensic pathologist frequently does about the cause of death. Our law in Western Australia has worked very well, allowing the judges to determine whether in any particular area of evidence a person is an expert. There is no statute of which I am aware in Western Australia which defines an expert in any particular area of endeavour. Judges have lots of judge-made law to refer to and common law to identify what principles they apply in identifying whether a particular person may give this opinion evidence. The law is simply if a person is found by the judge to be an expert in that area sufficient to be able to give an opinion, then they are allowed to give it. It was our view that it was appropriate to simply adopt that principle in relation to this new type of opinion evidence. It is as simple as that. There may be some persons who may well call themselves child psychologists who may even have degrees, but they may never have practised in the area sufficiently to persuade the judge they are an expert. So I have confidence in the judges, am satisfied with their construction of the law at the moment and felt that there was no need to define the class.

Hon DONNA FARAGHER: One aspect was raised in the submission that was supplied to the committee by the Law Society, and I might quote from the paragraph and ask you to comment on it. It says -

One of the difficulties with calling psychological expert evidence is an inclination of the courts to exclude it as failing the “common knowledge” test. Further, psychological and psychiatric evidence often comes perilously close to offending the “ultimate issue” rule, which may be impractical with this field of expertise.

Could you make a comment in relation to that?

Mr COCK: They are absolutely right in that observation, and that is why we put the proviso into paragraph (2) notwithstanding that the evidence relates to a fact in issue or to an ultimate issue, is a matter of common knowledge, or is relevant only to credibility. So, you are right, that is a problem and it was for that reason that we put these additional words there. We fully accept their view on that.

Hon GIZ WATSON: Did the department or you consider the experiences of other jurisdictions which allow expert evidence of child behaviour? If so, which jurisdictions and what was their experience?
Mr COCK: We did not really, because there was no good data or information about it. We simply relied upon the recommendations of the Western Australian Law Reform Commission, which recommended this type of approach.

Hon GIZ WATSON: So, are you aware of other jurisdictions where -

Mr COCK: New Zealand is a jurisdiction that does allow this, yes.

Hon DONNA FARAGHER: Could I just clarify that with New Zealand? It is my understanding that they are changing their laws and have changed them to make expert evidence more general; they are not going to specify.

Mr COCK: I understand they are abandoning the narrow list -

Hon DONNA FARAGHER: They are, yes.

Mr COCK: - and just going through the traditional law, as we have accepted it.

Hon DONNA FARAGHER: To the more general, which is what has been proposed here; okay, thank you.

The CHAIR: What I propose to do now, Mr Cock, is go back to the more general questions I have on behalf of the committee. I note that you have already addressed a number of the ones I had here anyway, but I just take you back to clause 4 of the bill. The clause purports to delete the definition of “circumstances of aggravation” in section 1 of the Code on the basis that, according to the explanatory memorandum, it complemented a now repealed section of the code. The explanatory memorandum also advises that the phrase is defined according to the offences in the respective part to which it applies. However, the phrase “circumstances of aggravation” does not appear to be defined for the purposes of sections 297, 301, 313, 317 or 317A of the code. Can you advise the committee what is meant by that phrase in those sections of the code?

[11.00 am]

Mr COCK: In section 297, for example?

The CHAIR: Yes. I should probably say that if you would like to take any of these questions back with you and reflect on them, you are welcome to do that. However, I am not sure that this is an appropriate one.

Mr COCK: I do have the answer. In section 297, “circumstances of aggravation” is defined in section 221, so if you go back to section 221 of the code, you will find that part V, in which section 297 and others to which you referred reside, now has its own definition of the term “circumstances of aggravation”.

Hon PETER COLLIER: That will be the same for the others as well, I guess.

Mr COCK: That is my understanding, yes. I should say that this amendment was a recommendation of parliamentary counsel; it was not anything that I specifically instructed. However, I was satisfied with their explanation that “circumstances of aggravation” was by now defined in all the chapters and all the passages and therefore that the definition in section 1 was just redundant.

The CHAIR: I take you to clauses 7 and 8 of the bill. Section 317 of the code provides that a person who unlawfully assaults another person and thereby causes that person bodily harm commits a crime and is liable to, among other penalties, imprisonment for up to five years.

Mr COCK: That is right.

The CHAIR: Section 317A of the code provides that a person who assaults another person with the intent to do certain things specified in that section commits a crime and is liable to, among other penalties, imprisonment for up to five years. Clauses 7 and 8 propose to, among other things, increase the maximum penalty in sections 317 and 317A, to which I have just referred, to seven
years’ imprisonment when the respective offences are committed in circumstances of racial aggravation. The phrase “circumstances of racial aggravation” is defined in section 80I of the code. Have there been any difficulties in prosecuting offences allegedly committed in circumstances of racial aggravation since the phrase was inserted in the code in 2004 that you are aware of?

Mr COCK: There has been a fairly well-publicised acquittal by a magistrate in the Children’s Court in Kalgoorlie. Despite those who criticised it, I thought that she was right and I must say that I am not a member of those who criticised her. From my perspective, there have been no difficulties in the enforcement of these provisions or the application of that definition, but I have a view that is different from others. Some police officers take a contrary view. I am simply not agreeing with them.

Hon GIZ WATSON: I might just expand on that, if I could, because that case is significant. It seems to me that some other amendments might be required to deal with what arose out of that case. It seems that when this particular provision was used for the first time, it was used totally inappropriately. Were any other amendments considered as a result of that particular court case and that acquittal?

Mr COCK: I received a full briefing from the prosecutor in relation to that particular prosecution. I felt that the outcome was appropriate, based on the findings that the magistrate made, and I felt there was no need at all for the law to change. I do not think I can say any more helpfully. You may be aware that that particular case initially arose when the police charged an even more serious offence; in fact, it required my signature on the charge sheet. I in fact declined to sign it, and so the magistrate drew it to the attention of the police and they then withdrew the charge because it was not able to proceed because I had not signed it. They then charged a less serious offence, which was able to proceed without my authority, and that resulted in an acquittal, although there was a conviction for assault occasioning bodily harm in that case. There still was an appropriate conviction, but the more serious aggravating circumstance was not established. Again, in my opinion, that was also appropriate and, I think, consistent with the view of Parliament at the time.

Hon GIZ WATSON: There was no consideration of whether there needed to be some amendment to provide greater clarity about the application of this particular provision?

Mr COCK: Not in my view. I had always thought that the provision was pretty clear and, as I say, the magistrate seemed to take a view consistent with my own. You may remember at the time in 2004 when the matter was being debated in Parliament, the Attorney General and the committee and I were at pains to make out the view that this was to be used only in extreme circumstances; it was not to be used in the run-of-the-mill slanging situation, which is pretty much what the Kalgoorlie case was. I was not at all surprised that the magistrate took the same view. I did not think amendments were necessary because of that. I never hoped that they would apply in that situation and I am sure that Parliament did not either.

The CHAIR: Mr Cock, I take you to clause 10 of the bill. The clause proposes to repeal and replace section 321A of the code, which deals with the offence of having a sexual relationship with a child under the age of 16 years. One effect of clause 10 is that the offence will be known as persistent sexual conduct with a child who is under 16 years old. A person persistently engages in sexual conduct with a child if he or she commits a prescribed offence, or sexual act, against the child on three or more occasions, each of which is on a different day. For the purposes of proposed new section 321A, the offences prescribed as sexual acts are various sexual offences against children who are under 13 years old or who are of or over the age of 13 years and under the age of 16 years. As is the case under the existing section 321A, proposed new section 321A prescribes offences under section 320(2), (3) and (4) and section 321(2), (3) and (4) as sexual acts. Why does it not also prescribe offences under section 320(5) and (6) and section 321(5) and (6) as sexual acts that could constitute persistent sexual conduct?
Mr COCK: Section 320(5) and (6) were not offences of the kind that were thought to be sufficiently serious as to enable the somewhat draconian provisions of section 321A to operate. That was the policy decision that was made when section 321A was initially enacted in 1992. I was not party to that decision, but when its reformulation was to be considered and I was involved, at no stage was it put to me that it was appropriate to enlarge the class of cases to include procuring and inciting a child to do an indecent act or indecently recording a child, and so the provision has not been expanded to cover those sections. There would be no problem if it were to do so, other than it would expand a provision that is, in any view, quite draconian and is really there to get the most serious types of sexual offending matters before the court. There are strong arguments that this provision should be used only in particularly serious cases of sexual offending when the victim is likely to have been seriously damaged.

I do not think, so the argument goes, that inciting a child to do an indecent act or recording a child are in that sufficiently serious category, but it is ultimately a question for the Parliament. If the Parliament wanted to include those two subsections, I would be prepared to prosecute those sorts of cases but it is clear that they are not as serious as the other types of sexual offences presently included.

[11.10 am]

The CHAIR: What is the rationale for defining persistent sexual conduct as a sexual act on three or more occasions, with the emphasis on “three”?

Mr COCK: Again, it is a policy decision that goes back to 1992 when Western Australia, and Queensland in particular, and I think some other non-Criminal Code jurisdictions, felt that the recent High Court case of S v The Queen required a response so that we could somehow prosecute sexual offending against children but we could not identify the day or days on which the offending occurred. A new offence carried a maximum penalty of 20 years’ jail. Someone had to decide on how many separate days we should have this offending to justify a conviction. All jurisdictions felt that two was not enough but three or more was. The policy of not only Western Australia but also Queensland and some other jurisdictions was to create this quite unique offence in 1992. We did so and nothing has come to light since then to suggest that it should be less than three; that is, two, or it should be set at more than two. When we proposed to re-enact the provision, we did not suggest that Parliament take a different position to that, which has been part of Western Australian and Queensland law for 15 years now.

The CHAIR: One of the things that distinguishes proposed section 321A from the current section is that not all the sexual acts need to have occurred in Western Australia. Do you envisage any difficulty with the conduct of charges under this provision? Will there be any enforcement difficulties with respect to the legislative powers of the state to prosecute matters that have occurred outside the state boundaries?

Mr COCK: A number of the cases within my office in the past eight years that I have been there relate to sexual offending against children in circumstances of itinerant families in which incidents have been said to have occurred in South Australia, Queensland and Perth. On a number of those occasions victims have given statements to say that they can remember it happening in Carnarvon, Port Augusta and Cairns. We have not been able to prosecute such offences at the moment because the law requires three separate acts on separate days happening in Western Australia. Section 12 of the Criminal Code provides that an offence under our code is committed and can be dealt with in Western Australia if at least one of the acts that make up the elements occurs in Western Australia. Parliament has already - I think back in 1966 - taken the view that we can legitimately prosecute offences under some acts with territorial reach as long as one of the acts that constitute the offence occurred in Western Australia. There has never been a constitutional challenge to contravene that. I am prepared to accept it in constitutional law. Applying that principle in section 12, we have drafted this provision accordingly.
Hon GIZ WATSON: Have there been previous successful prosecutions that rely on that principle where one matter occurred in the state and other matters occurred outside the state and there has not been an impediment to the conviction?

Mr COCK: Yes, there have been, generally in the drug area where one element of the offence may have occurred in Melbourne or Sydney airport and one occurred in Perth airport. We have been successful in upholding those convictions.

The CHAIR: I refer again to the explanatory memorandum. It advises why proposed section 321A was drafted, and states -

... it is clear that it is not necessary to specify dates or in any other way particularize the circumstances of the alleged acts, either on the indictment charging the offence or in the course of the proceedings in respect of those charges, in line with the recommendation of His Honour Justice Murray in his Review of the Criminal Code.

Proposed section 321A reads, in part -

A charge of an offence under subsection (4) -

(b) need not specify the dates, or in any other way particularise the circumstances...

The committee notes that existing section 321A(5) already provides that in proceedings on an indictment charging an offender with having a sexual relationship with a child under 16 years, it is not necessary to specify the dates or particularise the circumstances of the alleged acts. Can you confirm whether the wording of the proposed section also provides that the particularisation of the circumstances is not needed in the course of proceedings in respect of the charge?

Mr COCK: Absolutely. Subsection (5) has been reformulated to better clarify the relationship between this provision and the Criminal Procedure Act. When section 321A was originally enacted, there was no Criminal Procedure Act. Subsection (5) was designed to meet the procedural provisions of the Criminal Code. The Criminal Procedure Act is now phrased somewhat differently. On my instructions, parliamentary counsel has reformulated subsection (5) to achieve the same objective but it has done so by picking up language from the Criminal Procedure Act to make it clear that we will never be required to specify the dates or the circumstances of alleged acts. It seeks to do the same as subsection (5) but in a different statutory environment.

The CHAIR: The charge of an offence of persistently engaging in sexual conduct with a child under 16 years of age need not particularise the circumstances of the sexual acts alleged to constitute the offence. Can you explain to the committee what details will be required to appear on the indictment?

Mr COCK: You need to particularise sufficiently to identify the sexual offence. The indictment will often says that between a certain date and another date, at one or other places, the accused person engaged in persistent sexual conduct with a child being under 13 years of age. I should say that that is almost the same as now; it uses that most inappropriate formulation of “had a sexual relationship with”.

The CHAIR: I now refer to proposed section 321A(6) which says that a person charged either in the same or a separate indictment with persistently engaging in sexual conduct with a child under 16 years of age may also be charged with a prescribed offence that is alleged to have been committed during the same period as the persistent sexual conduct was alleged to have occurred. I think that differs from the current section 321. You have probably seen the correspondence from the Criminal Lawyers’ Association to the Attorney General of 21 September.

Mr COCK: Yes, the Attorney General provided that to me and I prepared a draft reply.
The CHAIR: It says that it is not necessary to particularise the acts alleged to constitute persistent sexual conduct with a child under 16 years of age. The making of a specific charge as well as a persistent sexual conduct charge may result in both charges being declared by the court as being bad for duplicity. What is your view of that contention by the Criminal Lawyers’ Association?

[11.20 am]

Mr COCK: It is my view that the court would not declare a charge of that kind for duplicity because it would be implicitly authorised by the subsection. If I am wrong in this, then the prosecution would be required to elect upon which charge it decides to proceed, and that would have to happen. We would not initiate the indictment; it would simply mean that we would elect whether we proceed on the sexual relationship charge or the specific charge. If I am right, we can proceed on both.

Hon SALLY TALBOT: The worst case scenario would be that the prosecutor might be asked to determine which charge should proceed.

Mr COCK: In the worst case scenario, if the criminal lawyers are right and my view is wrong, the judge would say we would have to elect which one to proceed on.

Hon SALLY TALBOT: Both of them would not be thrown out?

Mr COCK: No. With the consequence of duplicity, we have to simply elect which one we want to go with. It would be no worse than it presently is.

The CHAIR: In terms of indicting people on these charges and the particularisation of charges, are we talking about the same sort of standard of detail applying in both instances?

Mr COCK: No. In relation to a specific charge we would have to comply with the normal rules, which are to identify the dates and the nature of the act. It does happen at times under the present law that we have a sexual relationship charge for which the complainant may have clarity about one act, but confusion about two or three others. It is a most unfortunate situation where we have to proceed with the sexual relationship charge. That is all we can do. The person may be acquitted simply because the jury might be completely satisfied about one or even two of the acts, but not about the third and it must acquit. I cannot retry the person for any sexual offence between those dates; therefore, the one in which there was no doubt remains unconvicted. Under the new provisions, I could do both the sexual relationship charge and the specific charge. If the accused is convicted of both, he can be punished for only one.

The CHAIR: I refer to proposed section 321A(8), which prohibits a court from ordering a prosecutor to give a person charged with persistent sexual conduct with a child under 16 years of age particulars of the sexual acts alleged to constitute that offence. The proposed section also overrides the operation of section 131 of the Criminal Procedure Act 2004, which provides courts with the power to order further particulars from the prosecution. You have dealt with this question generally. However, is there anything you would like to add to the answer you have given in terms of the rationale behind that proposed section?

Mr COCK: I touched on it briefly when I said that parliamentary counsel has been asked to formulate the provisions with the Criminal Procedure Act in mind. Subsection (8) complements subsection (5). It is necessary, in our view, because of the Criminal Procedure Act’s specific provisions, but it is intended to do no more than is accommodated by subsection (5) of the present provision; that is, we are not required to particularise. It was felt that just expressing it as subsection (5) does, it is a charge and does not specify the date or particularise the circumstances and may not expressly deal with the authority of a judge to require a prosecutor to provide particulars. It may or may not be necessary, but proposed subsection (8) specifically says, in effect, that subsection (5) means what it says and you cannot be required to provide particulars and you cannot be ordered to provide particulars.
The CHAIR: I refer now to proposed section 321A(11) of the Criminal Law and Evidence Amendment Bill 2006, which is a new element in the offence of persistent sexual conduct with a child under 16 years of age. If a person is being tried by jury for this offence, proposed subsection (11) states that if -

... there is evidence of sexual acts on 4 or more occasions, the jury members need not all be satisfied that the same sexual acts occurred on the same occasions as long as the jury is satisfied that the accused person persistently engaged in sexual conduct in the period specified.

The explanatory memorandum explains that this element was inserted in order to overcome the decision of KBT v The Queen. Why is the effect of proposed subsection (11) only triggered if there is evidence of sexual acts on four or more occasions?

Mr COCK: If there were only three sexual acts, all the jurors would have to be satisfied that each has been established. If one or more jurors were not satisfied as to one of those sexual acts, the jury cannot bring a unanimous verdict of guilty. If there are four or more acts and all the jurors were satisfied about one and two, half are satisfied about three and half are satisfied about four, they can still bring their verdict, because all the jurors are convinced to the required standard that the accused committed sexual acts on three or more occasions, although not the same three or four. This adopts the same provisions that the Queensland Parliament introduced last year. We thought it was very useful and it overcame the decision of KBT.

Hon DONNA FARAGHER: You said that the jury agrees to one or two, half agree to three and half to four. Therefore, you are adding together three and four to make three. Is that correct?

Mr COCK: Absolutely; that is right. But every juror must be satisfied that the accusation was three separate sexual acts. You cannot use the same jurors for three and four - it has to be the other jurors. Every member must be satisfied that there were three separate occasions of sexual assault.

The CHAIR: Of any allegation - four, five or six.

Mr COCK: Absolutely.

Hon SALLY TALBOT: And they have to be unanimous over two.

Mr COCK: No, as long as it is unanimous that there are three separate occasions of sexual assault. My example of one or two is for the sake of explanation. There could be 15 examples; however, all of them must be satisfied that there were three separate occasions.

Hon SALLY TALBOT: Net three.

Mr COCK: Absolutely right. It copies the Queensland provision, which we thought was very sensible.

The CHAIR: I refer to proposed clause 15, which will amend section 14 so that an approved officer rather than an authorised officer may extend the 28-day period. Do you have the Criminal Procedure Act with you?

Mr COCK: Yes, I do.

The CHAIR: What is the difference between an “approved officer” and an “authorised officer”?

Mr COCK: The definitions are found in section 4 of the Criminal Procedure Act and are as follows -

“approved officer”, in relation to an infringement notice, means a person appointed as an approved officer under regulations...

“authorised officer”, in relation to an infringement notice, means a person appointed as an authorised officer ...
Forgive me for not having my eye on it at the moment, but there is a slight difference between the two and experience has shown that when it was initially drafted it was meant to be “approved” not “authorised”. It is a different class of person.

The CHAIR: The short answer to the reason the amendment is necessary is that it is correcting a previous oversight.

Mr COCK: It is correcting a pre-existing error.

The CHAIR: Hon Donna Faragher has to leave, but we will soldier on. I refer now to clause 20. Again this is in relation to the Criminal Procedure Act, which you have in front of you? What is the rationale for the removal of the requirement to complete a service certificate?

[11.30 am]

Mr COCK: I think this was adoption of a recommendation that the courts made to the Attorney General. It was certainly nothing that came from my office. Nevertheless, I understand that it was felt simply unnecessary to burden the court with the obligation to provide a certificate of service of these notices when it is simply passed down by the bench clerk, as I understand it, at the time of the proceeding. It is to slightly reduce the administrative burden on the court staff.

The CHAIR: Clause 25, section 111 repealed. The explanatory memorandum advises that the proposed replacement will, among other things, result in more flexible jury arrangements for the state, which is consistent with a trend in other states. Can you explain the practice of the sequestration of juries and the suspension of jury deliberations in other states and how they differ from the current practices in this state?

Mr COCK: I had understood that judges in other states have greater authority to allow a jury to separate during deliberations - to allow them to go home in the evenings and things of that kind. I think it was felt by the judges that section 111 presently formulated leaves them with less flexibility than their colleagues in the eastern states have. Amending the provisions to make it quite clear to the judges that they are entitled to permit jurists to separate was seen by them to be an advantage. The tradition is that juries are allowed to separate during deliberations except on crimes of murder and wilful murder. That is a practice in Western Australia. Juries determining other cases are often allowed to go home at night and sleep and come back. Obviously, judges practices differ, but, generally, judges do not require jurists to bring an overnight bag to deliberate on the less important cases.

The CHAIR: I take you then to clause 28. We are still on the amendments to the Criminal Procedure Act. This clause seeks to amend section 143, which allows the accused to give an opening address to the court about an accused’s case, so that the accused is entitled to give an opening address to the court that outlines the accused’s defence. Also, I believe the Law Society has written to the Attorney General. You have probably seen the letter.

Mr COCK: Yes, I have seen that correspondence.

The CHAIR: I think the letter is dated 27 October, and I think I referred earlier to September correspondence. The Law Society’s contention is that the defence should be permitted to comment on burdens and standard of proof during its opening address. That appears to be the point of contention. Can you confirm whether the proposed amendment is intended to narrow the scope of the defence’s opening address?

Mr COCK: Yes it is. The amendment is designed to restrict the defence lawyer’s opening address to issues arising regarding the accused person’s defence and to limit and prevent defence counsel speaking about wider issues such as the trial process generally. The initiative is the product of a request by the Chief Judge of the District Court. It did not come from my office. It does not trouble us much one way or the other what defence lawyers do. I think Her Honour, the Chief Judge was troubled because it was taking additional time. The introduction of the defence opening
was proposed initially by a number of people to simply define issues and that that purpose has been subverted if, in fact, defence lawyers are actually talking more widely. The Chief Judge felt that it was adding to the prolonging of some trials and she felt that it should be restricted to its original purpose. I see the merit of that.

**Hon GIZ WATSON:** Can you provide any examples of particular cases in which defence counsel has done that.

**Mr COCK:** The issue was not proposed by me. If you want to know more detail, I recommend you ask the Chief Judge. She was the one who put it forward as a proposal. I was simply the agent in implementing instructions to initiate it. I have not made a study of the extent to which it really is a problem.

**The CHAIR:** We might take up that suggestion. I refer now to clause 47 of the bill, which proposes to replace section 106C of the Evidence Act with proposed new section 106C which melds children under 12 and mentally impaired witnesses together able to give unsworn evidence. The committee is interested to know what input the Public Guardian has in relation to clause 47.

**Mr COCK:** I do not remember consulting the Public Guardian specifically on this provision.

**The CHAIR:** I think the point of the question is, will it. Once it is enacted what role will the public Guardian Play here?

**Mr COCK:** The Public Guardian occasionally has an interest in particular victims for obvious reasons and, on occasions in which she is interested, will bring her interest to our attention. It may well be valuable to identify those persons to whom the provisions will have scope of operation. Naturally, of course, there are other sources of information regarding the capacity of a witness to give evidence and their intellectual mental impairment. She would be merely one source of information regarding that.

**The CHAIR:** Moving onto clause 61, which seeks to amend section 11 of the Criminal Law (Mentally Impaired Accused) Act 1996 in dealing with questions of whether the accused is mentally fit to stand trial to be raised in this section. Specifically, the explanatory memorandum states that the proposed amendment will update terminology. Does that mean that ex-officio indictments are no longer presented by the Attorney General or a person appointed by the government?

**Mr COCK:** The term “ex-officio indictment” is a term capable of explanation only under the Criminal Code and the provisions of the Criminal Code relating to it were repealed in 2004. The term “indictment” under the Criminal Procedure Act includes indictments that are presented after committal and indictments that are presented without a committal. The latter is in fact what used to be called ex-officio indictments. They are now subsumed into the class of normal indictment, so the term ex-officio indictment is no longer a term of definition. As I say, it is one of two means by which we can lay an indictment under the Criminal Procedure Act, so the term is of no current use.

**The CHAIR:** I refer to clause 74 - amendment to the Wildlife Conservation Act. The explanatory memorandum says that clause 74(2) will “correct phraseology”. Clause 74 proposes to delete “the” where it appears before “Part”. However, “the” appears several times in section 27B before “Part”, and it is unclear how that section is to be amended. Can you advise the committee how section 27B should read after that proposed amendment?

[11.40 am]

**Mr COCK:** My understanding is that it is to delete every “the” that appears before every “Part”, so that instead of using the formulation “the Part”, it will simply be “Part”. Therefore, on each of the occasions on which “the Part” appears, it will henceforth be called “Part”.

**Hon SALLY TALBOT:** I have just one small point of clarification that I am not sure we covered in relation to clause 10; that is, the amendments to section 321A, and in particular proposed section 321A(13). Can you confirm whether the amendment of that section is, first, to ensure that a person
Mr COCK: Yes. I will just confirm how that is achieved. Subsection (13) will provide that if a person is sentenced, whether on one or more than one indictment, to a term of imprisonment for an offence under subsection (4) - you will see that subsection (4) is persistent sexual conduct - and a term of imprisonment for a prescribed offence committed in the period during which the persistent sexual conduct occurred, the court must not order the terms to be served wholly or partly cumulatively. In other words, they must be served concurrently.

The CHAIR: That concludes the questions that we have for you today. I note that you will be providing us with that list of offences.

Mr COCK: Yes, I have undertaken to provide a list of all offences to which the proposed appeal provisions would have application, and we will do that within three days, if that would be satisfactory.

The CHAIR: Great. Thank you very much for your evidence today. We appreciate the time you have given to us and the fulsomeness of your answers. That concludes our hearing.

Hearing concluded at 11.42 am

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