JURIES LEGISLATION AMENDMENT BILL 2010

Reconsideration in Detail — Motion

On motion without notice by **Mr C.C. Porter (Attorney General)**, resolved —

> That the Juries Legislation Amendment Bill 2010 be reconsidered in detail for the purpose of reconsidering the remainder of proposed new section 34K within clause 34.

Reconsideration in Detail

Clause 34: Part VC Division 2 inserted —

Mr C.C. PORTER: On Tuesday evening, the house agreed to an amendment moved by the member for Mindarie to clause 34 of the Juries Legislation Amendment Bill 2010. The amendment was to delete the lines from page 27, line 16, to page 28, line 4. This deleted the part of the clause being inserted into the Juries Act 1957—that is, it deleted subsections (1), (2) and (3) of proposed new section 34K headed "Certain lawyers, excusing". Unfortunately, the effect of that amendment was that proposed subsections (4) and (5) of proposed new section 34K remained in the bill, which is anomalous. In order to delete the remaining two proposed subsections, an amendment must be moved to delete the words on page 28, from lines 5 to 19. Therefore, I move —

> Page 28, lines 5 to 19 — To delete the lines.

Mr J.R. QUIGLEY: When I moved the original amendment, I thought that the words referred to were in reference to other proposed sections also, and did not realise that they were limited to proposed section 34K. The Clerk of the Assembly pointed this out to the Attorney General and me after the rising of the chamber, and the opposition agrees with the Attorney General's amendment, and the reason for it.

Amendment put and passed.

Clause, as amended, put and passed.

As to Third Reading — Standing Orders Suspension — Motion

MR R.F. JOHNSON (Hillarys — Leader of the House) [10.44 am] — without notice: I move —

> That so much of the standing orders be suspended as would enable the third reading of the Juries Legislation Amendment Bill 2010 to be moved forthwith.

MR M. McGOWAN (Rockingham) [10.44 pm]: Just for the record, the opposition is agreeable to this motion because the mistake was a joint mistake between the government and the opposition on amendments to the legislation. Ordinarily, the third reading of this bill would be required to wait until the next sitting of the house, but I think that this is a fairly easy thing to deal with expeditiously. Therefore, we are happy with that arrangement.

Question put and passed with an absolute majority.

Third Reading

MR C.C. PORTER (Bateman — Attorney General) [10.45 am]: I move —

> That the bill be now read a third time.

MR J.R. QUIGLEY (Mindarie) [10.45 am]: As the Attorney General said in his response to the second reading debate on the Juries Legislation Amendment Bill, juries legislation is seldom opened up for amendment; it is a very settled structure within criminal law. It was last amended in 2006, when peremptory challenges, amongst other things, were reduced in number from eight to five. This is a far wider review of, and amendment to, the Juries Act 1957 than has ever taken place since 1957. As I mentioned earlier, we have, as legislators, had the benefit of the very instructive and helpful final report of the Western Australian Law Reform Commission, published in April 2010. For the sake of completeness, I thank again the authors, Dr Hands and Ms Williams, their research assistants, Ms Yoon and Ms Scaife, the technical director, Ms MacFarlane, and the executive assistant, Ms Cranston. I think the paper was very thorough and very instructive and helpful for me as a legislator. Notwithstanding the fact that I have appeared before juries for more than 20 years, this paper addressed some of the issues behind the widening of the capture of the classes of people who should be available for jury service and the methodology and ways in which potential jurors can raise objections to jury service. I will deal with those matters in a little more detail as we come to some of the particular amendments.

The second reading debate and consideration in detail were very helpful, and I thank the Attorney General and his advisers for their assistance during the debate. There will always be points of difference between lawyers

discussing amendments to legislation, and the points of difference between the opposition and the government were several, but not many, in number. Indeed, a couple of those differences showed the almost bipartisan approach to this legislation, which is not driven by any political or ideological agenda, but by a general desire for reform by the Parliament and the former Attorney General, Hon Jim McGinty, who wrote to the Law Reform Commission to ask it to review the Juries Act 1957, and by the current Attorney General's commendable and ongoing commitment to that process. The opposition recognises the contributions that both gentlemen have made to this process and it thanks each of them for it.

As I said, there are some points of difference between the opposition and the Attorney General. As they do not involve politics or ideology, settlement or agreement was reached on some of these points of difference after discussion across this table. One of the areas on which the Attorney General entered this chamber in a state of "not settled certainty" is whether members of the legal profession are included in the group of people who can claim exemption as a right by reason of their occupation. The Attorney General said to me before the debate—I think he also said it during the debate; I cannot quite recall—that he had not quite made his mind up on this issue and he was waiting to hear the debate in this chamber. That evidences the open-mindedness of the Attorney General.

On this occasion it was not political ideology that members brought to this chamber to try to improve the very important structure of juries for the community of Western Australia. As it turned out, with the to-ing and fro-ing across the chamber and the open discussion, the Attorney General accepted an amendment by the opposition that the legal profession remains within the class of people who are exempt—sorry, not "exempt" but ineligible to serve; there is a difference, of course. "Ineligibility" means a person cannot claim exemption, but is simply not in the pool, whereas "exemption" means a person can be in the pool but can seek an exemption because of particular reasons. The reasons for seeking an exemption are set out. The number of grounds has been reduced so that more people in this community will participate in the process of trial by jury and thereby more evenly spread the burden.

It has been my experience over two decades of practice that members of the community who are selected for jury duty initially appear to be mildly put out that their lives have been interrupted to go to court, but once they engage in the process and take the oath, a metamorphosis takes place. Having appeared before jurors, I know that they take the task seriously and they impress with not only their preparedness to participate, but also the conscientious way in which they go about their business. I get the impression that once a person is empanelled, they regard taking part in this aspect of the criminal law jurisdiction as a solemn privilege. We thank all members of the community who serve so conscientiously in this role—past, present and those to come.

If there is an ideology or something driving the amendments that have been brought before the chamber, it is to have wider participation in the jury system, because that is crucial to democracy in Western Australia. I understand that some of my very close friends who are very senior lawyers—who I am sure are also friends of the Attorney General—are amongst those people whom the Attorney General would describe as sceptics of the system. I think the Attorney General hit the reason for that on the head: senior lawyers are very intellectual and have years and years of experience advocating before the courts, but they cannot predict the outcome of a jury trial with the same certainty as they might be able to predict the outcome of a legal argument before a judicial officer, who is more predictable. A jury brings to the courtroom the collective experience of its members to—in the words of an almost ancient oath—hearken to the evidence. To hearken to the evidence is to not only listen to the words being spoken, but also look at the witnesses giving evidence, assess and adjudge the weight to be given to a particular witness's evidence, and look at physical exhibits and determine what weight is to be given to them. Juries hearken to the evidence through their collective experience and input. I think that in my electorate and all members' electorates the common feeling is that juries stand as a bulwark between the state and the citizen, and not as the defence's bulwark. Jurors sit there and if the state makes an allegation, it is the community that will judge the truth or otherwise of that allegation. As the Attorney General said, there are only about 500 jury trials in Perth per annum, so it is not as though the courts are teeming with juries. However, trial by jury is important. A person can elect to go on indictment or not. Magistrates can also do that by sending someone up on the either-way offences that the Attorney General has referred to.

I turn to some remaining points of difference between the opposition and the Attorney General. I do not want this legislation to pass without highlighting the opposition's concern and objection to those remaining points of difference, which, as I said, are not ideologically driven. The first issue is peremptory challenges, which I addressed at length in my second reading contribution. The opposition is concerned about the reduction from five to three peremptory challenges. It is noted in the Law Reform Commission's discussion paper that given the relatively contained—not sparse—number of jury trials in Perth of about 500, and given that the research shows that very few trials involve three or more accused, to cater for trials with two extra peremptory challenges requires only 250 to 500 additional jury summonses a year out of a total of approximately 53 000 jury summonses a year. The difference is absolutely insignificant in terms of the burden on the overall community.

Secondly, the peremptory challenge is very fast: counsel says "challenge" and the person does a U-turn and goes back into the balance of the pool sitting at the rear of the court. A peremptory challenge does not hold up any time in the court. It takes less than 30 seconds, as the Attorney General appreciates.

We understand the Attorney General's argument for reducing the number of peremptory challenges is twofold. One argument is that peremptory challenges appear to be a bit of an insult to those people who are challenged. The opposition does not see that as an issue at all, because the sheriff's officer in the big jury assembly area—I think that is still on the fifth floor—plays a DVD instructing the jury of the process it will go through once it goes into the courtroom and the officer is at pains to say, "Do not be insulted or put out in any way by a peremptory challenge. It is just part of the process and not a reflection on you." It is not as though the Attorney General sees this as such a big issue that peremptory challenges need to be done away with altogether; instead, he reduces the number of times a peremptory challenge can be made from five to three. The opposition is concerned that this seems to be driven not by research or the need to make our courts more efficient, but by the Attorney General's expression that he does not like peremptory challenges; he finds them a little unsettling and not desirable. This important matter seems to be put forward on the whim of the Attorney General's personal preferences and not on solid research in this area. As I have said, research shows that it would only involve 500 more summonses a year.

In this review, the Law Reform Commission paper referred to the capacity of multiple accused getting their heads together before empanelment to try to significantly affect the shape of a jury by way of pooling their five challenges each. A leader of the group will then tap the bar table—I have seen it happen—and each of the other accused's counsel will take it in turn to challenge resulting in a jury shaped according to age or sex or race. It is a very unusual event for that to occur because there are very, very few trials in which there are three or more accused. I remember from my own practice that I participated in only a few trials in which there were three or more accused—perhaps one or two trials a year. The majority of trials involved an accused and an accomplice or an accused by himself or herself. In any event, we thought a more reasonable proposition, or the halfway house, would have been a reduction in the number of peremptory challenges when there are three or more accused, but to leave it at five challenges when there is only one or two accused. That is a point of difference. We do not accept the government's explanation for that reduction in peremptory challenges. The opposition sees this as a whittling down of the process. The previous Attorney General reduced the number of peremptory challenges from eight to five. Having been a practitioner who has appeared before juries, I thought, "What's the difference?" I am with the current Attorney General to a certain extent. The more experienced I became, the less I used the peremptory challenge other than for the purposes I have outlined in the house today; namely, to challenge someone who was showing a reluctance to participate. This was not by coming from the back of the court with their hands in their pockets and dragging their feet on the carpet, but by having said something to the judge clearly indicating that they did not want to participate in the trial. I did not want someone in the jury box who was resistant to the whole process, because they were open to neither the prosecutor nor the accused's advocates' proposition and would be resentful.

I have mentioned before that I would also use the peremptory challenge very occasionally, not to gender stack a jury, but quite the opposite, because I think it is the height of arrogance for any lawyer to see someone coming forward and determine that he will not be able to talk to or relate to that person. I think all members would know from their doorknocking experiences that when knocking on someone's door the thought comes to mind: "Is this going to be a difficult contact or an easy contact? Is this person going to say, 'Get out of here, John' or will they say, 'We want more of you', or whatever?" Members then have to use their powers of persuasion. The doorknocker just cannot predict that reaction when knocking on a door because it cannot be known what is on the person's mind or what the reaction might be. Similarly, when a juror is balloted to come forward, a lawyer cannot predict those things. However, I always thought it was important as counsel, if there was a predominance of men on the jury, to use my challenges to ensure there were some women on the jury, or vice versa, or to try to see some Indigenous people balloted on to the jury when a good mix of the community was wanted.

In my third reading speech, I make an appeal to the members of the upper chamber, which, following events with the stop-and-search legislation, I regard now as the "Court of Appeal", Mr Speaker. I appeal to those members of the "Court of Appeal" who sit across the courtyard to give this further careful consideration and to exercise their independence, and, hopefully, come to the view that leaving the number of peremptory challenges at five is no great imposition on the community. I appeal to those 36 members sitting over in the "Court of Appeal" to give this matter some further consideration.

The other point of difference was, and remains, clause 10, "Section 5 amended", and subclause (2)(g), which deals with classes of people ineligible to serve on a jury. The opposition agrees with the government propositions in proposed section 5(1) outlined in clause 10. Obviously, the opposition disagrees with clause 10(2)(b) because it believes that the age limit should remain as it is. The age limit should be lifted from 70 to 75. That is common ground, given the ageing population and increased health and intellectual health of the

community overall. By staying fit and healthy, there is no reason why people of 73, 74 or 75 years of age cannot actively participate in jury service. At the moment, people aged 65 to 70 have the right to elect not to serve because they have hit the age of 75, and we think that right should be preserved. We voted against the amendment to compel all those between 65 and 75 to take up jury service. Our argument was not an ageist argument that says people over 65 are not capable of serving, but an argument driven by respect for the retirement of people over 65 who have already put in 30 or 40 or 50 years of community effort. When they get to 65, if they want to travel or just to forget about it all, we thought they should be able to. The Attorney General raised by way of rebuttal that those people cannot opt out of democracy—that they still have to participate in democracy by voting. Indeed, my late father, prior to passing from this world two years ago aged 93, was a resident at the Aegis nursing home in Mindarie, and he, of course, voted right up until the end. But it was no great imposition on him, even at the advanced age of 93 years, because he could do an absentee vote and people would come to his home to help him do that. We all do that to help the aged in our community.

Mrs M.H. Roberts: Member for Mindarie, my grandmother is still voting at the age of 99.

Mr J.R. QUIGLEY: That is right, and it is no great imposition on her life to do so.

Mrs M.H. Roberts: She enjoys it.

Mr J.R. QUIGLEY: That is right. But it would be a different proposition if she were balloted into a jury at that age, member for Midland, although that is not proposed by this bill. However, the opposition is saying that the opposition respects the rights of those people aged between 65 and 75 years and who have contributed to the community to say, "No; I'm just going to wander off and I don't want to think about this anymore." It is not an ageist argument; it is a respect for those in that age group. That was a point of difference between the opposition and the government.

The third point of difference between the opposition and the government was about clause 10(2)(g)(iii) which renders ineligible for jury service anybody who has, during the relevant period—that is, five years before the jury summons—been convicted of two or more offences for which the statutory penalty is or includes imprisonment. There are a lot of minor offenders who the court would never think to actually imprison for their first or second offence and I include amongst those, as a quick example, people who obstruct the police in the course of their duty. This often happens; it is a common charge. Dad is stopped for suspected drink-driving and has to blow in the breath bag after police see him wandering over the road. His vehicle is pulled over by the traffic patrolman who asks the driver to step from the vehicle. The police begin administering a breath test and the wife, who has perhaps had one or two to drink, gets out and starts arguing with the traffic officer and is arrested for obstruction. I can recall a classic case. It was actually after a Law Society Christmas drinks party. I will not mention the judge because he has now left this world, but his wife was driving them both home to Cottesloe and such an interception happened just past the old Swan Brewery. With his wife at the wheel, the Supreme Court judge got out to advocate on her behalf, and the constable then turned on the Supreme Court judge with a view to locking him up! The sergeant, recognising the Supreme Court judge and realising who the couple were, got out of the police car and said he would escort them home. I often appeared before this Supreme Court judge and he was a terrific guy. This Supreme Court judge said, "No, the law knows no fear or favour; arrest her, officer, and run her in!" I do not know what the breakfast conversation was the next morning! It often happens that during a traffic intercept, for example, a passenger might seek to intercede on the driver's behalf and gets charged with obstructing the traffic officer in the course of his duty. It could be a very minor matter. It would be assessed as that matter plus something else and some other minor matter that carried a possible term of imprisonment; it might be a shoplifting offence, but it could be anything of a very minor nature over which the court would never think that the person was of bad character or of imprisoning that person. However, if that person had two of those offences for which imprisonment was technically possible, that person would be ineligible for jury service. The opposition thinks that will exclude a lot of people from jury service who would otherwise be good jury people.

The opposition thinks there is a danger that outside the metropolitan area, especially among the Indigenous population, who comprise 3.8 per cent of the population—I worked this out with the Deputy Premier the other night—and 1.5 per cent of whom are enrolled voters, this provision could see quite a few such people being rendered ineligible for jury service. Before they even get to make up a panel from which the jury is selected, they will already have been drafted out. The opposition thinks that this is a mistake and unfortunate.

Similarly, the government proposed a new provision that excludes a person who, during the period, has been convicted of three or more traffic offences. As I said, this would not include the issuing of an infringement notice. A traffic officer can elect to either issue the infringement notice or a summons: if he thinks the person is not going to pay the infringement notice, he can issue a summons. There is no inhibition on him doing so; and, indeed, after minor traffic accidents in which there has been a weight of work by the accident inquiry section, sometimes when the result of the inquiry is handed in only shortly before the expiry of the limitation period for

commencing the summary prosecution, they do not go to the infringement notice—they just issue the summons. If they have been issued a summons for three offences, that person is also rendered ineligible for jury service, as is someone would forgets to pay infringement notices on three occasions. This is for minor offences. It might be for exceeding the speed limit by more than one kay an hour, but less than 10 kays. We think cleansing the jury pool of these sorts of very minor offenders will once again have a tendency to racially cleanse the jury of Indigenous people. We listened to what the Attorney General said on questions of arithmetical statistics et cetera, and that he felt the propositions put forward by the Law Reform Commission would see more people off the jury. The opposition agrees that is possible, but as we have said in argument, recommendation 41 at page 87 of the Law Reform Commission's report, which breaks this down into five categories of ineligibility, was far too complex. It would be a drafting nightmare and was likely to see more people off the jury. We did not see the only alternatives being clause 10(2)(g) or the Law Reform Commission's report. The opposition thinks that easing that off and taking away three or more traffic offences or just two offences of which imprisonment is a possibility is setting the bar far too low and will exclude a lot of people who should be participating in jury service.

In the last two minutes available to me, I want to commend to this chamber and to the community at large the very important role that juries play in our system of justice. I also thank the Attorney General, his staff and everyone at the Law Reform Commission for the thoughtful effort they have put into this matter, even though it leaves those two areas of disagreement between this side and the government. As I am sure members will appreciate, that disagreement is taken from a different, shall we say, rationale. People approaching a problem rationally can still come up with different answers. That is why the Court of Appeal is so full and there are dissenting judgements: two people viewing the same problem can come up with different answers. Our differences are not ideologically driven, but we will not budge from those important differences. Although we did not move amendments, we voted against the government's proposition and we would like that recorded in *Hansard*. We thank the chamber and the Attorney, and we commend the bill.

MR M. McGOWAN (Rockingham) [11.15 am]: I will speak briefly on the Juries Legislation Amendment Bill 2010. The member for Mindarie set out quite a good case on the points of differences between the government and the opposition.

It is often said, and the Attorney General said it quite eloquently, that the role of the jury is an important and historic one in our society and has for a long time been perhaps a method of ensuring that individuals are not subject to arbitrary decisions by the state. That is probably the basis on which this system of justice arose centuries ago to protect the individual from arbitrary actions of the state and to ensure that the broader community in common law society has a role in the administration of justice. I think it has served that role fairly well. I do not ascribe to the theory that it is one of the major factors in guaranteeing democracy or something of that nature, which I have heard people say before. The major factor in guaranteeing democracy is chambers like ours, and that we have a strong government and a strong opposition that can keep an eye on the executive.

I have no doubt the jury system is important. We do not have that many jury trials any more, with roughly 500, 600 or so in the course of a year. Of course, for those people involved in a jury trial, either the accused or those people who are sitting on the jury, it is a very important matter. It is also very important for the family of the accused and so forth. For many people in our society, the administration of justice is a very important matter because it can result in very adverse consequences for the person who is subject to the decision of a jury.

I am happy that in common law society, as opposed to the situation in the United States, the spread of the use of the jury is quite limited. Our jury system is very much used for the criminal justice system. There are odd occasions when it can be used in civil matters—predominantly, if I recall, defamation. I might be wrong but I think that a smaller jury of four or six is available in defamation trials. I have always been a little perplexed why that is, and maybe the Attorney General can set out the reasons why that might be the case in a defamation matter and whether that is particularly necessary. However, in the case of our system of justice, juries are predominantly for criminal matters, and normally at the more serious end; that is an appropriate use of them. In the United States, of course, jury trials are much more widespread, particularly in matters of civil negligence. I do not agree with that. I think it might explain some of the things that have happened in the United States, particularly in the spread of massive judgements. The preponderance of civil negligence trials in the United States might have something to do with the jury system. In the United States, the jury not only decides questions of fact, but also comes up with the answer on what the judgement might be in a monetary sense. Accordingly, the jury can award whatever it likes against a major corporation. Judgements are made in the hundreds of millions of dollars in some circumstances. I may be wrong, but I believe that sometimes in the United States a jury has a role in determining sentence imposed on an accused. That is wrong—in fact and in principle. To put the obligation on ordinary citizens of the decision about whether someone lives or dies is wrong. It is not a decision that should be placed upon the shoulders of an ordinary citizen; it should be bound and guided by precedent, and the best people to decide that are members of the judiciary. In our society, the jury's role is

limited to determining questions of fact. Fortunately, we have not gone down the course of allowing a jury to decide questions of sentence. That is a very good thing. I am pleased that these reforms do not send Western Australia in that direction, and I would be very surprised if that development were to happen here in the future.

I turn to the issue of peremptory challenges as raised in the second reading debate. I listened to both sides of the argument. The Attorney General said that he hated them because they were impolite and perhaps embarrassing. He felt it would be somewhat difficult for a juror to march forward and then for a challenge to be issued—I have seen it myself—and the person then has to go back into the jury holding pen for whatever reason. I do not agree that that is a significant ground for changing the law, although I can understand that some people might be slightly offended that a lawyer did not want that person as a juror. During the debate, in an unusual burst of humour, I referred to the Leader of the House, the member for Hillarys. I said that if I was a defence lawyer and the member for Hillarys was a potential juror—he will be eligible to be a potential juror for five or so years after the next election—I would raise a challenge. I used some humour in the debate, but now that I think about it —

Mr R.F. Johnson: I would be a defence lawyer's nightmare, I can tell you, because I wouldn't listen to all the rubbish that they come out with—all the excuses about what a terrible childhood the offender had.

Mr M. McGOWAN: That is very enlightening!

Mr R.F. Johnson: I would not be sucked in by some dodgy eastern states defence lawyer or certain defence lawyers in our state as well. I wouldn't be bullied by them.

Mr M.P. Whitely: You would find them guilty no matter what.

Mr R.F. Johnson: Would I? Because I wouldn't be bullied by a defence lawyer?

Mr M.P. Whitely: What about listening to what they have to say and considering what they have got to say?

Mr R.F. Johnson: I would do that exactly.

Mr M.P. Whitely: Then you would find them guilty.

Mr R.F. Johnson: I would consider it very carefully.

Mr M. McGOWAN: I was indicating why we need peremptory challenges against some jurors, and on cue—C-U-E that is; no offence member for Mindarie!—the Minister for Police has explained to us exactly why peremptory challenges are needed. Let us imagine that in the government's circumstance in which no peremptory challenges can be made, the former Minister for Police, now a humble citizen of Hillarys, came up for jury service. We have just heard his attitude —

Mr C.C. Porter: Would you object to him because you know he used to be the Minister for Police, for certain views that he has here expressed, or simply because you didn't like the look of him?

Mr R.F. Johnson: Exactly!

Mr M. McGOWAN: He was the Minister for Police.

Mr C.C. Porter: But if that was why you would reject him from the jury, you would have a challenge, not merely the peremptory leave, but a challenge as to cause, because you say that you know something about him that would make him unable to undertake a judicial role in an unbiased fashion.

Mr M.P. Whitely: It is the fact that he walked into the court with a noose in his hand that would have been a giveaway.

Mr C.C. Porter: There are no props, but, yes.

Mr M. McGOWAN: No props?

Mr C.C. Porter: I am just saying that there is a distinction.

Mr M. McGOWAN: Yes. I do not like the look of him either, to be honest!

Mr R.F. Johnson: I don't look like the look of you either, my friend—or half of your members! That is why you are not the leader today.

Mr M. McGOWAN: Anyone who says that they like the look of him is lying!

Mr R.F. Johnson: That is a terrible statement to make. I wouldn't say that about you.

Mr M. McGOWAN: It is shocking. It is a bit like saying that all people charged are guilty.

Mr R.F. Johnson: I did not ever say that.

Mr M. McGOWAN: That is the implication.

Mr R.F. Johnson: You've got to tell the truth in this place! I don't mind a bit of humour, but that comment is totally untrue and you know that.

Ms M.M. Quirk: Find it in *Hansard*; you actually said that.

Mr M. McGOWAN: Fortunately, the Attorney General has a more finely balanced sense of justice than the Minister for Police, and he thinks that perhaps people should be judged by the court in an unbiased fashion.

In any event, we need to retain the right of peremptory challenge with some jurors. A lawyer appearing in court might have an instinct about some potential jurors like the member for Hillarys. I do not think that a number of peremptory challenges is too big a burden to ensure that some weight is given to the instinct of lawyers, on both sides, about potential jurors and the way they might act.

I had a slightly different view from the member for Mindarie about the issue of age. I thought that the age for members of the judiciary and the jury should be lifted to 75 years. The Attorney General pointed out why that might be difficult—certainly in relation to judges of the Supreme and District Courts. There should be some consistency between the ages of jurors and judges. I expressed that view. That is a reasonable proposition, and probably is the Attorney General's instinctive view also. That is something that we should work on. With the emphasis on exercise these days, the improvement in the quality of medical care and the significant increase in life expectancy every decade, things are now quite different from how they were in the early 1970s when those rules were put in place. Like their height, people's life expectancy is increasing; people are changing and evolving over time.

Ms M.M. Quirk: Height is not changing.

Mr M. McGOWAN: The average height is indeed changing, as is life expectancy. It is a good thing to ensure that people can serve on the jury bench or in court for longer periods; however, that period should be the same. To have a juror serve for a significantly longer period than a judge seems to me to be illogical. Just because I express that point of view does not mean that I dislike older people or some such silly and ridiculous statement of that nature, as implied by people in close proximity!

Mr C.C. Porter: By whom?

Mr R.F. Johnson: You're accusing me obviously. Why are you saying that?

Mr C.C. Porter: No, it wasn't you this time.

Mr R.F. Johnson: It wasn't me.

Mr M. McGOWAN: It is not all about you.

Mr R.F. Johnson: It is all about me.

Mr M. McGOWAN: The Minister for Police reminds me of Charlie Harper's mother: she thinks that it is all about her as well!

In any event, there should be consistency, and that is something for Attorneys General across Australia to work towards. I look forward to the conclusion of this debate, and I hope that the upper house gives this legislation as much consideration as we have given it.

DR A.D. BUTI (Armadale) [11.29 am]: I am sure the Attorney General may be getting a bit tired of us repeating our arguments, so I will try to make mine short. These points need to be made again and have, to some degree, been made this morning by the first two speakers on this side. I see the Attorney General is sick of it already—he has left!

Mr R.F. Johnson: We have heard a lot of tedious repetition today.

Dr A.D. BUTI: Sometimes repetition is needed.

Mr R.F. Johnson: No; tedious repetition is not allowed in this place.

Dr A.D. BUTI: This is repetition, but not tedious.

Mr R.F. Johnson: It is actually contrary to standing orders.

Dr A.D. BUTI: I refer to clause 10(2)(g) of the Juries Legislation Amendment Bill 2010. The Attorney General, by this piece of legislation, is trying to widen the jury pool. We agree with that. There is definitely a need to widen the pool of potential jurors. I am concerned whether clause 10(2)(g) will achieve that. The underlying principle is the issue of ineligibility based on criminal record. The Law Reform Commission looked at whether a person with a criminal record should be excluded on the basis of a perception of bias against the state. Of course that is a perception that is reasonable to argue, but it is the degree to which the perception of bias may be there that is problematic. Surely, not every person who has been convicted of a criminal act will have a necessary bias

against the state. This is where part of the problem lies in the proposed amendments. The problem is that some offences that lead to disqualification from a jury pool are minor.

This legislation retains the current provisions in section 5 of the Juries Act 1957, which excludes anyone subject to a community order, or similar, over the past five years. That is wider than what was proposed by the Law Reform Commission. Its proposal was to restrict people who had been subject to a community order, if they are an adult, in the past three years or, if they are a juvenile, in the past two years. That can be found at page 86 or 87 of the commission's report. Although the Law Reform Commission and I, and other speakers on this side, recognise that if a person has a criminal conviction of some sort, there could be a perceived bias against the state and that should be considered in determining whether a person is eligible, the question is how wide that net should be. I am concerned that it may be too wide.

People will be restricted if they have received two or more convictions in the past five years for an offence that carries a statutory penalty of imprisonment. Clause 10(2)(g) includes anyone who is fined, as opposed to being placed on an order, on two separate occasions for an offence that carries a term of imprisonment. That could include numerous road traffic offences, escaping lawful custody, trespass, running from police, obstructing police or common assault. One is not saying that in some respects these are not serious offences, but whether they automatically should lead to a person being ineligible for jury duty as a result of perception of bias against the state may need to be reconsidered. It would not be difficult for a person charged with one offence to be charged with two offences under that category of offences. A person could have a conviction for disorderly conduct and trespass. I can quite easily see the scenario in which trespass and disorderly conduct could come under the one offence. That could lead to a person being ineligible for jury duty. I do not have any statistics, but it will be interesting to see whether the Attorney General and his department can provide statistics relating to that proposal. He may have mentioned it in the consideration in detail stage; I am not sure. It really is important to know how many people have been convicted of at least two offences in the past five-year period for one criminal act and therefore would be excluded from jury duty.

Clause 10(2)(g) relates to a person who has received three or more convictions in the past five years for an offence under the Road Traffic Act. Road traffic offences have a wide scale of seriousness. At the moment there are offences such as a person driving under an expired driver's licence, minor careless driving, failure to renew a licence, drink-driving in excess of 0.05 and 0.02, failing to report an accident and failing to provide particulars to the other party following a collision. Then there are the more serious categories of dangerous driving causing bodily harm, reckless driving, driving under the influence of alcohol and driving under suspension. One wonders whether there should be a consideration of the category of seriousness of an offence under the Road Traffic Act, and the Attorney General may wish to reconsider how he will frame the offence under that act. I argue that many people could be caught under this provision. We may need to look at a repeat pattern of serious offences under the Road Traffic Act, not just a pattern of convictions under the RTA. Do not get me wrong; I think repeat RTA offences are silly and a person should seek to change their driving habits, but it does happen. A person may be slightly over the speed limit a number of times. They are a repeat offender but it is not a serious offence. Will that person have a necessary bias against the state if they are on jury duty? I am not sure whether someone convicted of a road traffic offence, sitting in a jury trial for murder, will have a perception of bias against the state when they come to the decision on the murder. If that juror thinks the accused is guilty, they will convict, or they will say that that person should be guilty.

Mr C.C. Porter: In fairness, member, the rule is that a person would have to be convicted of an offence. In the overwhelming majority of cases that the member listed, the offence would have proceeded on infringement. As the member pointed out, I can see that there may be times when some of those offences could be proceeded by way of summons, but as a matter of practice that happens rarely. With the government's criminal penalty infringement notices, more and more of those types of matters will be dealt with on infringement. I understand the point, but I think that it can be characterised slightly too highly.

Dr A.D. BUTI: I take the Attorney General's point. If a person is convicted under the Road Traffic Act, however that may be, I wonder whether that will cloud a person's perception in a jury trial for murder. I am not sure that will happen. This might complicate the legislation, but maybe we could disqualify people convicted of road traffic offences from only certain types of trials, such as trials that relate to road traffic offences or similar—maybe even burglary, I am not sure. If the charge is for murder or sexual assault, I do not know whether a person who is ineligible because of road traffic offences would be clouded in their views. I really would like to see evidence or a cogent argument put on that.

Before I conclude, I refer to a couple of inconsistencies with, or absences from, the proposed legislation. Under the bill, a person who was subject to a sentence of two years' imprisonment or less for a serious offence such as sexual assault or indecent dealing of a child, say, six years ago, is eligible for jury service, but a person who is subject to a community-based order for disorderly conduct four years ago is ineligible. Surely that is an

inconsistency. A person who was convicted of a serious offence such as the first one I described would, just because it occurred six years ago, be eligible for jury duty, but a person who was convicted for a less serious offence four years ago would be ineligible. When does that perception against the state expire? Is it at the five-year mark that a person suddenly has a clean sheet, their history is forgotten and they will not have a bias against the state? I understand it is always hard —

Mr C.C. Porter: The member raises a very good point. It is very difficult. It is not unheard of that an indecent dealing against a child might result in a community-based order. Because the offence is so wide, it contains some very low-level indecent dealings such as the one I mentioned earlier about the girl in the park. I accept the point. There will always be anomalies of that type one way or another.

Dr A.D. BUTI: I know it is very hard to do anything about that because we always need an arbitrary line at some stage. I am not sure about this, and am open to the Attorney General correcting me, but the way I read the legislation, a person who is sentenced to a community service order in the District Court the day before the jury trial commences can still sit on a jury. Is that correct? I am not sure. I thought that might be the case. It is something the Attorney General might want to consider. Thank you.

MR C.C. PORTER (Bateman — Attorney General) [11.40 am] — in reply: I want to thank all members present for their contributions. I want to make three quick points; I will be brief. The first is about the Law Reform Commission; the second is about the concept of civic duty; and the third is about the idea of democratic empowerment lying inside the concept of juries.

I first place on record my appreciation and that of the government for the Law Reform Commission's efforts and its thoughtful report. It makes reform in this area a genuinely simpler task than it would be otherwise. I also thank the Sheriff's Office and the Department of the Attorney General for their contributions. As I have already mentioned I thank the opposition for the way it has allowed this debate to proceed, and for members' contributions, which have been very helpful.

I make this point about the Law Reform Commission: it is not to denounce or decry the use of commissions in carrying out law reform of this type, because I think it is very, very important. In fact, I recently gave a reference to the Law Reform Commission on the issue of whether juveniles on the Australian National Child Offender Register should appear on a jury, who have technically met the requirements of ANCOR registration but have done so in circumstances in which they have committed an offence that involved consensual acts with a girlfriend but the age differential was such that they would meet the technical requirements of the offence committed, and their names would be placed on ANCOR. It is the so-called young love situation. I sent it to the Law Reform Commission because, given the high level of public concern with paedophilia, which is not a legally defined word, it struck me that having the Law Reform Commission look at that in a sober, simple and legalistic way, and having its report presented to me and later to the public, will be helpful in trying to work out a way of repairing a situation that I do not think is operating perfectly at the moment.

Law reform commissions do not govern, and nor should they—that is the role of Parliament. The same, I respectfully say, applies to recommendations that come from any number of bodies that are not parliamentary bodies, whether it be the coroner or any other body. Generally, I find the majority of recommendations that come from commissions of inquiries, reports, coroners and law reform commissions to be very helpful. Watching this debate unfold it seemed to me to be interesting that at least on two issues—only three were perhaps contentious in the debate—both parties had views at variance from the views of the Law Reform Commission. The Law Reform Commission's decision on widening the net to draw rules to try to exclude a greater number of people from the jury list was, in my view, not particularly well thought through. That is not a criticism of the Law Reform Commission. On paper, its rules make sense, but when we have the benefit of the type of analysis that my department can do—albeit that analysis is not perfect because it is very difficult to undertake—we can test the propositions at a basic level. The government formed the view that if the Law Reform Commission's recommendations about the rules for excludability of the jury pool were adopted, we would probably get too wide a net. The government took issue with that and drew back some way from that recommendation. The opposition, whilst not preparing an amendment on the issue, indicated it would probably have drawn back even further from the Law Reform Commission's recommendation in that regard and would sit somewhere between the existing legislation and what the government is doing. On a very important issue, it is an example in which the Law Reform Commission makes a sensible, rational and reasonable suggestion with which many people may well agree. However, there was at least some level of disagreement with that Law Reform Commission proposal from both sides of this Parliament. I raise also the issue of jurors of 75 years of age. When I read that, my initial instinct was, for purposes of consistency, that the age should be 70. In the end I accepted the Law Reform Commission's view. The opposition took a slightly variant view from the Law Reform Commission's view—that is, there should not be a compulsion on those aged between 65 and 75; their attendance should be optional.

I raise those two points because I detect there is sometimes a tendency for the general public, through the media, to consider that if a body outside Parliament—even one commissioned by the Parliament—comes up with an answer, it must be the perfect answer, and any variance from that recommendation represents some kind of wrong-headed ideology, obstinacy or a failure to see truth and reason. I caution some care about that kind of concept. Perhaps one of the reasons committees of inquiry, coronial recommendations and Law Reform Commission recommendations are treated almost as sacrosanct, particularly in the media, is that ultimately those groups never have to actually govern in instituting their recommendations, so they do not wear the public opprobrium if something goes wrong. If the Law Reform Commission made a recommendation that was latterly instituted by government and it turned out to be not practically functioning terribly well, I can guarantee that people would not be complaining to the Law Reform Commission.

A member interjected.

Mr C.C. PORTER: Indeed. I am setting the opposition up for next time we disagree with something from the Law Reform Commission that the opposition agrees with! I gently make the point that the Law Reform Commission members should be treated with enormous respect because of their intellect, the time they spend, and the care and non-partisan way they go about their business—but they are not government.

Dr A.D. Buti: Just like academics in universities.

Mr C.C. PORTER: They are even worse!

That is a point I make on those issues that were quite properly raised by the opposition. We have diverged from the Law Reform Commission in some respects. The opposition might have diverged in a different way from the way we diverged; nevertheless, those are areas in which there was some disagreement.

The second issue is about civic duty. I do not usually veer too much into anecdote in this place, but I will raise one matter that I can recall from my early years in civil litigation at a large corporate law firm. I became aware of a practice in large corporate law firms where it appeared that someone was routinely the go-to solicitor when one or another larger client wanted to get out of jury duty. The law firm would prepare the papers and be paid to do so. The practice was not unlawful or necessarily improper because the rules were so broad that in a canny and legalistic way, a lawyer could come up with a fair excuse that could be properly drafted and the client could be almost guaranteed of being excused from jury duty when he would otherwise not be. I must say that I was ashamed of that practice as it existed because I think, particularly in a law firm, it represents the lack of enthusiasm about jury duty that I spoke about in the consideration in detail stage. We have all had the experience on polling day of people coming in and out of polling booths. They can be sometimes quite difficult but sometimes quite joyful days. The one thing I find difficult to understand is when people turn up at the ballot box strongly begrudging the fact that they must be there. Some people who turn up to the ballot box to vote—with whom you politely try to engage; it is compulsory to be there of course—behave as though the government had compelled them to swim to China; it is the biggest ask of all time to turn up at the ballot box!

Dr A.D. Buti: Harold Holt!

Mr B.S. Wyatt interjected.

Mr C.C. PORTER: Indeed. I detect that same rather ugly element in our society. We surveyed jurors to see whether they support doing jury duty, and quite a large percentage said no. But of course that information was taken only from the people who bothered to turn up for jury duty. We all want to enjoy a properly functioning criminal justice system, but, at the same time, statistics clearly show that a huge swathe of us want nothing to do with it. We complain vociferously if things turn out in a fashion and produce outcomes that we do not think, based on the little knowledge we have of them, are right. But we also have a predilection to divorce ourselves completely from it. What this legislation tries to do is put through the Parliament a set of rules about jury duty that hopefully will change something of a mindset and impress on people that excuses must be real and narrowly defined; the reason being that this is terribly important and everyone must be a part of it to make it work. That is the reason, probably, that there has been some level of disagreement between the opposition and government on the issue of jurors aged between 65 and 75. The view was taken by the government that to try to create at least the possibility of an attitudinal change in this area, the rules should be clear, firm and well understood. The fewer exceptions and opt-outs and the fewer professions that are able to declare an excuse as of right, the better, because the system becomes clearer, more definable and better understood. Having said all that, some people clearly understand how important jury duty is and enjoy jury duty. I recall a trial in Esperance. It was sometimes difficult to get juror pools in Esperance. I had two trials in a week. A few members of the jury pool had already sat on the first jury. After the first trial, the sheriff said, "I don't have to let you go, but you've been here before and you've been picked. You can go home." A lot of them said that they loved it and would do it again. It is fantastic that people think that way. The more people who think that way, the better.

The final thing I want to talk about relates to the issue of civic duty—that is, democratic empowerment. This goes to the issue of strengthening the operation of juries, and thereby the public's confidence in the jury and justice systems, which, despite some minor disagreements in this place, is the purpose of this legislation. When I think about the ways in which we as citizens participate in our system of governance, which extends from public policy to the courts, I can think of only two areas in which we are free to make incredibly important decisions without one or either form of government standing over our shoulder, watching and assessing what we do, suggesting how we should do it and creating a fairly firm set of rules about how it should be done. Those two areas are voting and sitting on a jury. Both areas represent the exercise of a democratic right to make a very important decision that affects the way in which society operates. Thankfully, when we go to a ballot box in this country, we do not have a facilitator—we do not have someone staring over our shoulder—and the rules about who can and cannot vote are reasonable and quite properly err on the side of inclusion. There is no effort by any arm of government to get involved in our thought processes and decision making or in our right to exercise a vote completely free from interference.

The only other area that I can think of in which government has not slowly encroached on the ability to decide for ourselves is the jury. That is why I made the point during the second reading debate that if this legislation increases public confidence in the operation of the jury system and makes juries operate a little better—those two issues are intertwined—and if that staves off calls for facilitators to sit in jury rooms, or that we poor democratic citizens need help in the jury room, which calls arise from time to time, that would be a very good result. I feel absolutely certain that as soon as government pops a facilitator in a jury room to watch what a jury does, that will be the first of 10 nails in the 12-nail coffin for juries. Juries will eventually die a death; it might be quick or it might be slow and painful. As soon as a facilitator gets in there, they will be paid by and will have to report to someone—that is, the government. Of course, they will have to report on something and they will have to have some view. The privative nature of juries, which means that they cannot be appealed against, will be washed away, and juries will be washed away with it. It is an important point to make, because if we think about the way in which we exercise the values of freedom of religion and freedom of speech, which we hold so dearly, we find that the government encroaches, perhaps necessarily, in those areas to a quite significant degree. But the only true freedoms that are left are at the ballot box and inside a jury. This is coming from an Attorney General who thinks that the arguments against juries and in favour of trial by judge alone are, nevertheless, powerful and persuasive arguments. It is very difficult for a lawyer to deny the proposition that decision-making outcomes are, generally speaking, and perhaps in the overwhelming majority of cases, improved when we can analyse precisely how the decision was made and review it, and perhaps review it again and perhaps review it to the High Court. For a lawyer, that is a very powerful proposition. But there must be a few select exceptions to that ability for one or either wing of government to analyse, transcribe, review and appeal a decision, and those exceptions must be the ballot box and the jury.

This legislation has proceeded in a way that has been generally bipartisan. I note the amendments from the member for Mindarie. I think that, ultimately, they were good amendments. I would not even claim the dignity of having wavered on the issue and accepted his amendments. I changed my mind on those amendments during the debate. My mind was not strongly of the view that lawyers should be included, but I thought that, on balance, they should be. I think the arguments that were put about the potential for a perception that lawyers will do dumb things on juries and thereby weaken people's confidence in the jury system were fairly put, and the government ultimately accepted that proposition after debate. I thank members opposite for that amendment.

Ultimately, this legislation is about strengthening juries, because strengthening juries strengthens democratic participation in the justice system. The justice system is one of several areas of government that will always produce results that are dissatisfying to a range of people. If people have confidence that they and people like them are large contributors to those results, the system will have stability in the same way that democratic systems of governance have stability. I thank all members for their contributions. I accept the points of difference. Ultimately, some lines had to be drawn in some areas. I commend this bill to the house.

Question put and passed.

Bill read a third time and transmitted to the Council.