JURIES LEGISLATION AMENDMENT BILL 2010

Second Reading

Resumed from 25 November 2010.

MR J.R. QUIGLEY (Mindarie) [3.13 pm]: I rise to give the opposition's response to the Attorney General's second reading speech on this bill. It has often been said that the jury system is the bulwark of our criminal justice system. It stands between the citizen and the state in that any citizen of the state who is charged with an indictable offence can be tried by a jury of their peers. The current Juries Act that governs juries was proclaimed in 1957. There have been several amendments to the Juries Act 1957. The bill before us is one of some complexity in the sense that it is a bit like an amendment to the income tax act of the federal Parliament. It is trying to splice into current legislation all of these amendments. It would have been much better for this Parliament to be given a bill repealing the previous legislation in its entirety and a consolidated bill to be placed before this Parliament. However, that is not the case. We shall now deal with the several areas of amendment.

In speaking to this bill and the members of the public who might be following these proceedings either now or as the result of press reports emanating from this chamber, the real jump-off point is the "Selection, Eligibility and Exemption of Jurors", the final report of the Western Australian Law Reform Commission, which was published in April 2010. I highly recommend this report to members and the public to educate them on the selection, eligibility and exemption of jurors. The authors of the report were Dr Hands, Ms Williams, together with their research assistants Joanna Yoon and Elizabeth Scaife. The technical editor was Cheryl MacFarlane, and the assistant was Sharne Cranston. They all should be commended for the excellent report that was presented to Parliament. I note that the report is about 130 pages long, and it deals with submissions from a wide range of people, including the Department of the Attorney General, the District and Supreme Courts, the Legal Aid Commission, the Jury Research Centre at the University of Western Australia, the Aboriginal Legal Service and Gillian Braddock, SC, who is now Her Honour Gillian Braddock of the District Court, and several others for their contributions to this most illuminating discussion paper on the selection, eligibility and exemption of jurors.

Perhaps the jump-off point is to be found on page 7 of the report where, having said that juries are regarded absolutely by many as the bulwark of criminal law, the report notes in the third paragraph on page 7 that presently in Perth alone—we are not talking about the regions—the incidence of pre-attendance excuse is approximately 50 per cent. Fifty per cent of all people who receive the initial summons at the moment have the capacity to claim exemption. One only has to turn to that which will be eliminated, that is, the second schedule of part two of the Juries Act, to see that medical practitioners, dentists, veterinary scientists, psychologists, midwives, chiropractors, osteopaths, people in all holy orders, pregnant women, people looking after children 14 years or under, people who have reached the age of 65—the list goes on—can claim an exception as of right.

It is little wonder that 50 per cent of those who receive a jury summons before they are called into a quorum claim an exemption as of right. The report notes that there are a further 14 per cent of people who receive a jury summons who fail to attend on the day. There could be a range of reasons for this, including transport difficulties, or work commitments such that people feel that they would be abandoning their obligations. That is nearly 64 per cent of people bailing out of jury duty. This is not acceptable given that we regard juries—as both sides of this Parliament do—as an essential part of the criminal justice system. It is a duty that should be shared evenly across the community. With this in mind, the jump-off point—that is, the guiding principle of this paper—was that there be a more even spread of obligation than what is currently reflected in jury selection in which 50 per cent of people claim excuses of right and another 14 per cent are non-attending. Having been a practitioner who has practised as an advocate in front of juries for over 25 years, paper 6 debunks some of the myths that surround juries. Because of the manner in which they are selected—that is, with 50 per cent of the people claiming an excuse as of right or being challenged once they are in a jury panel, not empanelled into the jury box—the juries become and have been unrepresentative of the community. It is often said that the unemployed and housewives predominate on juries because they are the ones who are not going for the excuse of work or fitting in to one of the other occupational categories that gives an excuse as of right under part 2 of the second schedule. However, research by Western Australia's jury research unit demonstrated that this was a myth. If we look at juries overall, we would see that all manner and class of people are represented on them. From the experience that I had over the years, from the list of jurors' names, addresses and occupations—I will come to that aspect in a moment—there was a good spread of occupations in every pool. There was a good spread of gender. There was less spread of race—I will come to this later, too—given that our Indigenous population is about 1.5 per cent of the overall population. Our Indigenous population provides 39 per cent of our prison population. The paper notes, however, that one per cent of Indigenous people find their way onto juries, which is just under the 1.5 per cent of their representation in the wider community. This could be explained by

their high incarceration rate, rendering some of them ineligible under section 5 of the current Juries Act, or they may live in remote areas. There is difficulty serving a summons on someone who is on the electoral roll and might live in a remote area, be undertaking law in a remote area or have transport difficulties, as I have alluded to.

Mr C.C. Porter: Or, member, unfortunately, it might also be explicable in part by the challenge part of it.

Mr J.R. QUIGLEY: I will come to that in a moment. It might be part of a challenge too. The challenge part would probably come—I only say this anecdotally from my own experience—from the right-hand end of the bar table, from the prosecutorial end, because the left-hand end of the bar table would say that this person is more likely to be let off.

The Attorney General, in his interjection, raises the next point; that is, jury building. This legislation, regrettably, seeks to reduce peremptory challenges from five to three. I will tell members in a moment why that is regrettable. The thought is that if defence counsel has too many challenges, it can start to shape a jury. This is nonsense. Members do not have to take my word for it; it is debunked in the paper. Although defence counsel might challenge a juror, defence counsel has no control over which number will next be pulled out of the box by the clerk of arraigns. Although defence counsel might challenge because he does not want an Indigenous person, if there are five in the back of the court when he makes his peremptory challenge, he has no guarantee that the next one coming out is not another Indigenous person. It is not a very effective way of building a jury. However, I think the Attorney General referred to this in his second reading speech; the Law Reform Commission certainly referred to it. When multiple accused are on trial—I am thinking of trials that I have undertaken in which up to eight accused have been arraigned at one time, such as the prison officers trial, or the prison riot trial in which about 12 prisoners were all arraigned at once—five times 12 is 60, and if all counsel have hunkered down together before the trial and decided what the jury should look like, they will have that capacity with 60 peremptory challenges. That can be addressed in another way, which I will come to during this speech and during consideration in detail. There is already some fashioning of the jury pool because certain persons under section 5 and elsewhere are simply not eligible. People with serious criminal convictions or people who have served two years' imprisonment are simply not eligible. In that way at least, the jury is fashioned by unsuitable people being vetted out.

I come back to this issue that is dealt with very well in the Law Reform Commission discussion paper dealing with peremptory challenges and the need to maintain the number at five. We believe the need to maintain it at five relates to the fact that there are two sorts of challenges, there have been two sorts of challenges and there will always be challenges; that is, challenge for a cause or where the juror himself declares that he is unable to deliver a fair verdict for one reason or another. I started practising before juries in 1977, and my last jury trial was in 1999, a span of 22 years. I never saw—I am sure they would have happened—a challenge for a cause; that is, when the number is called and the person comes forward and, before the person takes the oath, defence counsel says, "Challenge for a cause." Counsel is then required to lead a factual basis to have a voir dire, a trial within the trial, in which the accused person can lead factual evidence through counsel, not that the person looks scruffy or was yawning at the back of the court but because there is something about the person and his association with the police or with the accused that would lead to a perverse verdict. I have never seen that happen for the obvious reason that if counsel challenged a juror in this fashion and the challenge was overruled, that juror would be empanelled and would be on that jury knowing that either the defence or the prosecution did not want him. We would expect that that person may have a bias against the person who did not want him to participate in the trial. The Law Reform Commission paper notes that when a person comes into the court, like the chamber attendant just did then, and walks forward, when we see the person walking forward, all we have to do is say "challenge". It is very efficient. There is no time wasting. We just say "challenge". It is explained to the people in the pool before they enter the courtroom that they should not take offence at being challenged. It might be a gender challenge. There are two reasons there might be a gender challenge. For example, if the number of jurors got up to eight and there was not one female on the jury, defence counsel or the prosecution might say, "We're heading for an all-male jury here. When number 9 is balloted and he is a male, I will go 'challenge' to get a spread because when the jury retires to the jury room, it is meant to bring all of its different experiences to the room." Or, there are certain cases in which—I heard of this as a younger lawyer and tried it and it was nonsense—a challenge could be made on gender because of a particular case. When I was younger, the very experienced lawyers around this town who were schooling me, and whom I will not name, would say that, in a rape case, or a sexual assault case as we now refer to it, in which there was some provocative behaviour on the part of the victim—mildly provocative; I am not blaming the women—such as being heavily affected by alcohol or wearing skimpy clothes, it was best to have a jury dominated by women because they would be more likely than a man to pass judgement on a young woman who had behaved in such a way, as they were always conservatively schooled not to go out in skimpy clothing because it could be asking for trouble. Therefore, I was

advised to get those women on the rape trial jury and to exclude men who had been schooled all their lives that no meant no and they should never commit rape. No matter how mildly provocative the complainant may have looked at the time of the offence, it would be better to have on the jury a woman rather than a man who had been told "no means no" and who would be a harsher judge of the male accused. I did not find that in my own experience, and feel that it is nonsense that anyone could look at a juror and try to read what sort of juror they would be—what sort of prejudices that person may or may not have. The golden rule that a very experienced criminal lawyer and senior Queen's Counsel—I will not mention his name because he was a Supreme Court judge who recently retired from the Court of Appeal—used to espouse was that when doing police trials and a policeman was on trial, we should object to everyone from the western suburbs being on the jury. That is because, although those people from Mosman Park to City Beach and back to the river are for law and order, they want law and order on their terms and will look down on a policeman who has an allegation against him. That rule, over a quarter of a century, proved, by and large, to be correct, but otherwise, the building of a jury was nonsense.

It is sad that we are reducing the peremptory challenges. As I started to get a little more successful in the art of jury trial, and some say I became quite successful in the last 10 years, I started to follow Ron Cannon, QC and the late Brian Singleton, QC's advice that it is impossible to read what is in a person's mind when they step forward, as the Attorney General knows, but that what we do not want on the jury is a person who does not want to be on the jury. Some jurors come forward and tell the judge that they cannot serve on a jury because they have booked a prepaid ticket for a family holiday to Bali the following week. His Honour asks when they booked it and they reply, "A month ago." The judge replies, "But the jury notices went out two months ago. This is not a valid excuse; you had advance notice that this was coming up. The mere fact that you did not know that you were going to be on this jury for this week and you have booked the ticket means that you are not going to be on this jury." I would challenge that immediately; I would say, "Challenge." The judge could not do anything about it, and the person would go away with a smile on their face. I have always felt that the person we do not want on a jury is the person who, for some reason or another, really does not want to be there. It may not be for a reason that is contained in this legislation and it might not be sufficient to satisfy the judge. We want a person who wants to participate in the process—

The ACTING SPEAKER (Mr P.B. Watson): Member for Rockingham, you walked past the member speaking. I gave you the benefit of the doubt the first time, then you came back and did exactly the same thing. Therefore, I call you to order for the first time.

Mr J.R. QUIGLEY: I am not challenging the Acting Speaker's ruling, but I thank the member for Rockingham for walking by. I can read his mind in thinking that I was coming to a bit of a loss and that he would give me some assistance by going by me.

The person we do not want on the jury is the person who is reluctant. Therefore, towards the end of my career, nearly all my challenges were confined to those people who had expressed a reluctance to participate. As Mr Ron Cannon used to say, what more powerful thing can a lawyer say to a jury at the end of the day than that they noticed at the start of the trial that people did not want to be on the jury? In the past—it is not the case now—the sheriff's office would supply to the prosecutor a criminal record of everyone in the panel, and the prosecutor would start challenging anyone who had a record. The panel would not know why they were being challenged, so it was much more powerful for the defence counsel to be able to say, "You will recall, Mr Foreman, ladies and gentlemen, that two days ago at empanelment, the prosecutor picked very carefully through the pool, hoping he had picked a list of convictors, whilst the defence counsel, who was the defendant, is happy to stand trial in front of any of his peers selected from his community at random." I do not know whether it was much of an advantage; it seemed to be a bit of an advantage in advocacy to limit the challenges to those people who genuinely did not want to be on the jury.

The discussion paper on the selection of juries deals with the selection eligibility and exemption of jurors. The biggest thing that it has thrown up that worries me is the wiping out of the vocational exemptions in part II of the second schedule—emergency services workers, health workers, religious workers and people with family obligations—as well as the change to the age requirement. The biggest cohort of people who do not participate, who do not take their share of the burden and who avoid jury duty are those people who are registered on the electoral roll as silent voters. They are excluded from the jury book. There are 15 jury districts—I might have that wrong, it might be 17—in Western Australia for which a jury book has to be generated. From my recollection, the names of those people who are on the roll silently do not come up in the jury book for that district. The paper notes that in Western Australia there are 12 488 silent voters. That is a huge number of silent voters. Members might recall from their own experiences in each of their electorates that although the silent voters, when electing to become so, must fill in a statutory declaration giving a reason for why they do not want

their names on the roll, the excuses given in those statutory declarations are often very thin and never challenged by the Electoral Commissioner. For example, if any member of this Parliament applied to become a silent voter and said they were worried about being targeted because they were the Attorney General or the shadow Attorney General and they had spoken against organised crime, there is no doubt that the Electoral Commissioner would grant them a silent registration. However, any of their children or wives and so on could also register as a silent voter. We can see how it grows. Someone could say that she had a previous boyfriend, who is not the subject of a violence restraining order but who is stalking her and of whom she is scared. Someone could say that they have a previous husband or had been threatened by someone; the list goes on. They simply sign the statutory declaration. All these people will find themselves relieved of the obligation for jury service. Then we have to look at what happens.

On any given day, the jury list, which is usually the number of jurors to be empanelled, plus about 25 or 30 people, is made available to defence counsel or the accused person. Under the current legislation, it is made available four days before a case, I think, which presents a bit of a danger. It is a requirement that anyone who receives the jury list—especially a solicitor—does not copy the jury list. They do not know what an unrepresented accused person held in custody might do; they could get the jury list and flash it around the prison; who knows? That would be most undesirable. On occasions when I had to collect a jury list within the four-day period, I had to sign an undertaking that I would not copy it, and that I would return it immediately after empanelment had taken place. The process proposed by the Juries Legislation Amendment Bill 2010 is that the jury list be made available at 8.00 am on the day of the trial. I do not see a problem with that. It means that on trial days, counsel will have to organise themselves to get there early. I think that is right. But, getting away from that mechanism, there will be no exposure of that list to people other than those in that courtroom. Therefore, I cannot understand why people who are silent voters will escape their obligation to serve this community by being available for jury service.

Mr C.C. Porter: Do you have an amendment on this issue?

Mr J.R. QUIGLEY: I do not; I will come to that in a moment.

We could attempt to amend this bill on a number of matters, but, instead, we will flag our concerns, and it is for the government to pick them up or not. We know that if we have an amendment the government does not accept, we will be outvoted anyway, because that is the way it is. We do not want to waste this Parliament's time; we want to make a sensible contribution.

This bill attempts to broaden the number of jury challenges to five, and we see that as too many. We see the need for the peremptory challenge of five and the efficiency of it as improving the jury system with the ability for not only defence counsel, but also prosecution counsel to get rid of people who do not want to be on the jury and who do not really fit within the rules of exemption. However, we believe that in a case in which there is more than two accused, five challenges would introduce the capacity for jury shaping or building, which is most undesirable. It worries me that such a large cohort of people can be exempted. I am even worried that, by raising this in the chamber, if it gets any publicity, someone out there might say, "I know how to avoid jury duty now. I just need to nip down to the Electoral Commission."

Mr J.E. McGrath: You always get publicity!

Mr C.C. Porter: You know it will get publicity, and you know it!

Mr J.R. QUIGLEY: No.

Mr J.M. Francis: You'll have it in "Inside Cover" tomorrow!

Mr J.R. QUIGLEY: I do not speak in this place to get publicity; I speak in this place to contribute, members.

If these matters are raised, members can imagine people will say, "I don't want to be on the jury panel; I'll slip down to my local Electoral Commission office and quickly tell the commissioner that I'm being hassled by an old girlfriend", and sign the statutory declaration. I have had my house graffitied.

Mr J.M. Francis: There are dozens of them hassling you.

Mr J.R. QUIGLEY: The member makes the point that he has dozens of them hassling him; he has a big dog to keep them all away from his premises and his current wife!

Everyone in Western Australia knows that my house has been graffitied, and that my house has been targeted. That would be sufficient grounds for exemption. I am a member of Parliament, so I am not eligible anyway, but that would be sufficient. People in the suburbs can come up with any weak excuse. How is the Electoral

Commission ever going to prove that the claims are not true? We would urge the government to give consideration to that matter.

I now turn to another area. Jury service is civil conscription, and we think this area of life is so important to the running of this society under the rule of law that we cannot just rely on volunteers, which would never provide the proper spread; therefore, we conscript them to come. As with military service, the question is: at what age do we start conscription and at what age do we stop? From my memory of the Vietnam War, conscription began at age 18 years and stopped at age 20 years, because that provided a big enough pool of young sappers. In Western Australia, people are not allowed to be a juror after age 70 years; it is now proposed that that will be extended to the oldest cohort of people in Australia, and people will be compelled to perform jury service right through to age 75 years. We will move an amendment to that provision because we think it is wrong. It is not just that a 75-year-old person will be sitting on a jury; we do not have a problem with a more elderly person sitting on a jury. We do note, however, that a referendum was conducted in Australia in about 1987.

Mr M. McGowan: It was 1977.

Mr J.R. QUIGLEY: It was 1977; I thank the member for Rockingham. The majority of people in the national referendum put a ceiling of 70 years on judicial age. Consequently, no matter how bright a person is—I refer to a person such as former Chief Justice Murray Gleeson—as soon as a person hits the age of 70, he has to finish. That is not to say that he, at that age, has not got all of the sharpness of intellect to be a judge, but the community put a ceiling on judicial age. We all know that Mr Gleeson, QC, now acts as an international mediator and is performing, intellectually, at the same level as he previously performed, as is Sir Laurence Street, former Chief Justice of New South Wales, who hit 70 years of age and had to retire; he, also, has gone on to be an international mediator, and I think he sometimes sits on the bench of the Court of Appeal in Hong Kong, but I might stand corrected.

Mr J.N. Hyde: He does.

Mr J.R. QUIGLEY: He sits on the Court of Appeal in Hong Kong.

There we have it: in Australia, the judicial age of retirement is 70. The Labor Party's proposal is that by the time a person has reached 65 and worked all their life, paid their rates and taxes and contributed to the community, they should be able to opt out. The Labor Party's proposal is that, between the ages of 65 and 75 years, people can sit on a jury. However, people may have gone on their caravan holiday. If they have reached 65 years of age and are just a wreck because they have been a Department of Corrective Services officer, or they have been doing community support work and dealt with troubled minds and kids et cetera, they may be worn out and just want to take off down the nomadic highway with the Coromal caravan. Such people should be free to do so without having to worry that they will be reefed back into jury service. This is the big part of wiping out a lot of the jury exemptions.

The government has picked up on a Law Reform Commission proposal to defer jury duty. The act as it currently stands—I wish there was a consolidated act before us, but there is not; I have said that in the Attorney General's absence—states that members and officers of the Legislative Assembly and Legislative Council are exempt from jury duty. That means that the lovely clerk at our table, Ms Kerr, as a parliamentary officer, and Mr McHugh and Mr Mandy, would be exempt from jury service on the basis that it is integral to the running of this Parliament to have our officers in this place to advise Parliament at all times. We have received a letter and a submission, as did the Law Reform Commission, on that from officers of the Assembly and the Council. However, it is noted in the Law Reform Commission paper—the opposition agrees with the government on this—that given that there will be a capacity to defer jury service for six months, and given the reality that officers of this Parliament get annual leave, which has to be worked into the schedule of the sitting of this Parliament, there must be within that capacity for deferral the capacity to avoid disruption to the business of Parliament. Members, on the other hand, are in a different category, because they are politically driven. If they are empanelled onto a jury of a nasty trial, they will be recognised. If the member for Ocean Reef, for example, were on a jury for a trial of someone charged —

Mr J.M. Francis: With his new haircut!

Mr J.R. QUIGLEY: No-one would recognise him! It is the new member for Ocean Reef. People will still recognise him. He will still get his 70 per cent in Ocean Reef; they will not forget the member. If he were on the jury of a trial that involved an environmental offence or a really nasty sexual offence and that jury, hypothetically, were to acquit, he might feel that this could have a political backlash. This is why it is considered undesirable that we political beasts, who always keep our political outcomes at the forefront of our mind, should not be on juries. But the same does not apply to the Clerks of this Parliament, and that is why we would exclude that.

We note that we have to be pretty even-handed on occupational ineligibility. I think it is right. We almost have to go back to the starting point of the Law Reform Commission's paper. Fifty per cent of the people who are eligible for jury service claim a pre-excuse—they fall within the category of pre-excuse—which is not sustainable, and another 14 per cent do not attend. We are removing emergency services workers—officers and firemen of permanent fire brigades and pilots employed by the Royal Flying Doctor Service of Australia—from the category of pre-excuse. Currently, they can just make a claim and they will not serve. We are removing all that, and we agree with removing all that on the basis that they can defer it to a more convenient time. If we are to do that, we must have even-handedness. We cannot look at this place and say that our crucial workers are exempt while the Royal Flying Doctor Service's crucial worker—to wit, the pilot—is not exempt. It must be even-handed.

I do not have the submission of Western Australia Police to the Law Reform Commission, but threads of it can be picked up throughout this paper. It made the submission that, unlike in the United Kingdom, police officers should not be on a jury. The police service said that it did not want the juries or the verdicts challenged because of a perception of bias because an officer was on the jury, which has happened in the United Kingdom, as the Attorney General is aware. The Department of the Attorney General wanted to capture everyone; it wanted everyone to be included. We support the position in that regard in the submission of both the police department and the police union and its current president. We would, however, disagree with the government's proposal concerning lawyers on juries. We will argue about the government's proposal in essence, but we are not going to hold this Parliament up forever. If we cannot persuade the Attorney by argument, it will not happen. I am encouraged that the Attorney has asked whether we have an amendment for the secret list of voters, because that means that the advocacy has raised an issue that he is thinking about. There is no undertaking, and I understand that, but he is thinking about that.

Mr C.C. Porter: The reason I raise that is I do not actually recall that being dealt with by the Law Reform Commission in any substantive way.

Mr J.R. QUIGLEY: No. It just passed over it.

Mr C.C. Porter: You do make a good point, but it has not been raised with me.

Mr J.R. QUIGLEY: Its recommendation was that silent voters not be included, but they are the biggest cohort of people who are avoiding jury service. Their names will not be released to anyone, as the Attorney General knows—I have limited time, so I do not want to go over that again—because the jury list is not like the electoral roll, which is available to the public.

I now turn to lawyers. Recommendation 25 of the Law Reform Commission, which has not been taken up by the government, is that all Australian jurisdictions exclude lawyers from jury service; however, it disagrees on the period for exclusion. We are not talking about thousands of people in Western Australia; we are talking about a relatively small number. There could be a couple of thousand now, I suppose, on the bar roll, but we are talking about a relatively small number. It must be people with a practising certificate. An Australian legal practitioner is defined not as someone who has a law qualification, but, under the Legal Profession Act, as someone with a current practising certificate, which I keep abreast of and have. There would be lawyers in this chamber who do not have a current practising certificate. Many people undertake the study of law these days with the intention of entering a stockbroking firm or the journalism profession. I know there are people in the press gallery with law degrees. My objection to lawyers going on a jury is that after that bikie trial, when the bikies got off—I think it was the shooting at the Metro City nightclub on Roe Street and Mr Mercanti, Mr Kizon and others were involved in the trial —

Mr C.C. Porter: The Spider Boys incident.

Mr J.R. QUIGLEY: The Spider Boys incident. The jury acquitted Mr Kizon, Mr Mercanti and others who were involved in that incident. There was a quick reaction by some policemen, who said that the jurors were intimidated by the bikies. The jury research group at the University of Western Australia conducted research into juries, and was given permission by, I think, the previous Attorney General—it might have been a continuum of the current Attorney General—to investigate this matter. It was the Fordham report, which was not released in its entirety. When she interviewed jurors, none of them felt intimidated by the bikies. That was a common theme of the jurors —

Mr J.M. Francis: Maybe none of them was prepared to admit that they felt intimidated.

Mr J.R. QUIGLEY: No, they were not. This was all conducted in secret afterwards. They said that they were not intimidated by the bikies. She has a chapter on intimidation and jurors did report feeling intimidated. The instances that they cited of intimidation occurred in the jury room, when one person became bombastic or over

the top in an argument and intimidated his fellow jurors. Some jurors felt on reflection that they would have voted the other way had it not been for the intimidation—had it not been for one person taking the pre-eminent role and urging that.

I know that I am a lawyer—all of Western Australia knows that—and have been since 23 December 1975. The proposal is that criminal lawyers will not be able to be empanelled on criminal trials and, in the few civil jury trials we have—they are principally for defamation, and I cannot remember a civil jury in Perth for quite a while, quite frankly; it is a jury of six, for those who do not know—civil lawyers will not sit on the jury. My concern is that once a lawyer gets into the jury room and is soon known to be a lawyer—that will happen for sure—that person will start to try to educate or interpret the judge's charge. There is a very important principle in a jury trial; that is, that the jury will be obedient to the judge's charge as to the law. The jurors might not like it; they might think that the law is wrong in terms of assisted self-defence. That was an example the Attorney General raised after the Macleod acquittal. The jurors might think that that law is wrong, but it is the state of the law, and the oath that they take is to give a true verdict according to the evidence and according to the law. All of those jurors then might defer to the legal arguments being advanced by the lawyer on the panel, thinking that he has some special knowledge—even though he is a civil lawyer in a criminal trial—or some special powers of retention or perception when it comes to interpreting the evidence and, more importantly, applying the evidence as they find it to be to the law.

The Attorney General in his second reading speech asked what is wrong with lawyers serving on juries, because they would bring their special life experiences—he did not say special legal experiences—to the jury room, and would that not just be helpful? Yes, but it appears that lawyers run just about every aspect of life, including the Parliaments of Australia, in which they play a high-profile role. In the court system everyone is a lawyer, including the judge who, although he is a judge, could be described as a lawyer because he obviously cannot become a judge unless he has been a lawyer for five years—it is everything. The reasoning and the culture of lawyers is all-pervasive, and we think their requirements for jury service should be the same in Western Australia as in all other jurisdictions; namely, that no lawyer can serve on a jury unless he has been without a practice certificate for five continuous years prior to empanelment, because he has not practised for five years. It is the same as the requirement proposed for police, as I understand the legislation. When we consider that we are just looking away from 12 500 silent voters who are available to swell the pool, kicking all the lawyers out of the pool, first, it is not going to be a great loss to the jury system; and, second, will not deplete the number of available jurors if we capture this other lost multitude of silent voters. Therefore, we support the Law Reform Commission's recommendation 25 that lawyers should not be included.

When it comes to court officers, there was quite a discussion, which has found its way into the bill, as to what sort of judicial officers should be excluded. Should it be only judges of the Supreme Court or could it include people who are on the Western Australian Industrial Relations Commission and suchlike? This is contained in schedule 1, division 1, clause 2, "Judicial and court officers", of the bill currently before the house, and includes judges and auxiliary judges of the Supreme Court, judges and auxiliary judges of the District Court and Family Court judges. Do not forget that in the United Kingdom, judges can serve on juries; but here, the excluded judicial and court officers include judges, magistrates of the Magistrates Court and the Children's Court, the State Coroner and—this one we cannot understand, but we will go with the government on it—the president or a commissioner of the Western Australian Industrial Relations Commission. That was discussed in the Law Reform Commission paper, which did not see the particular need for that exemption but, heck, we are dealing with four or five people in Western Australia and we are not standing in this place to argue over those sorts of things; if that is the government's call, we will go with it.

However, we do have one more amendment. I have talked of lawyers and the reason why we do not think lawyers should serve on juries. There is one other class of people who we do not think should be on juries, and that is not included in the bill—that is, the clerks of arraigns, the judge's associate and the judicial support officers of the Magistrates Court. I say that for this reason: these people are almost lawyers. In the old days people who had been a judge's associate for long enough could sit their bar exams because they had listened to that much law. I think that there are very good magistrates who qualified in that way. I can remember in the old days Magistrate P.V. Smith was one of those, and probably Magistrate Keith Hogg, but I am going back to the seventies. In more contemporary times, I seem to recall Magistrate Bob Lawrence, who was last regularly sitting in Fremantle, and who I always used to see empanelling juries as the clerk of arraigns. I think he was former Chief Justice Sir Francis Burt's associate, if my memory serves me correctly. Were it to be in a jury room, these people would not be honour bound to swear to keep their occupation a secret, and that in normal life they sat in front of the judge day in, day out in these trials, so once again we would see a capacity for them to have more influence than any other juror, not just by bringing experience into the jury room but also by their take on the law or their way of analysing or applying the judge's charge as to the law to the facts at hand. Once again, we are

probably dealing in Western Australia with only about 30 people; it might be 50 overall, but it is a drop in the ocean compared with this big pool of silent voters. Therefore, it is important for the system to continue to be seen to be impartial, which is something the Law Reform Commission plugs throughout its paper. It is not a question of impartiality or of a lack of bias, but the perception of, and the community's confidence in, the system that is so important. If an accused person who had been through the system—as the Attorney General knows, the accused might appear three or four times at least in the Supreme Court dealing with matters, directions hearings and whatnot before different judges—is at his trial, the empanelment has taken place and out of the jury room leading the jury is the foreman who was the associate of the judge the accused appeared before two months ago, there would not be a cause basis because it might have only been a regular remand appearance. However, the accused knows an officer of the court, the clerk of arraigns, is now the foreman on his jury. It might not just be the accused person, it might also be that the police and everyone in the community would start rubbing their chins and asking whether it has the appearance of perfect impartiality, which is the ideal that we all have to strive for in this whole process—not only impartiality but also the perception of impartiality. That was the very reason it is not sane. The WA Police Union of Workers and its president, Mr Russell Armstrong, in their submission were not saying that, if empanelled, a policeman—who would live a blameless life vis-à-vis the transgression of the criminal law—could not give a true verdict according to law but that it would not be a good perception for the public of Western Australia.

Finally, I ask members to look at proposed section 5(b)(iii), which, as I said before, will allow greater capacity for racially stacking a jury than any other provision in the bill. A new provision under clause 10(2)(g) deals with ineligibility as a result of convictions. Clause 10(2)(g) deletes 5 (b)(iii) and (iv). I will not go into what section 5(b)(iii) and (iv) of the Juries Act say, because they say more than what the new provisions say; those subparagraphs deal with other areas. Clause 10(2)(g) inserts —

> (iii) has, in the relevant period in Western Australia, been convicted of 2 or more offences the statutory penalty for which is or includes imprisonment;

The relevant period is five years. If members think of the Indigenous people up north—my black brothers and sisters—for example, a person might commit an offence of obstructing a police officer, which carries a penalty that includes imprisonment as a possible punishment. A person could easily be convicted of two offences—not leaving licensed premises when ordered to do so, and resisting a policeman removing them from licensed premise. In a five-year period people can easily be convicted of two or more offences that carry imprisonment. Dangerous driving is another such offence. It could be just more than a moment's inattention, which is the careless driving test. Many driving offences, including dangerous driving, carry nine month's imprisonment for the first offence. Where is it suggested that a person convicted of dangerous driving could not give a true verdict? In a five-year period a person could have one charge of dangerous driving and one charge of obstructing a police officer and suddenly be ineligible for jury duty.

Of even more concern in the bill is proposed subparagraph (iv), which is also inserted by clause 10(2)(g). I invite the Attorney General to consider this clause. The Attorney General has considered matters before and I praise him for that; he is the only legislator in this place to think about those things and, subsequent to a bill being passed in this house, come back and re-amend it. I am now thinking of the mandatory sentencing legislation in particular and its application to very young children. After that legislation had passed this house, the Attorney General came back and amended the bill once he had had more time to think about it—perhaps also because of the contributions made by opposition members; we would like to think so.

Proposed subparagraph (iv) says —

> has, in the relevant period in Western Australia, been convicted of 3 or more offences against the *Road Traffic Act 1974*;

Those offences can be any minor offences against the Road Traffic Act, so long as the person has been convicted of three or more offences in the relevant period. This proposed subparagraph would perhaps render the honourable Minister for Transport ineligible to sit on a jury. He could be eligible to be a minister for the state—as members heard from the Premier during question time—but ineligible to sit on a jury, if his traffic offences were dealt with other than by way of infringements. In other words, if an infringement was not paid and a summons was issued—that happens to thousands of people—and the Minister for Transport paid it on that, he would have a conviction. People do not get convictions on infringement notices.

MR M. McGOWAN (Rockingham) [4.13 pm]: I rise to make a few remarks on the Juries Legislation Amendment Bill 2010. I commence by congratulating my colleague, the member for Mindarie, on his well-reasoned arguments. I also congratulate the Attorney General for a fair, reasonable and concerted attempt to expand the range of people eligible for jury service.

The Juries Legislation Amendment Bill is an overdue reform. We need to ensure that there is less capacity for people to avoid jury service and that a wider range of people are able to be empanelled as jurors, so that the burden of jury service does not unreasonably and unnecessarily fall upon certain categories of people. I say from the start that the principle is correct; we should be expanding the number of people who are eligible and able to serve on a jury. Attorney General, in that sense it is a good reform.

I want to raise some concerns that I have about these laws. My concerns fall into three categories: members of Parliament; age; and the capacity of legal practitioners to serve on juries. I will start with the easiest category. My understanding is that under this bill the prohibition on members of Parliament serving on a jury is retained, but the prohibition is removed once a member's parliamentary career ends. That is the correct approach. I do not think it reflects adversely upon members in this chamber that if members were required to serve on a jury, many would argue that they have important jobs and that time is of the essence and so forth.

The judgments of members of Parliament on issues are perhaps more susceptible to public opinion than the judgements of anyone else in the broader community. Therefore, our judgement may to some degree be impaired in a trial that is subject to publicity; the accused might be held in some disrepute or disregard by members of the public. Members of Parliament should not be put in that position, for a start. Secondly, if a member of Parliament is placed on a jury for a high publicity matter and the member feels some pressure from public opinion, their actions may result in a different outcome for a trial. I do not think that reflects adversely on members of Parliament; I think that is a reflection of reality. I agree with the Attorney General that it is a good thing to allow members of Parliament to serve on a jury once they are finished in this place. Bearing in mind that there is probably only a couple of hundred former members of Parliament in the state, the pool of potential jurors is not greatly expanded, but at least it sends a signal that the government and the opposition are prepared to take on the issue of expanding the pool of potential jurors.

The second reform allows lawyers to serve on juries. I do not agree with that. Lawyers or people with law degrees should not serve on juries. I say that because a number of people have law degrees regardless of whether they have practised as lawyers; they may have worked for government or in a range of professions. When I studied law at university, there were two law schools in Queensland and there are now something like six. A large number of people do law degrees and work in a range of fields. The other day I met a young man on St Georges Terrace who works for the Chamber of Commerce and Industry or the Chamber of Minerals and Energy—I cannot remember which—and he has never practised law, but he has a law degree. He could quite fairly be seen by members of the general public as a lawyer: a person with far greater levels of expertise and understanding in the law than an ordinary citizen. Whether a person has been a practising lawyer, is a former member of Parliament and a lawyer, or has worked in any range of professions with a law degree, the reaction in the jury room to a person with that qualification would be significant. Such a person would carry undue weight in the jury room for their view of what has taken place. Furthermore, that person could potentially mix questions of law and fact. As members know, jurors are required to decide questions of fact. A lawyer serving in a jury room could potentially skew the outcome of a trial and carry unnecessary weight amongst his or her fellow jurors. Although a large number of people have law degrees and there are a large number of law schools, the number of lawyers is certainly not a significant component of the population in overall terms. Allowing lawyers to serve on juries has the potential to influence how a jury system operates in practice in unintended ways. Despite the benefit we would receive of that additional pool of people being available, it would not be a wise course of action. I suggest to the government that lawyers being placed in that position is perhaps not unfair on them, but I think it is potentially unfair on justice, and it is unfair on fellow jurors in the jury room.

The final point I want to raise is the question of age. Clause 10 of the bill states that a person is not eligible to serve as a juror at a trial if he or she has reached 75 years of age. Therefore, if that person has reached their seventy-fifth birthday on that particular day, they are not eligible to serve as a juror at a trial. That, of course, brings in an obvious and interesting debating point about whether people should, at a certain age, be eligible to undertake certain activities. The point I want to go to is the requirement on judges and magistrates in this state. My recollection is that magistrates are required to retire at age 65, and my understanding of the law is that judges are required to retire at age 70. Therefore, a judge, on the date of his or her seventieth birthday, is no longer eligible to sit on the bench. A magistrate, on the date of his or her sixty-fifth birthday, is no longer eligible to sit on the bench. However, this legislation is saying that a juror, on the date of his or her seventy-fifth birthday, is no longer able to adjudicate upon someone in a court of law—that is, whether that person is found guilty or not guilty, obviously, but also what might happen to that person's life. Therefore, we have a different standard for a judge who can decide questions of law and, on occasion, of fact—but often just questions of law—if an accused person elects for that to be the case. Judges are no longer able to do that once they turn 70 years of age.

Obviously, a great many cases that might otherwise go before a judge can go before a magistrate. At age 65, magistrates are not able to adjudicate upon such matters.

These questions were largely resolved in this country—this brings in a bigger issue that I am going to raise in a moment—in the 1970s. In this state, I think the laws for the compulsory retirement age were put in place in the early 1970s. I think the law for District Court or Supreme Court judges was put in place in 1969 or 1970, and for magistrates it was perhaps around the same time. But, nationally, in 1977 a referendum was put forward by the Fraser government. In Western Australia, 78.3 per cent of the public voted in favour of the proposition put at the referendum, and 21.6 per cent voted against it. The proposition was that all judges appointed federally—that is, to the Family Court, the Federal Court, the High Court and so forth—be required to retire on their seventieth birthday. As a result of that national referendum, it was put in the Australian Constitution that all judges appointed to federal courts be required to retire on the day they turn 70. I think this was prompted by—I checked this some years ago with Alannah MacTiernan—a judge by the name of Edward McTiernan. I asked her whether Edward McTiernan and Alannah MacTiernan were related. She said they were, even though the spelling of their last names was different.

Ms M.M. Quirk: Plus the judge used to always say, "I concur", and that's all. It doesn't sound like Alannah.

Mr M. McGOWAN: Obviously, the genetic pool is not just alphabetically stretched.

I asked Alannah MacTiernan whether Judge Edward McTiernan was related to her; she said he was. Then she said that the spelling of his last name was different. I do not know how she came to that conclusion. In any event, she came to the conclusion that they were related despite the spelling difference in their last names. Edward McTiernan was appointed to the High Court in 1930 —

Mr C.C. Porter: He was 39.

Mr M. McGOWAN: — when he was 39. He was probably the second youngest person to be appointed a High Court judge. Was the youngest not Doc Evatt, at age 36? In any event, he was appointed in 1930—the Attorney General knows better than I—and he retired in 1976. So he served on the bench for 46 years and, according to my recollection, he is the longest serving judge on an appellate court in the history of the common law system.

Dr A.D. Buti: That's about as long as Hon Norman Moore has been in the upper house.

Mr C.C. Porter: Someone told me in a speech the other day that they remembered when Hon Norman Moore wasn't in the Legislative Council. He wasn't a young man.

Mr M. McGOWAN: In any event, the story goes that Justice Edward McTiernan retired in 1976 only because Garfield Barwick, true to form, refused to put a ramp up to the bench so that his wheelchair could get up there. Therefore, because he could not be pushed up into his place on the bench, as a result of the nature and style of Garfield Barwick, he was unable to continue in his role as a High Court judge and was forced to retire. From law school I also recall judgements by a judge whose last name was Windeyer, if that is the correct pronunciation. It is a long time now since I have looked at any of these issues. I have a recollection that he served into his 80s or something like that.

However, generally what happened was that the Fraser government came along and said that something had to be done about judges remaining on the bench until they were in their 80s and 90s and perhaps not performing to the standard that was expected and perhaps not reflecting the values and social standards of modern times.

Mr C.J. Barnett: Eighty is okay.

Mr M. McGOWAN: Premiers do not generally serve until that age. I digress, Premier. I saw the Premier on television the other night in footage from 10 years ago. I was slightly shocked. If I were the Premier, I would have been a bit disturbed, looking at myself 10 years ago and perhaps looking in the mirror this morning.

Mr C.J. Barnett: My wife burst out laughing when she saw that.

Mr M. McGOWAN: There is a gymnasium downstairs. I can show the Premier the way, if he likes.

Mr C.J. Barnett: All right. I think I'm good for 80!

Mr M. McGOWAN: In any event, I am heading down there during the dinner break and, if the Premier wants, I will take him down there, and no doubt he will do some exercises.

We had those judges, and the Fraser government said that it had to do something about what had gone on. Therefore, as a part of those four referendums in 1977, it decided to put a proposition about fixing the retirement age. It put forward the 70 years of age retirement age, which reflected the position in the state Supreme Courts and District Courts around the country. When we look at it now, 34 years later, 70 seems a bit young. People's

life expectancy is longer, medical attention has improved, and we like to encourage people to remain in the workforce for longer. However, I note that Murray Gleeson and Michael Kirby on their retirements recently said that they thought 70 was the right age, because the judiciary needed to be constantly refreshed and renewed, firstly, so that people who were coming on in the legal profession had an opportunity to get into a judicial role and, secondly, so that there was a reflection of current standards, attitudes and legal thinking, rather than the thinking perhaps being stuck back in the past. Therefore, there are a series of arguments about whether the age is right.

My view is that we need a cap on judicial appointments; otherwise, if appointments are open-ended, we could end up with the Justice McTiernan situation. If we have a system under which judges are appointed subject to the whim of governments or for a fixed term, those judges might try to perhaps appease or live up to the expectations and political ideology of the government of the time, à la the United States. Therefore, I believe that we need to come up with a new arrangement. I think the maximum age of judges in the courts could be lifted. I believe it would be a reasonable proposition if the age were lifted to 72 or 75. The same could be done with magistrates. Sixty-five is obviously too young. It also impacts on who can be appointed. Of course, for people who want to take up judicial roles or go into the Magistrates Court, there is a judicial pension scheme. If someone is appointed a magistrate at age 60—I think a person must have served a certain amount of time; seven years or so —

Mr C.C. Porter: Ten years.

Mr M. McGOWAN: No-one would become a magistrate, or people would be reluctant to become a magistrate, post the age of 55. People would be reluctant to become a judge post the age of 60. The government is limiting itself to who can become a judge or a magistrate in that situation. I know a prominent lawyer—the member for Mindarie has worked with him in freeing innocent men from jail—who is 71, I think. He has a two-year-old daughter. He obviously goes to the gym.

[Member's time extended.]

Mr M. McGOWAN: The Premier might want to get a few tips from Malcolm McCusker; he might end up with a bouncing baby boy. Malcolm McCusker obviously has a fine legal mind at the age of 71. He is too old to serve on the High Court, the Supreme Court or the District Court of this country. I suspect in his case that he does not want to and has never wanted to, or else he would have ended up being a High Court judge some time ago. He is too old. I think he would be a fine judge at this stage of his life. The current rules unnecessarily inhibit people seeking judicial appointment. The way the pension scheme works is unnecessarily inhibiting. Under the Australian Constitution, the provisions governing the Federal Courts cannot be changed without a referendum. That would be a very complex matter for members of the commonwealth Parliament, so we should leave it to them. In our case, it is a matter of legislation. We could easily pass legislation to lift the retirement age for a judge.

Mr C.C. Porter: No.

Mr M. McGOWAN: I understand we can.

Mr C.C. Porter: We could for a magistrate but the problem with judges is they sit on the Supreme Court, which now exercises federal jurisdiction so they have to be governed by the same constitutional provisions as federal High Court judges, so that would have to be done by a constitutional change.

Mr M. McGOWAN: That would be the case unless they were hearing a matter which did not involve the exercise of the federal jurisdiction.

Mr C.C. Porter: No.

Dr A.D. Buti: Is that by arrangement?

Mr C.C. Porter: No. Supreme Courts are now viewed, because of the complete interventioning of the federal jurisdiction, as chapter 3 courts under the Constitution. We could not do it without a constitutional change.

Mr M. McGOWAN: In the case of magistrates, the 65-year retirement age strikes me as silly, and we should fix that. In the case of judges, we should work with the commonwealth to fix that as well. I do not think it would be difficult to move that to 72, 73, 75 or some such age.

This legislation is creating a situation in which the judge is unable to decide a matter involving a person once the judge hits the age of 70 or 65, while a juror can decide a matter involving a person when the juror is 74 years of age. The inconsistency is such that we should fix not only one part of the problem; if we want to fix the problem, we should fix the problem for everyone. It is not easy to argue why a judge should not be able to decide a matter involving an accused person at the age of 70, yet a juror can. Would normal logic not have said that if there was

to be a way through this, it should be the other way around—a person with long judicial experience would perhaps be more suited at an older age to deal with these matters than someone without that? Having said that, I think it should be repaired for everyone, perhaps as a single package. It is illogical to have that inconsistency in the people able to decide a criminal matter involving an accused person and it should be repaired in totality, not just one part of it. I suggest that the government should work at a national level. I suspect there would be some sympathy for it to be fixed at a national level. The entire situation should be fixed at once. I would suggest that the 75-year rule should perhaps be in this legislation, the same as is available for the courts. The government should attempt to fix the rule for magistrates and judges at a national level and if it wants to lift the age for jurors, it should lift it to the same level. That would be a fair and reasonable approach to this matter.

They were my only three concerns. I am sure that the government probably considered the issue of the age of 75. The situation we have at present does not strike me as logically consistent. Could it result in an injustice for someone or could it result in a less efficient system? If a judge sitting on a court was nearing retirement age and the juror was five years older, and the judge was not allowed to decide upon matters and the juror was, the judge would probably think there was something slightly wrong with the system. Would the accused person suffer as a consequence? People are generally more vibrant, active and aware at an older age these days, so maybe the accused person would not suffer. I certainly think there should be one rule for deciding matters involving an accused person and it should apply across the board. There should not be a different set of rules depending on whether a person sits on a bench or serves on a jury.

MR J.M. FRANCIS (Jandakot) [4.36 pm]: I listened intently to the member for Rockingham and the member for Mindarie. They seemed to have conflicting arguments on why the cap on the age of jurors should be kept at the age of 70. The member for Rockingham argued that the cap be kept at 70 because it is 70 for other people, besides the fact that the other people he was referring to were paid employees of the Crown whereas jurors are not. The member for Mindarie made the point that once people reach the age of 75, they should be allowed to go off and do what they want to do because they have made their contribution to society. My only conclusion from this is to ask another question: why does the Labor Party hate old people so much? One of the first recollections I have of an argument in this place was the member for Rockingham ridiculing the new government —

Dr A.D. Buti: The member for Mindarie did not say that. That is so silly. We've been having a mature debate; now we go down to a juvenile level. The member for Mindarie talked about giving the choice. He said: give him the choice.

The ACTING SPEAKER (Ms A.R. Mitchell): Member for Armadale, would you please cease your interjections.

Mr J.M. FRANCIS: I would suggest that if all members in this house went out —

Dr A.D. Buti: He was saying we should increase the age of judges to 75. What does he have against old people?

Mr J.M. FRANCIS: Is the member always so rude? He should stand and get the call when I sit down.

The ACTING SPEAKER: Member for Armadale!

Mr J.M. FRANCIS: I would suggest that everyone go out and ask some of the people in their community who live in retirement villages if they think that, just because they are over 70, they can no longer make a worthwhile contribution to society. They should ask them whether, because they are 72 years old, they cannot make a reasonable and rational contribution to a jury. My father, who is 83, would be very competent and very reasonable and would make a great contribution to a jury. Just because a person is over the age of 70 does not mean they should not be able to be part of society —

Mr J.N. Hyde: So you're supporting our amendment then?

Mr J.M. FRANCIS: Absolutely not. The Labor Party wants to keep the age at 70. It is going to move an amendment to keep the retirement age at 70.

Dr A.D. Buti: They should have a discretion.

Mr J.M. FRANCIS: The member for Armadale was not even in the house when the member for Mindarie was speaking. I do not know what he is talking about.

The ACTING SPEAKER: Member for Jandakot, I suggest you direct your statements through the Chair.

Mr J.M. FRANCIS: One of the other points that was raised, which I think is worth correcting, is that the largest cohort that will be exempted from this will be those who choose to be silent members on the electoral roll. The member who raised that point is absolutely wrong. I did some quick maths, and it is only rough but I will prove

this point. In the 2008 state election about 1.3 million people were on the electoral roll in Western Australia. The population of WA was about 2.2 million. About 19 per cent of the population were aged between zero and 14, about 68 per cent were aged between 15 and 64 and about 14 per cent were aged over 65. Generally, just less than 25 per cent of the 2.2 million people in Western Australia in 2008 were under the age of 18 years, which means that about 1.65 million people were over the age of 18. So, 1.65 million people, minus 1.3 million people, meant that there were roughly 350 000 people over the age of 18 years in Western Australia who were not even on the electoral roll.

Mr A.J. Waddell: They were not eligible to be on the electoral roll.

Mr J.M. FRANCIS: They were not even on the electoral roll. A very small minority are not eligible to be on the roll.

Mr A.J. Waddell: What about New Zealanders?

Mr J.M. FRANCIS: The figure is not 350 000.

Several members interjected.

Mr J.M. FRANCIS: I know that every single member of Parliament —

Mrs C.A. Martin interjected.

Mr J.M. FRANCIS: Are you going to be rude like him—or shut up?

Several members interjected.

The ACTING SPEAKER (Ms A.R. Mitchell): Order, member for Jandakot.

Mr J.M. FRANCIS: I am guessing that when almost every single member of Parliament gets a phone call from a constituent, their electorate officers check whether the constituent is on the roll.

Mr M.P. Whitely: No, no.

Mr J.M. FRANCIS: That is done so that when we write back, we get their name right —

Several members interjected.

Mr J.M. FRANCIS: Of course we do. We do that so that when we write back, we get their name right, we get their address right and we get their details right. The member knows his office does that as well as everyone else does.

Several members interjected.

Mr J.M. FRANCIS: I am always amazed at the number of people who are not on the roll. Sometimes I ask people why they are not on the electoral roll, and they say it is because they do not want to get a fine for not voting. The point is—members know I am right—that a large number of eligible people in Western Australia are not on the roll because either they do not want to vote or for another reason. The largest cohort who will be exempt from this will be eligible people who are not on the electoral roll for whatever reason, not those on the silent roll. I wanted to correct that particular claim made by the member for Mindarie.

The last point I make on the Juries Legislation Amendment Bill 2010 is about the exclusion of members of Parliament. I would argue that it is not so much that a member of Parliament could not sit on a jury and make a rational, impartial decision of guilt.

Several members interjected.

Mr J.M. FRANCIS: Guilt or innocence!

Mr D.A. Templeman: Give him a shovel, and he can dig himself out of it!

Mr J.M. FRANCIS: I would argue that it is not so much the jury's decision that is important; it would be the decision of a division in this house. If there was a trial taking place, I know what the Labor Party would love: it would love three Liberal members of Parliament serving as jurors at the same time as the house was sitting! I think it is a fundamental principle of our parliamentary system that members of Parliament can come into this house and represent their electors, and not be bound to a service such as jury service when this house is sitting. I accept the amendment that provides that after a person has finished their parliamentary service, they are perfectly eligible to serve on a jury—I think that is a very worthwhile amendment. Nevertheless, as I said at the beginning of my contribution, I would encourage members to say that just because someone is old, it does not mean they cannot make a great contribution to society, and it does not mean that they cannot serve on a jury. I know a lot of

people in my electorate who would have otherwise been excluded, and who, after this legislation is passed, will be eligible to serve on a jury, and I reckon they are looking forward to that day.

MR J.N. HYDE (Perth) [4.43 pm]: I am very interested in the Juries Legislation Amendment Bill 2010, and I am particularly interested in the excellent discussion papers circulated by the Law Reform Commission of WA. An initial discussion paper was published in September 2009, with a follow-up paper in April 2010. I will quote from the document of September 2009, because it seems to be more fulsome and, perhaps, more historically accurate, as there were some omissions from the 2010 document. I raise this in light of my former role as Parliamentary Secretary to the Attorney General—namely, Hon Jim McGinty—at the time when the previous government decided to reconsider and amend the Juries Act 1957.

The introduction to the September 2009 document acknowledges that —

> The former Attorney General of Western Australia, the Hon. Jim McGinty MLA, gave the Law Reform Commission of Western Australia (the Commission) a reference to examine and report upon the operation and effectiveness of the system of jury selection giving consideration to:

Then the four areas of examination are listed, the wonderful fourth point being —

> (iv) any related matter.

The introduction continues —

> And to report on the adequacy thereof and on any desirable changes to the existing law, practices and procedures in relation thereto.
>
> The reference was initiated in response to concerns raised about the growing number of people who apply for and are granted exemptions from jury service, or who are disqualified or ineligible to participate on a jury. These concerns have been recently reiterated by the current Attorney General, the Hon. Christian Porter MLA.

That introduction, and the scope of the reference, is missing from the final April 2010 document, but it is important to acknowledge that many of the reforming provisions were initiatives of the previous government, and as Parliamentary Secretary to the Attorney General, I was quite honoured to be part of that.

In light of my role as shadow Minister for Citizenship and Multicultural Interests, I wish to concentrate on the proposals from page 37 onwards of the final report, which deal with inclusion and gaining a greater representation of people with multicultural backgrounds in our jury service. Quite rightly, the Law Reform Commission report deals with those important issues, which were intended to be addressed under the original proposal. The bill presented to us by the current government includes a number of proposals that the Labor Party supports, and a number of other areas that it believes deserve amendment. I think many of the issues I will raise may be able to be dealt with by regulation or practice within the Department of the Attorney General, and I think it is incumbent upon him to report to the house regarding what he has done since the publication of the initial report in September 2009 to change practices within the department to make them more inclusive.

The first issue goes to one of the cruxes of the issue of jury selection—that is, the English language requirement and identifying people who do not understand English. Currently, our juror information sheet contains instructions in only four languages. The report details that in South Australia, similar details are provided in Chinese, Greek, Italian, Pitjantjatjara, Polish, Serbian and Vietnamese. Of course, we note that when it comes to the selection of jurors, information is provided in four languages; when it comes to trying to get people on the electoral roll, the information is provided in 29 languages. We seem to be a little bit more dinkum about getting people's votes than we are about encouraging them to participate fully in democracy, as jury duty is a hallmark of participation in democracy.

The report also states —

> Online access to translated versions of the juror summons and the Juror Information Sheet would enable non–English speaking people (and people who cannot read English) to easily access the necessary information.

The commission's report proposed that the jury summons and the jury information sheet should state in a number of different languages that translations are available on the website or by telephoning the sheriff's office. The 2006 census shows that the 10 most commonly spoken languages in WA, after English, are Italian, Mandarin, Cantonese, Vietnamese, Arabic, German, Indonesian, Polish, Croatian and Spanish. The commission suggested that as a starting point the juror summons and juror information sheet should be updated to include relevant information in these more common languages. I would certainly like to find out from the Attorney

General whether this has been enacted and whether he has proposals to widen this information in other languages.

Proposal 38 looked at the provision of information in different languages and noted that the 2006 census found that 1.7 per cent of people in WA, which is 34 962 people, indicated that they did not speak English well or at all. However, the percentage of people summoned for jury duty and excused because of a lack of understanding of English, was 2.6 per cent. There is a discrepancy between the number of people identifying as not speaking English well or at all and the number of people who are being excused for that reason.

Proposal 39 recommended that the WA government provide resources for the Sheriff's Office of Western Australia to conduct regular jury service awareness-raising strategies specifically targeted at people from culturally and linguistically diverse backgrounds. We would certainly like to find out from the Attorney General what financial allocation he has made to enable this to occur and to what degree that is now happening more than two years into his watch as Attorney General.

Proposal 40 looked at the guidelines for accessing English language requirements. Importantly it recommends that the sheriffs be able to develop guidelines to assist staff and judges in assessing whether prospective jurors can understand and communicate in English. There is also a recommendation that these guidelines include standardised questions to be asked if a person self-identifies as not understanding English and the circumstances where further inquiries might be warranted. This of course would deal with the discrepancy between the number of people identified in the census as not being capable of speaking English well and the number people who get excused from jury duty for the same reason; the number of people who are excused is almost double.

We then look at the issue of representativeness. It is obvious to all of us here that the potential consequence of the English language requirement is that people from culturally and linguistically diverse backgrounds may be underrepresented on juries. Again the 2006 census figures show that 11.4 per cent of the population reported speaking a language other than English at home. A corresponding 81.8 per cent of people stated that they spoke only English at home. An exit survey was conducted of jurors who served in Perth from 1 June 2008 to 4 June 2009. Of the jurors who completed the survey, 95 per cent stated that their preferred language spoken at home was English, and only two per cent stated that their preferred language was a language other than English. Clearly the proportion of jurors who stated they preferred speaking a language other than English at home—two per cent—is immensely lower than the proportion of Western Australians in the 2006 census who reported speaking a language other than English at home, which was 11.4 per cent. There are variations in those statistics. Quite rightly the commission report recommends that the juror feedback questionnaire program should be expanded so we can undertake a proper assessment of whether people from culturally and linguistically diverse backgrounds are being adequately represented on our juries.

Any major reform of legislation, be it in areas such as juries or prostitution, does not happen in a vacuum. We look at precedents and other reforms and inquiries that have happened around the world. The New Zealand Law Commission, when it was looking at the issue of getting greater representation, rejected the option of providing interpreters specifically in Maori languages because of the high cost and the likely delays involved. The New South Wales Law Reform Commission recommended that interpreters and "other reasonable accommodation" should be provided for blind and deaf jurors but also declined to examine the option of interpreters for non–English speaking jurors.

Figures from Deaf Australia Inc estimate that the number of users of sign language in Australia is 15 400, while corresponding data for the number of people in Western Australia who do not understand English well or at all, is 34 962. There is certainly scope to economically address the issue of people with disabilities, particularly people with hearing impairments, to be greatly more included in our pool of jurors, but I also believe that the government, through education and other projects, would be able to greatly increase the number of people participating on juries from culturally and linguistically different communities in WA.

I also support the amendments proposed by the Labor Party regarding the age of jurors. I am not sure whether the member for Jandakot is the parliamentary secretary in waiting to the Attorney General, or whether he is going to manfully struggle on alone, but I think he is mistaken and his comments were somewhat ageist. Clearly what we are trying to do is to have more of the informed option for older Western Australians to be active participants. The member for Jandakot let slip his motive when he referred to the entire pool of people as living in retirement homes. Those of us who are active members in their electorates would know that not every Western Australian over 65, over 70 or even 100 lives in a retirement home. I recently had the great pleasure to go a 100th birthday party in West Perth for one of my constituents, a Greek-born lady who had lived in Egypt most of her life, came out here in 1956 but has never been back to Egypt, and is still living at home. I think we need to be

much more cognisant of the abilities and capabilities of seniors in our community to contribute to the important part that jury service plays in this democracy.

DR A.D. BUTI (Armadale) [4.59 pm]: I rise to contribute to the debate on the Juries Legislation Amendment Bill 2010. In many respects, as has been reflected by the contributions from this side of the house, we are in agreement with what is being proposed. The Attorney General outlined the aim of the bill in his second reading speech. He said —

> This bill is motivated by the principle that public confidence is enhanced when juries are drawn from the broadest possible number of citizens as this inherently makes juries more representative of the community as a whole.

There is no doubt that this bill attempts to do that; I suppose it is a question of how far one should go. I know that the Attorney General is a scholar of legal history and I have in front of me a 1957 thesis from Philadelphia, "Jury Selection and Service in Philadelphia" by Ronald Wilson, who later became Sir Ronald Wilson, the first Western Australian to serve on the High Court bench. The thesis is interesting and I think the Attorney General and members of the house would find what was said by Ronald Wilson at the time interesting. It is a beautiful volume, if anyone would like to have a look at this after this debate. It is printed on beautiful paper; it is that rice-type of paper. It is very enjoyable to look at and touch. However, we have moved a long way since the thesis was written. On page 70 this thesis, which is a master's thesis for a master's degree at the University of Pennsylvania, states —

> There is no doubt that women have a unique and significant contribution to make as jurors, but that contribution is not without some limitation; generally speaking, men embrace in their experience of life a greater range and variety of human situations leading to a breadth and depth of outlook that can more readily and realistically grasp the issues that arise in the courts. This quality of practical experience in the affairs of life is one of the important indices to a competent juror;

He then goes on to talk about the problem of having more women than men on a jury. Of course, we are talking about 1957.

Mr C.C. Porter: Even a progressive can be old fashioned.

Dr A.D. BUTI: But he was not progressive then. I think that even the Attorney General would agree that back then Ronald Wilson would probably have been considered a darling boy of the conservative movement. The Attorney General will find the following quote from later on in the thesis interesting. If he had proposed this, it would have been quite radical. The thesis states —

> The rigid requisition of twelve jurors to serve in every case, civil and criminal, is an unjustified concession to a tradition of obscure origin; there is no magic in the number twelve, and a jury of seven, eight, or nine, given intelligent, competent persons, certainly would be adequate and probably more efficient than the larger body. The resultant saving in personnel would be considerable.

I think that would have been a bit radical for the Attorney General to consider, however, Ronald Wilson's concluding paragraph is interesting. At the time that Ron Wilson went to Philadelphia, in 1957, he had been in the Crown Law Department pre-war and then post-war and he was a crown prosecutor. He states —

> The greatest obstacle to these or any proposals for reform of the jury system is likely to be found not in the sentiment of the layman, but in the prejudice of the legal profession. In the course of his inquiries relative to this paper, the writer raised the questions of majority verdicts and the size of the jury with a dozen defence counsel in Philadelphia, and with only one exception the reaction was one of strong opposition to any "tampering" with the jury; indeed, even a discussion of such proposals proved impossible. Whatever may be the merit of the suggestions which emerge from this study, the blind antipathy to the consideration of any reform cannot be too strongly condemned, for the survival of the jury depends upon the extent to which its character and function are relentlessly and realistically examined and moulded to meet the changing conditions under which justice is administered in a modern society.

There were later writings by Sir Ronald Wilson in which he was not a great fan of the jury system, unlike the current Attorney General who is a fan of the jury system, as am I. Therefore, Sir Ronald Wilson had a particular prejudice in regards to that.

Ms M.M. Quirk: Because he was a prosecutor.

Dr A.D. BUTI: He was, but the Attorney General has also served as a prosecutor and he can still see the virtues of the jury system.

I should say, and it was mentioned by the member for Mindarie, that the discussion paper and the final report on selection, eligibility and exemption of jurors, produced by the Law Reform Commission of Western Australia, are quite outstanding documents as a whole. I have only done a rough calculation, so I should not be held to this, but I think that the Attorney General has taken up a lot of the recommendations—at least three-quarters and maybe slightly more. That shows the quality of these papers and reports.

In many respects, I will repeat what other speakers have said, but maybe with a slightly different slant. Remember that the Attorney General has come to this house with this bill with the intention of increasing the jury pool. It is probably agreed on both sides of the house that we need to do that. It is very difficult to get a jury together; there are many people who excuse themselves, so if we can increase the pool it should be congratulated. Before I go on to some of my points, I have discussed in private with the member for Jandakot the issue of silent voters raised by the member for Mindarie—an issue not really addressed by the Law Reform Commission—and one of the ways around it is that once people obtain a driver's licence there may be some way that the associated information could be used in a database —

Mr J.M. Francis: You could crosscheck the rolls.

Dr A.D. BUTI: Yes, the rolls could be crosschecked; that could also be used for the electoral roll. Of course, not everyone eligible for jury duty will necessarily have a driver's licence, but I am sure a high proportion would.

Mr J.M. Francis: Not everyone who has a driver's licence is eligible to go on the electoral roll.

Dr A.D. BUTI: That is true, but there is a cross-referencing system there that —

Mr J.M. Francis: But you admit that that is a problem; there are people who are eligible on that roll who don't get appointed.

Dr A.D. BUTI: I do not think that was denied here; there was an issue about the degree.

In regards to the peremptory challenges, the bill proposes to reduce the number from five people currently to three. Remember back in 2000 the Attorney General at the time, Jim McGinty, reduced the number from eight to five, from my recollection, without really explaining why he did so. I am not sure whether the Attorney General has explained why he is reducing the number from five to three. I congratulate him on saying that the prosecution should have the same number of challenges per accused, and he mentioned the McLeod case, which is very understandable. It should be the same for the prosecution and for the defence counsel, and I am a bit concerned that the Attorney General is reducing the number from five to three. Remember, we have gone down from eight down to three in just over a decade. The discussion paper of the Law Reform Commission, from page 28 to around page 32 or 33, provides reasons that peremptory challenges are important. I wonder why we are doing this because, in many respects, the bill increases the possible pool of jury participants. I am not sure why we then need to reduce the amount of peremptory challenges, and the Attorney General may like to take that up.

Another issue, of course, is that of lawyers. As we know, this bill recommends that unless someone is practising in criminal jurisdiction, they should be eligible to be on a jury. This basically comes from the New South Wales Law Reform Commission recommendation, but the members for Rockingham and Mindarie expressed some concern about this, and I express the same concern. As we all know, a jury should be independent, impartial and lay. The concept of layman may be a bit antiquated—we should maybe move on from that—but a jury should still be independent and impartial. The member for Mindarie expressed the concern, with which the Attorney General would surely agree, as would any other lawyers in this place—non-lawyers probably more so—that lawyers tend to dominate in any discussion.

Mr P. Papalia: They do seem to go on!

Dr A.D. BUTI: They do!

Mr P. Papalia: They talk a lot!

Dr A.D. BUTI: My wife has always said that the worst dinner parties we have had were with groups of lawyers!

Being serious, I think there is a problem that by having lawyers in the jury room there will be a tendency for them to dominate. In his proposal, the Attorney General exempts criminal lawyers. In some respects, and it is outlined by the Law Reform Commission of Western Australia in its discussion paper, it may be worse if it is a lawyer who does not practice in the criminal jurisdiction, because they may seek to dominate on matters that they know nothing about.

Mr C.C. Porter: It doesn't stop us!

Dr A.D. BUTI: Well, that is right!

Having lawyers, full stop, on the jury is a problem, but saying that we will only exempt criminal lawyers does not solve the problem because it could be worse by allowing the non-criminal lawyers on the jury. I think it really will affect some of the principles of juries, which are to be independent and impartial. I know that the Attorney General agrees with those principles that underpin the jury system.

There is no doubt that the inclusion of lawyers in the jury pool will broaden the pool. That is the motivation that the Attorney General has brought to the house. I understand that; I think we all understand that. As I and many others have stated, that is complimentary in many respects and he should be congratulated for that. We have a problem with the shrinking pool; maybe it is not that the pool is shrinking, but that the ability to excuse oneself from that pool is increasing. That is one of my concerns. As the Law Reform Commission has stated, maybe we should not be saying that lawyers per se are not eligible, but that there should be a five-year exemption period from the time that one ceases to holds a legal practising certificate. I think that it would be best not to have lawyers, full stop, but I understand that the Attorney General is trying to increase the pool. As such, a compromise could be for a five-year exemption period. I understand the issues about judges, magistrates and police, but they are ineligible only while serving in those positions. I believe that thought should be given to allowing judges, magistrates, police and Corruption and Crime Commission employees to have a five-year exemption period for many of the same reasons that I put forward for lawyers. They would come to the table with a certain way of thinking. The real issue I have is that lawyers tend to dominate proceedings if the jury has predominantly non-legal people or people who have not worked in the legal system. Recommendation 37 of the Law Reform Commission sought to exclude employees of the Department of Corrective Services. That could become quite important, because those people have certain knowledge and thought processes from their employment at the Department of Corrective Services.

It is very commendable that there will be the ability for a person to seek to defer their service on a jury. At the moment, it is proposed that the deferral be for six months. I think the Law Reform Commission suggested that it be for 12 months. I initially thought it should be 12 months. I have not found it in the paper; I am not sure that it is in there. Twelve months would allow certain categories of people, such as teachers and students, to better meet their civic obligations to serve on juries. Of course, teachers have a two-week break between the second and third terms, and university students have slightly longer. If we allowed them to defer service for 12 months, they could serve over the longer Christmas period around the later part of December and into January. University students usually have a three-month period at that time of year. I wonder whether the Attorney General might consider increasing the deferral period from six months to 12 months. I do not think that would taint his legislation or his major motivation for this legislation, which is to increase the jury pool. I urge the Attorney General to consider that issue.

The issue of disabilities was raised in some respects by the member for Perth. He talked about the hearing impaired. I wonder about the thinking of the Attorney General on the ability of the hearing impaired to sit on juries and about the facilities that are available in the court system for people with hearing impairments who serve as jurors. Of course, jurors should be impartial and competent. People who have a hearing impediment are competent, but of course they have difficulty hearing, so care should be taken to ensure that they are not discriminated against. We would also reduce the pool if we were to discriminate against them. If there are not proper facilities for the hearing impaired to have what has been said in the court communicated to them, the pool would be decreased, and that would be contrary to the purpose of this bill, which is to increase the number of people eligible to serve as jurors.

To take this further, I raise the issue of people with intellectual disabilities. As people may know, I am loath to exclude people with disabilities from anything, but, of course, one of the criteria for being a juror is that people are competent to serve on a jury. How do we determine whether someone is intellectually impaired? It may be obvious, but it may not be. A person with an intellectual disability could be selected for jury duty, but that person might not say anything, might not be challenged, might serve on the jury, and might have trouble understanding what is happening, because it is really a process of self-identification. I wonder whether the Attorney General might consider that issue. I am sure that it does not happen often, but it may.

[Member's time extended.]

Dr A.D. BUTI: There could be a cross-reference with Centrelink for people on disability pensions or allowances. People who receive disability pensions or allowances from Centrelink must have an identifiable disability under a category. That information would be included in the Centrelink database, so we would be able to know who has an intellectual impairment that prevents them from being a competent juror.

Mr J.M. Francis interjected.

Dr A.D. BUTI: Whatever; I do not get that train of thought. I hope the Attorney General will consider that issue.

There are a couple of Law Reform Commission recommendations that I did not see in the bill. They may be in the bill; I may have missed them. Recommendation 6 states —

> **Prosecution vetting of jurors' criminal records**
>
> That Rule 57 of the *Criminal Procedure Rules 2005* (WA) be amended to provide that lawyers employed by or instructed by the Office of the Director of Public Prosecutions are not authorised to check the criminal background of any person contained on the jury pool list as provided under s 30 of the *Juries Act 1957* (WA).

Of course, it would be within this legislation. I am sure that the Attorney General has turned his mind to it, but I wonder whether he will act on that. Recommendation 8 states —

> **Provision of personal information about jurors**
>
> That the *Juries Act 1957* (WA) be amended to provide that the jury panel or pool list made available to the parties in a criminal trial (and their respective solicitors) under s 30 should not contain the street address but instead list the suburb (or town) for each person included in the list.

I cannot see where that recommendation has been taken up in the bill. The Attorney General may have decided that he does not agree with that, but I would be interested in his comments.

I turn briefly to the member for Mindarie's very legitimate issues about clause 10(2)(g) of the legislation, which refers to people who have been convicted of two or more offences or three or more offences against the Road Traffic Act. There is a real issue that this may result in many, and by far the majority of, Indigenous people, particularly in the north west, being excluded from jury duty. That is not the Attorney General's intention and that is not the aim of the bill. I commend the purpose of, and his motivation behind, the bill. I hope he will consider some of the issues that I and other members on this side of the house have raised.

The ACTING SPEAKER (Ms L.L. Baker): Minister.

DR G.G. JACOBS (Eyre) [5.19 pm]: No longer, unfortunately—the member for Eyre will do, thank you.

The ACTING SPEAKER: I have been away; sorry!

Dr G.G. JACOBS: I thank you, though, for your recognition of my past role, and it is in and around that that I will recount to the house that during the weekend I was attended by a constituent who wanted to talk to me about the Juries Legislation Amendment Bill 2010. It was not a complaint about fines for non-attendance or fines for employers not allowing a juror to sit, and it was not about issues necessarily to do with the proposed bill, but it was in and around a duty made pleasant, if we like, for potential jurors and second-time jurors alike so that they will at least be willing to play their part. I found that that was a very refreshing attitude, which I want to share with the house because I do not want to go over all the other information that has been presented today.

My constituent talked about some of the jury process and how it could be improved to make the duty of jurors a pleasant experience, which was a duty that I must say he enjoyed but gave me some points on how it could be made better. Of course, the bill is essentially about this in that it is intended to improve and increase participation. We know that jurors are randomly selected from the electoral roll maintained by the Western Australian Electoral Commission. It is really interesting that from the electoral roll in WA each year approximately 158 000 people are selected to be available for jury duty. Of these, approximately 7 400 serve on juries each year.

I have been to court a couple of times. I must say, just so that people do not get too excited, that I was on the right side of the fence in that I was called to be an expert witness.

Dr A.D. Buti: In what?

Dr G.G. JACOBS: The member would be surprised!

Dr A.D. Buti: You're an outstanding medical practitioner; we all know that.

Dr G.G. JACOBS: Even as an expert witness, when I know that, if members will excuse the expression, I am not under the pump, and not even on the jury required to make a decision, but I am presenting some information in order for that decision to be made, I feel challenged in the environment of the court proceeding and, I must say, out of my comfort zone. For a lot of people, court is out of their comfort zone. As a result of that, I think this constituent very rightly brought some ideas that could make it more comfortable and in fact a duty more

pleasant. He made the point that if someone will not be required for anything in particular before 9.45 am or 10.00 am, why are people summonsed to be punctually present at nine o'clock? Surely "punctually" can be taken as read. What about those of us who believe that "on time" is at least 10 minutes, not an hour or more, before one is required?

I noted that in the list of jurors' frequently asked questions, which I read on the Court and Tribunal Services website, about what happens when people present at court, it states —

> **What are my responsibilities as a juror?**
>
> Unless excused, you must appear at the date and time stated … You will need to bring:
>
> - your jury summons which is bar-coded
> - personal identification
> - your bank account details (as all payments are made by direct payment into your bank account).
>
> When you arrive at the jury assembly room, you will be shown a DVD 'About Jury Service'. This DVD provides an overview of the role of a juror and the proceedings within the courtroom. Jury officers are available to provide help and support throughout the jury process.

My constituent made the point that the instructions to attend the courthouse could at least contain something like "report to the clerk of petty sessions" or similar. This would avoid the unfortunate situation of jurors asking the guy standing alongside them whether he knows the juror procedure, only to be informed that he is a defendant and does not know. A signposted juror-designated area would help in this regard. This is no criticism, but it is the sort of feedback I get from people in my region.

As a medical practitioner, I was involved in assessing people's eligibility for jury duty. People would often come to me and ask, "Doc, I've got a bit of a cough and I don't want to be on jury duty; can you sign me out? Can you as a GP give an excuse why I don't need to go there because, although I've got a minor ailment, I still don't want to go there?" I would say that in the state of Western Australia there were situations whereby people in droves found excuses to opt out. Part of that is people do not feel comfortable and do not feel cared for when they arrive at the courthouse; they are not instructed, they stand there like shags on a rock, they do not know what is happening, and they feel very uncomfortable and do not want to be there. For people who are not involved in the judicial system, it can be very challenging.

Mr C.C. Porter: Have you ever sat in a doctor's waiting room?

Dr G.G. JACOBS: I would hope, Attorney General, that at least the receptionist would say, "Look, the doctor is going to be an hour late. He's been called to the hospital to deliver a baby and one day it might be you."

Several members interjected.

Dr G.G. JACOBS: If not you, maybe your wife!

It would be an improvement to have communication via text or phone, particularly, but not limited to, when plans change—for example, an extended case, a guilty plea, et cetera. Potential jurors, some of whom have to travel over 100 kilometres in my region to attend court, could be told that they are not required as previously instructed, bearing in mind that they may still have to attend the next day. This would give tradesmen a chance to rebook work that had been declined or cancelled due to the receipt of the summons.

This issue is about making jury duty more pleasant and it is about increased participation in jury service. I support this bill in what it tries to do to improve participation, but there are some other things that we can do, from the experience of my constituent, that would make the duty more pleasant and improve our participation rates. Of course, under the exemption categories my previous career would have exempted me from jury duty. I could say that it is going to be an issue for general practitioners, because it may be a problem for them in running their practices et cetera. However, I do not believe it is an insurmountable problem. Of course, individuals retain the right to be excused in particular circumstances.

One of the things that this bill will do—I commend the Attorney General for this—is provide a wider spectrum of people. It is important that we also have professionals on juries, because we want a representative sample of the community. It should not be just those people who find that they are the ones left because everyone else has opted out as they have all found excuses for why they should not do jury duty. People can feel uncomfortable about it, and they may feel that it is inconvenient. When they go to the court to do jury duty, they are not made comfortable, and they are not valued. I believe that is important. What I am hearing from my constituents on the whole issue of jury duty is that a bit of care should be shown towards them, and their attendance should be

valued. I believe that will go a long way, without a great deal of extra expense and without a great deal of extra effort, to increase the participation rates for jury duty. That is what this bill is about. I support that, and I congratulate the Attorney General on trying to increase the participation rate and include a broader spectrum of people on juries to make the law even better in the state of Western Australia.

MR B.S. WYATT (Victoria Park) [5.31 pm]: I, too, rise to speak on the Juries Legislation Amendment Bill 2010. I do not propose to speak at great length. However, I appreciate the words of the member for Eyre. As the Attorney General has already indicated, it is always good to hear a doctor tell lawyers how they could perhaps make their practices more user-friendly or, to quote the member for Eyre, show a bit of care. Member for Eyre, I look forward to that being applied to my GP, whom I am pretty sure I have not had an on-time appointment with for the better part of 30 years. No doubt I will get those SMSs from him, telling me he is going to be late next time because he was so keen to be involved in the justice system.

Mr I.C. Blayney: I might send him a copy of your speech!

Mr B.S. WYATT: Member for Geraldton, I have no doubt that my GP will pay no attention whatsoever to my comments about him, because he knows full well that I will still be there and I will still be paying his bills.

I want to address one small part of the Juries Legislation Amendment Bill, and that is clause 10, which amends section 5 of the Juries Act 1957. The member for Armadale has already addressed this briefly, and the member for Mindarie, the shadow Attorney General, has gone over it generally. However, I still want to make a couple of comments. The overall aim of this bill, as the member for Eyre and every other member of Parliament who has contributed to the debate have pointed out, is to increase the pool of people who are eligible to sit on a jury. Certainly, the Attorney General's second reading speech on this legislation outlines the history of the jury system in Western Australia and the fact that the property qualification excluded people—women and Aboriginal people specifically—for a long time. My worry with clause 10 is that the proposed subparagraphs outlined in (g) will exclude a whole swathe of Aboriginal people, particularly in regional Western Australia, from being eligible to sit on a jury. In particular, proposed subparagraph (iv) disqualifies a person from being eligible to sit on a jury if that person has in the relevant period—that is, in the previous five years—been convicted of three or more offences against the Road Traffic Act 1974. No doubt this is something that the member for Murray–Wellington will probably comment on, because I know that he is currently going through a process that I went through in 2007 in looking at motor vehicle offences, driver's licence offences and accessibility to drivers' licences of Aboriginal people in remote locations.

I want to spend a short time going through the recommendations of the Law Reform Commission of Western Australia in its report of April 2010, because its recommendation and the legislation that we have before us are very different. I will quote from page 89 of the commission's report, which states —

> It is the Commission's view that only the more serious and repeat traffic offenders should be disqualified from jury service because jury trials do not commonly deal with traffic-related matters and the presence of people with less serious traffic convictions would be unlikely to cause any apprehension of bias or loss of public confidence. On this basis, the Commission decided that a person should be disqualified from jury service if he or she is currently subject to a drivers licence disqualification of 12 months or more.

They are the more serious driving offences that subsequently result in a more serious suspension of a driver's licence. Interestingly, the commission goes on to point out that the Attorney General's very department opposed that proposal by the commission on the basis that it would narrow the scope of potential people who would be eligible to sit on a jury. No doubt, the Department of the Attorney General was thinking exactly how I am thinking now of Aboriginal people, particularly in remote and regional parts of Western Australia. In some locations, a vast majority of them have a string of offences against the Road Traffic Act. I dare say that the Department of the Attorney General had those concerns, because a huge number of people would be excluded from eligibility to sit on a jury, when the chances are that the accused also would probably be an Aboriginal person in those situations. Therefore, we are by another method—in times gone by, it was by the property stipulation—excluding Aboriginal people from eligibility to sit on a jury. I think the commission's recommendation was a good balance, because the commission made the point that a person on a standard traffic offence is not going to be dealt with by a jury, and by having that 12-month disqualification standard, it would effectively remove people who had much more serious road traffic offences.

Interestingly, the Director of Public Prosecutions—my former employer—unsurprisingly had a different view from that of the Department of the Attorney General. I will quote from the commission's report at page 90 —

> … the DPP expressed the view that the exclusion of traffic offenders should be wider; that is, anyone with a current drivers licence disqualification (of any length) should be disqualified from jury service.

Mr M.J. Cowper interjected.

Mr B.S. WYATT: Exactly, member. At one end, we had the DPP wanting a very broad disqualification from jury service and, at the other end, the Department of the Attorney General had another view altogether. The commission went on to say at page 90 of its report —

> The Commission does not agree with this suggestion —

That is, the DPP's suggestion —

> because too many people would be excluded from jury service and on the basis of relatively less serious matters.

Obviously, the Attorney General has disagreed with the advice and the submission of his own department. It looks as though he has accepted the view of the DPP. If the DPP set out other parameters, it is not disclosed in the commission's report. However, it is my view—I will put some questions on this point to the Attorney General in consideration in detail—that by simply saying that people who have been convicted of three or more offences against the Road Traffic Act over the last five years will be excluded, he is also going to exclude a huge number of people, particularly Aboriginal people in remote and regional Western Australia.

I want to refer to some of the statistics and findings of the committee that I chaired in 2007, which was designed to explore the effect of motor driver's licence and driving laws on remote communities. The findings and statistics from that committee's work were quite extraordinary. For example, at the time the most up-to-date statistics that the committee could get from the Department of Corrective Services on why people were in prison was up to March that year—2007. A total of 148 Indigenous Western Australians were in prison during that 12-month period—from April 2006 to March 2007—for not having a driver's licence. Those offences included driving under a court-imposed disqualification, driving under fine suspension, driving with an expired licence and driving having never held a licence. That was a 12-month period from April 2006 to March 2007. The breakdown of the statistics from each remote region was quite extraordinary. I should qualify these statistics; I believe they relate to those people appearing before the Court of Petty Sessions. In the Goldfields region, nine per cent of all appearances related to driving licence offences. Does the offence of failing to return a numberplate come under the Road Traffic Act? The member for Murray–Wellington would know that.

Mr M.J. Cowper: It is an infringement under the Road Traffic Code.

Mr B.S. WYATT: In the Kimberley, the figure was eight per cent; in the Murchison–Gascoyne, it was 10 per cent; in the Pilbara, it was eight per cent; and in the Wheatbelt, it was seven per cent. Overall, 14 per cent of offences in remote and regional areas are as a result of offences under the Road Traffic Act. It is larger than that; I am just focusing on driving licence offences.

Mr M.J. Cowper: A lot of those incarcerated had committed multiple offences, not just stand-alone ones.

Mr B.S. WYATT: Absolutely. We find that when people get out of prison, a month later they are still getting fines that are working their way through the system. When someone goes inside, they are not serving all the time they need to serve to clean their slate. That was the problem we found, particularly in Broome Regional Prison.

The point I am making is that increasing the pool of people who are able to serve on juries is a good thing. I do not think anyone in this chamber objects to that. We have to be careful that in finding people willing to serve on juries from regional Western Australia, we are not making it even more difficult by excluding a class of people who are overly exposed to the Road Traffic Act because of the necessity of life. People who live in a remote location may not have access to somebody who can qualify people for a driver's licence. It does not mean that such people cannot drive or they are not going to drive. That is simply absurd. That is why some people incur literally dozens of offences under the Road Traffic Act. It may be that some of those offences would qualify for the 12-month disqualification period that the commission recommends. I intend to ask the Attorney General during consideration in detail why he rejected the advice of the Department of the Attorney General—his own department. Why did the Attorney General reject the commission's recommendation and why has he adopted a very broad exclusion for people who live in remote parts of Western Australia? I think he will find that in his task of increasing the pool of people who serve on a jury, he will exclude a significant percentage of people in regional Western Australia, which, in my very strong view, defeats the purposes of the legislation that is before us today. I think the Law Reform Commission struck a good balance. It seeks to exclude the more serious offenders under the Road Traffic Act, which means those people with minor road traffic offences, some of whom

may sit in this chamber, are still eligible to sit on a jury. I bring that to the attention of the chamber. It is something that I intend to pursue with the Attorney General during consideration in detail.

MS J.M. FREEMAN (Nollamara) [5.44 pm]: I want to say a few things about the Juries Legislation Amendment Bill 2010. I congratulate the government for including in the bill the provision to increase the period of time one is excluded from returning to jury duty. I was called up for jury duty. I had always been really keen to participate in a jury. Because of personal circumstances—that is, a death in the family that I had to deal with—I was excused on that day and that was it. I was never called up again, even though I was perfectly willing to do so. I went back into the lottery of jury duty and suddenly I was not called up again. I want to congratulate the government for that amendment.

There are two issues that I rise to speak about and upon which I seek clarification from the Attorney General. One relates to proposal 37 of the Law Reform Commission of Western Australia's discussion paper. The proposal is to amend the Juries Act 1957 so that a person is not qualified to serve as a juror if he or she is unable to understand or communicate in the English language. I note that proposed section 34G(2)(e) on page 21 of the bill states that a person must be excused if that person —

> does not understand spoken or written English, or cannot speak English, well enough to be capable of serving effectively as a juror;

I want to raise a couple of issues relating to that clause. Many of the communities that I represent are very diverse and its members are newly arrived. Their capacity to speak English is extremely good considering the length of time that they have been in Australia. Sometimes it takes some time to explain and deal with issues in the communities. When people are confronted with jury service, they may be concerned about their capacity to converse in English. If they are Australian citizens, which they have to be because they are on the electoral roll, and if they arrived in the past 10 years, they have sat the Australian citizenship test. There is no way a person can have an interpreter present while sitting the Australian citizenship test. They have to sit it by themselves in front of a computer and they have to understand and answer the questions in English. Even if people fail and sit the test again and again, there is no capacity for them to sit with an interpreter. These people have understood and been able to communicate effectively enough to become Australian citizens and find themselves on the electoral roll. Therefore, we need to be very cautious in how we look at that issue and the guidelines around that.

I notice that the Law Reform Commission's discussion paper refers to guidelines to assist staff and judges in assessing whether prospective jurors can understand and communicate in English. I wonder whether those guidelines have been established and whether those communities have had input. It is very important for those communities to be included. The Sudanese community—I think the Premier mentioned this in his response—met with the Department of the Attorney General recently to carry out consultations. There are many issues with communication. Their biggest issue is inclusion and being part of the Australian community and playing a role. Recently I went to one of the Sudanese community events. The Nuer community had a community celebration. There was a long presentation from one of the community elders, who talked about how important it was to participate in the Australian community and to become part and parcel of all the institutions. Their mistrust in some of the procedures and processes in our justice system needs to be offset by ensuring that they are included. We need to be really cautious about those guidelines. Although it might not be apparent in the first instance that a person has a clear capacity to understand and communicate, if they have been here for 10 years and are Australian citizens, they have already demonstrated to a great extent that they have that capacity. I commend the changes to include diversity in the act, but we need to make sure that that equity is substantive in its nature, and not just in the words on the paper.

I hope the Attorney General can clarify something for me. I understand that jurors are paid by their employers when they are on jury duty. That is something recent. When I was a union official, people could get an allowance but it was a paltry allowance in comparison with their pay and there was often a financial cost to attending juries. Some people would therefore seek to be excluded on that basis. Employers are now compelled, I understand, to pay wages and can be fined up to $2 000 if they do not. If a juror is not paid and an employer is fined, that does not necessarily mean the juror gets their wages recouped. Can the Attorney General clarify whether a juror who is not paid can claim the payment in the Magistrates Court, or do they have to apply to the Sheriff's Office for payment? I would like to know how that operates. If a worker says to their employer that they have to pay, and the employer turns around and says, "I don't have to. After you have served on the jury you can claim the wages yourself at the Sheriff's Office", it puts the onus on the worker. To put the difficulties and onerous tasks associated with claiming the wages on the worker, who is already outside their comfort zone, would create an impediment to the worker participating. I think it is proper that the penalty is on the employer so that the worker

can pursue the wages directly from the employer. An employer will not want that additional penalty above and beyond being fined $2 000. Those are the few things I wanted to raise and discuss.

MS M.M. QUIRK (Girrawheen) [5.52 pm]: I will also be brief in my comments on the Juries Legislation Amendment Bill 2010. I am a supporter of a more diverse jury system and I think the extent to which this bill will facilitate that is a very good thing. I have always taken the view that as many members of the community as possible should take the opportunity to serve on a jury; it gives members of the community a better understanding of the justice system and allows us to have a more mature debate about issues in the criminal justice system. Having said that, many people have legitimate reasons for not being able to serve on juries—whether they are ongoing reasons or occur at particular times—including the reasons raised by the member for Nollamara.

The Law Reform Commission's discussion paper is thorough; it is good that it is informing this debate. Legislation is often brought before members in this place with very little policy underpinning it. I think the standard of debate here reflects the fact that members are able to inform ourselves of the issues by virtue of that good work in the discussion paper. The Law Reform Commission report—I think the Attorney General said this in his second reading speech—was to some extent initiated by what was seen by the community as the caprice, if you like, of the jury when it acquitted the McLeods of assaulting Constable Matthew Butcher. That acquittal was incomprehensible to many people in the community and they believed it was necessary to have a broader representation of the community sitting on juries so that the jury contained a creative tension and better represented the composition of the community.

The workings and machinations of juries are, by and large, a mystery, although in recent years research has been done on what goes on in a jury room. I think the work of Judith Fordham is particularly valuable in this regard. I have a bit of a prejudice from my former, long-time-ago career as a prosecutor that sometimes jurors behave more as they did in an episode of *Minder* in which Arthur was on the jury. I commend members to watch that episode if they get the opportunity. It is a fantastic episode of *Minder* that illustrates why verdicts sometime seem a little nonsensical. Similarly, *Joh's Jury* is a great Australian drama in which the same dynamic was looked at. Things go on in jury rooms that can lead to puzzling outcomes. The broader the range of people from which we draw a jury, the less chance there is of a decision being made in a perverse and capricious way.

My colleagues have talked a bit about whether non-criminal lawyers should be able to be called for jury duty. I probably take a less robust view than some of my colleagues on whether non-criminal lawyers should be part of the jury. I certainly take the member for Armadale's point that lawyers can want to run the show. Commercial lawyers may not be terribly aware of the issues, but decide to take the opportunity to lead others in the deliberations, and that might not be helpful. One of the problems here is that some criminal lawyers may not have terribly many associations with the criminal milieu. The Attorney General can explain to me how we make that distinction. Is a criminal lawyer someone who predominantly practises in criminal law or half the time, or someone who is a member of the Criminal Lawyers' Association? Prosecutors are probably already excluded. I would not mind an explanation as I am not sure what the differentiation is.

The member for Jandakot talked about the exclusion of parliamentarians from serving on juries. There are probably two reasons for that: one is the separation of powers and not wanting to interfere with the efficient running of this place; and the subsidiary reason is that members in this place all have, shall we say, shaky self-esteem, and the idea of walking to the jury box and being challenged for no apparent reason would greatly disturb some of my colleagues.

I want to mention a matter that I think is particularly interesting. We have heard about the exclusion of Indigenous people from juries, but I think there is another issue. In regional towns where the court sits, such as Kununurra, I am aware of circumstances in which non-Indigenous people, for example, do not put themselves on the electoral roll because they think that they will be called for jury duty too frequently. Those people make a conscious effort not to get involved in jury duty. I think that is dangerous. The administration of the large pool of fly in, fly out workers in Western Australia is an issue that might be worth looking at down the track when Parliament evaluates the broadening of the jury pool. I suspect that fly in, fly out workers are not reflected in electoral rolls or permanent addresses or whatever to the extent that is possible. Frankly, there is no good reason why those people should not be part of jury deliberations.

I commend the government for bringing this thoughtful piece of legislation to the Parliament. It is obvious that from time to time we will have disagreements on this side of the house about some of the detail, and that is healthy. However, I make the point that, unlike much of the legislation that comes to this place, some solid policy, evidence and research backs this legislation. I commend the government for doing that, and I wish that would happen more often.

MR C.C. PORTER (Bateman — Attorney General) [5.59 pm] — in reply: I have a small amount of time before the dinner break, so I commence by thanking all the members present for their contributions. It is very pleasing to see so many members speak and give thoughtful contributions. I find it a great personal privilege to bring legislation in this area to this Parliament. I do not say that because I think the legislation is completely perfect.

Sitting suspended from 6.00 to 7.00 pm

Mr C.C. PORTER: Prior to the dinner break, I noted that it was a great privilege to bring this bill into Parliament, not because I consider that this bill is in all respects perfect, but, that, indeed, any time we make amendments, there will be a variety of opinions. We will address some of those, no doubt, in consideration in detail. I will touch on some of them in this second reading response. I note here, though, that it is a privilege to bring a bill like this to Parliament because juries are fundamentally very important. We very rarely open up the Juries Act for parliamentary debate by way of suggesting substantive amendments to it. Someone noted during debate on the second reading that perhaps these changes are long overdue. I think that is fairly put. By the same token, we open up the Juries Act for debate irregularly because we in this place are cautious about the nature of the jury system and where it sits in our entire system. We should not amend the way in which juries function and the act that covers that without a great deal of consideration. Through assessment of the Law Reform Commission report, analysis of my own department, looking at the submissions to the Law Reform Commission report and, indeed, consulting with my colleagues and my party room, I have reached reasonable compromises on a range of issues on which reasonably minded people might form different views. To note one of those now is the potential retirement age, if we like, for a juror. When should people be eligible and up until what age? Even in this short debate, a variety of views have been put on that matter. The Law Reform Commission suggested the age of 75 years. I must say that my first view was that perhaps 70 was better for the reasons the member for Rockingham suggested—those of consistency. In the end, I was persuaded out of that view and to the view of the Law Reform Commission. That might be something we refer to in consideration in detail.

I also understand that one of the amendments the member for Mindarie will move is yet another variation—that is that people may be able to serve until aged 75 years, but they would be one of the categories of people who could opt out if they wished and exempt themselves. I must say that is not an amendment I am terribly keen to accept because I think it muddies already cloudy waters. Again, that is something we will talk about in consideration in detail. Among a group of people who want to do the best by the jury system—there seems to be broad support in this Parliament for it, which is very heartening—even on that issue, there is a great divergence of opinion. Many of these changes are, to an extent, changes of taste more than changes based on science or judicial opinion. We will go into those in consideration in detail.

I thought I would spend the bulk of my time now speaking about juries generally and why I am pleased to say that I will listen to some of the member for Mindarie's amendments. One in particular that I think probably deserves further attention is the issue of lawyers. That is an issue I have agonised over in the process of drafting this bill, because there are reasons for and against making changes with respect to lawyers. I will give consideration to some of the other amendments, although I am most minded to give consideration to the issue of lawyers. The reason it is very healthy to listen to those amendments in this place and to have as great a degree of bipartisanship as can possibly be mustered is that the jury system has its enemies in modern society. It was heartening to hear across all the speakers here that there is a great deal of enthusiasm for juries and for the jury system. For an Attorney General, it is perhaps a once-in-a-lifetime opportunity to open up the act that governs the jury system in this state and make a contribution to it. The point of this contribution is very much directed towards strengthening the jury system, and people's confidence in and support of it.

A number of speakers raised the possibility that the slightly different approach this bill takes from the Law Reform Commission approach on disqualifications from being eligible to be a juror because of driving offences might further disenfranchise Indigenous people. I will explain during consideration in detail that the best advice from my department is that it will have the opposite effect and that it will be more inclusive than what the Law Reform Commission would impose. That might be counterintuitive looking at the way we go about doing that, but we have some data to that effect and will discuss that in consideration in detail. It is my earnest instinct in this process to make this outcome more inclusive. That is the point. However, both the Law Reform Commission and a range of submissions put to it formed the view that, as things presently stand in the Juries Act, too many people with too serious a level of offence are able to sit on juries. What was proposed was a change, but I will talk about that in a moment.

Again, I would like to focus now on how important it is to have a degree of bipartisanship in this process as a means of strengthening the jury system in its operation and, therefore, the perception of its good operation and

the confidence in it. As I say, there are enemies of the jury system in Western Australia, as there are in all common law systems. I use the word "enemy" without meaning to be pejorative. There are people with very sincerely held and very well thought through views that lead them to believe there is a better alternative to juries in making factual determinations of guilt or innocence. If this bill is to support and strengthen juries, it is important to understand why we have them in the first place. I might commence that by reading a very brief quote from Thomas Jefferson that I particularly like. He said —

> It had become an universal and almost uncontroverted position in the several States, that the purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove. Of the first kind, for instance, is freedom of religion; of the second, trial by jury, habeas corpus laws, free presses.

Of those institutions that Jefferson, who lived, worked and revolted in a time of serious questioning of the way in which government approached its citizens, he numbered as second in terms of preventing government encroachment on people's individual liberties and, as a liberty itself, the right to trial by jury. What has happened in this jurisdiction over a number of years has been to an extent the erosion of the jury system, not in its fundamentals but simply in the number of trials in which we decide criminal matters actually before a jury rather than a magistrate. I do not levy this as a criticism of the previous government, because we could have likely made the same decision. I was not here at the time and maybe the Liberal Party supported the move to have what are now known as "either-way offences". The effect of that was that a whole range of offence types that used to be dealt with before a jury were pushed down into the Magistrates Court and are dealt with before a magistrate. That represented a significant erosion of the jury system insofar as a range of quite serious criminal matters were dealt with before a magistrate. That was done because, in effect, it is cheaper and more efficient than the trial by jury. The jury system is an inefficient and costly system. I do not mean that it is inefficient in terms of the quality of the outcomes it produces, because in that sense it is probably the most efficient system. A government may try to make the world slightly more efficient to meet a key performance indicator by eroding the jury system. All parts of politics are somewhat guilty of that. But quite apart from that, there is a view that juries should not exist at all. Indeed, some of the people I most admire in the judicial profession in terms of their ethical standing, intellects and as learned men and women of the law, subscribe to that view. For the purposes of this debate, I will describe them as the sceptics or detractors of the jury system. The jury system also has a great number of supporters, of whom I am one. Quite clearly, the member for Mindarie is one, as are, overwhelmingly, parliamentarians. It brings me great delight to think that the commonsense of members of this place means that very few, if any, fall into that camp of sceptics.

Why do the sceptics believe that the system is flawed? It is difficult to summarise a view that is held by a number of very learned individuals, many of whom are senior lawyers and some of whom are judges. To do justice to them and to not create a straw man, theirs is a composite view that is underpinned by a belief that better and more just outcomes would be achieved by replacing trial by juries with trial by judge alone or by a panel of three judges sitting and determining matters of fact. People inside and outside the legal profession who advocate that kind of root-and-branch reform, which really is the eradication of the jury system, do so because they exhibit a very high degree of scepticism of the ability of a jury to deliver a just, fair or best possible outcome based on the facts of the matter. A very powerful part of the sceptics' argument is that they dislike and distrust the secrecy provisions that surround juries. The fact is that with only the most minute number of exceptions, the deliberative processes of juries are secret and will never be known to any person outside the jury. Their decisions are also privative; that is, they cannot be appealed in a substantive way, except in a limited number of circumstances. Sceptics of the jury system find this to be highly objectionable. What they say, in effect, is that there would be better and more just outcomes from a trial by judge alone because, firstly, judges are better equipped to make the initial decisions on fact in a criminal trial, and, secondly, they would do so in the open, so that if they did make a mistake, that mistake would be known and reviewable through the usual appellate method. That is a very powerful argument. I give some fairness to the sceptics' view by characterising it in that way. I consider that to be perhaps a natural response of very highly educated, highly trained people, most often in senior levels of the legal profession, to an institution that makes decisions in their domain on a daily basis but does so through an accumulation of laypersons who have put nothing like the effort that senior members of the legal profession have put into their legal career and who do not have their base of knowledge or understanding of the rules of evidence or of the logic of fact. Those people are sceptical about whether good decisions can be made in that setting. It is the response, if we like, of an intellectual elite to an institution in

which enormous trust and faith is reposed but which is comprised purely of laypeople. That scepticism is not unhealthy in itself, but in my view it overlooks some of the very important features of juries, which the government is hoping to protect through this legislation. My own view is that juries do not deliver an inferior outcome on questions of fact. Juries are a composite of 12 people—I must say that I do find that number to be quite magical; if that number were changed, I think it would change some of the authority of a jury—who are essentially concerned with determining questions of fact. I believe that those 12 people, drawn as they are from a broad cross-section of society, are uniquely skilled to make determinations of fact on a large group basis.

It may surprise members to learn that there were only 534 jury trials in this jurisdiction in 2009. One hundred thousand individuals are processed through the Magistrates Court each year and there are many, many people in prison, but there are only 530-odd jury trials a year. That goes to the point I raised earlier—that we have slimmed down the number of trials that we actually bother to put before a jury at great expense to the state. I cannot say what questions of fact are determined in those 534 jury trials. A wide variety of factual questions arise in those trials. Each trial is uniquely different. A point that often features in the arguments of the sceptics is that members of juries are not intelligent enough or learned enough to come to grips with the factual concepts that are put before them, and particularly with how those factual concepts relate to the law. They believe that jury members do not understand judicial directions or the substratum of facts on which they need to make a decision. If that were the case, it would be a very powerful argument to suggest trial by judge alone. There are some trials where that argument is more likely to be true than others, although ultimately I still reject it. Some trials can be described as technical trials, which are the longer trials that might involve matters of fraud or a range of quite detailed corporate transactions. Leaving aside the complexity of the judge's directions on the law, the jury would have to be able to comprehend a whole range of transactions and how things fit together, sometimes across different corporate entities. That can be difficult and can pose a challenge to any counsel—defence or prosecution—who is trying to put matters simply to jury members so that they can make good, intelligent and informed decisions. It is notable, however, that technical trials are a tiny majority of the trials that are heard in any jurisdiction.

Mr M. McGowan: Minority.

Mr C.C. PORTER: Sorry—a tiny minority. In 2009, 487 jury trials conducted in the District Court had an average length of 3.2 days. That might also surprise members. Only 40 trials in that year lasted for six days or more. In the same period there were 47 trials in the Supreme Court, which had an average length of 5.5 days. The type of trials that we think a jury might struggle with are those horror stories in which people say they were called for jury duty and were put on a trial that lasted for three months. Those trials are as rare as hen's teeth. Our judicial system wisely offers an option in those trials, after the submissions are put by the defence counsel, to have those trials in front of a judge alone if they involve matters of extreme technical complexity of fact or of fact and law. The option exists for those trials to be put before a judge alone. Very few trials are of a highly technical, factual nature. That does not mean that in a short trial, of which the overwhelming majority of trials are, the facts will be simple. Indeed, it is precisely because the facts are inherently complicated in terms of a person's ability to assess them and make a good decision that juries are uniquely suited to the task. It is precisely because the issues in most jury trials are complicated that I favour juries resolving those issues of fact. It is very important for this Parliament to understand, for the purposes of the debate we are about to have, that juries consider oral and documentary evidence so that they may determine matters of fact that are relevant to determining ultimate issues of guilt. They do that in the context of a proper application of legal principles regarding the treatment of evidence and the elements of an offence and defence, so it is trite to say that it is a basic, understood legal proposition—but it is a very important proposition. Juries decide matters of fact. That is what they do. They listen to a judge's charge as to what the legal rules are, and they say, "Having understood those legal rules, this is my determination on the facts before me."

As I have said, opinions will, and they certainly do, differ on this point amongst lawyers, but my perception is that the legal principles that juries are given in a charge by the judge at the end of a trial, which is usually 3.2 days long, are capable and are, as a matter of practice, readily understood by laypeople on a jury. They are well and truly inside the comprehension of the ordinary citizen. To the extent that judges' directions on law are not comprehensible to ordinary citizens, it is not the fault of ordinary citizens; it is the fault in which the law shows a complexity that can be cured. One of the things that modern law reform should be about, in my view, is looking at the way in which explanations of the law are given to juries by judges.

It is also the case that it is sometimes difficult, as I think the member for Rockingham noted, to distinguish between questions of law and questions of fact; it is not always a simple matter.

Ms J.M. Freeman: My learned colleague the member for Mindarie has told me that the judges' instructions are not written down. Is there any reason they cannot be written down, in terms of that absolute capacity to be able to understand?

Mr C.C. PORTER They are and they are not. They certainly are not written down in the way in which we would expect, say for instance, in a textbook or a guidebook.

Ms J.M. Freeman: What about a transcript? I am talking more transcript-oriented.

Mr C.C. PORTER: A transcript is recorded of every judge's charge to a jury—the directions on law—which is what defence counsel and other counsel will pore over, saying, "This was right; this was right; this was wrong."

Ms J.M. Freeman: But that is not provided to the jury.

Mr C.C. PORTER: No; but each judge will have their own collection of charges to a jury. It is a little like a mix-and-match scenario, because there will be standard charges in every trial and then there will be other charges that will be relevant to this trial. For no single trial could I provide the member with a handbook as to what the direction should be, but what there is is based on common law and previous directions and statute law—well-known formulations of words that judges will match together.

Mr J.R. Quigley: If I may interpolate there: and the jury, in the box, is permitted to take notes.

Mr C.C. PORTER: Absolutely; and pose questions in writing.

Ms J.M. Freeman: But in terms of that thing that you have just discussed now—which is that it is not that the common person cannot understand it, it may be that judge is at fault for not making himself or herself understood to the common person—why, then, do we not allow for it to be written down?

Mr C.C. PORTER: There is no prohibition on it being written. It is partly written in our statutes, in our Evidence Act and in the common law, and it is used in that way. My point is this: by and large, the directions given to a jury are comprehensible. They are commonsense concepts, easily reduced into language that most people get. Members can look at juries and see that they get the concept of beyond reasonable doubt, and a lie that is a consciousness of guilt rather than a lie that goes to the issue of credibility. Juries seem to get these things. There is a lot going on in a charge to a jury, but my contention is that they seem to get these things. If they do not, that is the fault of other things. We need to look at ways in which we can simplify our own Evidence Act to make those rules simple, and there are a variety of those that will be tackled, no doubt, over successive governments.

This might sound very simple, but unfortunately it is not, but what juries basically determine is whether or not a certain event occurred at all, or occurred in a certain way. Sitting beneath that kind of simple description of a question of fact there is a whole range of things going on, such as rules of evidence, but the jury need not be concerned by those, because the evidence is presented in court after those arguments are made. Determining whether or not a certain thing occurred in a certain way is often about credibility, about assessing the way a witness gives evidence, and determining whether they are telling the truth or not; or if they are telling the truth, whether their recollection is sufficiently cogent and clear enough to be relied on to the standard of beyond reasonable doubt. That type of exercise—determining whether someone is telling the truth; determining whether they are credible; determining whether a thing that occurred three years ago or 18 months ago occurred at all or in a certain way—is something that 12 average people, drawing together their life experience, are uniquely well suited to doing, and perhaps they do better, in my assessment, than any one single person, whether that person is legally educated or not. The collectivity of juries is what gives them their power. I think that that is very important.

The other interesting issue is that sometimes, beyond that question of whether a thing happened or happened in a certain way, one of the questions that juries are called upon to determine is whether a certain occurrence, which is agreed on, meets a certain standard. To give members one example, I remember prosecuting a trial about an individual giving a letter to a very young girl in a park, and the letter was, for want of a better description, rude. The question in that trial became whether the giving of that letter to the young girl constituted an indecent dealing. It was not in dispute that giving a letter to someone was dealing with the person; the question was simply whether the letter was indecent. It was a question that I as a prosecutor could not answer with any certainty. I had my views about it; no doubt defence counsel had their views; and no doubt the judge had his views. That trial simply looked like a very basic exposition of the facts, the acknowledgment by all present that certain things had happened, and then the jury read the letter and they deliberated. Was the content of the letter such that the process was indecent? That is a task that is uniquely suited to a composite of individual laypeople from our community.

Mr M. McGowan: What did they find?

Mr C.C. PORTER: In that case they found that it was indecent.

Mr J.R. Quigley: You never tell your story—I never do—when you lose the trial!

Mr C.C. PORTER: No, no, but as prosecutors there was no winning or losing; it was only the doing of justice.

Dr A.D. Buti: Based on what you said, is there any need to have lawyers on juries? One of the arguments in your second reading speech was that the jury system will reap the benefits of this "talented pool of individuals". Why do we need that if a group of laypeople could fill that position?

Mr C.C. PORTER: I think that is a very fair question. I will talk about this again in consideration in detail, but the point of having lawyers on—I have agonised over this, and the member has raised some persuasive reasons why lawyers should not be on juries—is not merely because there are thousands of lawyers out there who could swell the pool. There are negatives to having lawyers on, which I think the member has fairly put as the perception that lawyers might somehow dominate proceedings, and if people regard lawyers as always dominating proceedings and then saw lawyers on juries, a potential perception is that the juries are not good and they do not deliver just outcomes, which plays into the theory of individuals whose view I reject. The benefit, though, is not just the swelling of the number available to the pool; the benefit is, first of all, practical. Even with, say for instance, a very technical trial with a substratum of issues that deal with commerce or trade or architecture or engineering, or whatever it might be, as is often the case, there is no reason to believe that a judge better understands that substratum of facts than a jury, because the jury might have an engineer on it. Having a great diversity of professions brings something to the composite power of the jury. Lawyers bring more to a jury than just what they learnt in law school as the nuts and bolts of the law. They bring a way of thinking and approaching problems, and if lawyers can—as they should—not involve themselves in second-guessing rules of evidence and giving their view to other jurors as to how to go about understanding things that they need listen only to the judge on, then I think lawyers bring something to the pool in terms of the composite power of decision making.

There is a second thing they might do in terms of a perception, which may or may not outweigh the potential for negative perception. Why is it that there is a level, sometimes, of distrust in the judicial system? There are a variety of reasons why that may be the case, but it may also be that excluding lawyers from juries gives that sense that, somehow, lawyers are above it all. Everyone else gets called in to do jury duty, and we are now saying that an orthopaedic surgeon will be called in to do jury duty—but not us lawyers. I think there is an alternative perception issue at play.

Dr A.D. Buti: There is also an alternative perception that the standard of lawyers is so low in society that it would be best to not have them on!

Mr C.C. PORTER: That is something to at least acknowledge, if not consider, for the purpose of the debate. Having thought about this over some period, my point is that it was not simply the idea that there are more people who can go on a jury that led me to the idea that lawyers should serve on juries. However, we can discuss this more in consideration in detail. I would say that the strongest point that has been made here tonight is the perhaps overwhelmingly negative perception that we get of having lawyers on juries. I have no intention of weakening people's perception of the jury system, which brings me to one of the final points that I want to make; namely, that my perception and view is that juries deliver at least as good a result, and likely a better result, than would be delivered by a judge alone or by a panel of judges, for the reasons I have given. But there is more to juries than simply producing an outcome. Producing an outcome is very, very important, and I will touch on this again when we go to consideration in detail and the many issues raised about inclusion and disabilities and so on and so forth. They are important matters. But the most important matter in any trial is delivering the best outcome for the defendant—a fair outcome. Unfortunately, if it simply becomes too hard to include people who might, other than for a disability, contribute to that outcome, and we have to cut corners to put them on the jury and it detracts from the outcome, the rights of the defendant must come first. That is not to say that more could not be done in this area. I am not an expert on it. However, the outcome is very important.

In addition to the outcome, the very important issue that we are dealing with here is that juries are a key component of a system of government that relies on separation of powers. It is important to understand why that is the case. The different institutions of government, in a federation in particular, operate separately from each other. Parliament, the executive, the judiciary, an independent civil service, state and federal governments, upper and lower houses—all of these bodies act independently of each other. This is very powerful and original idea of democratic governance. Interestingly, different people place the jury in different arms of that government. Some people instinctively see the jury as part of the judiciary; that is, part of the courts, and thereby not part of the

Parliament. A jury certainly is not part of the Parliament. But the very interesting thing about the jury is that it is not part of the courts either. It physically resides in the courts, but the jury represents a separation within the judicial wing of government itself. When I say separation, I mean that juries are separate from the judicial arm of government.

Ultimately, the power of the judiciary is its independence, which is why judicial officers do not have to retire before they are 70 and we can do nothing to them except in the most unusual circumstances. That is a powerful independence, but it is not a complete independence. The fact is, the executive is still appoints judges. And of course the debate rages in the United States about how independent judicial officers are, because they are continually required to make decisions on matters that often appear political and they have been appointed by politicians. I do not think that is a criticism that could be levied at the Australian jurisdictions for a variety of reasons. We have excellent and independent judges. Nevertheless, juries do not owe their allegiance to judges. They do not owe any explanation to judges, or anyone else, for their decision—not to any member of government. Juries, unlike every other part of the government, owe no allegiance or original power to the executive or the Parliament—none at all. They are not appointed by the Parliament or the executive. They are not answerable to the Parliament or the executive. They do not even have to explain their decisions in any way to the Parliament or the executive, or indeed to judges and the judiciary. Therefore, the jury is a very powerful decision-making body at complete arm's length from every branch of democratic government. That is why I think people like Jefferson viewed the jury as the final safeguard against historically precedented and reasonably imaginable state excesses. That is not too say that these are around the corner in Australia or indeed that we have ever really witnessed them in 100 years, but they are at least reasonably imaginable. That is why the jury sits separate from all other arms of government.

The jury is an inherently democratic institution, not just because it fits into that scheme of separation of powers, but for another reason. I will read this from His Honour Justice Dean in Brown v The Queen —

> The essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached.

Not only are they structurally detached and unbiased and unaffected by the executive or the judiciary or any other aspect of government, they appear to be so. What got me thinking about this legislation and the need to bring it on and why I ran the process of reform parallel to the Law Reform Commission—watching what it was doing and getting drafts, rather than waiting and then having another 12 or 18 months on top—was indeed the Macleod trial. I put it to members present that there was a great deal of disquiet among the population generally about the outcome of that trial. People who obviously had not sat in on that trial, instinctively, after having watched the footage, thought there was something wrong with that outcome. I am sure that legally, given all the rules of evidence and everything that was at play, the jury did its best and made a decision that is completely justified—based in the aspects of the system that we have.

Mr J.R. Quigley: After having received a flawless charge.

Mr C.C. PORTER: Indeed; a charge that no-one disputed by way of appeal.

Mr J.R. Quigley: Yes, and a lot of people commended the judge on that.

Mr C.C. PORTER: Indeed. There are two issues. We might be able to change the rules of evidence thereby making the outcome different and maybe fairer. I do not know. Leaving aside the fairer, we could definitely change the rules of evidence so that the outcome was different. That same jury, with different rules of evidence, seeing and hearing different things, might have come to a different decision. However, the point I want to make for members present is to imagine what if that result was given and occasioned by a judge alone and not by a jury.

Mr J.R. Quigley: It would be like the football umpire—he'd have to be escorted off the ground.

Mr C.C. PORTER: Indeed. One of the critical virtues of democratic participation in our system of government is that people are ultimately responsible for all the outcomes with which they are invariably dissatisfied. Government is difficult and people are invariably dissatisfied with the outcomes. That is not unhealthy; it is quite natural. But in the democratic system of governance, what gives it perpetuity and strength and longevity such that it has had so far is that ultimately, when people do not like what the government is doing, they are in effect blaming themselves or at least everyone else who are people like them because they, in a roundabout albeit indirect way, have produced the government that has produced the result with which people invariably seem to be dissatisfied with. That is the strength with which the democratic process is imbued; that is, by having democratic participation. The way in which juries are indispensably important is that, like governance generally,

the wider population is very often dissatisfied with the results that they see come out of a trial. Not having sat in on the trial, not having been intimately involved in it, seeing the results very swiftly on the television for a short time, they say, "That doesn't sound right to me." But instinctively, at the back of their minds they must be saying, "That decision doesn't seem right to me, but at least it wasn't made by some politician or some toffy judge. Ultimately that decision went through the filter of 12 people like me." I think that that dampens down people's natural proclivity towards dissatisfaction with outcomes. If we did not have that, if we went to a system of trial by judge alone without changing anything else in the nature of the Australian psyche or the system we are dealing with, I think that would be a very, very short-lived system. If you like, juries are a democratic safety valve that is primarily responsible for the resilience of our system. In my observation, there is a similar and perpetual level of discontent with the outcomes produced by criminal justice, just as there is with the outcomes produced by democratic governance in public policy.

Dissatisfaction with the justice system is derived from a desire for the production of just outcomes. Just outcomes in the justice system simply mean outcomes that the great majority of rational citizens would agree are fair, or whatever word we want to substitute for "fair". Such outcomes must be impossible in systems the outcomes of which are the result of institutions that balance competing principles. It will be impossible for everyone to agree on an outcome being just when that outcome depends upon the balancing of principles as fundamentally incompatible as retribution and mercy, or speed and due process. People will take different views on which of those should be favoured in any given situation. When one is favoured over the other in criminal justice, outcomes can be radically changed. We try to strike the best balance we can, but people still maintain something of an unrealistic belief that the justice system can produce perfect outcomes in the sense that it is able to balance, to everyone's satisfaction, usually unattainable values that are generally at loggerheads, including the things that I have already mentioned. We will never get retribution and mercy in the same trial; similarly, in respect of speed and due process, one always has to be sacrificed to gain some more of the other, and people will not always agree on that mix. To guarantee the role that the ordinary citizen undertakes in this area and guaranteeing that it is absolutely the most important role in the system, and doing so without interference, gives the system durability.

My final point is that the detractors and sceptics of the jury system most often argue that it should be replaced by trial by judge alone. A new argument has emerged in recent times to suggest that, rather than taking the huge leap to the root-and-branch reform of getting rid of juries entirely and replacing them with judges, facilitators should be provided for juries. Those facilitators, as I understand it, are meant to sit in with the jury, guide and help it, and ensure that it does not do the things that we sometimes hear, anecdotally, that bad juries do; instead, the facilitator would ensure that the jury is doing the things that we would like to think good juries are meant to do.

Although this sounds quite good on the surface, I am thoroughly opposed to it, for the reason that the longevity of the jury, which gives durability to the entire justice system, has depended on its deliberations being held in secret. Whenever the executive wing of government gets a foothold into a deliberative process, it ends up controlling the process. It will be endlessly reviewed; the facilitator will invariably have to report to someone, and that will be the purpose of it. It could easily be appealed, and what will result is the poisoning of the jury system by the wings of government, from which we have protected it for hundreds of years. I am greatly opposed to that concept, although I accept that it is put intelligently and for well-meaning purposes. However, in my view, it would be the first 48 or 50 nails in the jury's coffin, and the jury would disappear in a very short time.

I have taken that approach to the second reading speech for the reason that members opposite have raised a number of issues which I think are worthy of consideration and which will be considered in detail. I am contemplating giving at least one of them some distance; that is, the issue of lawyers on juries. At least one of them is a point very well raised, and that is whether this bill's approach to disqualification for criminal records and traffic offences produces a worse result in terms of Aboriginals not being on juries, compared with the Law Reform Commission's approach. I hope to convince members that we took this approach for the reason that it is somewhat gentler in that respect than the Law Reform Commission's approach. Indeed, the Director General of the Department of the Attorney General —

Mr M. McGowan: If you want to speak for longer, we can suspend and give you extra time.

Mr C.C. PORTER: I can address these issues very easily during consideration in detail; it is probably worth separating out these issues. The other issue about silent voters is well put. I will have the benefit of the presence of my advisers, who have some statistics on that.

Finally, another matter that I have touched on briefly is the issue of people with disabilities serving on juries. In my view, that would make juries even more powerful than they are now, but there are some very large practical hurdles. It is my view that if those hurdles became prohibitive with regard to cost or efficiency, or if corners were cut regarding those hurdles, which are very high in cost, it would lead to an outcome that is not as good as it could be for a defendant, and we simply could not do it.

Dr A.D. Buti: Presumably you are talking about intellectual disability.

Mr C.C. PORTER: I think, frankly, that people with intellectual disabilities should not be on juries, but the member has raised the issue of how to ensure that they are properly excluded. I have no doubt that a deaf person could contribute to the power of decision making on a jury, because a deaf person may have found that their visual acuity is so greatly heightened that, in a trial that is heavily visual, they might do something fantastic for a jury. However, there may be difficulties. In the long run it is going to be very difficult for a person with visual difficulties serving on a jury, because almost all juries rely on some form of visual evidence. Ultimately, those sorts of questions are going to be up to defence counsel—whether they think it is going to be to the benefit or detriment of their client. This legislation always leaves the ability to challenge an individual juror for whatever reason. However, these are matters that we can deal with during consideration in detail.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 to 3 put and passed.

Clause 4: Section 104 amended —

Mr J.R. QUIGLEY: The opposition will not move an amendment to this clause, but I rise to express my dissent from it. I have been looking at the Law Reform Commission paper, and I am looking for the government's reason for taking the peremptory challenges down to three. As we have already discussed, it was only a few years ago that the former Attorney General took them from eight to five. In situations in which multiple accused are working in unison, we understand that if there are to be eight or even five challenges each, as discussed in the Law Reform Commission paper, there will be the ability to start to shape a jury by gender, race or whatever other criteria the defence counsel settles upon at the time in deciding the people whom it is not desirable to have on the jury.

As the Law Reform Commission notes in its report titled "Selection, Eligibility and Exemption of Jurors: Final Report", the peremptory challenge process is very quick and efficient. As I said in the second reading debate, many counsel and I were used to ejecting from the jury box those who obviously did not want to participate. They are summonsed to be there. I gave the example of a person who books a late holiday. The judge would not excuse from jury duty anyone who did that. By the same token, I always had grave disquiet about forcing a person to sit there against his or her will rather than getting a good outcome by having a juror who participated properly during a trial. That is not an opinion I share solely; it is shared by many of my colleagues at law. I also said in the second reading debate that when an Indigenous population makes up such a large percentage of the prison population, often three challenges is not enough to secure one Indigenous person onto a jury if that was the aim. If a person was being tried in the north west and we are objecting to it being an all white jury, having only three challenges would make it hard to ensure that one Indigenous person sat on the jury to bring his or her cultural sensitivities and life experience to the jury. Apart from efficiency, and given that the rest of the effect of the legislation is to increase the number of jurors available, what is the purpose of further trimming it by two? Page 25 of the Law Reform Commission's final report states —

> The Commission has been advised that in 2009 approximately 50 out of a total of 449 trials in the District Court involved more than one accused. Using these figures and assuming that the number of peremptory challenges available to each accused remains at five, the following observations can be made:
>
> - if each of the 50 trials involved two accused, an additional five jurors would be required for each trial (ie, 250 people);
> - if each of the 50 trials involved three accused, an additional 10 jurors would be required for each trial (ie, 500 people).

Reducing the number of challenges from five to three would amount to between only 250 and 500 people over a year. The Law Reform Commission's report also states —

In this regard, it is worth emphasising that in 2009 a total of 53,000 jurors were summoned …

By taking away two peremptory challenges, the Attorney General will reduce the number of people required to be summonsed by between only 250 and 500. I wonder whether the Attorney General could give us an explanation of that.

Mr C.C. PORTER: I do not dispute that some questions the member for Mindarie asked were fairly put and that he deserves a fair explanation. He may find this explanation unsatisfactory, but here it is. I hate the challenges, personally. I have read the Law Reform Commission report and all the submissions and I have consulted with a variety of my colleagues, whose views I value. Had I had my head in this matter, I would have got rid of them entirely. I will come to why I dislike them so much in a moment. What was put to me very sensibly, and what I accepted in the end, was that getting rid of them entirely may well have had the effect of enlivening the challenges for cause, which, as the member knows, are rarely, if ever, used at the moment. If either the defence or the prosecution had a strong view, for whatever reason, that a certain potential juror should not sit on a jury—it may have been because of something the person did when walking from the panel to the jurors' box that indicated that the juror did not want to be there—getting rid of the challenges entirely might have enlivened that now dormant system of challenges for cause, which would have been costly, inefficient and may have led us down the track of American trials on which so much time and effort is consumed determining who should or should not be on a jury. That is the reason that I was dissuaded from getting rid of them entirely.

I will explain why I dislike them so much. I accept what the member said about there perhaps being more than one reason why either a prosecutor or a defence counsel would challenge someone. For those who have neither seen it nor been part of it, a prosecutor or defence counsel can see the pool of potential jurors in the back of a room. A number is read out and the prosecutor and defence counsel have a sheet in front of them containing the potential juror's name and address. The sheet used to have marks on it about whether the person had a criminal record. That does not happen any more, and I will get to that in a moment. The potential jurors walk up to the panel and the prosecutor and defence counsel look at them. The defence counsel or prosecutor can say "challenge", and that is it. So long as they say "challenge" before the potential juror's bottom hits the juror's seat, that juror is out before he is sworn. There may be a number of reasons that a defence or prosecutor does that. I accept that of the many reasons, one of the better reasons is that a prosecutor or a defence counsel might take from the body language or the behaviour of the juror on the walk to the box that the juror does not want to be there. Alternatively, the juror might have stood up earlier and said, "Your Honour, I want to be excused because I would rather be playing golf," and His Honour would say that that was not a good enough excuse and that person might be called up and be challenged. That would be one of the better reasons to exclude or challenge a potential juror and to move on. The member raised that reason, which is what I have gently called one of the better reasons for challenging a juror. It is one of the few tolerable reasons I can possibly think of. Although the member for Mindarie has used the challenges in that way, in my view—I am not as experienced a counsel as is the member—and from trials that I have seen, both prosecutors and defendants basically make a very snap judgement about whether they like the look of the potential juror. They base their decision on whether they think the potential juror is either "with me or against me". Sometimes it could be as fairly put as this: do I think that is someone I can speak to for four days in the box and have a relaxed approach with, even though the jury member is not talking to me? Those things are more about magic than anything else. All potential jurors have come to do their duty as citizens. They have done the right thing and have not excused themselves. However, when they get there and make the short walk to the jurors' box, a defence counsel or prosecutor, on what is not much better than a whim, can look at the potential juror and say, "That person isn't for me," and challenge them, and that person must turn around and walk back. I believe that is a particularly corrosive and dispiriting thing to do to someone—for no good reason—who has turned up to do his or her civic duty.

My personal view is that I would have liked to get rid of challenges entirely. I accept that there might be unintended consequences of getting rid of them entirely. Certainly, I supported the previous Attorney General's move to reduce the number of challenges from eight to five. This legislation further restricts them. I do not have any intention to decrease the number of challenges to fewer than three. Three is enough to let the whims of counsel have their way and to dismiss jurors whom they either feel uncomfortable with or do not like the look of, whom they think might not go their way, or whom they perceive are disinterested in the process of being there. But that is enough. The best we can do is hope to decrease, slim down and minimise the quite dispiriting effect that the process has on individual jurors.

Dr A.D. BUTI: I now know the reason that the Attorney General has agreed to reduce the number of challenges from five to three. However, in his reply to the second reading speech, the Attorney General said that he is most concerned that the accused have the fairest trial possible, and that he believes that the jury system is the mechanism by which that can be done. A defence lawyer may use that peremptory challenge for a number of

reasons, but the ultimate aim is to decide whom he believes would be the best 12 jurors for his client. Is it not contradictory to the Attorney General's stated purpose that the fair trial of the accused is the most important factor in all this when, in the next breath, the Attorney General says, "So be it, but I will not allow the defence lawyer or the prosecutor to shape the jury to some degree"? Although it is shaping the jury, to some degree, overall it is a random selection process. Anyone could be selected to participate on a jury, so why are we removing the peremptory challenge, which is an important tool in the defence lawyer's ability to represent his client?

Mr C.C. PORTER: The reason is that I honestly do not believe it is an important tool in either the defence counsel's ability to properly represent their client or the prosecutor's ability to discharge their role as an officer of the court and to conduct a fair and appropriate trial. The best reason we can possibly muster for why defence counsel or a prosecutor might dismiss someone from sitting on a jury in this very abrupt way is that they get a sense from something that has happened—a glint in the person's eye, something they have said or their manner of walking to the jury box—that indicates they do not want to be there. That is the best reason given in this place for why this challenge is important. I am saying that we should keep the challenge because I accept that there is at least the sense on the part of some defence counsel and some prosecutors that, put at its highest, it is an important aspect for them in the proper conduct of the trial. I do not think it is that important myself, but at least some people feel that way.

On the other hand, I have noted that it has a very interesting impact on the psychology of individual citizens who have turned up to do their civic duty. Perhaps this goes to something the member for Eyre noted. We joked a bit about people being delayed in doctors' waiting rooms. But I think he makes a good point that when we ask a citizen politely to come and do their duty and then we treat them roughly, impolitely and without due care and attention, it really does not say a lot for the whole purpose of them being there to conduct their civic duty. All I can say to the member for Armadale is that I am hoping in this clause to strike a balance to allow defence counsel—for the better reasons that the member for Mindarie has noted, and for the many worse reasons, which are not much more than black magic and witchcraft, and a sense of what is going to be best in the trial for them and their client, or for the prosecutor—to slim down that process as much as possible and still leave a reasonable avenue. I therefore personally do not take the view that it is very important.

If we asked 100 lawyers, I am not quite sure how many would agree with the view I have raised, or the view that five is a better number; I just do not know, but there has to be some number. As I say, my personal instinct is to get rid of challenges entirely, but there are reasons for not doing that. That is how strongly I feel about the corrosive effect they have on panels.

Mr J.R. QUIGLEY: What concerns me about the Attorney General's response and where we are going with this is the following, and I realise it is no good winning an election and getting into power if a person cannot put his personal preference forward. Firstly, the Attorney's initial response, and his substantive reply, was that he personally does not like challenges. Secondly, the reason given for not liking them is the unintended insult it may deliver to a person who is balloted forward. However, that will still stay with three peremptory challenges, and quite overlooks the intelligence of the jury. I believe when a jury panel is in the assembly area and taken through the instruction book by the summonsing officer or sheriff, it is explained in detail to the people in that panel that they should take no offence to a peremptory challenge whatsoever; it happens and no reason is given. The Attorney General said that it is all black magic, but I know that there are some lawyers who place some weight on black magic. I am not one of them. There are other reasons than the reasons that I first cited for why I would take a peremptory challenge. Ron Cannon used to school me: "Don't do it because you will look to those empanelled that you are trying to select, that you are trying to shape. That's the risk you run and you will be marked down." But the other reasons are: first, I always tried, when a juror not wanting to appear was overruled by the judge, to facilitate that juror by expending one of the accused's peremptory challenges. The second reason is the gender balance of a jury. Jury selection is a random ballot: firstly, by the summonsing officer, and then by the clerk of arraigns when he starts to pull numbers out of the box. I would be more comfortable if the Attorney General had reserved the position that at least three of the jury people would be women and three would be men. I do not mean that there is an androgynous part in the middle, but that there would always be some gender weighting so that it is not an all-male jury or an all-female jury. That is another reason that I would expend all my peremptory challenges: to ensure there is a balance between the sexes. In a rape case, a sexual assault case or a child-interfering case, both men and women are needed to bring their life's experience to the jury, and not just an all-male jury or 11 men and one woman. I believe we have got to have this balance. That is another very good reason for keeping peremptory challenges at five. A further reason is that very many Indigenous people are accused people. I have seen many trials in which there was not one Indigenous person on the jury. As mentioned earlier by me today, 1.5 per cent of our population is Indigenous; 39 per cent of our prison population is

Indigenous, which indicates a large number of Indigenous people going through the court system; and one per cent of jury persons are said to be Indigenous. I therefore think that defence counsel and prosecution counsel, by the exercise of peremptory challenges, are not doing this just for black magic, if we truly trust the jury system, as I do. As I addressed juries, I said that there is one thing about the truth: it is a bit like trying to put a balloon full of air under water. The truth cannot be submerged forever; it will find a way back to the surface if there is a broad enough range of people on the jury.

Mr M. McGOWAN: I look forward to hearing more from the member for Mindarie.

Mr J.R. QUIGLEY: I think this issue goes beyond what the Attorney General was saying about black magic. There are real reasons for the peremptory challenge. I was saddened, as a lot of members of the profession were, to see the number of challenges trimmed from eight to five. But this further trimming—this must go on the record because the opposition disagrees with it, although this clause will win on voices—will take it to the lowest in Australia.

What is so genius about our collective wit in this Parliament that we know better than all other Australians? Is it because the populations of Western Australia and of this relatively small chamber know better than all the collective chambers around Australia? I do not wear that. I do not buy that. We should be loath to interfere with peremptory challenges. It should not be done, with respect, because of the Attorney General's personal preference or because he has a distaste for them. His distaste was expressed on the basis that a peremptory challenge offers almost mild insult to the person who has taken the time to come to court and is then just turned around. Finally in that regard, I remind the chamber that when a peremptory challenge is taken, the person is not dismissed from jury service. He goes to the back of the court and the balance of that panel is then taken back to the assembly area and taken to another court. I have quite often, therefore, seen a person I challenged moving through the court at lunchtime with a group of other jury persons, having been selected on another jury because there might have been a different gender balance or whatever. The mere fact, therefore, that they are peremptorily challenged does not mean in any sense that the person is regarded as worthless or that their opinions are of no worth.

It means that for the composition of that particular jury, they are not required. I plead for the government to reconsider and go beyond personal preference and disquiet in this matter, and not take us down to the lowest number in the commonwealth of Australia on the basis of the Attorney's whim.

Mr C.C. PORTER: I did anticipate the member for Mindarie would find my explanation unsatisfactory. First of all, we are not the only state that would allow three jurors to be challenged. There would be at least one other state, that is South Australia, and there may be another, but I cannot recall which state it is. We are certainly not alone in that respect. Whilst I have been open and frank with the member for Mindarie and members assembled on my personal view, I am no orphan in holding that personal view of high dislike for this system of challenges, particularly at elevated numbers. I know of a number of counsel from both sides of the bar table who share that view. Certainly, from the little contact I have had with jurors, particularly those who have been rejected, it is not merely the preferences of lawyers that is important here. The jury system is a civic system which is about inclusion and involvement. The member stated that jurors might feel an unintended insult for no good cause. My point is that there really is not a good cause for those challenges. The best that we have heard here in open debate is, first, that counsel might challenge someone because they appear disinterested; second, they might challenge either males or females to achieve a better gender balance on a jury; and, third, they might challenge to ensure an appropriate number, whatever that might be, of Indigenous people.

Mr J.R. Quigley: No, I said "racial".

Mr C.C. PORTER: When those challenges, whatever number they are, appear on even sides of the bar table, as is the case now, there is going to be some fair amount of room to create a balance, whether that is gender or racial, on the jury. As unpalatable as it may appear, the defence and prosecutors in a trial for one reason or another regularly form a view that they do not want women or Aboriginal people on a jury; or perhaps they take the view that they do not want non-Indigenous people on the jury, as sometimes might be case; they might see some distinct advantage in that. The unfortunate fact is that we get this quite unpalatable episode in court, where many, many challenges are exerted by prosecution and defence in the effort to get an advantage. I am saying that that is a system for which no particularly good reason has been given here as to its existence. It has a corrosive effect on all those in the court, and it is disliked by not merely me but also a number of other people who have experienced it, both as a lawyer or as having participated in the system as a juror or otherwise. Three is a fair number; it exists in other states. I do not have any intention to go below three.

Mr J.R. Quigley: Your predecessor had no intention to go below five, might I add!

Mr C.C. PORTER: I have never been a big believer in submissional arguments. I understand the member's point, but the explanation for why they are so necessary are ultimately weak—someone is disinterested; someone looks scruffy; or a defence or prosecuting counsel might want more or less women on this particular jury. The whole point of this exercise is to have a large pool drawn at random which respects a cross-section, with as little interference from individual counsel based on whatever whims of the day. It is not my whim that has motivated this; it is the motivation to get a reasonable decrease in the whims of trial counsel on the jury pool.

Clause put and passed.

Clauses 5 to 9 put and passed.

Clause 10: Section 5 amended —

Dr A.D. BUTI: Mr Acting Speaker (Mr J.M. Francis), I was on my feet trying to get your attention. I wanted to deal with clause 8.

The ACTING SPEAKER (Mr J.M. Francis): I am sorry, member for Armadale, we have dealt with that. You have to call "Mr Acting Speaker" to seek the call.

Mr J.R. QUIGLEY: Clause 10 will amend section 5 of the Juries Act 1957 dealing with eligibility to sit on a jury. Subclause (2), which will create section 5(3)(a) of the Juries Act, changes the position under that act to read —

> is not eligible to serve as a juror at a trial if he or she has reached 75 years of age;

That means everyone is compellable to sit on a jury if they are over the age of 18 years, are an Australian citizen and have not yet attained the age of 75 years. I said before that the opposition believes that from the age of 65 on, serving as a juror should be optional. We are not seeking to exclude more elderly people from the jury. We reject the member for Jandakot's criticisms that we are against the elderly or the aged. We are not objecting to people who are aged 72, 73, 74 or 75 years sitting on juries. Our position is that prior to this amendment, there was an excuse for people aged between 65 and 70 years to opt out of jury service; but they were still eligible. We believe that situation should be preserved for those people over the age of 65, so that they can opt out if they want to. Elderly people are more conscientious and more interested in the criminal justice system—in my electorate at least—than are the young people. They take a closer interest in the trials and in the outcomes of trials. We would expect that the majority of people over the age of 65, if given the option of sitting on a jury, would elect to participate. Jury service is civil service; it is civil conscription. A lot of people have worked hard in their life for the community in jobs that are not as well paid as judges, but in lesser stations like firefighters and police officers, and have served this community long and hard, maybe in remote police stations, for over 30 and or 40 years, and when they get to their retirement age—not many police would be waiting until 65—they just want to go on a long wandering holiday with their wives and forget about civil service, WA and the whole lot for a while. If they elect not to take part, then the Labor Party supports them. They are not opting out. By the age of 65, they have done their duty in supporting this community. If they want to go on and participate in civil service by being on a jury, well and good, and we encourage them, but we should not force them after 65.

I know many people over the age of 65 who have anxieties about all sorts of things in life, perhaps because they have lost their partner and they are now living alone for the first time in a retirement village or whatever, and they just do not want to participate. Why do we want to put their hands behind their backs and force them to do this? This has never been the way in Western Australia. This is new ground. We say that we welcome the lifting of the age from 70 to 75. I say to the member for Jandakot: No, we are not ageist; no, we are not against people up to 75 sitting on a jury; but from 65 on, for heaven's sake, a person should be allowed to say, "I do not want to; I've done the whole effort for more than 60 years in this community; I just want to have my retirement now." We think that is a fair position. We have an amendment to move in this regard. I have not signed it. I have distributed the amendment.

Mr M. McGOWAN: I might allow the member for Mindarie to finish what he had to say.

Mr J.R. QUIGLEY: I move —

> Page 6, after line 19 — To insert —
>
> > (aa) if the person has attained the age of 65 years but has not yet attained the age of 75 they may elect not to serve on a jury; and

Mr C.C. PORTER: I thank the member for his submission and for various contributions on this 70 to 75 opt-in, opt-out issue. As I intimated in my second reading response, my initial inclination was to have the retirement age, if I can use that term for a juror, at 70, for the reasons raised by the member for Rockingham, which are

reasons of consistency. The member for Rockingham's description of the reasons our Constitution, on one of the few occasions it has been changed, was changed with respect to Justice McTiernan, was a very good reflection of what occurred. It was a fascinating situation. Having spoken to a variety of people, I was ultimately convinced by the Law Reform Commission's view on this for a couple of reasons—one is that ultimately I do not find the consistency issue overwhelmingly strong because the situation —

Mr J.R. Quigley: That is not an issue for us.

Mr C.C. PORTER: Okay; but I will address it. The McTiernan situation and the constitutional provision we have now for retirement at 70 is quite a different situation than actually sitting on a jury. The basic difference is that the reason, as I perceive it, that amendment to the Constitution was passed is to guarantee the independence of the judiciary. We do something for judges that we do not do for any other employee who receives taxpayers' dollars; that is, we cannot touch a judge in any way except in the most extreme circumstances, until he or she reaches a certain age, or, before McTiernan, forever, in effect. We were constitutionally prevented from doing that. I think there are reasons to have a limit on that. There might be an argument to suggest why that limit should be increased in the future. There are fairly strong arguments for up to 75 years of age. But as to consistency, the two situations are different. If we are to have a situation in modern western society, which I suspect we will, in which people stay in the workforce longer and are active members of the community longer than taking a gold watch at the age of 55, as used to be the case in years past, that will probably happen in increments. We will see statutory ages increase for a range of things. Ultimately, I was persuaded that it should increase for juries. I am open to the idea of an increase for judges down the track, but as I said that is a matter for the commonwealth.

Mr M. McGowan: What about magistrates?

Mr C.C. PORTER: I think there is a slightly different issue with magistrates, although I think there is room to increase the level from 65 upwards. The Magistrates Court is a creature of statute, not a creature of the Constitution. Magistrates are appointed by Parliament under the requirements of statutory provisions that the Parliament sets out. It is certainly within our power to increase that level from 65. I think it should basically be the same with judges, give or take.

Mr M. McGowan: It is an easy one to do.

Mr C.C. PORTER: In fact I am looking at it at the moment.

Mr M. McGowan: We will be able to call it the McGowan amendment!

Mr C.C. PORTER: As to the opt-in, opt-out for people aged up to 75, there are a couple of reasons for that. This government and I have preferred the Law Reform Commission's view that if there is a cut-off, it should be that a person is prima facie compelled to serve on the jury. Of course it is the case that if a person is over 67, 70, 71 or 72 and has compelling health reasons, that person is caught by the ability under the existing legislation to formulate a reasonable excuse that will be considered, and not go onto the jury. We are not just making a decision for "older" people; we are making a decision for all of us, because at some stage we will all be 65, 66 and 72. At that point is the requirement that we fulfil our civic duty—I think it should be.

Many people over 65 that I have spoken to find it very strange that there is a different rule for them with respect to jury service than for someone slightly younger. This is a matter in which a variety of individuals might form a variety of views, but the view that the government has formed in this instance, based on the Law Reform Commission's determination or response, is that if we are to have a cut-off age at which people are prima facie required to sit on a jury, it is made the same across the board. That means that everyone over 18 and up to 75 years of age, nice and clear, prima facie, has to sit on a jury unless a reasonable excuse is made under this system. We will not have different rules for people between 18 and 65 and 65 to 75. It is much better to have one rule for all people; that is, the civic responsibility is to sit on a jury, keeping in mind that elderly people, just as young people, benefit from the jury system.

Mr J.R. QUIGLEY: I would like to address the comments the Attorney General just made. We are not talking about consistency here. We are not talking about a juror's cut-off age being consistent with a judge's retirement age. Although a judge retires from his permanent tenure as a judge, there is nothing to stop the Attorney General reappointing, on a commission, a judge who is over the retirement age. I think that some of the judges who have been appointed on the Bell appeal are in that category. From memory, Mr Justice Lee is involved in that case. That calculation is based on my exit from law school and his! But we are saying in terms of civic duty to which a person is conscripted and compelled, someone who has put in 40 or 50 years to this community and now just wants to go, should be allowed to do so. Bear in mind that other people will fall through this net and will not have to worry about their civic duty. These people have put in 50 years' civic duty. But if a person elects to be a

silent voter, they will not have to perform their civic duty. They will just be on the silent list and will never have to worry about being a juror, ever; or—here is another catch—if they put on their enrolment form "no fixed address", as itinerant workers do, they will not fit in within a jury district because their residence is no fixed address. There are 15 jury districts in Western Australia. They will never have to worry about being conscripted into civic jury service, ever. There is another category, too, which I will come to. If we are to allow a great swath of people to be excused from jury service—I cannot see any basis upon which they should be—those people who were removed from the roll will not perform jury duty. When the electoral commission cleanses the roll, as we all know it does, because someone has changed address, and the electoral commission writes to that address and the mail does not come back—or, if people, as you Liberal people do, come to my electorate to doorknock and find the person on the roll is not at the address and ring in and have that person knocked out anyway—there is another raft of people who do not do jury duty and who will not do jury duty under the current system; that is, people who have been taken off the roll because the electoral commission has worked out they no longer reside at that address.

As I have said, if itinerant workers put on their form "no fixed address", they are not conscripted to do jury duty. If people fill out a declaration saying that they want to be a silent voter, because they have some fear of being on the public roll—for whatever reason, and that can be as flimsy as anything—they do not need to do jury duty. However, people who are aged over 65, and who have done over 50 years of civil service to the community, will not get a break at 65 but may still be called back from their caravanning holiday or from their retirement in Kakadu, if they are on the electoral roll in Western Australia, and be made to do jury service. I am not talking about a six-month deferment for these people. These people have downed tools and given up work. They have done their service. It seems unjust that people over the age of 65 who are still on the electoral roll can be conscripted, after a lifetime of work, when other people who have filled out a declaration saying that they want to be a silent voter will never in their lives have to do jury duty. That is why we have moved this amendment, and we will stand by it.

Mr C.C. PORTER: If I might respond in this way, we are all in this boat called civil society together. Whether a person is aged 18 years and one day, or 74 years and 13 days, we are all in this boat called civil society together. We all reap certain benefits from a well-functioning civil society, an integral part of which, as I have explained, is a functioning jury system in which people can feel confident. What we are saying as a government is: does a person's requirement to participate in civil society stop at the age of 65? No, it does not. Given our ageing population, I believe that the somewhat firm future of that approach is very, very important. In some ways it is similar to saying that it is an important value that we compel people to turn up to the ballot box in Australia. We do not say that it is optional for people over the age of 65 to do that.

Mr J.R. Quigley: But if people are on holiday, they can pre-vote or do a postal vote.

Mr C.C. PORTER: Indeed, and if the member for Mindarie was aged 65 or 67 and was a grey nomad and was away with his wife on holiday, that is a fact that the deferral system can take into account; or, indeed, he may even find himself able to warrant an excusal, even though prima facie he is required to attend for jury duty under the present system. The member for Mindarie has said that this is unfair when we consider the situation of people who go silent on the electoral roll. That is an interesting comment. I have given some thought to that as we have been speaking. That issue was not raised in any detail in the Law Reform Commission report. I think the reason that people who opt to go silent on the electoral roll do not appear on jurors' lists is likely to be this. People apply to go silent on the electoral roll if they have some fear that the public nature of being on the roll—I think people can access the roll for certain purposes—will present them with some risk, perhaps a stalking ex-boyfriend, or whatever it might be. I imagine that a case could be put that that risk could transfer if the names of those people were put on a list of jurors. As the member quite properly points out, the list of jurors is not as readily accessible as is the electoral roll. However, it occurs to me that there is one important way in which the list of jurors would be accessible, and which would cause concern to a person who had enough fear to ask to be silent on the electoral roll. When a defence counsel is able to challenge a particular juror, of course he does so at the request of his client, and he exercises his client's challenge. My understanding of that situation is that the client—the defendant—is prima facie able to view the jurors' list.

Mr J.R. Quigley: The defence counsel should, as a matter of professional propriety, show the defendant that list.

Mr C.C. PORTER: Indeed, and some defence counsel physically do that, but others, by oversight or practice, do not do that. But the point is that if a person took the trouble to go silent on the electoral roll, but the person was able to appear on a jurors' list, that person's name could be seen by a person who was accused of an indictable offence. The member for Mindarie has pointed out that people may go silent on the electoral roll for a "flimsy" reason. Nevertheless, that to me seems to be the explanation for why this area has not been considered by the Law Reform Commission. Whether the member thinks that is a strong or a weak explanation, I must say I

have not had enough time to think through the strength of that explanation and why we would not compel people who are silent on the electoral roll to be on a jurors' list. That is not part of this legislation. But there is a reason for it. As I say, I do not believe there is any inequity in comparing the situation of those people with that of people in the 65 to 75-year-old age bracket. We are saying this is very important. We are all in it together. The rules will be the same for a 74-year-old as they will be for a 19-year-old.

Dr A.D. BUTI: I want to make a couple of comments about the Attorney General's response to the member for Mindarie. The Attorney General talked about consistency. I think the Attorney General is being a bit flippant here. I do not think the Attorney General realises the onerous task that jury duty will be for persons aged in their 70s, who, due to a hard life in their workplace, may be battling to serve out their term as a juror. As the Attorney General has said, some trials go on for months. There is no consistency. I am sure the Attorney General knows that people who are over the age of 65 are not entitled to full coverage under the workers' compensation legislation. I therefore presume that if the Attorney General wants to be consistent with regard to jury selection, he will also seek to bring into this house legislation that will ensure that people over the age of 65 are entitled to the full workers' compensation cover that people under the age of 65 are entitled to.

I also have concerns that when we bring in this civil conscription, as the member for Mindarie has correctly described it, for people aged between 65 and 75, there will be an increasing possibility that the people who are selected for jury duty will be hostile to serving on a jury. The Attorney General is also proposing to reduce the number of peremptory challenges to three. If the people who are selected for jury duty are hostile to their duties, that may affect the way in which they see the case before them, and that may, in turn, affect the decision that they make with regard to the innocence or guilt of the accused. As the Attorney General has said, the main motivation of this legislation is to ensure that the accused is given a fair trial.

Therefore, to reiterate, consistency does not follow, because people over the age of 65 are not treated consistently in many areas of society, and in many pieces of legislation, both in this state and nationally. Secondly, because the Attorney General is proposing to also reduce the number of peremptory challenges, it may mean that people aged between 65 and 75 who may not have the energy or the capability to sit through a lengthy trial are selected for a jury, and that may affect the way in which they see the case.

Mr M. McGOWAN: There is merit on both sides of the argument, obviously, and the speakers on both sides of the argument have put a reasonable case. The Attorney General indicated that we are all in this boat called civil society together; therefore, we should not have any exclusions based upon the grounds put by the member for Mindarie. We already have exclusions from jury duty for a range of reasons. The member for Mindarie is suggesting that there be another exclusion. As I argued earlier, subject to some criticism from members of the government, perhaps when it comes to age we should have consistency between members of the judiciary and people who serve on a jury. That argument was condemned by some members of the government, so I can only assume from that that the government says there needs to be some inconsistency in relation to these matters, depending upon a range of factors. As we know, we are excluding a range of people from jury duty and the member for Mindarie is suggesting there be another category of people who, I suppose, are in a grey zone between excluded and —

Dr A.D. Buti: Discretionary.

Mr M. McGOWAN: — discretionary at their election, depending upon their life's circumstances. I look across the chamber at the member for Hillarys —

Mr R.F. Johnson: Don't you start picking on me at this time of night.

Mr M. McGOWAN: A year has begun again and I look across the chamber at the member for Hillarys regularly. He is in the category of someone who upon his leaving Parliament will be eligible for jury duty. If I were a defence lawyer, I would exercise my right to challenge.

Mr R.F. Johnson: Why would you do that?

Mr M. McGOWAN: I can assure the member for Hillarys, in the case of himself —

Several members interjected.

Mr R.F. Johnson: Yes, every single week Tom Percy mentions my name. He must have some fixation for me.

Mr M. McGOWAN: The member for Hillarys would be walking into the court with some sort of a stamp of guilty written on him. It would be ready to go down on whatever piece of paper was there. It would be like Ben Cousins' tattoo across his stomach that says "Such is life". The member for Hillarys would have "Guilty till proven innocent" written across his stomach. I look at the member and I imagine, considering he will be eligible for jury duty upon his retirement from this place, that he might like to have that discretion. I am looking around

at other members approaching that age category who might like to have that discretion. Whilst the member for Hillarys will vote according to party lines, I am sure he might think it correct, that after a long history of service to the Parliament and a distinguished parliamentary career, he deserves the opportunity to exercise a discretion upon his retirement from this place based on what he would like to do with his life. I can see some merit in the argument put by the member for Mindarie. On the other hand, the Attorney General argued the important case that there needs to be consistency. However, there is some flaw to his argument about that because he is not being consistent in a range of other areas in which, as we understand and accept, people will be excluded from jury service. I take it that the Attorney General will not accept the amendment moved by the member for Mindarie, but he is representative of an area of an electorate with an aging population, as are most of us. Indeed I am. I suspect, based on the arguments put, that most of the aging population of this state would prefer to have the option.

Mr C.C. PORTER: There are two issues—that of consistency and that of convenience to people aged over 65 years. The point I am trying to make is that there is a value in consistency. I am not asserting that what we are doing here is perfectly consistent in its legal treatment of people over 65 with a whole lot of other statutes that legally deal with people over 65. Of course it is not. I did not know that about workers' compensation, but I accept that is the case. The nearest analogous situation of which I can think is the compulsion on people to turn up at the ballot box. We say that is a good thing for society. That is what numerous Parliaments across Australia have agreed is part of a civil society—a civic duty to attend at the ballot box. In that area, we do not say that people aged over 65 years have an option to vote. Even if that is the best case scenario in terms of an analogy, of course, what we are doing here is not perfectly consistent with that because there is not a cut off from voting at age 75. People aged 95 have to vote. If we are alive we, prima facie, have to turn up at the ballot box.

Mr J.R. Quigley: I hear in your party that's so even if you are dead!

Mr C.C. PORTER: I think both parties have had allegations about that. In any event, the provision is not perfectly consistent, but in this area of civic duty it moves to a position of consistency. What I think is really the crux of the member for Mindarie's argument is that we are being unfair in terms of the inconvenience levied upon people who might be between 65 and 75 years of age by not accepting his amendment. But the fact is that we are trying to decrease all the categories—this is a very important category—that make turning up optional. We have quite extensively tried to decrease the number of instances that make it optional to turn up. Nevertheless, in proposed section 34H, a judge or summoning officer cannot excuse a person under this proposed section except on an application made by the person under section 34F. If there is something to do with the nature of the person's business or occupation such as a special or pressing commitment; the person has; mental impairment affecting the person; a physical disability that the person has; something to do with the person's state of physical health; or some other circumstances personal to the person; attendance in accordance with the summons would cause undue hardship or serious inconvenience to the person, the person's family or the general public, the judge or the summoning officer can either defer the duty or, given the nature of the explanation, excuse the person entirely. There might be many instances in which a person over 65 and under 75 finds that he meets that criteria and applies it and is either deferred or excused entirely. It will not be a massive impost on the senior citizens of Western Australia, but it does say that in an aging population, their contribution to the good functioning of our civil society is as important as anyone's. I think it is a fundamental part of this legislation so neither I nor the government are minded to accept the amendment.

Amendment put and a division taken with the following result —

Ayes (23)

Dr A.D. Buti	Mr F.M. Logan	Ms M.M. Quirk	Mr A.J. Waddell
Mr R.H. Cook	Mr M. McGowan	Mr E.S. Ripper	Mr P.B. Watson
Ms J.M. Freeman	Mrs C.A. Martin	Mrs M.H. Roberts	Mr M.P. Whitely
Mr J.N. Hyde	Mr M.P. Murray	Mr T.G. Stephens	Mr B.S. Wyatt
Mr W.J. Johnston	Mr P. Papalia	Mr C.J. Tallentire	Mr D.A. Templeman *(Teller)*
Mr J.C. Kobelke	Mr J.R. Quigley	Mr P.C. Tinley	

Noes (29)

Mr P. Abetz	Mr M.J. Cowper	Mr R.F. Johnson	Mr A.J. Simpson
Mr C.J. Barnett	Mr J.H.D. Day	Mr A. Krsticevic	Mr M.W. Sutherland
Mr I.C. Blayney	Mr J.M. Francis	Mr W.R. Marmion	Mr T.K. Waldron
Mr I.M. Britza	Mr B.J. Grylls	Mr P.T. Miles	Dr J.M. Woollard
Mr T.R. Buswell	Dr K.D. Hames	Ms A.R. Mitchell	Mr J.E. McGrath *(Teller)*
Mr G.M. Castrilli	Mrs L.M. Harvey	Dr M.D. Nahan	
Mr V.A. Catania	Mr A.P. Jacob	Mr C.C. Porter	
Dr E. Constable	Dr G.G. Jacobs	Mr D.T. Redman	

Pair

Mr A.P. O'Gorman	Mr J.J.M. Bowler

Amendment thus negatived.

Mr J.R. QUIGLEY: I go to clause 10(2)(g). We stand in opposition to this clause. We do not have an amendment to move. Section 5 of the Juries Act makes provision for the exclusion of people who have been convicted of serious offences. Bearing in mind that section 5(a) will no longer exist on proclamation of this bill, section 5(b) precludes anyone who is under sentence of death, albeit irrelevant now; strict life imprisonment; imprisonment for life; or imprisonment for a term exceeding two years or for an indeterminate period unless he or she has received a free pardon. These still stand, do they not, Attorney General?

Mr C.C. Porter: At present they do. They are added to by what is being proposed.

Mr J.R. QUIGLEY: I know. The point that I am seeking to make is that the section 5 prohibitions will continue to stand but clause 10(2)(g) will add to those prohibitions. Section 5(b)(ii)(I) of the act refers to being the subject of a sentence of imprisonment within the last five years in Western Australia or elsewhere. It does not matter whether a person has suffered a term of imprisonment of two years or more 10 years or 20 years ago—they will not be eligible to be a juror. If, in the last five years a person has been subject to any term of imprisonment or been on parole, has been found guilty of an offence and been held in a juvenile detention area or has been the subject of a probation order or a community service order as defined in the sentencing act, they will be ineligible for a period of five years.

The Law Reform Commission report refers to a five-year break after a lesser offence as a period sufficient to satisfy the requirement that the person can deliver a true verdict according to his oath; that is, to harken to the evidence and give a true verdict according to law.

However, proposed section 5(3)(b)(iii) adds that a person must, in the relevant period—that is, five years—have been convicted of two or more offences for which the statutory penalty is or includes imprisonment. We are not talking about people who have been sentenced to prison, because anyone who has been sentenced for a minor offence will not, under section 5(b)(ii), be eligible for a five-year period. Proposed section 5(3)(b)(iii) provides that anyone who has committed two offences for which the statutory penalty includes imprisonment is not eligible for jury duty. This includes the offence of obstructing a police officer in the course of his duty; for example, an Indigenous person in Fitzroy Crossing who obstructs the police trying to move him and his mates off licensed premises—a relatively minor matter.

It does not say that they have to be offences defined in the Criminal Code. There is a range of offences in Western Australia for which a six-month term of imprisonment applies; for example, offences in the Road Traffic Act.

Ms J.M. FREEMAN: I would like to hear more of what the member for Mindarie has to say.

Mr J.R. QUIGLEY: Dangerous driving defined in the traffic act does not normally attract a term of imprisonment for a first offence. It would have to be rank dangerous driving to attract a term of imprisonment for a first offender. This includes a statutory penalty of up to nine months for the first offence of a person with an unblemished record who is considered to have been driving dangerously. A person could have one count of obstruction, one of dangerous driving and suddenly not be fit to sit on a jury for five years. Similarly, proposed section 5(3)(b)(iv) states —

> has, in the relevant period in Western Australia, been convicted of 3 or more offences …

And the person is not eligible to sit on a jury. These could be three offences of a very minor nature. The sorts of offences that the member for Vasse, the honourable Minister for Transport could —

Mr C.C. Porter: That is not true.

Mr J.R. QUIGLEY: No.

Mr C.C. Porter: You have to be convicted of the offence. It cannot be by infringement.

Mr J.R. QUIGLEY: That is right. I said that in my contribution to the second reading. I am not making a cheap point here.

Mr C.C. Porter: No?

Mr J.R. QUIGLEY: No; I am not. It was not a cheap point. I think he copped $150 a trick! It was not cheap by any means! However, the point is those offences can be dealt with by way of summons, as the Attorney General well knows. They can be dealt with by summons and indeed for a lot of offences summonses go to people who otherwise could have had an infringement notice when the detection is by camera or suchlike and a period has elapsed, or there has been an inquiry. Therefore, a person who attracts three relatively minor traffic offences dealt with by summons—a police officer does not have to issue an infringement notice; he can elect to summons a person for careless driving—is disqualified from jury duty. This has the capacity to racially cleanse the juries outside Perth because it would affect many of the Indigenous population. The statistics show that Indigenous people make up 1.5 per cent of the Western Australian population, yet they make up 39 per cent of our prison population. Many Indigenous people —

Dr K.D. Hames: They make up about 3.5 per cent.

Mr J.R. QUIGLEY: I am sorry; I thought the Law Reform Commission report stated 1.5 per cent, but I am wrong.

Dr K.D. Hames interjected.

Mr J.R. QUIGLEY: The Law Reform Commission might contain a typo, minister. My point is that for relatively minor traffic offences, if proceeded by way of a summons, a person is precluded from jury service. In the north, many Indigenous people present all the time and we are talking about excluding even more of their peoples from sitting on a jury. These are their peers. In the words of the Law Reform Commission, if it is a serious traffic offence, the person could be biased against the state and be less likely to convict. What constitutes a serious offender? I believe that the Law Reform Commission came up with the right solution. A serious traffic offender is a person who gets a 12-month suspension. By the time an offender gets a 12-month suspension, he has done something pretty serious.

Mr C.C. Porter: Like section 49 of the Road Traffic Act—driving while unlicensed?

Mr J.R. QUIGLEY: The penalty for that is 12 months.

Mr C.C. Porter: Would you say that is serious?

Mr J.R. QUIGLEY: It is thumbing your nose at the law, which is serious. I am using being suspended for 12 months as a yardstick because I think it is fair yardstick, but it does not make sense to render a person unfit to sit on a jury for committing three or more of any traffic offences if they are proceeded with by way of summons.

Mr C.C. PORTER: I understand the point that the member for Mindarie is making. There are a couple of layers to this. The first is that the member has read out what presently exists in the Juries Act by way of exclusion for people who have contravened the law of this state. The Law Reform Commission said that the provisions in the present act are insufficient, and the government agrees. Based on the analysis done by the Department of the Attorney General, the rules exclude only five per cent of an eligible population of 210 000 people per annum extracted from the electoral roll. There appears to be agreement, at least between the government and the Law Reform Commission, that that number is too low. The fact is that many matters in the courts are dealt with by a range of dispositions other than imprisonment. Therefore, people who have committed quite serious criminal offences can appear on juries. The question then becomes whether we should extend the nature of the exclusion. There is agreement between the government and the Law Reform Commission on that. I am unclear whether the member for Mindarie agrees that we need to move beyond what is presently in the act. In any event, the secondary question is which of the Law Reform Commission's proposals and the government's proposals in this bill is more exclusionary. Which is harder on people who have contravened the law to make them ineligible for jury service? The best analysis I have from my department is that what the government has proposed in this bill excludes a smaller number of people than the Law Reform Commission's proposed rules for exclusion. On the face of the two options, that may appear somewhat counterintuitive for some of the reasons the member for Mindarie raised. I hope to convince him that the department is correct.

I will explain the government's and the Law Reform Commission's models. The first option of the government's model is that a person would be excluded from jury service if he had ever been convicted of an offence carrying the penalty of death, strict security life, life, or imprisonment for more than two years. The second option is that a person would be excluded from jury service if within five years that person had been convicted of two or more offences, the statutory penalty for which was imprisonment. That is not to say that the person was imprisoned but that the statutory penalty was imprisonment. A third level of exclusion would be if a person had been convicted of three or more offences against the Road Traffic Act. That is the government's proposal. The Law Reform Commission's proposal is to exclude from jury service anyone who has ever been convicted of an offence carrying a penalty of death, strict security life, life, or imprisonment for two or more years; anyone who in the past 10 years has been the subject of a sentence of imprisonment imposed due to a conviction of an indictable offence; anyone who in the past five years has been convicted of an offence of indictment—that does not mean that the offender necessarily had to go to prison for that offence; anyone who has been the subject of a sentence of imprisonment in the past five years; anyone who has been the subject of a sentence of detention in the past five years; anyone who in the past three years has been the subject of a community order or a sentence of detention; anyone who in the past two years has been the subject of a Young Offenders Act community order; anyone who is presently the subject of an order of some nature; and, finally, anyone who is the subject of a court-imposed driver's licence disqualification for a period of 12 months or more. The Department of the Attorney General informed me that about 100 000 people in Western Australia have their licence disqualified.

Mr J.R. Quigley: By a court order?

Mr C.C. PORTER: I am getting there. We think that 60 000 of those are by a Fines Enforcement Registry imposition and that the other 40 000 are by a court order. Unfortunately, of those 40 000 people, we cannot track how many have had their licence disqualified for a year and how many for less than a year, but our best estimates are that a very large number of that 40 000 have had their licence disqualified for a year. The department told me that if the government adopted the Law Reform Commission's recommendations, the number of people who would be excluded from jury service would be so far and above what we would anticipate as reasonable that we would find it difficult to conduct trials. The director general was somewhat concerned that that recommendation would be so large in its exclusionary effect that it would make the system unworkable.

Mr R.F. JOHNSON: I am very interested to hear the Attorney General continue his remarks.

Mr C.C. PORTER: To give the member for Mindarie an idea of how wide the net would have been cast by the Law Reform Commission, consider the number of people over the past three years who have been subject to a community order. That is a large number of people moving through the Magistrates Court in the past three years. Consider also the number of people who had their licence disqualified for months by a court order, keeping in mind that we believe 40 000 people have had their licence disqualified for some period by a court order. I raised section 49 of the Road Traffic Act because that provision was raised with me in the explanation of this situation. Section 49 of the RTA provides that if a person drives while unlicensed, the court can order a disqualification for up to 12 months for a first offence, and the courts very often do that. This is one of the offences that Indigenous people often commit and for which their licence is disqualified for 12 months. Often they breach that lawful order of the court and find themselves in further trouble. We propose that even if someone has his licence suspended for 12 months, that would not be the trigger for excluding him from jury service. Rather, a person will have to commit and be convicted of three or more offences against the Road Traffic Act in a five-year period. A person will have to have done that three times and not been proceeded against by infringement but, as the member suggested, by summons.

Mr J.R. Quigley: Often an interaction with an Indigenous person and a traffic policeman up there would be not only driving without a licence; the thing that brought him under attention could be careless driving and often supplying a false name. Often a person gets done for careless driving, supplying a false name and driving under suspension or without a valid driver's licence. They get the three in one hit.

Mr C.C. PORTER: That does happen. All I can say to the member, quite genuinely, is we went down this path because the best analysis from our department is that we would catch and exclude fewer people under this system than under the Law Reform Commission's system. I do not know why the Law Reform Commission proposed to go down that path. Maybe it took a dimmer view than the government does about the involvement on juries of people who have committed criminal offences, or maybe it was because the commission does not have the coalface experience that the Department of the Attorney General has in dealing with the throughput of the courts on these matters and of getting a sense of how it would affect people. Although the member properly raises the point that under the Road Traffic Act a person can be proceeded against by either infringement or summons, it is certainly the case that in response to alleged offences, the payment of a modified penalty under an

infringement notice does not constitute either a conviction for an offence or an admission to the commission of an offence. If it were the case that, in the member's example, an Aboriginal person who had been convicted of driving without a licence and failing to give details was proceeded against on infringement and not by summons, that would not count as a strike. From the data that the department has worked out, we are convinced that the system we are proposing will cast the net over a narrower group of people than the Law Reform Commission's proposal. If I may say so, I think that the Law Reform Commission's proposal looks good on paper, but we must consider the number of people who have been the subject of a community order in the past three years and the number of people who are on a court-imposed driver's licence disqualification. It shocked me to hear that there are 40 000 people who are on a court-imposed driver's licence disqualification. That is huge number of people. Therefore, all I can say is that the best analysis that has been presented to me is that people's ability to serve on juries will be affected less negatively by what we propose than by what the Law Reform Commission proposes. If the member for Mindarie accepts that we need to move beyond what is presently in the Juries Act, this is a better option than the Law Reform Commission option. Again, my intent in this has genuinely been to widen the pool of people sitting on juries, although I also took the view that what we had in place with this particular group of people with criminal convictions was unsatisfactory. The government has proposed an option in this legislation that does not go as far as was recommended by the Law Reform Commission.

Mr P. PAPALIA: If the Attorney General has already answered this question, I apologise; I have not been here for the entire debate. In the analysis the Attorney General just referred to, was the geographical distribution of those numbers considered to determine whether the concerns raised by the member for Mindarie about population pools being reduced or diminished in some way by either this or any other process that excludes people in the Kimberley, for instance, may have been legitimate?

Mr C.C. PORTER: We are conducting that analysis, but it will take a long time. I put it this way: in a given year 100 000 people pass through the Magistrates Court. We know that presently out there in the community, about 40 000 people have had their licences disqualified pursuant to a court order, and another 60 000 because of the Fines Enforcement Registry and the failure to pay a fine. Obviously, Indigenous people are disproportionately affected in both categories. But when we consider 100 000 people moving through the Magistrates Court, and then look at the Law Reform Commission's suggestion outlining anyone who has been the subject of a community-based order in the past five years—that is, 500 000 people through the Magistrates Court—it is a very large number of people indeed. Even if the person who took the firmest view in the world about people with criminal records not serving on juries adopted these suggestions, they would make life very hard for themselves administratively. Therefore, we looked at the fact that only five per cent are excluded from the 210 000 people summonsed at the moment, and we went through a couple of models and options. Our best calculation is that this option would increase the exclusion rate from five per cent to 19 per cent of those 210 000 people. We do not have exact data on the Law Reform Commission's options; it is hard to calculate because we cannot break down the figure of 40 000 between 12 and lesser amounts, but given that number of 40 000, even if we estimate that half get a 12-month suspension, and if we then look at the community-based orders—considering 500 000 people going through the courts in five getting a community-based order—the government thinks that percentage of exclusion of the 210 000 people will be well in advance of 19 per cent. I can only genuinely impress upon the member for Warnbro that we are seeking to exclude fewer rather than more people under this option.

Mr J.R. QUIGLEY: I thank the Attorney General for that explanation, but I wish to inform the chamber that this is not a matter of mathematical or actuarial calculation. As I said earlier today, I practised before juries between 1977 and 2000. I participated in jury trials in Albany, Kalgoorlie, Bunbury, Geraldton, Karratha, Port Hedland, Broome and Kununurra—I do not think I participated in one at Derby.

Mr P. Papalia interjected.

Mr J.R. QUIGLEY: No, that was in Karratha.

To the best of my recollection, over that time, over that geographical spread—and as the Attorney General knows, I was not just doing the odd trial a year—I had a reasonably busy practice and was going for it. This might sound unbelievable, but I cannot remember an Indigenous person being balloted onto any of those juries. I did not look around at every occasion that a prosecutor took a peremptory challenge, but I cannot remember in 23 years ever having appeared before a jury in which an Indigenous person was in the jury box. I find it incredible, given the participation rate of Indigenous people in the criminal justice system as accused persons, that I have never appeared before or addressed a jury with an Indigenous person on it. I am disturbed by that recollection. I think it was because so many of them have suffered convictions that so many of them were purged from the list before they got to the assembly area because the sheriff's officer would have taken them out of the

jury book. This is not a question of mathematical calculation and it is not a contest between the outcome of debate on proposed paragraph (g) in clause 10(2) of the legislation and the Law Reform Commission's recommendation concerning which casts the net the narrowest. The reality is that in Western Australia that proportion of people who have been convicted of a statutory offence, which includes imprisonment of any length as an option, will be heavily weighted mathematically against Indigenous people, and they will be purged from jury lists before they get to the assembly area. Similarly with traffic offences: it is not a contest between this legislation and the Law Reform Commission's proposal. Even the commission, in relation to its recommendation 41, in response to the Department of the Attorney General's reply querying whether this recommendation started from the date the sentence finishes or the date it starts, put its hand up and said the recommendation would have to be redrawn. Even the Law Reform Commission conceded the imperfections in its recommendation 41. Therefore, I do not say it is a contest between proposed paragraph (g) in clause 10(2) and recommendation 41. The purpose of excluding convicted people from the jury is surely that we do not want biased juries, and people who have been recently convicted of offences of some seriousness might be less inclined to convict. Even if they are not, the community might think, "We know he has been convicted of an offence; therefore he will be biased in favour of the defence and therefore we do not trust the jury and the jury system."

Mr P. PAPALIA: I am enthralled by the member for Mindarie's line of debate; I would love to hear some more.

Mr J.R. QUIGLEY: It is about not which proposal captures the most people and how wide the net is, but, rather, confidence in the jury system and how the jury system is perceived by the community. It is not about whether one capture is wider than the other, but about confidence in the system. People will not be confident in the jury system if they know that people who have had reasonably serious convictions in recent years are sitting on the jury. People will say that that person will bring a bias against the prosecutor. There will not be confidence in the jury system if that situation exists. That is because they will say the person who has been recently convicted will lean towards the defence.

Similarly, members of the Indigenous population, who comprise many accused people before the courts, rarely get to see an Indigenous person sitting on a jury. They will lose confidence in the system itself, just as law-abiding citizens would have the perception that people on a jury who have been recently convicted might be biased. What, for heaven's sake, does this chamber think is the perception among Indigenous people who very rarely see black people on juries? They think the system is biased against them and that this is white man's law. The filter is provided in proposed subparagraphs (iii) and (iv) in clause 10(2)(g). I will not take the chamber's time in moving the amendment. The Attorney will either think about it over the break, or he will not. If he does think about it—as he has thought about proposed amendments on previous occasions—after speaking to his advisers outside this chamber on another day, he might say that he could adjust it. I believe the words "has, in the relevant period in Western Australia, been convicted of two or more offences the statutory penalty for which is or includes a term of imprisonment of not less than two years" would filter out those minor offences of which the Indigenous people are very often convicted in Fitzroy Crossing, Halls Creek and places like that. A person, therefore, who in the previous five years has been convicted of two offences but is not otherwise barred by section 5 of the Juries Act—who has not gone to jail, who has not received a community service order but has received fines—is debarred because the offence was serious enough to have a notional upper-limit penalty of two years or more. That is fair enough; similarly for a person who has been convicted under the Road Traffic Act. It does not have to be someone with a 12-month suspension, which was one suggestion of the Law Reform Commission, but a person with a conviction for an offence under the Road Traffic Act that carries a term of imprisonment—I will not be definitive—of 12 months, two years; or some term of imprisonment signifying the opprobrium that the community holds for that particular offence because it carries with it a possible term of imprisonment. If we make it an offence that carries, for example, a term of two years' imprisonment, a lot of those minor offenders that we have been talking about, especially in the regions and especially Indigenous people, will then be able to participate in the criminal justice system without putting it at risk at all. None of these people would think that these minor offenders could not then participate in a jury. I will not take the chamber's time further. I will not move an amendment. The opposition will vote against this clause on the voices, and we do hope that the government can give some further consideration to paragraph (g) outlined in clause 10(2).

Mr C.C. PORTER: I will briefly respond, as there is some interesting information. The member said that it is not all about data, but there is some important data that is tracked in this area. The first interesting aspect to note is a summary taken of all people who served on a jury in a year. When they were asked whether they wanted to do jury duty, 62 per cent said yes, 27 per cent said no, and 11 per cent gave no response. One of the points about this legislation is to try to change that composition, because there is, if I dare say, an unhealthy lack of

enthusiasm among too many people about the prospect of doing jury duty. It is seen as inconvenient and not important enough to justify the inconvenience.

If I can be frank with the member for Mindarie, I am not sure whether that lack of enthusiasm is more or less in the Indigenous or non-Indigenous population. I suspect it is equally shared among both segments of the population. What I would like to achieve with this legislation is to create a culture of acceptance of the importance of jury duty. I accept what the member for Mindarie said: it is a very important and healthy thing to have Indigenous people on juries, for them to be seen to be on juries, for them to have experience on juries and for them to be seen by non-Indigenous people participating in the same jury. The member for Mindarie says that he cannot ever remember it happening. The best data that we have available, which appears to be very good data, is that in a year the number of Aboriginal and Torres Strait Islanders who sat on Western Australian juries was one per cent. That was only in the metropolitan area. This is metro data. We might therefore expect that percentage to be somewhat larger in the regions. I am speculating, though. One per cent of 3.8 per cent of the population, given the existence of a somewhat lack of enthusiasm among Indigenous and non-Indigenous people for jury duty, is not perfect by any means. By the same token, it is not an absolutely disastrous outcome. There are, therefore, Indigenous people serving on juries. This bill is about trying to create a culture of acceptance of the importance of jury duty and an acceptance that people should, if not be overwhelmingly enthusiastic, not do their best to avoid it.

Mr J.R. Quigley: I don't see how proposed paragraph (g) in clause 10(2) advances that particular argument.

Mr C.C. PORTER: For the purposes of this public debate, I am stating the fact that Indigenous people are serving on juries. The member for Mindarie said that it is not a competition between the Law Reform Commission's recommendations 41 to 46 and the provisions in the bill that we propose. I have to say, in effect, that it is a competition between those two, particularly in the absence of some other suggestion other than the status quo. There is, if I dare say, a conventional wisdom that the present status quo allows too many people with too serious a level of criminal convictions to sit on juries, which is undermining confidence in the jury system.

Mr J.R. Quigley: With respect, I did offer an alternative; that is, offences that carry a notional imprisonment of two years or more.

Mr C.C. PORTER: Offences that carry a notional imprisonment?

Mr J.R. Quigley: I am not saying people who were sentenced. I did say that in my earlier speech.

Mr C.C. PORTER: I would disagree with that outcome. We have presented an outcome that I think is a much more modest proposal than the proposal by the Law Reform Commission. As to the point between the proposal of the Law Reform Commission and the government, I do not believe the Law Reform Commission thought through that proposal terribly well. Another example of that—then I will finish on this point, as the member for Mindarie has—is the Law Reform Commission's suggestion of three years. I am sorry, I had previously said five years to the member. The Law Reform Commission suggested anyone who is the subject of a community-based order in the previous three years, which on our rough calculations looks like 13 500 people. Interestingly, when one looks at the sorts of offences for which people might get a community-based order, one of the common offences in cases lodged for which Indigenous people get moved through the Magistrates Court is a public order offence. Generally speaking, that is a disorderly conduct offence under section 74A of the Criminal Code. Interestingly, that is punishable by a fine of $6 000; but there are also community-based orders for that offence. People cannot be sentenced to imprisonment for that offence, but they can be sentenced to a community-based order. A lot of Indigenous people would be sentenced to a community-based order for that sort of offence. The Law Reform Commission would capture it. We would not capture it at all, because it is not even an offence for which someone would be liable for imprisonment; so, it would not even count under our regime. We have designed that regime to try to move the situation slightly further than at present in the Juries Act, but to present a slightly more modest response than that which has been suggested.

Mr P. PAPALIA: I would like to hear more from the Attorney General, if he has more to say.

Mr C.C. Porter: I have finished but the member for Warnbro might have more questions.

Mr P. PAPALIA: I have one other question, if the Attorney General can respond to it.

Mr J.R. QUIGLEY: I did not understand that last comment in relation to having regard to section 5(b)(ii)(III) of the Juries Act, which reads —

> … been the subject of a probation order, a community order … or an order having a similar effect, made by any court;

Even though those social disruptive offences, I forget how they are described —

Mr C.C. Porter: Disorderly conduct offences.

Mr J.R. QUIGLEY: Yes, that is what the Attorney General called them. They do not carry imprisonment as an option.

Mr C.C. Porter: That is right.

Mr J.R. QUIGLEY: But the Attorney General said they might carry a community service order, or a community-based order having that effect. Is that not then captured by section 5? Section 5(b)(ii)(III) of the Juries Act reads —

> been the subject of a probation order, a community order (as defined in the *Sentencing Act 1995*), or an order having a similar effect, made by any court;

Therefore, they are caught anyway if they are put on a community-based order. I was making that point about what the Attorney said. Those minor offenders would be excluded, even though imprisonment is not an option.

Mr C.C. Porter: As they are presently.

Mr J.R. QUIGLEY: Yes, and they will continue to be excluded.

Mr C.C. PORTER: That is right, except the Law Reform Commission goes on a back-capture exercise for those individuals, which increases the number who will be excluded.

Mr P. PAPALIA: I was taken by the member for Mindarie's observation about the absence of Aboriginal people on juries during his career. The Attorney General referred to a report indicating that one per cent of metropolitan jury panels comprise Aboriginal people. Could the Attorney let us know from where that information was drawn and whether he would be willing to provide that report? I am interested in that information.

Mr C.C. PORTER: It is data collected by the sheriff's office.

Mr P. Papalia: Over what period was it collected?

Mr C.C. PORTER: It was about two years of collected data. I am very pleased to table that.

[See paper 3141.]

Clause put and passed.

Clauses 11 and 12 put and passed.

Clause 13: Section 16A inserted —

Mr J.R. QUIGLEY: I rise on this question of silent enrolment, which was not really addressed by the Law Reform Commission, save to say that it supports the recommendation. I listened to the Attorney General talk about why people who are silently enrolled are exempt. As I said, they can have the flimsiest of excuses; in fact, from what I have heard, the Electoral Commission seldom challenges anyone who fills in the form in the right way and signs off. That person will be a silent voter, which frees them of their obligation to be a juror for the rest of their life, or until such time as they ask to be a voter. The reason for that is that proposed section 16A, which clause 13 proposes to insert, requires the sheriff to prepare a book each year taken from the list of names of persons in the district. Of course, if someone's name is not on the electoral roll, they do not have to do jury service. I have listened to the Attorney General's explanation, and I realise it is an explanation given on the fly, in the sense that it was never considered properly by the Law Reform Commission, which just ticked off on it. The Attorney General says this is probably because at some stage, even though it is not going to be published widely, the defence counsel and the accused person would see those names—this is getting pretty remote—and one of these silent voters would be known by the accused person.

Dr A.D. Buti: It would be very rare.

Mr J.R. QUIGLEY: It would be extremely rare. In any event, it could be that a silent voter's address on the jury list is not to be revealed to an accused person. That is not a problem and that would be the end of it. If the accused person knows the person is Billy Bloggs, he will know that whenever he sees him in the street. That is not the point. Billy Bloggs or Betty Bloggs does not want the accused to know where he or she is camping at the moment because of fear of an unwanted visit, harassment, stalking or such thing. Just think: we in this chamber are going to all this effort to broaden the list, yet jury service is almost optional for those people who fill out a

form at the Electoral Commission. Before the Attorney responds to this, there is one area that I forgot to look up and meant to look up and did not, but I am sure that one of the Attorney's advisers will be able to enlighten us.

Mr C.C. Porter: They are very good like that.

Mr J.R. QUIGLEY: They are excellent, which is why they are there and why we all look so good from time to time. I did not examine the commonwealth Jury Exemption Act 1965 before this debate. I am so sorry that I did not, but that is one act that this chamber should have been informed about because people are not eligible for jury service if they fall within that act. I would like to hear the Attorney on those two things. Is there a mechanism by which we can delete the address of the silent juror, thereby including these twelve and a half thousand people who elect to not participate in jury service for the reasons explained?

Dr A.D. BUTI: Can the Attorney also refer to recommendation 8 on the address?

Mr C.C. PORTER: The member for Mindarie raises a good point. This is an exercise to try to get as many people as possible prima facie required to serve on a jury. I am informed that the figure of around 12 000 is right for the number of people on the WA electoral roll who have made their entry silent. The only explanation I can see for why those people have not been considered is that they fear some risk in the publication of their details and that there is some, however remote, risk to the publication of their details, which are not on the roll but on the jurors' list. There are options that we could engage in to get rid of the addresses.

Mr J.R. Quigley: Or even if the addresses remained silent.

Mr C.C. PORTER: I undertake to give that some consideration between this house and the other house. The member has raised a good point; it fits thematically with what we are trying to achieve here with inclusion. Given that the issue is about risk and safety, no matter how remote it may appear, it warrants further consideration. If it were to be the subject of amendment in the upper house, which it may be, it would need to be properly drafted to make sure that as safe an outcome as possible could be occasioned.

Mr J.R. QUIGLEY: I will explain the opposition's situation. We will refrain from voting on the clause. In other words, we will not vote against this clause; we will remain silent on the matter on the basis that the Attorney is giving this matter some further consideration between its passage in this place and the other place.

Clause put and passed.

Clauses 14 to 33 put and passed.

Clause 34: Part VC Division 2 inserted —

Dr A.D. BUTI: Proposed section 34E(1) refers to physical disability or mental impairment. This also comes up in other clauses, but I am not allowed to jump around so I will not. I have two matters, Attorney General. Mental impairment, as I stated previously, in many respects will be by self-identification. How can the Attorney General be confident that issue will be addressed? A wide range of people have mental impairments that may present as so-called normal but would not have the competency or capacity to do the job that one would hope a juror would do. How will that issue be addressed? I am not sure why people with a physical disability should be excluded. I can understand a visual impairment having a great bearing on whether a person is competent to sit as a juror. I can see no reason to disallow a person with a hearing impairment, if the state provides the resources, to sit on a jury. The Attorney General mentioned, if I am correct, resource implications, but surely we cannot allow resource implications to exclude people with physical impairments. Is the Attorney General saying that if we are to exclude people with physical impairments, the commonwealth Disability Discrimination Act or the disability provisions under the Equal Opportunity Act 1984 will be waived? I really have a concern about that. That is followed up in some other clauses I will mention at the relevant time.

Mr C.C. PORTER: I guess there are two issues here. They play on the distinction between a person's request to be excused based on either physical or mental impairment and the need to exclude someone on the basis of a physical or mental impairment. The two sides of that coin are, first, as the member has identified: what if someone with a mental impairment slips through various nets and ends up on a jury? What safeguards are in place to ensure that does not happen? The first safeguard is the fact that there is an ability under the legislation, as there was under the previous legislation, to request, as the member put it, self-identification; that is, a person asks to be excused or excluded particularly because of mental impairment. However, as the member points out, a person with a mental impairment might not be able to do the job of a juror. They might present quite normally, and might not exclude themselves and ask to be excused. The answer to the question is that it is not impossible that such a person would find their way onto a jury. Would it be possible to somehow make the bureaucracy tighter by cross-reference to disability services or Centrelink, or whatever it may be? I do not know the answer to that question. When we run a system like this with 210 000 jurors in a pool in a given year for 536 jury trials, it

is not impossible. However, the system itself has its own peculiar informal safeguards. The first and probably most important of those is that it is more often than not the case when jurors are empanelled that 12 are empanelled and there is a reserve juror in case someone gets sick or in case someone for one reason or another cannot continue. In the overwhelming majority of trials, that occurs. I am sure it is sometimes the case that the foreman of a jury, who is under a responsibility to have some organisational capacity and is the person who communicates with the judge through the usher in court, might identify someone who presents at any stage during the trial or during deliberations as a person who has a mental impairment and has somehow ended up on that jury. In that case that person can be excused even at that point and the reserve juror brought along. But it is not a system that functions with absolute perfection. It has not been unheard of that a trial may abort and the whole thing starts again. For one reason or another a juror at the last minute may have indicated, "Actually, I do know the accused." These things happen from time to time, in which case the trial has to start again. Is there a perfect way of bureaucratising the system so that that never happens? I think the cost would probably be prohibitive. At the moment some informal mechanisms prevent that happening. I have never seen a mental impairment issue happen, but I have seen other things go wrong with juries. Unfortunately, we just start again, which is a costly exercise. It is not an overwhelming problem but it does exist from time to time. That is giving an answer to say the system is imperfect.

The other issue the member raised was a very interesting one relating to the commonwealth discrimination act and the Equal Opportunity Act. A person who had visual impairments would in a sense be prejudiced against in a trial that required determinations to be made on visual evidence. I have no doubt that that person would be excluded from a jury if they presented in court, even if they desperately wanted to go on that jury. I have no doubt that that would probably, all other things being equal, be contrary to the provisions of the Equal Opportunity Act and the commonwealth discrimination act. I do not have those acts in front of me, but they contain provisions that create exceptions. The other issue would be the court's inherent jurisdiction to control its own processes so that the judge made that determination. In that sense the court is a defamation-free zone. It is an equal opportunity–free zone in that sense to an extent because of its intersection with the judge's power to control the processes of the court, which is a conflict of laws-type issue. There is probably a good thesis in that, but I think the ultimate answer is that people are discriminated against all the time in their ability to serve on a jury because of disabilities, unfortunately.

Mr J.R. QUIGLEY: I have an amendment to move to clause 34. I will sign it off now, if I may. I will explain the amendment as I sign it. The amendment relates to lawyers. I move —

> Page 27, line 16 to page 28, line 4 — To delete the lines.

I have combined the two into one, but there are other amendments on the page. If that can be accepted as one amendment, I am happy. That is removing from the bill—I think it is clear enough—proposed section 34K(1), (2) and (3). Is that understood by the chamber and the Attorney General?

Mr C.C. Porter: Yes.

Mr J.R. QUIGLEY: A further amendment will follow, when we get to it, at page 30. I will come to that. That is to include a proposed paragraph (j) to include an Australian legal practitioner amongst the occupational exemptions.

The DEPUTY SPEAKER: Member for Mindarie, you are moving an amendment to clause 34. We understand that will delete the lines from page 27, line 16, to page 28, line 4.

Mr J.R. QUIGLEY: Thank you. I will just deal with that. The amendment is aimed at deleting that because those two are, for the first time, facilitating the inclusion in a criminal trial of any lawyer who is not practising criminal law and, in a civil trial, any lawyer not practising civil law, and that is very rare.

I have just explained that later on I will include the exemption formally in the other exemptions.

The reason that the opposition has moved this amendment is that lawyers run everything. They run the courts. They run this Parliament. I am sorry, Mr Deputy Speaker. The government runs the Parliament. Lawyers do not run the Parliament. But they are prominent in this Parliament. Lawyers are prominent in both the major parties, and even in the Greens—the member for Fremantle is a lawyer. Lawyers, by nature, tend to seek to dominate a conversation, because they are trained in an adversarial occupation. From what I have heard from jurors, within a jury room things can become argumentative and different points of view can be put very robustly. I have this great worry that lawyers will start to dominate a jury, just because of who they are. I am sure the community would like juries to be free of lawyers and that they be community lawyers.

Dr A.D. BUTI: The member for Mindarie is making some important points and I would like to hear more from him.

Mr J.R. QUIGLEY: The situation is that the police union and the police service were very realistic in their submission that police officers not sit on a jury because of the public perception that that could create. The concern was that that might affect the public's confidence in the verdict either way, but particularly if it was a verdict of conviction. It is not that police officers, above all others, cannot be trusted to do their best once they have taken the oath, and it is not that police officers cannot arrive at a proper verdict. I am sure they all would. But what the police union and the police service were addressing was the public perception. I would think that the police would themselves say that they do not want to be on a jury, because that would undermine community confidence. I think there would be room for the police, when faced with an acquittal that surprised them, to lose some confidence in the jury system, as would other people, if it became known that there had been a couple of lawyers on that jury. Despite the work of the Law Society of Western Australia, despite the work of many, many practitioners whom I have mentioned, some by name in my Christmas address in thanking them for their pro bono work, and despite the many contributions that the legal profession makes to the community through charity fun runs—the Attorney took part in one of those with his wife—and all the other things that the legal profession does to outreach to the community, the community would still hark back to what was said by Dick the butcher in Shakespeare's *Henry VI*: "The first thing we do, let's kill all the lawyers". "Let's kill the lawyers", said the bard. If we asked people in the community how we could improve this society, a lot of them would say, "Let's do away with the lawyers." That is the starting point. When Dick the butcher said when addressing the proletariat, "The first thing we do, let's kill all the lawyers", that gave voice to a sentiment of the seventeenth century that still exists today.

As the Attorney quite properly pointed out in his reply to the second reading debate, the jury is not part of the court. The jury is situated within the court. But jurors are not officers of the court. They are members of the community. A legal practitioner, however, is an officer of the court and is ultimately in control of the court in a very real sense, because he will continue to be a legal practitioner unless the Full Court of the Supreme Court of Western Australia strikes him off the bar roll, or the State Administrative Tribunal suspends his practice certificate. But, in any event, the opposition believes that the jury system is very important. We agree with the Attorney General. We are not sceptics. We agree with the Attorney General's comments in that regard. We agree with the police union and the police service that community confidence in the jury system would be undermined if police were to sit on a jury and judge people. We equally think that there would be disturbance in the community overall if lawyers were to sit on a jury, particularly in the event of acquittals, and that would undermine the confidence of the community that the verdict had been arrived at properly. That is why we are moving these amendments. If this bill is passed, Western Australia will be the only state in Australia, as I understand it, in which lawyers can sit on a jury. In the United Kingdom, lawyers can certainly sit on a jury.

Dr A.D. BUTI: I want to add some additional comments to the excellent contribution that has been made by the member for Mindarie. This is probably the guts of our major opposition to the bill. As the Attorney General would know, we are very supportive of the bill overall. But what the government is proposing here would seem to fly in the face of the traditions of the jury system. As the Attorney mentioned in his second reading speech, there is a long history to the jury system. As the Attorney also rightly pointed out, the jury is the arbiter of fact, and, of course, the judge is the arbiter of the law. It would be unrealistic to expect that a trained lawyer would sit on a jury and not allow his understanding of the law to cloud or influence the decision he might make about the facts. The separation of fact from law would be under real threat of being blurred if we were to allow lawyers to sit on a jury. As the Attorney General has also mentioned, the jury is separate from the judicial system. The Attorney General did labour the point that there is a separation of jurisdictions. If lawyers were allowed to sit on a jury, we would be in danger of removing that very important distinction between the arbiter of the law and the arbiter of fact. It is not worth having a jury system if we do not keep that distinction between the law and fact. We know how the minds of lawyers operate. It would be nearly impossible for a trained lawyer not to look at a case through a legal prism. That is the first point I want to make.

The second point I want to make is about public perception. We can have it either way, really. There may be a perception that lawyers would dominate proceedings. Let us be honest. Lawyers are probably as popular as politicians—or less popular than politicians. I am not sure whether they are more popular or less popular than used car salesmen.

Mr J.R. Quigley: Politicians are very unpopular. But people like their own member. It is the same with lawyers. Lawyers are very unpopular. But a person will like his own lawyer.

Dr A.D. BUTI: That is right. The purpose of this bill is to improve the confidence of the public in the jury system. If we allow lawyers to serve on a jury, we will create perceptions that are negative in the eyes of the

public. Let us look at the situation in the courts. The judge is a lawyer. The defence lawyer is a lawyer, obviously. The prosecutor is a lawyer. There are already enough lawyers in the court system. We do not need to add lawyers to the jury system. The origins of the jury system are impartiality, competence and judgment by peers. We are looking, generally, at the lay peers. As the Attorney General mentioned, lawyers bring their expertise to the jury system. The expertise they bring is a lawyer's expertise. It is unrealistic to expect that the lawyer's expertise will not be utilised in the jury decision or deliberations. That could be very, very significant because of the ability of lawyers to dominate lay members on the jury who are not legally trained.

Mr C.C. PORTER: I listened very intently to all the submissions on this issue in the second reading debate and just now. The government accepts both amendments in this area concerning legal practitioners and judicial and support officers, not because I accept the argument that lawyers will dominate in the way that has been suggested. In fact, I deplore the negative view of the profession that members have put in that respect; I think lawyers would be very good on juries. But I accept the argument that members opposite have suggested; that is, a perception probably exists to such an extent that it is not worth whatever gain is achieved both in the quantum of numbers that are available and the extra utility those people would bring to the jury.

Having gone through this legislative process a few times, it is fascinating that two things sometimes happen. First, things are picked up that have not been picked up in the prior very lengthy process. I include in that full law reform commissions or commissions of inquiry and the various layers that are involved after that, such as party rooms, cabinets, agencies, departments, experts, advisers, ministerial staffers and ministers. On a couple of occasions, I have been surprised at the things that have been picked up that had been missed. The second benefit of this process is that, when things require some assessment of perception—we are all different and represent different people and come from different backgrounds—we get a good cross-section of perceptions. I accept what the members say; there is the likelihood of a broad perception that a lawyer on a jury, and perhaps for the same reason an associate of a justice or judge on a jury, might dominate. I do not believe that that would be the case but I believe the perception is strong enough to lead me to not oppose the amendment. The government accepts it. I note that I think the member for Mindarie will have to remove the whole clause and insert the words he has under proposed paragraph (j),"an Australian legal practitioner as defined in the *Legal Profession Act 2008*", in the schedule.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 35 put and passed.

Clause 36: First, Second, Third and Fourth Schedules replaced —

Mr J.R. QUIGLEY: I move —

> Page 30, after line 2 — To insert —
>
> (j) an associate of any justice or judge of the Supreme or District Court;
>
> (k) any judicial support officer of the Western Australian Magistrate's Court or Children's Court.

I will repeat briefly what I said in my second reading contribution; that is, when people go before a court, there are two prominent people in the court—the judge, and the clerk of arraigns, who sits above everyone else and just beneath the judge and reads the indictment. The clerk plays a very important role in the court and is present in court the whole time for all the trials. A person could appear before one judge and have the clerk of arraigns put the indictment to him—I know this is a remote possibility—and three months later get arraigned before a separate judge, and find sitting in the jury box the clerk of arraigns who had put the accusation to him on a previous occasion. This goes once again to the question of perception and the joint desire of both the government and the Law Reform Commission to preserve the perception of total impartiality of juries. I dare say that, although the Attorney General is not saying these people could not do an excellent job, by just going to the weight of the perception, he has indicated that the government would be prepared to accept this amendment.

Amendment put and passed.

Mr J.R. QUIGLEY: We have just inserted paragraphs (j) and (k), so the next amendment on page 30, after line 2, will have to be paragraph (l).

Mr C.C. Porter: Why not make it new subclause (3) rather than a new paragraph (l)? I make that suggestion in light of the following —

> (2) A person who holds an appointment to act in an office listed in subclause (1).

That reference is to someone who does not usually act in the office of legal practitioner. If the member includes the amendment as subclause (3), that will solve the problem.

Mr J.R. QUIGLEY: Thank you very much for your assistance, Attorney. I move —

Page 30, after line 4 — To insert —

(3) An Australian legal practitioner as defined in the *Legal Profession Act 2008*.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 37 to 44 put and passed.

Title put and passed.