COURTS LEGISLATION AMENDMENT (MAGISTRATES) BILL 2021

Committee

Resumed from 17 February. The Chair of Committees (Hon Martin Aldridge) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

The CHAIR: Members, before I put the question, I bring to your attention that our clocks are malfunctioning today, so we will keep time from the chair. I alert members of that to hopefully avoid a point of order in due course.

Clause 1: Short title —

Progress was reported after the clause had been partly considered.

Hon NICK GOIRAN: Thank you, Mr Chairman. We are resuming the Courts Legislation Amendment (Magistrates) Bill 2021. Last week, we spent some time not only merely agreeing to the policy of the bill and the second reading of the bill, but also considering some of the issues that have emerged. When we were last sitting on Thursday, 17 February we were interrupted in accordance with the standing orders for the taking of members statements. The parliamentary secretary moved that we report progress and be given leave to sit again. Regrettably at that time, the parliamentary secretary was mid-response to the last question I had posed. According to the uncorrected proof *Hansard*, that question was —

> With respect to the principle that is articulated in that letter—that this will enable the President of the Children's Court of Western Australia to remove a magistrate without recourse—is it a correct understanding by the Social Policy Practice and Research Consortium that this bill will enable that?

Before we move on to the next clause, Mr Chairman, I ask the parliamentary secretary whether he has anything further to say to conclude that response?

Hon MATTHEW SWINBOURN: Thank you, chair. The member's question was: can the President of the Children's Court of Western Australia remove a magistrate without recourse? The answer is: the recourse that would be available to any magistrate were the president to take any actions would be those that would be available against any administrative decision-maker, and they would be the prerogative writs that would be available through the Supreme Court in relation to those things.

Hon NICK GOIRAN: In response to the concern of the Social Policy Practice and Research Consortium that the bill will enable the President of the Children's Court to remove a magistrate without recourse, the government is saying that the bill will enable the president to remove a magistrate, but that to the extent that there is some contention around the phrase "without recourse", the government is indicating that the recourse that would be available would be that of judicial review. Is that the course of action that was taken in the case that was the genesis of this matter?

Hon MATTHEW SWINBOURN: I do not know what the course of action was in that matter. I do not have access to that material.

Hon NICK GOIRAN: Last week, the parliamentary secretary indicated that the genesis of the bill was the dispute between Magistrate Crawford and President Quail. I would be a little surprised if there was not now material available to the parliamentary secretary and the government given the passage of time. I think it is certainly uncontroversial to say that the matter ended up in litigation in the Supreme Court. I think it is also fair to say that the government is well aware of that particular course of action. Certainly, it is also fair to say that the Attorney General is aware of some of the allegations that have been made. We spent some time last week looking at what could be done with regard to those allegations and whether the Attorney General would do anything at all. But the point about this bill is that one stakeholder has expressed concern that the removal power that will be granted to the President of the Children's Court will be given without any recourse to the magistrate who is being moved on, and that that would be a new thing that is caused by this bill. I want to clarify whether that is indeed a new thing. One way in which we can test that is to ascertain whether the matter that we have discussed previously is actually an application for judicial review. As I say, I am a little surprised to hear that no-one in government has that information available. I wonder whether the parliamentary secretary might be able to take further advice on that point.

Hon MATTHEW SWINBOURN: I have covered many aspects of this bill. We are on a clause 1 debate, chair. The clause 1 debate is about the bill that is before the house. We have been very generous up to this point in relation to the areas that we have been willing to cover, but we have been in Committee of the Whole for four hours on clause 1, and this bill has 12 clauses. I have already indicated that I will not traverse the details of the Crawford v Quail case. I think I have probably been led into it more than I wanted to be; therefore, at this stage I do not have anything more to add on clause 1.

Hon NICK GOIRAN: Mr Chairman, parliamentary secretary, which clause in the bill will enable the President of the Children's Court to remove a magistrate?

The CHAIR: The question is that clause 1 do stand as printed.

Hon NICK GOIRAN: Deputy Chairman, for sake of —

Hon SANDRA CARR: On a point of order.

The CHAIR: Hon Sandra Carr, you need to speak from the podium.

Point of Order

Hon SANDRA CARR: I would just like to draw members' attention to "Chapter V: Conduct of Members" and standing order 30(1)(d), which states that when a member "persistently and wilfully disregards the authority of the Chair". The honourable member has been informed a number of times that the correct way to refer to the chair or the President is to be without "Mr", "Mrs", "Ms" or "Miss". I struggle to believe that he simply forgot at this point in time.

The CHAIR: Hon Nick Goiran, do you want to be heard on the point of order?

Hon NICK GOIRAN: Mr Chairman, I take on board what the honourable member said. I make just two points. First of all, I am aware a request was made at the start of this Parliament by the President. I certainly have made every best endeavour to adhere to that. Secondly, I was unaware that that might apply to you, Mr Chairman. If it is indeed the case that we are to address you by some other fashion, I absolutely assure the member that it has not been anything deliberate on my part. I am very happy to accept your ruling with respect to this matter.

The CHAIR: Thank you, member. I will just offer some clarity on this, because I understand there has been some confusion in the past. The President made a statement when she assumed the chair at the beginning of this term of Parliament. Her statement was in relation to her preference as to the title that should be used when addressing her as the President. That did not apply to other presiding members. I have sought the clarification of the President before, and members have sought advice with respect to this matter; that was not a ruling with respect to how you address other chairs or presiding members, but it was in relation to how you address the President. There is no point of order.

Committee Resumed

Hon NICK GOIRAN: I reiterate the point that honestly this is not something that I feel strongly about. I absolutely respect that other members do feel strongly about this and I will try to adhere to and deal with that in a cooperative fashion without seeking to invoke any concerns by members. Please understand the heart of what I am telling members right now. If it assists, I will try remediate my remarks in this respect. I might also make the point, Mr Chairman, that for those of us who are ensconced deeply in the task of reviewing legislation—we are the house of review and the final arbiters on the state of the law—sometimes when we are deeply ensconced on some highly technical matters, the addressing of the person in the chair, who might be in a different position in the chamber because it changes from time to time, is something that we can find difficult to keep track of. I will move on from that point, Deputy Chairman. I do hope that the honourable member understands the heart of what I am trying to say.

It appears that we are coming to the conclusion of the clause 1 debate for no other reason than the government, through its representative in this chamber, has indicated that it no longer wants to participate in the clause 1 debate. A question was raised originally by Hon Dr Brad Pettitt about some stakeholders, including the Social Policy Practice and Research Consortium. As I recall, the government indicated that it might not even be familiar with a piece of correspondence. Time has now passed—that was Thursday last week and here we are on Tuesday—and it appears that no work has been done by the government about that piece of correspondence. It is poor for the government to not only treat with disdain the issue raised by the honourable member, but also then many days later come unprepared to answer any questions on that matter, to the point of not even being prepared to identify the clause that the government asserts will give the President of the Children's Court the very power to remove a magistrate that the stakeholder indicated is a point of concern because it could be done without recourse. Again, the government is not prepared to respond on the genesis of this matter. It is concerning, Mr Chairman. I will read into the record at this time a piece of correspondence from the Law Society of Western Australia dated 18 February—that is, the day after we were last sitting. It is a communiqué that I understand has gone to all members of the society, and reads —

> Dear Members
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> The Courts Legislation Amendment (Magistrates) Bill 2021 (Bill) was re-introduced to the Western Australian Parliament (Parliament) in the Legislative Council on Tuesday 15 February 2022.
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> The Bill will make important changes to the operation of the Children's Court of Western Australia. The Law Society … has been urging the Parliament not to pass the Bill in its current form because creating this form of permissible interference with judicial independence does not reflect current community standards. This provision, and related supporting provisions, potentially imperil judicial independence of decision making by depositing power in one individual (whomever occupies the role of President of the Children's Court) to in effect override the granting of a Commission to another Magistrate at any time and for any reason.
>
> The Society considers the Bill may have consequences that are not immediately appreciated.

> Here are the two open letters the Law Society has sent to members of the Legislative Council dated 9 August 2021 and 14 February 2022 urging them not to pass the Bill in its current form and the responses from the Attorney General dated 15 February 2022 and 16 February 2022.

I pause there, Mr Chairman, to indicate to members that those letters are hyperlinked in the email so that members of the Law Society can access those pieces of correspondence. The statement issued by the president of the Law Society goes on to say —

> The Law Society appreciates that the Attorney General has responded to our letter dated 14 February, and advice from the Solicitor General on whether the Bill in its current form may be the subject of a legal challenge on the ground that it interferes with the operation of Courts, contrary to Chapter III of the Commonwealth Constitution has now been tabled in Parliament.
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> Whatever the *intent* behind the Bill, the *impact* of the wording in the Bill must be considered. The Society has not (at any point) been consulted by the Government in relation to the Bill. It must be asked why parties like the Society have not been consulted on this Bill prior to its introduction in Parliament.

That ends the statement. That correspondence is from 18 February 2022. I think it is consistent with a theme that has emerged during the course of debate on this bill; the Law Society indicated that there has not been any consultation with it. I invite the parliamentary secretary to indicate whether anyone within government has reached out to the Law Society since we were last sitting on Thursday, 17 February.

Hon MATTHEW SWINBOURN: Chair, I made my position clear that I do not have anything further to add at clause 1. I will address one point that Hon Nick Goiran keeps making that the government accepts, or asserted, that there was a power to remove a magistrate. We do not say that there is any power to remove a magistrate. I do not want to keep going backwards and forwards over the very well traversed ground here; I do not have anything further to add at this point.

Hon NICK GOIRAN: We will move on to the other clauses of this bill. As far as the opposition is concerned, and I am looking forward to going back through *Hansard* to look at the remarks from earlier this afternoon, we are pretty confident that the government indicated earlier in response to a question on the Social Policy Practice and Research Consortium that this legislation does include a power to remove a magistrate but it is not without recourse and there will be an opportunity for a magistrate to go to the Supreme Court. I find it strange at the very least for the government now to suggest that the president will not have the power to remove a magistrate. That is all the more strange in circumstances in which the government is unable to identify a clause under which this matter can be ventilated. To simply say, "We've got nothing further to add", only underscores the point that the Law Society makes. It says that it has not been consulted by the government in relation to this bill, and invites us, as members, to ask the question: why are parties like the Law Society not being consulted on this bill?

Mr Chairman, members will be aware that during the lead-in to this bill concerns were also raised by the Magistrates' Society of Western Australia. The question then becomes: has it been consulted about this matter and have any further discussions occurred since last Thursday? If we are simply taking things from where we left off last Thursday to where we are now, that means we have a government that is not prepared to listen to anybody—the Law Society, the Magistrates' Society, the Greens, the Liberals, the Nationals WA or anybody else who is concerned about this matter. The government is not interested in any discussion whatsoever. It wants to supress and curtail the debate.

As I conclude my remarks on clause 1, I question whether that might be because the government has been caught out with an Attorney General unwilling to take any action about allegations of tampering of evidence and bullying—not prepared to do anything! So it is a political imperative to get this hot potato out of the chamber as quickly as possible, rather than to continue to have the farcical situation in which the state's first law officer is not prepared to do anything about major allegations by judicial officers. That is the only reasonable conclusion that I can draw at this time, Mr Chairman, and the government is not prepared to add anything further on clause 1.

Clause put and passed.

Clauses 2 to 6 put and passed.

Clause 7: Section 11 inserted —

Hon NICK GOIRAN: Parliamentary secretary, what is the usual mechanism for removing a magistrate in our state?

Hon MATTHEW SWINBOURN: The current process is dealt with under the Magistrates Court Act 2004, schedule 1, clause 15 —

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

I note that clause 7 does not deal with the removal of magistrates.

Hon NICK GOIRAN: Is it the government's view that no clause in this bill deals with the removal of magistrates?

Hon MATTHEW SWINBOURN: We are dealing with clause 7 of the bill.

Hon NICK GOIRAN: That is okay. I will tell the parliamentary secretary what will happen: I will ask that question at clauses 7, 8, 9, 10, 11 and 12. That means that the question will get asked many times in contrast to its being asked once and the government briefly standing and identifying the clause. It is absolutely no problem for me, if that is the government's preferred course of action, that is the course of action we will take. The government is very keen for us to consider clause 7 in detail. It includes the phrase "dually appointed magistrate". Is this a term that is being introduced for the first time on the statute books or is it a term that is otherwise used elsewhere?

Hon MATTHEW SWINBOURN: It is a new term, member, but all it does is describe an existing arrangement, which is described in the Children's Court Western Australia Act under the definition of "dually appointed magistrate". It says a "dually appointed magistrate means a person who holds office both as a magistrate of the Magistrates Court and as a magistrate of the Court". That arrangement, where those two things happen, already exists, and the term has been created to reflect the existing arrangement.

Hon NICK GOIRAN: Is it fair to describe this phrase "dually appointed magistrate" as an existing administrative term that will now be a statutory term?

Hon MATTHEW SWINBOURN: The member has described it as an administrative term. That is not quite the right way to describe it. For want of a better term, it is an existing practice that is now being reflected statutorily by the creation of a term for its use.

Hon NICK GOIRAN: Parliamentary secretary, clause 7, amongst other things, will insert section 11 into the Children's Court of Western Australia Act 1988. Did the concept of a dually appointed magistrate commence with that 1988 act or did it commence prior to or after that time?

Hon MATTHEW SWINBOURN: I cannot give the member a date as to when the dual appointments process commenced, but it might be of assistance to the member to point out the 2004 reforms.

Hon Nick Goiran interjected.

Hon MATTHEW SWINBOURN: That practice of dual appointments existed before the 2004 reforms. We are not entirely sure at the table when it first commenced, because, prior to the 2004 reforms, a magistrate could have been appointed to the Court of Petty Sessions, the Local Court and the Children's Court. So those dual appointments, or commissions, if you want to call them that, existed before 2004. That is as opposed to post-2004, when every commission was a dual commission.

Hon NICK GOIRAN: Since 2004, has it always been a dual appointment?

Hon Matthew Swinbourn: That is the advice.

Hon NICK GOIRAN: For the purposes of consideration of clause 7, that is fine, because we can work effectively on the basis of the practice since 2004. It may well have been the practice prior to that, but at least we have the benefit of utilising some 17 years' or 18 years' worth of practice for consideration of this clause. The purpose of asking the parliamentary secretary that is that he will see at clause 2 an indication that the President of the Children's Court will be able to communicate with the Chief Magistrate by way of a written notice informing the Chief Magistrate that the President of the Children's Court considers that it is necessary or desirable for a particular dually appointed magistrate to perform Children's Court functions on a full-time or part-time basis. Is this a codification of an existing practice?

Hon MATTHEW SWINBOURN: The member asked whether it is a codification of an existing practice. My advice is that no, at the moment there is no established method.

Hon NICK GOIRAN: There is no established method. Once this bill passes, the establishment that is prescribed in the statute will be this written notice. Is the existing practice an indication that sometimes these things have been written and sometimes these things have been verbal?

Hon MATTHEW SWINBOURN: Currently, we do not know specifically whether it was done in writing or orally. We understand that the practice could have been any combination of those things. Obviously, it is a meeting of minds through all the different conceivable forms of communication.

Hon NICK GOIRAN: Under proposed section 11(2), will the written notice from the President of the Children's Court be restricted to the identification of a magistrate who is currently performing Children's Court functions?

Hon MATTHEW SWINBOURN: No, member.

Hon NICK GOIRAN: Last week I think we identified that approximately 5.5 magistrates sit in the Children's Court in Perth and deal exclusively with Children's Court matters, if you like—Children's Court functions—and an

additional full-time magistrate exclusively performs Children's Court functions outside of Perth, primarily based in Fremantle, I understand. The parliamentary secretary indicated that proposed section 11(2) will not be restricted to the identification of a magistrate performing Children's Court functions. That would imply that the President of the Children's Court could have a list of names of magistrates currently appointed in Western Australia. I do not readily have to hand my notes from last week indicating the number of magistrates.

Hon Matthew Swinbourn: It is 57.

Hon NICK GOIRAN: Does that 57 include the 6.5 or are there 57 "general" magistrates and then, in addition, we have the 6.5?

Hon Matthew Swinbourn: It is 57 plus the 6.5.

Hon NICK GOIRAN: That is very helpful. I thank the parliamentary secretary.

Once proposed section 11(2) becomes law, the President of the Children's Court could access this list of 57 magistrates, identify one of the 57 and write to the Chief Magistrate saying that it is necessary or desirable for that particular magistrate to perform Children's Court functions on a full-time or part-time basis. This is not a codification of an existing practice but there has been some form of practice. Has the President of the Children's Court ever identified a specific magistrate and requested that that magistrate be assigned Children's Court functions and had that request rejected?

Hon MATTHEW SWINBOURN: The advice I have from the advisers at the table is that they are not aware of it happening, but we would not necessarily be made aware of it ever happening because it is a matter that occurs between two heads of jurisdiction and is not necessarily a matter that is ever referred to outside of those rarefied environments.

Hon NICK GOIRAN: The government is not aware that this has ever been an issue in the past, but, understandably, indicated that it does not know what it does not know. It is not completely impossible that either the existing President of the Children's Court or a former President of the Children's Court has requested that the Chief Magistrate assign what I referred to as a magistrate on general duties to the specialist task of performing some functions in the Children's Court. No information is available to the chamber to suggest that that type of request, if it has been made in the past, has been rejected. Nevertheless, this will set out and codify the process—the mechanism—by which this might be able to take place.

I now turn to proposed section 11(3), which is sought to be inserted by the seventh clause in the bill. It indicates that if the president were to give a notice under proposed subsection (2)—the proposed subsection that we have just considered—in relation to a dually appointed magistrate, two things could happen. It identifies scenarios in which the Chief Magistrate may either consent to that request or not consent. The lack of consent is the first of the two scenarios. It states —

> (a) the Chief Magistrate may consent, or refuse to consent, to the magistrate for the time being performing Children's Court functions on the basis specified in the notice; and
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> (b) if the Chief Magistrate consents—the Chief Magistrate must, in giving any directions to the magistrate under the *Magistrates Court Act 2004* section 25, take into account that for the time being the magistrate is required to perform Children's Court functions on the basis specified in the notice.

Can the parliamentary secretary indicate to the chamber why section 25 of the Magistrates Court Act must be taken into account when the Chief Magistrate provides this consent?

Hon MATTHEW SWINBOURN: I am going to work my way through this to get it as correct as I possibly can. We have the scenario that has been described in proposed subsection (2), in which the president has made the request to the Chief Magistrate and the Chief Magistrate has consented to that request. Let us, by way of example, say that that request was for a magistrate to sit part-time in the Armadale Magistrates Court and work exclusively during that period on Children's Court matters. If the Chief Magistrate consents to that, that magistrate will perform 0.5 FTE Children's Court functions and the other 0.5 FTE as general Magistrates Court functions. Obviously, if the Chief Magistrate issues a direction to that magistrate under section 25 of the Magistrates Court Act, he must—I have to be careful with my wording—take into account, when giving that direction, the fact that he has consented to that magistrate sitting in the Children's Court. That is so that the magistrate does not effectively work at cross-purposes with what the Chief Magistrate has consented to by issuing a direction that is, as I say, in conflict with that particular part. For example, a direction might be that the magistrate needs to sit in the Joondalup Magistrates Court five days a week, and, plainly, that will not be possible. They must continue to have regard to that to manage the workload between the two courts and what we are describing here. I hope that answers the member's question; I am obviously open for him to push me further on that.

Hon NICK GOIRAN: I thank the parliamentary secretary; that is helpful. Let us say that the Chief Magistrate consents to a request by the President of the Children's Court for a particular magistrate—he has looked at the list of 57 magistrates, selected one, and identified that person. The parliamentary secretary gave the example of a part-time magistrate, which was helpful, but let us say it is a full-time magistrate. The President of the Children's Court says, "I would like Magistrate X to come and perform these Children's Court functions on a full-time basis", and the Chief Magistrate agrees. If that magistrate is currently working in Perth—this is a general magistrate, one of the 57—and the President of the Children's Court says, "I would like X to come and do Children's Court functions for the Children's Court in Broome on a full-time basis", and the Chief Magistrate consents, would it be the case that that magistrate, who is currently based in Perth, would be required to relocate to Broome without recourse? Again, I hesitate to reintroduce that word—recourse. Can the parliamentary secretary take us through the practice that would unfold in this situation?

Hon MATTHEW SWINBOURN: We are talking about magistrates here, and if we look at section 25(1) of the Magistrates Court Act, which we spoke about before, we see that the Chief Magistrate may, by direction given from time to time to a person who is a magistrate, specify where, when and at what times they are to deal with cases or perform those functions or duties. Under subsection (3), a magistrate must comply with such a direction, so if push comes to shove, the Chief Magistrate has the power to direct a magistrate to sit in Broome, as the member described in his example. The practice of the current Chief Magistrate and other Chief Magistrates has been to consult before making that decision; but, ultimately, as I say, when push comes to shove, it is a power that the Chief Magistrate has. I suppose if I wanted to be particularly harsh, the choice a magistrate generally has in those circumstances would be between complying, because that is the direction they have been given and they are required to do so, and resigning their commission. Obviously, that does not happen often; it may have happened, but I am not aware of it having happened. But that is no different from a situation in which an employer gives a lawful direction to an employee; the choice the employee has is to either follow the direction or end their employment contract. That is by way of an analogy; magistrates are not employees, of course, but those sorts of things happen.

Just to bring this back to the Courts Legislation Amendment (Magistrates) Bill 2021—this is jumping ahead a little—proposed section 12A reflects that for the President of the Children's Court. I am sure we will get to that, but the provisions are almost identical to those in section 25 of the Magistrates Court Act.

Hon NICK GOIRAN: I thank the parliamentary secretary. That was a very helpful and comprehensive explanation. The point is that if any of the 57 magistrates in Western Australia are concerned about this proposed subsection—at least the first half of it; we will get to the second half in a moment—they really need not be, because at the moment they can be subject to a direction from the Chief Magistrate to move anywhere in Western Australia. This legislation will not change that. At the moment, Chief Magistrate Heath has the final say on whether those 57 magistrates will move location. As the parliamentary secretary said, and as I understand it, this will just codify the request process by the President of the Children's Court. It may well be the case that these types of requests have been made in the past. They may have been consented to or refused. In any event, this will not change any of that. Chief Magistrate Heath currently determines whether a person who is not currently performing Children's Court functions will be moved elsewhere, whether that includes Children's Court functions or otherwise.

I guess that takes us to what could be argued is the more controversial provision of proposed section 11, which starts at line 14 on page 5. Proposed subsection (4) starts to deal with the situation in which the President of the Children's Court —the parliamentary secretary is welcome to contest this—will be able to remove a magistrate from Children's Court functions, whereas the earlier provisions refer to the President of the Children's Court bringing in additional resources. The earlier provisions contemplate a scenario whereby the President of the Children's Court makes an assessment that the workload of the court is such that he desires or finds it necessary that additional resources be brought to bear on the Children's Court functions, but proposed section 11(4) on page 5 seems to contemplate a different scenario. It states —

> If a particular dually appointed magistrate has performed Children's Court functions on a full-time or part-time basis or has been the subject of a notice under subsection (2), the President may, by written notice, inform the Chief Magistrate —
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> (a) that the President considers that, to deal with the workload of the Court, it is not necessary or desirable for the magistrate for the time being to perform Children's Court functions at all; …

I am just going to stop there and deal with that scenario. Earlier, I believe in our clause 1 debate, we talked about general magistrates having to take on some Children's Court matters from time to time. They do not exclusively deal with Children's Court matters. They are not one of the 6.5 full-time equivalent magistrates; they are part of the 57. Would they be captured by this proposed section insofar as if they had ever taken on a Children's Court case, they would be considered to have performed Children's Court functions on a part-time basis?

Hon MATTHEW SWINBOURN: I thank the member for his forbearance. The answer to his question is yes.

Hon NICK GOIRAN: Consequently, all magistrates in Western Australia at the moment would potentially be captured by this provision. The only magistrate who would not be captured would be a magistrate who has never handled a Children's Court case.

Hon Matthew Swinbourn: By way of interjection, I think it is, yes, all magistrates in Western Australia.

Hon NICK GOIRAN: Right. Are there any magistrates at the moment in Western Australia who have never had to take on a Children's Court matter?

Hon MATTHEW SWINBOURN: Member, there are conceivably magistrates who have never dealt with Children's Court matters. By the nature of where they do their work, they just deal with a particular list. I could not give the member numbers or anything like that, but there are some who do that. There is one magistrate whose commission is only as a Children's Court magistrate. That is the 0.5 FTE person. They are not dually appointed. That was not the member's question, but I am providing that information so that he understands that the 0.5 FTE person is currently commissioned only as a Children's Court magistrate.

Hon NICK GOIRAN: Just dealing with the part-time person, they would not be captured by this provision because they are not dually appointed. If we park that particular magistrate to one side, we are talking about the 57 magistrates who I have referred to as general magistrates, plus the six full-time magistrates who currently deal exclusively with Children's Court matters, so we are looking at a group of 63 magistrates who might be captured by this provision. Certainly, the six full-time magistrates will definitely be captured by this provision, and it appears highly likely that a large proportion of the other 57 would also be captured by this provision. The parliamentary secretary mentioned, however, that it could well be the case that one or more of the 57 general magistrates have never handled a Children's Court matter. What is the process by which these general magistrates receive Children's Court matters at the moment? Do they receive those matters via an interaction with the Chief Magistrate or the President of the Children's Court?

Hon MATTHEW SWINBOURN: I will play out what is, essentially, a practical example for the member. A prosecuting authority such as the police will commence a proceeding against a juvenile by lodging a prosecution notice at the nearest court to the event. This is the current practice. That could be at Broome, Armadale or Joondalup—those sorts of areas. The presiding magistrate will then exercise the Children's Court jurisdiction. That matter will be allocated to the presiding magistrate because the presiding magistrate will deal with it there. That magistrate will be subject to the practice, directions and powers of the Children's Court president when dealing with that matter, depending on what the practice directions are, how serious the accused's crime might be and any other number of matters. The matter may be moved from a court in a regional or outer metropolitan area to the Children's Court in Perth. Alternatively, the president himself may go and sit in a regional area if the matter dictates that that is the more appropriate thing to do and assume responsibility for the case as it progressed. I hope that answers the member's question.

Hon NICK GOIRAN: At the moment, the instant the police bring some form of charge against a juvenile, it triggers the magistrate sitting in the court, wherever they are in Western Australia, being captured by proposed section 11(4) of the Children's Court of Western Australia Act 1988. Given the example the parliamentary secretary gave, I think it further confirms the likelihood that most, if not all, of the 57 magistrates will have handled at least one matter and, consequently, will be captured by this provision, but it is not necessarily pertinent whether or not it is the full 57. I think we can at least agree that a very large number of magistrates will be captured by this, with the exception of the one part-time magistrate who has not been dually appointed. Some of the magistrates perform functions under the Coroner's Court. Are they part of the 57?

Hon MATTHEW SWINBOURN: My advice is that currently only regional magistrates exercise the coroner's functions that all dually appointed magistrates are able to exercise, but there are justices, for want of a better word, who are appointed exclusively as coroners who do not fall within the 57. I am told that there are three currently. It is a bit uncertain because I think it is in motion at the moment. There are a couple of them, but they are not magistrates; they are coroners—full stop.

Hon NICK GOIRAN: Again, the point is that they are not captured in our list of 57. The Children's Court president has access to this list of 57 general magistrates, most of whom, if not all, will be captured by this provision. The president will be able to indicate, by written notice to the Chief Magistrate, that he considers it not necessary or desirable for that magistrate to perform Children's Court functions at all for the time being. A situation could arise in one of the regional courts in a country town in which the magistrate needs to deal with charges that have been brought against a juvenile by the police, but the magistrate is subject to this new written notice by the Chief Magistrate. Currently, they are not subject to it because the process is that the written notice goes from the president to the Chief Magistrate, who will then send a direction, which I will get to in a moment. How will those matters be dealt with in places where no sitting magistrate can handle Children's Court matters?

Hon MATTHEW SWINBOURN: The member is inviting me to speculate somewhat on the management of the court, which is the responsibility of the presiding officer. I can only give a general comment about what would happen in the circumstance in which a magistrate, for whatever reason, was not able to perform a Children's Court

function. The practice would be to send someone to that location who was able to do that. My advice is that if it was for a serious matter, it is likely that one of the full-time Perth Children's Court magistrates would be sent to that location to deal with the matter. Also, videoconferencing facilities are available so that the Perth Children's Courts magistrate could sit in Perth and the matter could be dealt with via video link to the location where it was happening.

Hon NICK GOIRAN: Proposed section 11(4) of the Children's Court of Western Australia Act 1988 contemplates a scenario in which the president says that he does not need or desire a particular magistrate to handle any Children's Court functions at all. It also contemplates a second scenario in which the president considers that it is not necessary nor desirable for the time being for the magistrate to perform those functions on the basis that previously applied and, rather, that it is necessary or desirable that the magistrate should instead perform Children's Court functions on a part-time basis, as specified in the notice. The provision goes on to state, by way of a supplementary explanation —

> … (which must, in the case of a magistrate who previously performed those functions on a part-time basis or was the subject of a notice under subsection (2)(b), be a reduced part-time basis).

Again, I want to concentrate on those 57 magistrates who are not exclusively dealing with Children's Court matters. If they are in a country town, from time to time they will handle Children's Court matters by virtue of the fact that the police will bring before them a matter against a juvenile. How will this proposed section function in that scenario? They will be considered to be acting in some kind of part-time capacity, yet they will now be working on a reduced part-time basis. Is there a possibility that that could happen? It seems that they will be handling such a small part-time load that it will become infinitesimal, if you like, and somebody could be even further reduced beyond that. What type of basis would exist for that, or is this proposed section not intended to apply to those persons and it is the case that the earlier provision deals with a magistrate not performing the functions at all that is intended to apply to those general magistrates?

Hon MATTHEW SWINBOURN: I am advised that it can apply in the scenario the member described. I have been given an example to explain it further. I hope I do not do a disservice to my colleague here. He gave the example of a magistrate sitting in Bunbury whereby there has been an agreement, with the Chief Magistrate's consent, that a number of Children's Court matters are coming on and there is an increase in the workload. The Chief Magistrate and the president agree that the position needs to increase from one day to two days to address that workload issue. That workload issue will then be addressed. Over time, that workload may drop off for whatever reason, and a magistrate will subsequently deal with Children's Court issues on only one day a week. Therefore, the provisions of proposed section 11(4) would come into effect when the president notified the Chief Magistrate that there was a reduction in the workload. I am advised that the practical benefit of that to the administration of courts is that, from a listing perspective, it helps the court because it is then able to know that the Children's Court requires only the one day, and, if it is a full-time magistrate, the magistrate will be available for the remaining four days to perform those other duties. It works in that regard.

Previously I referred to the President of the Children's Court as a presiding officer. That was a bad mistake on my part, so I hope Hansard picked up and corrected it for me!

Hon NICK GOIRAN: The example the parliamentary secretary gave is helpful. I note that proposed section 11(5) reiterates, almost in mirror fashion, what was referred to in an earlier provision in this proposed subsection; that is, if the Chief Magistrate is required to go down this particular path, he must then proceed to give due consideration to section 25 of the Magistrates Court Act 2004. The parliamentary secretary previously explained the relevance and significance of that, which was perfectly understandable and necessary; otherwise, the entire process would be unworkable. I thought it would go without saying and without having to mention that; nevertheless, this is just putting those matters beyond doubt. I will group the provisions as proposed subsections (2) and (3) and proposed subsections (4) and (5). I said "almost mirrors" because one curious part of this proposed section is that the earlier provisions—that is, proposed subsections (2) and (3)—seem to indicate that ultimately it is a matter for the Chief Magistrate whether he will consent to the request. However, the latter group—proposed subsections (4) and (5)—seem to indicate that there is no capacity for the Chief Magistrate to consent; he simply must comply, if you like, with the notice given to him by the president. Why would it be appropriate for the President of the Children's Court to, in effect, give a direction to the Chief Magistrate?

Hon MATTHEW SWINBOURN: Thank you, deputy chair, and welcome to your shift.

I think that the member has separated the two things quite rightly into proposed subsections (2) and (3) and proposed subsections (4) and (5). If I were to characterise proposed subsections (2) and (3), they relate to an increase in the workload of the Children's Court. In that instance, the president would make a request—I use the word "request", but the president would "give a notice" to the Chief Magistrate—and the Chief Magistrate would be entitled to either consent or refuse to consent. Essentially, that is because there is a pool of magistrates and the Chief Magistrate is responsible for those magistrates. The Chief Magistrate, obviously, would understand that none of those magistrates is surplus to the requirements of the Chief Magistrate and, typically speaking, that would involve an issue about

how to manage the workload between those two courts. Therefore, I think it is entirely appropriate that it would require consent so that the President of the Children's Court would not be in a situation in which he would just pluck resources out of the general pool of people in the Magistrates Court and be damned for any consequences. I do not mean to reflect in any way on the Children's Court president or suggest that that would happen.

The flip side happens with proposed subsections (4) and (5), which are about the Children's Court no longer requiring the level of resourcing at a particular location, or wherever, to deal with its workload. In that regard, the Children's Court president must do something with that magistrate when dealing with the excess workload. It is entirely appropriate, as a resource of the state, for that magistrate to then be returned, in terms of that extra capacity, to the general pool. The consent of the Chief Magistrate would not be needed for that to occur. We do not accept that there must be, effectively, a direction; it would just be about making sure that we do not end up with a possible dispute in which the Chief Magistrate would say, "No, I am not taking back that workload issue. You must keep that in your court." It is hard to imagine any of these courts not having enough work at times, but, as I said, it depends on the location in the state. We gave the example of Bunbury and how there might be an increase in workload in that location applying to a specific magistrate and then a drop-off of that demand. Some other area of the state, of course, may need resources, but we think that it will be appropriate in those circumstances for the president to return that resource without having to get the consent of the Chief Magistrate.

Hon NICK GOIRAN: The parliamentary secretary indicated that he does not think that the government thinks it is a direction. I still think that if the president is giving notice to the Chief Magistrate, and he must abide by the notice, then it is, in effect, a direction from the president to a magistrate of the Children's Court. Regardless of our difference of opinion on that point, proposed section 11(6) indicates —

> In determining whether to give a notice under subsection (2) or (4) in relation to a dually appointed magistrate, the President has absolute discretion and is not required to take into account the seniority or length of service of the magistrate or any other matter.

Must the president take into account the workload of the Children's Court?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: How can the parliamentary secretary come to that conclusion when the proposed section currently reads that the president has absolute discretion and is not required to take into account any other matter?

Hon MATTHEW SWINBOURN: I think the member used some wording to describe whether some action will be available to the Supreme Court to deal with it. I do not want to paraphrase the member because I do not want to do him a disservice, but I understood what he said. We have already established that workload is the key issue here. If an administrative decision-maker—that is what the head of jurisdiction is doing; they are making an administrative decision without a proper lawful basis for doing so—takes into account irrelevant considerations, as a general matter of administrative law, the judicial review functions of the Supreme Court remain in place for these kinds of things. A cause of action could be available to an aggrieved magistrate if, in the circumstances, the powers in this bill are exercised in a manner that is not a lawful manner provided for within the powers of the act. I hope that answers the question the member was asking.

Hon NICK GOIRAN: I think it does. For example, if the workload of the Children's Court increases and the President of the Children's Court invokes proposed section 11(4) to remove a full-time magistrate from working on Children's Court matters, notwithstanding the fact that the workload of the Children's Court had increased—I am not asking for the parliamentary secretary to draw a conclusion or to determine what the outcome of that matter might be; that would ultimately be a matter for the Supreme Court—that might be the type of matter in which a magistrate would say, "With all due respect to the head of jurisdiction, it is, in my view, as the magistrate being moved on, not reasonable to conclude that the president has considered the workload of the court in those particular circumstances, so I will apply to the Supreme Court to review that administrative decision."

Hon MATTHEW SWINBOURN: As the member knows, all cases turn on their own facts. I take what the member is saying in the broadest sense, like A plus B equals C: it is probably within the realms of possibility if there was not that lawful purpose for doing that. Workload management of the Children's Court is not an inconsiderable matter; it is not as simple as one plus one equals two, as there are obviously issues to take into consideration, like location, where police might be instituting prosecution notices and all those sorts of things. I do not want to give a yes or no response to the member's question—and I think he would appreciate why I would say that and that each case will turn on its circumstances.

Hon NICK GOIRAN: The parliamentary secretary mentioned earlier that the President of the Children's Court is a head of jurisdiction and that the Chief Magistrate is a head of jurisdiction. Is there another scenario currently under Western Australian law whereby a head of jurisdiction can give a notice to another head of jurisdiction and they must comply with that? I have referred to that as a direction, and I appreciate that the parliamentary secretary contests the use of the word "direction", but the point being is whether there is another scenario whereby one head

of jurisdiction can—this will not help—compel another head of jurisdiction to take a particular course of action? Can they issue a notice and the other head of jurisdiction must comply with that notice?

Hon MATTHEW SWINBOURN: The member alerted me to the differences between our positions on directions so I will frame the response this way: proposed subsection (4) contemplates a scenario we have already described whereby the Children's Court president can issue a notice to the Chief Magistrate to return resources to the Magistrates Court. If I can extend that to the honourable member's question, is such a circumstance contemplated or arranged between two other heads of jurisdiction? The answer to that is no, not that we are aware of in the way that is described in proposed subsection (4).

Hon NICK GOIRAN: The parliamentary secretary used the word "resources" but I am mindful of the fact that we are talking about human beings. I am not saying this as a criticism of the parliamentary secretary because I know that he shares my respect and admiration for the judicial officers who take on these tasks. I do not use the word "resources" because we are talking about individuals who have had very extensive tertiary education and legal experience and have decided, probably in most instances, to put a more financially profitable career pathway on hold to take up service as a magistrate and perform a role in the justice system. That is why I am not enthusiastic about the use of the words "returning resources". Regardless of how we describe it, we are talking about returning a magistrate to another head of jurisdiction. That scenario does not otherwise exist in Western Australia at the moment; it will exist once this bill passes. Is it something that exists in Australia?

Hon MATTHEW SWINBOURN: Member, I accept your characterisation that referring to judicial officers as resources may seem a bit—what is the word?—impolite. That is not what is meant in any way. I am not suggesting that the member did that, but I definitely respect the role that they perform.

Moving on, we have to understand that there is an existing arrangement for the President of the Children's Court to move a magistrate but it has not been set down. Obviously, we are very well aware of the dispute on that. There is already movement of—my term—resources between the courts in practice. We do not know how that is done in other jurisdictions within Australia. I think most courts within their jurisdictions have developed their own idiosyncrasies, for want of a better word, but we are not familiar with that. I think a question was asked last week about what other jurisdictions do, and we said that we did not have information on that. It is not something that was looked out in the development of this bill.

Hon NICK GOIRAN: I understand the benefit of codifying a system that says that one head of jurisdiction can request another head of jurisdiction provide additional resources—in this particular case, the addition of one or more magistrates—to assist the other head of jurisdiction to fulfil their duty because of their workload. I can understand the desirability of having a very clearly defined mechanism for that request. What troubles me is that we will be bringing in for the first time this idea of one head of jurisdiction directing another head of jurisdiction to take back a resource—a magistrate—that does not exist currently for any other head of jurisdiction in Western Australia, and the government has indicated that it is unaware whether it is the case in any other Australian jurisdiction. It is in that general context that the opposition remains troubled by the fact that the government has not yet indicated whether the Chief Magistrate is in agreement with this newly codified regime. When I asked about the heads of jurisdiction last week, the government was not in a position, or perhaps not in a mood—however one might describe it—to provide that information. Is the parliamentary secretary in a position now to indicate whether the Chief Magistrate agrees with this new provisions set out in clause 7? I am less concerned about proposed section 11(2) and (3) under which the Chief Magistrate will retain consent. I am more concerned about the new provision that will impose an obligation on the Chief Magistrate. I would like to think that the house of review will be concerned about imposing obligations on any person, least of all the Chief Magistrate, and that it would like to hear their view on that. Is the government in a position to indicate what the Chief Magistrate thinks about this provision?

Hon MATTHEW SWINBOURN: The position on consultation with those heads of jurisdiction remains the same as last week. I do not have that information and we will not be providing it to the chamber.

Hon NICK GOIRAN: I thank the parliamentary secretary. It does not surprise me to hear that is the government's position; it disappoints me immensely. I believe the Auditor General needs to look into this. It is just not satisfactory that the government, the executive—it does not matter whether it is a Labor government or any other flavour of government, it is simply not satisfactory for the executive to refuse to provide to the Parliament information that it has. We know as a matter of fact that the government has this information because, in its own words, it has consulted with these heads of jurisdiction. We know the information is available, but the government is choosing not to release that information to the Parliament. I would like the Auditor General to look into this matter, because in the absence of that information, legislators, that is the Parliament, and in this case, the house of review, the Legislative Council, is expected to make a decision blindfolded without the benefit of what the judiciary has to say about this matter. It is no trivial matter, because the government conceded in debate on this clause that this is a new regime, a new arrangement, whereby a head of jurisdiction would be providing this type of notice to another head of jurisdiction, who, in accordance with the language in this bill, "must comply". There is no discretion given to the Chief Magistrate,

he simply must comply with this notice provided by the president. Parliamentary secretary, in debate on an earlier provision, proposed section 11(3), in which the Chief Magistrate retains the power to consent or refuse the request, when the Chief Magistrate makes that decision to consent or otherwise, does he need to take into account the seniority or length of service of the magistrate?

Hon MATTHEW SWINBOURN: There is no express obligation on the Chief Magistrate to take those matters into consideration, nor is there anything that prevents the Chief Magistrate from taking that into consideration.

Hon NICK GOIRAN: My question is: why do we specify this at proposed section 11(6) for the President of the Children's Court but not for the Chief Magistrate?

Hon MATTHEW SWINBOURN: It is a recognition of the differences between what the president does and what the Chief Magistrate does in the circumstances. The Chief Magistrate receives from the president a request for a particular dually appointed magistrate, so the president has already identified that particular person to the Chief Magistrate. In those circumstances, the question for the Chief Magistrate is whether that particular dually appointed magistrate is transferred, for want of a better word, or the workload component is transferred to the Children's Court, whereas the president is dealing with a much different circumstance whereby the workload of the court, for any number of reasons, has changed over time, and the president no longer has the workload requirement for the current cohort of magistrates who are exercising those functions. In those circumstances, because it is a specialist court with specialist functions, it is appropriate to give the president the express discretion to decide who the appropriate person is to return back to the general Magistrates Court, and to do that without necessarily having to have regard to those attributes that are defined at proposed section 11(6). I might add it says "not required to"; it does not mean a particular President of the Children's Court will not take into consideration those things in making the decision, so we have not mandated it in those circumstances. It is not a "must not"; it is a "not required to". The difference is the functions that are being performed by the Chief Magistrate vis-a-vis the president.

Hon NICK GOIRAN: At page 6, line 20, both the scenarios in proposed subsections (2) and (4) are captured. Whilst what the parliamentary secretary has said might arguably be the case in respect of subsection (4), how does it apply to subsection (2)?

Hon MATTHEW SWINBOURN: I take the member's point about proposed subsections (2) and (4). Proposed subsection (2) allows the president, when identifying a particular magistrate—I am reading out what is in here—does not have to have as a deciding factor both seniority and length of service. Of the pool of magistrates that might be available for the president to identify, there will be more senior magistrates and those who have longer length of service, but when the president identifies that, the president is not compelled to put those two matters as matters that he must take into consideration, or take into consideration at all, in terms of who he has identified. It is conceivable that the president will identify a magistrate who is junior and has a short length of service the most appropriate for the Children's Court to have. There could be some very compelling reason for that; for example, that particular magistrate may have practised exclusively in the Children's Court jurisdiction; they may be a 20-year or 30-year practitioner and may have specialist skills in child psychology, social work and those kinds of things, which is more applicable than perhaps a magistrate who has been there for 40 years, has the most seniority and has the most length of service, but really has no affinity with and could have been from practising in a civil jurisdiction, an employment law jurisdiction or something along those lines and, really, is not suitable for those particular purposes.

Hon NICK GOIRAN: That is an excellent response from the parliamentary secretary. I agree with him wholeheartedly. That makes perfect sense in a scenario in which the President of the Children's Court is trying to identify which of the 57 magistrates he might like to request join him in performing Children's Court functions. As the parliamentary secretary indicated, this provision also applies to subsection (4). That includes a scenario in which the president is trying to divest himself of a magistrate, for workload reasons. In that scenario of the Children's Court president making that determination, this provision states says that he has —

> … absolute discretion and is not required to take into account the seniority or length of service of the magistrate or any other matter.

Would not that divesting of a resource of a magistrate also follow with respect to subsection (3), under which the Chief Magistrate then considers whether to divest himself of a resource in the general pool?

Hon MATTHEW SWINBOURN: No, because they are performing a different function. The president would have already identified the particular magistrate that they want to be invested into the court. The Chief Magistrate will not make that qualitative or subjective determination because the president would have already made it. We think the President of the Children's Court is in the best position to make that decision as opposed to the Chief Magistrate.

Hon NICK GOIRAN: I can understand what the parliamentary secretary is saying about the decision of the President of the Children's Court, saying, "In my view, person X on this list of 57 is the best qualified" for the reasons that the parliamentary secretary gave earlier. Notwithstanding, potentially, their lack of seniority or length of service, they are the most qualified person. Should the Chief Magistrate be taking those factors into account when determining

whether to release one of the magistrates from the list of 57? Yes, the president might well have identified person X. The scenario that the parliamentary secretary gave was that they were a more junior magistrate. What happens if the Chief Magistrate identifies somebody who is very senior? Maybe it is the most experienced magistrate in Western Australia, the magistrate with the longest service and the greatest seniority. Why would the Chief Magistrate not take those things into account? The parliamentary secretary might say that he might take those things into account. If that were the case, should we not just say the same thing here—that he is not required to take these things into account?

Hon MATTHEW SWINBOURN: The Chief Magistrate, in exercising his consent in this matter, may take into consideration any number of issues when providing that consent. Obviously, the nature of the consent—it is outlined in the bill—is such that the Chief Magistrate may consent or refuse to consent. The Chief Magistrate can say that he does not think someone is the appropriate person to move into the court. That could be for any number of what we always hope and expect to be legitimate reasons. We did not think it was necessary to provide a similar provision in subsection (6) to require the Chief Magistrate to do that. That is mostly because we expect that when the President of the Children's Court has identified a particular person to the Chief Magistrate, there would have to be some very compelling reasons for the Chief Magistrate to not agree to that particular person if the Chief Magistrate was of a view that the workload justification of the court was such that it needed somebody to sit in the Children's Court in those circumstances. We all expect comity from our senior judicial officers and for them to work together and satisfy those particular things. In this particular instance, we did not think it was necessary to spell out all those things. We wanted to put beyond any doubt the powers of the Children's Court president, which, as we all know, have been the subject of dispute before the Supreme Court.

Hon NICK GOIRAN: Notwithstanding the fact that subsection (6) does not expressly refer to the Chief Magistrate, is it the government's contention with respect to interpreting this clause—I take members to the wording in subsection (6)—in determining whether to give consent under subsection (3) to a dually appointed magistrate, that the Chief Magistrate has absolute discretion and is not required to take into account the seniority or length of service or any other matter?

Hon MATTHEW SWINBOURN: We will not accept the member's characterisation that if we substitute the word "president" for "Chief Magistrate", the Chief Magistrate's powers would effectively be what is set out in the subsection. The Chief Magistrate has the powers that are provided to him or her, if that ever happens—I am sure it will—as outlined in section 25 of the Magistrates Court Act. Those powers are broad. Also, section 25(3) provides that a magistrate must comply with such a direction. The Chief Magistrate, when making a decision on whether to give consent, should take relevant matters into account. He should not take into account irrelevant matters, and he has discretion as to whether consent is given.

Hon NICK GOIRAN: What confuses me a little is why the equivocation on it. Perhaps this is a better way to consider this: does the Chief Magistrate have absolute discretion as to whether to consent under proposed section 11(3)?

Hon MATTHEW SWINBOURN: Yes, the Chief Magistrate has an absolute discretion, subject to all the same administrative law decision-making constraints, judicial reviews and all those sorts of things.

Hon NICK GOIRAN: I think that was worth putting on the record because as we indicated earlier, these things could end up in a dispute, which we all hope does not happen, but if that were to be the case, the last thing we would want would be the Supreme Court saying "Well, Parliament had the opportunity to insert a provision in like terms to proposed section 11(6) with respect to the Chief Magistrate. It elected not to, so we deem it that therefore Parliament must have intended that there be a difference between the two." I think it is helpful that we are putting on the record that that is not the intention. Quite apart from my general concerns about how this whole matter has been handled, at the end of the day, the statute that will pass this chamber will provide the President of the Children's Court an absolute discretion, and it is intended that that absolute discretion will also apply to the Chief Magistrate with respect to proposed subsection (3), albeit subject to the ordinary lawful restraints and remedies that might available to any aggrieved party. I think it was worthwhile putting that on the record.

The parliamentary secretary also indicated earlier—I do not think there is any disagreement on this—that both the President of the Children's Court and the Chief Magistrate are heads of jurisdiction. That being the case, a magistrate is dually appointed, but if magistrates were to find themselves the subject of a proposed section 11(4)(a) notice—that is, the complete removal for the time being from performing Children's Court functions—it would seem that that would be a power to remove a magistrate from that particular jurisdiction, the Children's Court jurisdiction. The parliamentary secretary indicated earlier that it is not the view of the government that clause 7 provides for the removal of a magistrate. If a notice under proposed section 11(4)(a) does not remove a magistrate from the Children's Court jurisdiction, what does it do?

Hon MATTHEW SWINBOURN: The member used the word "remove". I think that term is problematic when we are talking about magistrates, judges or anything else like that, because that has a specific meaning, and I think we referred to it previously in respect of clause 15, schedule 1 of the Magistrates Court Act. For want of a better

word, that is a for-the-time-being clause, if I can use that; I do not think it is a technical term, but it in effect means that they are no longer performing the function for the time being. In fact, the term "for the time being" is actually in there. It does not affect their commission at all; they still remain commissioned as a Children's Court magistrate and a magistrate in the Magistrates Court. Over the course of their commission they may, or in fact absolutely will, exercise the jurisdiction of the Children's Court across their commission. Of course, that depends; someone might be subject to this provision and have only six months left on their commission and therefore may never exercise that jurisdiction again because of those particular circumstances, but I am talking in a general sense. If we are going to drill down into some of those, for want of a better word, ridiculous examples, then of course they would never exercise that, but that is not what we mean. We are just talking generally.

Hon NICK GOIRAN: Does the President of the Children's Court have a commission for a set period of time? As I understand it, the President of the Children's Court is always a District Court judge. I appreciate that a commission as a District Court judge does not have a finite limit, but does a commission as the President of the Children's Court have any such term of tenure?

Hon MATTHEW SWINBOURN: The appointment of the President of the Children's Court involves consultation between the Chief Justice, the Attorney General and the Solicitor-General, prior to appointment by the government. The tenure of the president is not set out in statute; however, in the case of the current President, Judge Quail, and former President Wager, the tenure has been set at two years in the instruments of appointment. I think the answer to the member's question is that the tenure of the President of the Children's Court is set out in the instrument of appointment and, of course, they are District Court judges, so once that tenure expires, if they are not retiring, they return to the District Court.

Hon NICK GOIRAN: The parliamentary secretary mentioned a two-year period for the current President of the Children's Court. Has that two-year period already expired?

Hon MATTHEW SWINBOURN: It has not yet expired.

Hon NICK GOIRAN: That is quite interesting. I am not going to go down into the —

Hon Matthew Swinbourn: That's my advice.

Hon NICK GOIRAN: Yes, and I accept it without equivocation. The reason I say that it is interesting is if we consider for a moment some of the information that was revealed in the transcript that I tabled last week, it would almost seem to suggest that the instant the president was appointed, all this commotion seems to have emerged. I will leave that to one side; I just find the timing quite interesting.

That said, this clause refers to dually appointed magistrates. I refer to industrial magistrates. I appreciate that the parliamentary secretary will have a great deal of experience in this area. Do any industrial magistrates in Western Australia also hold office as a magistrate of the Magistrates Court?

Hon MATTHEW SWINBOURN: This question is a little bit more complicated than I think the member might anticipate, because we passed the amendments to the Industrial Relations Act last year. If I recall correctly—I was not as involved in it as the member was—there were provisions that related to dually appointed commissioners being industrial magistrates as well. I am advised that that act has not yet been proclaimed, so there is no issue there. But putting that aside, the general answer is that all magistrates are also industrial magistrates. If a person is appointed or commissioned as a magistrate, I think by virtue of what was 81B of the Industrial Relations Act—it comes under that act, in any event—my understanding is that all magistrates can exercise jurisdiction in the Industrial Magistrates Court.

Hon NICK GOIRAN: I am just trying to ascertain whether any of these industrial magistrates are then part of this list of 57 magistrates that the president can select from?

Hon MATTHEW SWINBOURN: Currently, one magistrate is effectively performing the functions of the Industrial Magistrates Court. The Industrial Magistrates Court workload is not that of other courts, so it may be a long time between drinks, but effectively it is one magistrate. When I was practising, Magistrate Cicchini was often the person exercising that role. I do not know who it is now—I have not been in there for a while—but all 57 can actually exercise those Industrial Magistrates Court functions. For example, if a matter was commenced in a regional area, under the industrial magistrates' jurisdictions, it is possible that a magistrate sitting in Kalgoorlie or Broome or those sorts of areas could exercise those functions, but typically, at the moment, it is one magistrate who does that work.

Hon NICK GOIRAN: At the moment, there is typically one magistrate in Western Australia who is performing the functions, role and duties as an industrial magistrate, but whoever that is at any given time is one of the magistrates in this list of 57 magistrates.

Hon Matthew Swinbourn: By way of interjection, yes.

Hon NICK GOIRAN: The bill refers to a dually appointed magistrate, and that is defined in proposed section 11(1) as —

> … a person who holds office both as a magistrate of the Magistrates Court and as a magistrate of the Court.

That is a reference to the Children's Court. Is it the case that it also means a person who holds office as a magistrate of the Industrial Relations Court?

Hon MATTHEW SWINBOURN: We need to make the distinction between "commissioned" and "appointed". Someone is commissioned as a magistrate; they are then appointed to the courts. I do not think it is called "articles of commissioning", but the papers issued or signed by the Governor will state the Magistrates Court, the Children's Court, the Industrial Magistrates Court and the Warden's Court. I am not 100 per cent sure about the Coroner's Court. It does not say the Coroner's Court, because that is specifically dealt with under the Coroners Act.

Hon NICK GOIRAN: The parliamentary secretary says that is there is a distinction between commissioning and appointing. Who does the commissioning and who does the appointing?

Hon MATTHEW SWINBOURN: I think the Governor does the commissioning and the appointing.

Hon NICK GOIRAN: In the case of an industrial magistrate, the person who is performing that role is subject to directions from the Chief Magistrate that might be issued from time to time under section 25 of the Magistrates Court Act. Is there also a head of jurisdiction for that court that the industrial magistrate must have some form of liaison or interaction with?

Hon MATTHEW SWINBOURN: Member, we are not certain of this. I do not think there is a head of jurisdiction like there is a President of the Children's Court. There is the President of the Western Australian Industrial Relations Commission, who is a commissioner under that body, and the industrial relations commission sits as a commission in court session, but they are not the head of jurisdiction for the Industrial Magistrates Court. I think we are about to be interrupted, and we might be able to get some more specific advice, noting that we are now talking about the Industrial Magistrates Court rather than the Children's Court. We might try to get a better answer.

Committee interrupted, pursuant to standing orders.

[Continued on page 445.]