[Tuesday, 5 September 1989.]

HON PETER FOSS (East Metropolitan) [8.25 pm]: I have much pleasure in supporting this motion. I convey my congratulations to you, Mr President, on your re-election as President of this Chamber and on becoming the most senior presiding officer in Australia. I convey my congratulations also to Hon James Brown for his historic appointment to the position of Chairman of Committees in this Chamber.

I represent East Metropolitan Region which is probably inaptly named. It stretches from Bullsbrook in the north to Keysbrook in the south, past Gidgegannup in the east and to Inglewood in the west. It contains a very large amount of rural land, as well as semi-rural and urban land. Hon Derrick Tomlinson and I receive all sorts of complaints about problems with rural and urban land. As Hon Derrick Tomlinson mentioned, problems arise out of the close proximity of rural and urban land, where the two cut against one another, with all the planning problems which arise from that position.

The most common problems coming to me, probably in view of my background as a lawyer, are the legal problems. An amazing number of people in our community have what seem to be insuperable problems. They cannot afford the law. They strike bureaucratic obstructions which they have no power to overcome. During my 25 years as a consumer in the law, time and time again I have come to wonder why things cannot be done better than they are being done at present. Now that I have the opportunity I would like to suggest to this Chamber how these problems can be overcome.

Everyone realises that the laws are too complex. Even those of us who have been involved with the law find it difficult to understand. I am sure members in this Chamber often read Bills which come before them and wonder what they mean. People who are not continuously dealing with the law find it very difficult to understand. Attempts have been made from time to time to overcome this by the use of what is called simple language: To write Statutes in the kind of language used by people every day. The Interpretation Act of 1984 was intended to make life easier in this way, but it has not succeeded. Judges still interpret the law in exactly the same way as they have always done. Lawyers will still argue about the law in exactly the same way, and the Parliament will continue to write the laws in exactly the same way as it always has.

The reason for this is that certain Acts are very difficult to render into simple language. We cannot change the method of appreciation of those Acts merely by changing the Interpretation Act. For instance, we now have a provision that we can look at Hansard for an interpretation of the law. This has made life more difficult for the ordinary person in the street. It is hard enough to get hold of an ordinary Act of Parliament, but if one has to read Hansard, one will find oneself even further away from understanding the law in the manner that was intended by the Parliament.

It has been suggested that one remedy may be this: We may find areas in the law where we can adopt the procedure which used to be adopted historically. Probably the most complex laws are the fiscal laws, or the taxation laws. One of the most simple Acts was the Statute of Uses brought in by Henry VII. It was intended to prevent people from escaping their feudal dues. The device called "the Use" was being used to avoid them. He had a simple act which said, "Uses are abolished," and that was the end of uses. Mind you, Mr President, the tax lawyers went around devising a thing called "the Trust" to avoid that. However, it is possible to have Acts which can quite simply state what is intended by Parliament and for it to be left to the judges to fill in all the details. One of the problems we get into is that we try to put in so much of the detail, and provide so much for all the possibilities, that when the judges get an Act which seeks to provide for all the possibilities and we have not thought of one which should have been thought of, the Act does not apply. Far more general wording of an Act with the ability for judges to fill in the gaps would be a better way for us to solve those problems. The only way we can do that is to say, "This is one of those Acts." We should not try to apply this form of interpretation to every single Act; we should say, "Right, this Act is an Act to be understood simply. We are not trying to cover all the possibilities. Judges, in this case this is our general intention; you fill in all the rest." I believe we would then have laws which were far better attuned to the needs of our community. We will never succeed by sitting here and trying to think of all the possibilities in advance, and this has been proved time and time again in the courts.

I think we should also look to using preambles more frequently. The Constitution has a preamble, which is a number of descriptions of what the Act is about. It is not quite like a long title; it is longer than that and gives a little of the Act's history and intent. Another Act, which probably will come before this Parliament later in the session, is one which deals with the university and it also has a preamble. For those of us who may have been involved with the law for some period of time, it is

possible to understand an Act by knowing its history and the legislative intent; but, generally speaking, people in the community who wish to understand the Act may not have that background. A preamble gives them that background and also indicates to a court how better to understand that particular Act. Speaking as a lawyer, having interpreted and advised on Acts, where there is a preamble in an Act it is considerably easier to interpret the remainder of that Act. Therefore, I urge that from the point of view of reducing complexity we should adopt these two measures: Firstly, to use preambles wherever possible and, secondly, when we feel the Act is a policy Act - one where we want to state the policy of the Parliament - we should state that and say in the Interpretation Act that policy Acts should be treated by judges as if they were judge-made laws and that judges should feel free to develop them from then on.

The next problem is that of laws which have no possibility of being properly enforced. Again this has an historical background. If one reads the Statutes going back to the fourteenth century, one frequently finds them saying, "Well, this practice is abolished." About two years after that one may see another Act which says, "This practice is abolished." Two years after that one may see, "Well, we really meant that this practice is abolished and if it continues to happen we will do something serious about it." Then, about two years after that there will be another Act which says, "The practice was abolished." We do not do that; once our Acts are on the Statute books we assume they will be enforced. The fact is that frequently they are not. The law comes into disrepute when Acts are not enforced.

How can we make sure that Acts we pass are enforced? Obviously to a large extent we rely upon the Executive arm of Government, but I think that the Legislature cannot say that it is purely the responsibility of the Executive. There are ways in which one can make Acts more likely to be enforced. For example, in the United States of America there exists the Clayton Act. In order to try to enforce the laws relating to restrictive trade practices - or anti-trust law as it is called in the US - that Act provides that people affected by restrictive trade practices can sue for damages. However, not only can they sue for damages, but they can also sue for treble damages. As a result of that there is an incentive for people in society to actually enforce that law. I am not saying that this is a regular move which we should copy, but we should look to see whether there is any way in which we can make laws self-enforcing.

Another example I have come across has some application to my electorate. In the Swan Valley the consumption of underground water is in excess of replenishment rates. Consequently, the Western Australia Water Authority imposed restrictions on the drawing of water from underground. The licences granted by the Water Authority are not transferable. If one buys a property, one has to go along and make one's case to the Water Authority in order to get a licence. The problem with that is that everyone sees it as being a battle with the Government - one has to go along to the Government and battle with it to get one's licence. That causes problems; it takes time administratively and it costs money. It also has the effect of pitting the individual against the Government. Exactly the same problem occurred in North Adelaide. The problem was that three times as much water was being drawn from underground as was being replenished. The idea the South Australian Government had was to grant everybody licences and to say, "That is yours. You can sell it, but when you sell it you can sell only 80 per cent of it. We would like to know when you do sell it because we will impose conditions on it to make sure you are using it properly, but you can sell it." A number of important things arise from that. Firstly, there is respect for the law because people do not feel they are being deprived of something they see as a property right. Secondly, the law in itself drew people's attention to the fact that there was a scarce commodity. They had something they could sell, and they had something which was scarce. As a result of that commodity being scarce, its value rose. We have the situation in Western Australia where people consider that the Government is depriving them of their water. They consider that if they draw more water than they are entitled to, they are cheating the Government and not themselves. I believe that if we have a law which is thought through intelligently - and I believe this one regarding the underground water resources in the North Adelaide plains is such a one - we will have a law which is self-enforcing. In North Adelaide, if people see other people drawing more water than they are entitled to, they consider they are cheating them of their rights and obtaining something by subterfuge rather than obtaining it as everybody else obtains it, which is by paying for it. That is the sort of law I believe we should be looking to in order to see whether the law can be made to be self-enforcing.

Another way in which laws can be made self-enforcing is by looking at some of the consequences. I do not think we should always be looking to see whether we can fine or imprison people, because that depends on somebody observing the offence, prosecuting, succeeding in prosecution and having the penalties imposed and someone else going to gaol. It is quite often the case that many of the transactions we seek to prohibit would of themselves disappear if they were made illegal; the consequence being that the whole transaction falls down because no contractual rights can arise from it.

Many a time in commercial matters we can solve the problem of enforcement by clearly giving a commercial penalty by saying to people , "If you engage in this conduct, the effect of what you are doing will be that all you are trying to do will become void and put to nought." It is very serious if we do pass Acts and do not enforce them. During the course of the election I came across the case of a lady in Belmont who had problems with youths breaking into her house. She had on one occasion reported this to the police; the police apprehended the people, took them away, charged them, and in due course they were released. They then went back and threatened the old lady. She was too frightened ever to complain again. We have a problem in our community when we pass laws and consider that that is the end of the problem.

The other difficulty with our laws is that too often we inconvenience 99 per cent of the community in order to stop behaviour by one per cent and then find that the one per cent is not even stopped by the law we have passed. I liken this to the habit people have in shops of asking one to sign the back of a cheque. It seems to be on the basis that, while one may forge one's signature on the front of the cheque, if a special extra precaution is taken and one is asked to sign the back of the cheque, one will not forge one's signature there. All too often some of our laws are like that. They stop people who are law abiding and who observe the law, but the very people we are trying to prevent from doing things are not in the slightest bit affected by them.

An example of that kind of law is the ID card legislation that would have had every person in Australia carrying an ID card. It was supposed to have stopped people evading taxes and immigration laws, but the experience overseas with such ID cards demonstrates that is not so. In Italy people carry ID cards but it is renowned as a tax evasion haven. Obviously, it would have no effect on those people who are determined to break the law. There is no point in making laws which inconvenience 99 per cent of the community and do not have any effect on the one per cent that they are trying to rein in. We should always test legislation with one simple rule; that is, are we trying to salve our conscience rather than solve a problem? It is too easy to salve a conscience and not take the steps to solve a problem.

Another problem I have seen worry people is that of delegated legislation. In my practice as a lawyer I found that whereas lawyers dealt with Statutes, the person in the community was surrounded with a web of regulations. Regulations come through this House in vast quantities, and because there is such a quantity and there are so many for us to read, it is possible that many slip past. We also have a form of debate in this Parliament that is likely to pick up any undesirable characteristics in our legislation. If it is created by one side of the House, I am convinced the other side of the House would pick it up. I am afraid that most delegated legislation does not get that scrutiny. An example of that is the Rottnest Island bylaws. When they were first commented on in the Press there was some suggestion that these would be made easier in some way. I was concerned that Mr Woldendorp will no longer take pictures at Rottnest Island because of the regulations. I thought I would move to disallow the legislation by moving an amendment and that the Press outcry about what was left would eventually get rid of the whole legislation. Unfortunately, I find that the amendment is in the mind rather than on the books. I do not know whether the Press is aware of it, but it still cannot take pictures at Rottnest.

These are the kinds of minor and annoying things that are frustrating people in everyday life. We find that life is getting faster and faster and part of it is due to the number of little rules in the way of our lives. We need permission to do all sorts of things about which one would have thought legislators would not be in the slightest bit interested. I would like to see all delegated legislation have a sunset clause; such legislation should not be set on the Statute books forever. There is not the same process of review in this State with those regulations as there is with legislation in this place. A sunset clause would mean that the regulation would not go on forever. I would like us to develop a policy over a period of time to make sure that laws are less likely to interfere with the everyday lives of people of Western Australia.

The other problem I have found as a practising lawyer is that there is too little time to consider and comment on new laws. Generally speaking, one finds out about the existence of a Bill just before it hits the second House of the Parliament and that people in the community will be affected by it. By the time one takes instructions as to what are the problems and starts to put forward submissions, it will probably be past the second reading in the other House. By that time the policy will be set and it is usually an uphill battle to get the thing changed. I am not saying that is attributable to this Government, or to any other Government; it is the process. The problem we have is that no Parliamentary Draftsman, bureaucrat or Minister can think of all the possible ways people might be affected by legislation. It is possible to think of a set of facts that in one's mind one believes must be overcome and the legislation is drafted accordingly. But there is sure to be someone out there who sees things quite differently.

For example, when the law of insurance was amended at the time the Commonwealth passed the Insurance Contracts Act, I was acting as an adviser on that Act to a broker, an insurance agent and an

insurance company. Each time I read the Act I wrote a letter of advice, and in each letter that I wrote the advice given was completely different. It was not that I was being inconsistent, it was just that I had a different perspective as to how the legislation applied to each of the different people. That is true of all legislation. No one person, and no House of Parliament can possibly think of all the appropriate inputs to the legislation to have it appropriately commented on. I would hope that we could set up a system here so that the public could have an opportunity to comment adequately on legislation. Frankly, I do not think that we members get enough time to reasonably consider legislation, as it is ploughed through at an enormous rate. We do not see it until it is read a second time and the proceedings march on in their inexorable way. People feel they have too little opportunity of having an input into legislation, and when they do it is often too late and things cannot be changed. That is the attitude often confronted.

Another thing people have terrible problems with is the fact that in Western Australia we have no way of reviewing the Executive power. I must commend the Commonwealth in this respect. It has an Administrative Appeals Tribunal and the possibility of a judicial review of administrative decisions under the Administrative Decisions Judicial Review Act. It does not mean that everybody is rushing off to court all the time or to the Administrative Appeals Tribunal. It is good to have such a body as a check and balance because the people who are checked then tend no longer to do the things that need checking. The good thing with the Commonwealth Administrative Appeals Tribunal and the Administrative Decisions Judicial Review Act is that it is possible to say to a bureaucrat or a Minister that they are being unreasonable, and if they continue to be unreasonable it is possible to go to the court about it. Because it is known that it is possible to do that, people behave in a more rational way.

A large number of people who come into our electoral offices complain about the fact that they are given the runaround by bureaucrats and departments. The only remedy is very expensive and only the largest companies can afford it. It is not good enough that the people of Western Australia do not have a remedy such as the one available to people when dealing with Commonwealth departments. People who follow these things over the years will remember that the Commonwealth departments had the tendency to be the hardest to get to and tended to ride roughshod over people. But with these appeals there was a change in the attitude of the Commonwealth departments, so much so that I believe the standard of justice that people have received in dealing with Government is far higher with the Commonwealth than it is with the State. I call upon the Parliament to follow that lead which has had an excellent affect on the administration of Government, and we should introduce those two things into Western Australia.

The final matter I will speak about is the role of this Legislative Council. I support the suggestions made by Hon George Cash that we should look at the committee system. Again I cite the Commonwealth which has a system of Standing Committees to consider legislation. From a lawyer's point of view, I would like to point out some of the consequences of that. Over the years the Commonwealth legislation, like some of the States' legislation, had a tendency to impose a burden on citizens, to give rights of seizure and entry and to deprive people of their right to have matters properly deliberated upon before being decided. That has been stopped by reason of the institution of Senate committees. What happened was that Parliamentary Counsel would draft legislation containing provisions which were totally unacceptable in terms of the rights of the citizen. The Senate committees had a system whereby they would regularly delete such matters from the legislation. It reached a stage where Parliamentary Counsel realised what would happen if certain aspects were included in legislation, and so the practice ceased. If parliamentary committees of this nature are established in this House, initially they will have a large job correcting legislation, but after a period of time the habit will grow up and a new institution will be in existence. Many of the things desired by the Parliament will occur automatically because the committee will have the experience and the ability to bring these things about.

We should not consider that the Westminster system of Parliament has come to an end. We are the inheritors of something which goes back many centuries. We in this Parliament have had people who were here before us and they, people who were here before them. Much of the tradition of Parliament has been handed down by members to other members. Many things have grown up over that time and have been handed on like an apostolic procession. We should not stop introducing new measures to make Parliament work better. We have the ability to start a new tradition in this Parliament which will assist the people of Western Australia and improve our legislation. The appropriate place in which to do that is this House. The system of committees goes back a long time. In my research I found that a parliamentary committee audited the King's accounts in 1340. Obviously, the auditing committees go back some time! The upper House is the appropriate place for this form of committee and it is also the appropriate place for the power of the Executive to be brought under control. Historically, it has been the role of Parliament to rein back on the excesses of the Executive.

All too often it is thought that this is a role which should be carried out by the lower House. Members should keep in mind that, under the Constitution, this House has the power of the House of Commons. Members should also remember that in 1890, when the two Houses of this Parliament were established, things were quite different in the United Kingdom. It was not until 1721 that the concept of a Prime Minister emerged with a concept of a mind independent of the Sovereign. Prior to 1721 the Executive was the Sovereign in spite of the fact that the Sovereign could have Ministers. Therefore, the mind behind the Government was the Sovereign. From 1721 the idea of a mind, separate from the Sovereign and guiding the Executive, came about. However, from 1721 to 1895, five years after the bicameral system was established in Western Australia, 56 Governments were formed, and of those 33 had their Prime Minister in the House of Lords. Members can understand that under those circumstances it was thought appropriate that it should be the House of Commons that was the principle brake upon the power of the Executive. Generally speaking, that power was in the House of Lords.

I believe the appropriate House in this bicameral legislature to be the brake on the power of the Executive is this House. We have only three Ministers in this House and we do not have anything to do with the forming of the Government. There is good authority for this and I quote John Stuart Mill, a much quoted person on representative government, as follows -

> A majority in a single assembly when it has assumed a permanent character - when composed of the same persons habitually acting together, and always assured of victory in their own House - easily becomes despotic and overweening if released from the necessity of considering of whether its acts will be concurred in by another constituted authority.
>
> The same reason which induced the Romans to have two consuls made it desirable there should be two Chambers: that neither of them may be exposed to the corrupting influence of undivided power, even for the space of a single year.

This House has a very important part to play in the Government of Western Australia. Because members are democratically elected on a proportional basis they have the authority of the people of Western Australia; because we do not form the Government and because the Government does not dominate this House we have a duty to the people of Western Australia to provide a sensible check on the power of the Executive. I hope by doing this we will have a better Western Australian Government than may otherwise be the case. I hope this House exercises its powers fully. I hope also that it sets up the appropriate committees and amends other procedures of the House to make sure members do their job properly.

I have great pleasure in supporting the motion before the Chair.

[Applause.]