

HON NORMAN MOORE (Mining and Pastoral — Leader of the Opposition) [8.05 pm]: On behalf of the opposition, I indicate our support for this motion. It is a sensible way forward and a sensible way for the house to deal with the letters that were tabled by Mr President yesterday, resulting from the Select Committee of Privilege that reported to the house at the end of last year. We need to progress this matter. The Standing Committee on Procedure and Privileges is the appropriate committee to consider these matters, and I commend the Leader of the House for the way in which he has gone about coming up with a way forward in this matter. We support the motion.

HON GIZ WATSON (North Metropolitan) [8.06 pm]: I indicate that the Greens (WA) appreciate the opportunity to have discussed this motion and we are happy to support it.

Question put and passed.

ACTS AMENDMENT (JUSTICE) BILL 2007

Committee

The Deputy Chairman of Committees (Hon Sheila Mills) in the chair; Hon Sue Ellery (Minister for Child Protection) in charge of the bill.

Clause 1: Short title —

Hon SIMON O'BRIEN: As indicated, the opposition is keen to deal with this bill with some despatch. I will indicate now—I alluded to some of this in my contribution to the second reading debate and it is not a secret—that there will be some consideration in committee of part 15, to which Hon Giz Watson has already alluded. I indicated that part 21 of this bill will also need some examination in detail. The opposition has a few other incidental queries on some parts of the bill, of which there are many. We will deal with them one by one. The opposition supports clause 1.

Clause put and passed.

Clause 2: Commencement —

Hon SIMON O'BRIEN: Clause 2, as is normal, deals with the commencement date and it singles out, amongst other things, proposed section 39. The commencement date for proposed section 39 is described as follows —

- (i) if the *Criminal Investigation Act 2006* section 113 has not come into operation on assent day, immediately after that section comes into operation; or
- (ii) otherwise, on the day after assent day;

Will the minister advise whether section 113 of the Criminal Investigation Act 2006 has come into operation? If so, does that mean that clause 39 will have a retrospective effect; and, if so, what are the ramifications of that retrospective effect?

Hon SUE ELLERY: I am not able to provide the member with an answer to whether section 113 of the Criminal Investigation Act 2006 has actually come into operation. If something hangs on it, we could find out by getting a copy of that act. I am sorry, but I am not in a position to tell the member whether that section has been enacted. I can advise that it certainly had not been enacted as at November 2007. I would be guessing whether it had been enacted between November 2007 and February 2008, but as at November 2007 it certainly had not been enacted.

Hon SIMON O'BRIEN: I appreciate the difficulties that the minister is facing. The commencement terms of the Criminal Investigation Act 2006 are simply that the act comes into operation on a day fixed by proclamation, and that different days may be fixed for different provisions. Unless there is some indication that there is a reserved day of effect for section 113 of that act, presumably it is in effect and therefore the new provisions that the government is proposing could be impacted on. However, on reviewing clause 2, we can answer the question because it contemplates a situation whereby section 113 is not in operation. Therefore, if the section is not in operation now—we do not know for sure—it will simply be superseded by the provision before us. Conversely, the new provision will supplant it anyway on the day that this bill receives the royal assent. That seems to indicate that there would not be an element of retrospectivity. It is not as though the rules are being changed. I think we have worked that one through and, upon closer examination, there is no element of retrospectivity.

Clause put and passed.

Clauses 3 to 29 put and passed.

Clause 30: Section 3 amended —

Hon SIMON O'BRIEN: Clause 30 is in part 7 of the bill. It proposes to amend a definition in the Criminal Injuries Compensation Act 2003. Members can see that the proposed amendment seeks to replace the definition of “health professional”. The definition in the act states —

“health professional” means —

- (a) a dentist within the meaning of the *Dental Act 1939*;
- (b) a medical practitioner within the meaning of the *Medical Act 1894*; or
- (c) a psychologist as defined in the *Psychologists Act 2005* section 3;

The new definition, as seems to be the way with drafting these days, is three times the money. It reads —

“health professional” means —

- (a) a person who is registered as a dentist under the *Dental Act 1939* or a law of another place that is substantially similar to that Act;
- (b) a person who is registered as a medical practitioner under the *Medical Act 1894* or a law of another place that is substantially similar to that Act;
- (c) a person who is registered as a psychologist under the *Psychologists Act 2005* or a law of another place that is substantially similar to that Act;

I have two questions. First, prima facie this seems to indicate that a medical practitioner, dentist or psychologist, suitably qualified wherever they come from around the world, can do things in connection with the Criminal Injuries Compensation Act 2003 and be acceptable for things done under that act, such as giving opinions, as a person who is registered under Western Australian law. I just want to confirm for the record that it is the government’s intention that that is the meaning and effect.

Hon SUE ELLERY: Yes, that is the government’s intent. By way of background, the suggestion for this came from the Chief Assessor of the Criminal Injuries Compensation Tribunal. That tribunal has found itself in a situation where it often gets reports from practitioners outside Western Australia and even overseas. The view of the chief assessor is that there is no reason that an applicant who happens now to be out of Western Australia, or was out of the state when being treated, should not be able to be compensated for the cost of reports from somebody who is from somewhere else. Therefore, the honourable member is right: the clause amends the definition, not only by referring, for example, to the Dental Act of Western Australia, but also by referring to the law of another place that is substantially similar to that act. The expanded definition therefore makes provisions for reports from those practitioners in other states who are registered in accordance with their own state’s legislation, and in the case of overseas practitioners where there are equivalent qualifications.

Hon SIMON O’BRIEN: The key expression that I was looking for there for the record has been delivered; that is, “equivalent qualifications”, not the qualifications of a doctor from the Island of Bob or somewhere like that! We are therefore reassured on that point, but it is important that it be explicit so that we maintain the standards that we set in this state, which are high standards, and that they apply in the case of anyone given professional standing before an assessment body or the like. Looking at the names of the local acts that I referred to, I guess we will see another amendment to this section of the principal act in due course relating to 2006 or 2007 bills that relate to medical practitioners.

Hon Sue Ellery: Most likely.

Hon SIMON O’BRIEN: This then does something to argue against those outside this place who would argue for its abolition by making sure that we will have a steady workload into the future with future amendments.

Clause put and passed.

Clauses 31 to 52 put and passed.

Clause 53: Section 119 replaced —

Hon SIMON O’BRIEN: Clause 53 proposes the replacement of section 119 of the Evidence Act 1906. Section 119 of the principal act and its proposed replacement relate to payment for service as a witness. The explanatory memorandum states that this amendment —

... deals with the payment of fees to prosecution witnesses, interpreters or a person who accompanies a child witness at criminal trials, appeal proceedings and inquests.

Currently payments are made to witnesses on the basis that the recipients of loss of income payments are responsible for declaring payments in their annual tax returns. Consequently no tax is withheld nor Payment Summaries issued.

I will summarise the explanation in the explanatory memorandum. It states that in May 2006 the Australian Tax Office—which has its tentacles everywhere—advised the Department of the Attorney General that payments to witnesses for loss of income are deemed to be taxable income under the relevant section of the Income Tax Act. It appears that nowhere is anybody safe from the Australian Tax Office. I suspect that if this chamber were ever

looking at the cadavers act, it would probably find that cadavers are also subject to tax, proving that even unto the grave there is no concession given by the ATO!

Hon Sue Ellery: But you digress.

Hon SIMON O'BRIEN: I would never digress, unless the minister encouraged me to, and I am sure she would not do that!

The impact of this is that, in effect, the state is paying the witnesses, or others in the group I have mentioned, which would mean that the state is responsible for withholding tax payments. It opens up a Pandora's box. This is my speculation, not necessarily the government's, but if that be the case, one wonders whether such witnesses are also eligible for workers' compensation premiums or superannuation. If the witness happened to be in the Construction, Forestry, Mining and Energy Union, he would probably also be eligible for some sort of site allowance in lieu. It will become an administrative nightmare.

Proposed section 119 is necessarily quite detailed. It sets out some extensive provisions to make some alternative arrangements; that is, a witness who is an employee will actually continue to be paid by his employer as if he were continuing his normal course of employment and not coming out of his workplace. In turn, the state will reimburse the employer for the actual expenses. As far as I can see, that seems to be a satisfactory solution all round; in fact, it is a commonsense solution, which makes me worry that some bureaucrat in Canberra will attack it for some reason.

Hon Sue Ellery: Not now.

Hon SIMON O'BRIEN: The honourable minister says not now; I do not know. In view of the fact that the inmates have taken over the asylum since late last year, I hope her confidence is not misplaced!

I note that for the record, with a brief explanation, and say that the opposition agrees with it. However, it raises a question that I will now put to the government: does any liability accrue from what has happened over the past 107 years, or has the Australian Taxation Office decided that it will not pursue that? Has any liability been incurred, or is the Australian Taxation Office politely asking us to change if we want to, in order to avoid that potential in future?

Hon SUE ELLERY: I am advised that the ATO made the various jurisdictions aware of its views on this matter by issuing a discussion paper. Some other jurisdictions have taken the view that the ATO's analysis is wrong, and have not done anything to change their arrangements. The Western Australian government takes a conservative approach and says "Let's just cover our backs in the event that the analysis turns out to be correct." Certainly nothing was canvassed with regard to, "And by the way—we're going to go back and seek to address this by way of looking back over your records." There is no indication that the ATO is going to pursue anything it might describe as outstanding liabilities. For the member's information, one of the questions asked was whether employers would be at any disadvantage because of the costs involved in employing replacement staff while regular staff are involved in court processes. I am advised that the Sheriff's Office processes electronic funds transfers within 24 hours. It is not envisaged that any employers will be out of pocket.

Clause put and passed.

Clauses 54 to 69 put and passed.

Clause 70: The Act amended in this Part —

Hon GIZ WATSON: I appreciate the call on this clause. However, I think my comments relate more to clauses 71 and 72. Nonetheless, I reiterate that this part of the bill, which amends the Magistrates Court Act 2004, is the part that the Greens (WA) have considerable concerns about. I am happy to not oppose clause 70 and leave my comments for clause 71.

Hon SIMON O'BRIEN: Clauses 70, 71 and 72 comprise part 15 of the bill. Clause 70 advises that the amendments in this part are to the Magistrates Court Act 2004. As Hon Giz Watson just indicated, the Greens have a problem with clause 71, and that is something we want to discuss in detail. I guess it does not matter whether we endorse clause 70 now, because the bill will still make sense.

Clause put and passed.

Clause 71: Section 33 amended —

Hon GIZ WATSON: During the second reading debate, I spoke at length about this amendment. Despite the minister's response, I maintain my opposition to this clause. I thank the minister for her response and for kindly providing me with a copy in writing. Having had the opportunity to read it, I note that the government's response to this issue of access to court records in the Magistrates Court seems to be saying that the amendments made in this place in 2004 have created inconsistencies. I am not disputing that, and I will not argue against that proposition. However, it seems to me that the inconsistencies that have been raised could be rectified other than

by deleting sections 33(5) and (6); that is, by repealing those subsections. The first point made is that, in 33(5), the introduction of the term “record of proceedings” is superfluous and, for the sake of consistency, it is preferable to refer to the documents specified. Quite frankly, I do not have a problem with that. If there is a question of creating some ambiguous or superfluous reference by having a generic term, which is the record of proceedings, why not amend the bill to specify the particular documents, as has been suggested in this response kindly provided by the minister? Why not specify the prosecution notice, the record of proceedings, the criminal record and the conviction or order? The second inconsistency concerns reference to the requirement to pay a fee. I note that the response to this has been covered in section 33(10). That is fine, but we could simply delete that reference. Section (6) defines “record of proceedings” and the minister has argued that it is unnecessary because the same area is covered in existing section 33(3)(b), (c) and (d). My point is that the remedy proposed is excessive compared with the inconsistencies that have been perfectly legitimately raised. I put to the chamber that clause 71 should be amended again—unfortunately, I do not have an amendment in front of me, because I have been dealing with this as it has been presented to me this evening—to remove those inconsistencies without going to the extent of completely repealing section 33(5) and (6). The point I continue to make is that the intention of the amendments made in 2004 was to ensure that certain parties, other than the parties to the case, have access to the proceedings. It is interesting also to note in the written information provided by the minister that the issue of “any party interested therein”, which is part of the existing wording, has raised the question of interpretation. The note that I have received states that although the media are not strictly speaking parties with an interest in the proceedings, they are in many cases entitled to restricted information, considering their role in providing the community with accurate and fair reports of certain proceedings. It says “in many cases”; it does not say “in all cases”. This is interesting to me because I am not sure how a court would rule that in certain cases, or any cases for that matter, the media were not parties with an interest in the proceedings. It seems to me that the media have a function, and either always have an interest in proceedings, or never do. I do not see how it could be up to the court to decide what is of interest to the media. To me, that is a kind of fundamental principle about having the proceedings of the court available and, as I have emphasised in this debate, having that information disseminated widely in the public interest. That is a particular point we are trying to preserve by opposing this clause.

I was interested in the response of the government indicating a deficiency in non-criminal proceedings, where there is no power to provide access to records to anyone not a party to a case. This particularly causes difficulties for police in accessing court records on applications under the Restraining Orders Act 1997. My interjection to the minister during the second reading debate was that that should be fixed up, rather than making this amendment. It is certainly a deficiency, and I would argue that it should be resolved. Perhaps the minister might indicate whether there is an intention to rectify that problem through some anticipated amendment. It is the first I knew that the police had problems accessing records in restraining order cases, and I am sure it is a significant impediment to their operations. I think it relates to this clause, and I would be interested in whether the minister can tell the house that it will be addressed as well.

Hon SUE ELLERY: I have identified discrepancies in a couple of areas. The honourable member is right—we could take the approach of accepting her principled position and therefore change all the other arrangements so that there are no inconsistencies. However, that does not assist the government with the substantive position, which is that access to court records should be for parties to the case or by leave, so that the decision is made by, for example, the registrar, rather than a situation in which a member of the administrative staff of the court is asked to determine whether every person who asks for a copy of a certain record is able to get one. I have used an extreme example, but my point is that the courts might be required to spend a lot of time providing information to people who might have just some sense of curiosity about the proceedings and not a genuine interest.

It is interesting to add to this debate the views of the Chief Justice. The Chief Justice has signalled that one of the areas that he believes the courts need to get better at is recognising the role of the media in reporting judgements. The Chief Justice has flagged that issue in relatively recent days, and has made comments about his expectation that the courts will get much better at doing that.

The substantive point of difference between us is who should make the decision about who is able to access court records. We can argue about the other inconsistencies and about the best way to fix those inconsistencies. However, if we cannot agree on that substantive point of difference—and we cannot—then there is no point in arguing about those other issues, because they are extraneous and will not enable us to get to the nub of this issue. The government’s position is that the decision about public access to records should be made at a senior level. The public records should be made available to the parties to the case. There is no argument about that. There is also no argument that anyone else should be free to seek leave to access those public records. That may well include the media. Given the signals that the Chief Justice has sent to his judicial officers and to the wider community about his expectations, we would expect that the courts will get much better at the flow of information and in dealing with applications for leave to access court records, and that a broader range of people, and certainly more media outlets, will be able to gain access to those records.

As I have said, the substantive point of difference between us is should that decision be made by a clerical administrative person in the court system or by someone who holds a more senior position. The government's position is that that decision should be made by the registrar or a senior person, because we will then be able to find the right balance between ensuring that the public is given access to information, and ensuring that we are not wasting the resources of the court.

Hon Simon O'Brien: Would that same principle that you have just outlined apply also to a Court of Petty Sessions that was dealing with a relatively minor matter? Do relatively minor issues really need to be referred to a senior person? I ask that because although those persons might have greater experience, as you have said, to make those judgements, it could be a very time consuming process for the court.

Hon SUE ELLERY: The answer to that question is yes, because the Court of Petty Sessions is now part of the Magistrates Court as a result of the recent changes. Hon Giz Watson referred to a specific case in which a person in an administrative position in a court had made a decision that had certain consequences. What the courts have learnt from that exercise is that it is not reasonable to place somebody at that level in the position of having to make that decision. We must draw the line and get the balance right. We must ensure that the public is given the access that it should have about how decisions are being made, because taxpayers' money is being spent to determine important matters. We must get the balance right between ensuring that people have access to that information and, equally, that the courts' resources are not wasted by having to provide that information. Every day the courts attract people whom, it might be argued, do not have a genuine interest when they ask for that material. That is at the extreme end of the spectrum. We need to balance the comments that have been made about the Chief Justice and the direction he thinks the courts should take to be more open. We think that we have got the balance right in the changes that we are seeking to make.

Hon GIZ WATSON: Are all Magistrates Court proceedings heard in public?

Hon SUE ELLERY: I am advised no, not necessarily. For example, some matters might be heard in the chambers. It depends on the nature of the proceedings.

Hon GIZ WATSON: What percentage of Magistrate Court proceedings are heard in public?

Hon SUE ELLERY: I will put this in the context that we are dealing with criminal jurisdiction. The advice that I have received is that 99 per cent of matters are heard in public. A matter that involves the protection of witnesses, for example, and other matters of that nature may need to be held in private. However, I am advised that a clear majority—around 99 per cent—are heard in public.

Hon GIZ WATSON: The chamber must be clear that we are dealing with matters that are almost entirely held in public. A member of the public—not an interested party or even a party to a case—could be present in a hearing and privy to the whole proceedings. What happens when somebody who, for whatever reason, is not able to be present during proceedings but who has a right to be at the proceedings to hear what is said? That person would approach the registrar and ask for a copy of the particular proceedings. However, the registrar will no longer be able to decide whether that person should receive a copy. In my view, that person has a right to have a copy. It is a bit like a member of the public sitting in the public gallery. Indeed, having access to a copy of certain court proceedings is similar to obtaining a copy of *Hansard*. The proceedings are recorded electronically and are available electronically. My frustration is with the furphy that the court administrative system will be bogged down with dozens or hundreds of requests for information. I suggest that there will not be hundreds or even dozens of requests for copies of court proceedings. There are a few cases in which people other than the parties to the case have a genuine reason for wanting a copy of the proceedings, particularly members of the media. As I have said before, if we want to ensure the accurate reporting of court matters, we as a Parliament should not do anything to restrict the media's easy and timely access to such material. One of the things that strikes me is that even if we do change this act so that the decision is made by the Magistrates Court itself rather than the registrar, that decision will not be made on the day, as far as I understand. A member of the media cannot go to the registrar after a particular case that may be of high public interest and say, "I'd like a copy of those proceedings in order to report on it in the paper tomorrow." I made the point in my speech on the second reading that members of the media get exceedingly frustrated by this and give up trying to accurately report on matters before the courts.

I do not buy into the argument that there is a problem with allowing the registrar to make the decision. If we go back to the Titelius case, what was the assessment? The assessment was that it was correct and appropriate. That is, it was judged both legally and in the public debate that it was right for that registrar to access that information. It seems to me that this amendment seeks to wind that back and restrict that flow of information. I would like to hear the government's argument, given the current days of electronic recording of court proceedings, which makes it is very easy to provide a copy of proceedings to an interested party. I do not think that it is such a high-level decision that it cannot be made by a registrar. If we are talking about protecting matters that may have been heard in camera—we have just heard that 99 per cent of the matters before the Magistrates Court are not heard in camera—the registrar would know whether those matters had been heard in camera and could automatically say,

“You are not going to get that because it was a private proceeding.” That is the same as what happens in our committee work—we know what a public hearing is and what a private hearing is. I think that it is an unnecessary restriction. The minister said—I hope it is true, and I think it is—that there is a trend, an expectation and a will within the court system to make court proceedings more readily available. It seems to me that this amendment is counter to that intention. I still remain unconvinced that this amendment should be supported.

Hon SUE ELLERY: It is clear to me that the member remains unconvinced. I do not think I will be able to convince her, because that is the essential point of difference between us. I think it is clear that the Chief Magistrate is of the view that the courts in Western Australia should be far more open. With this amendment we are trying to ensure that the correct decisions are made about making court records available. This is not about saying that people cannot get them; it is about saying that the people who make the decision should be at a certain level. We are not saying that no-one can seek leave to get the records. In fact, we are saying that people can make application to get the records. My interpretation of the comments of the Chief Justice is that his expectation is that the courts will move closer to that situation. The essential point of difference between Hon Giz Watson and me is who should make those decisions. The honourable member has argued that anybody ought to be able to put up his hand and say, “I want a copy of those records”, and as a citizen of Western Australia he should be entitled to receive those records. We say that there needs to be some management of that process, and there ought not be any prescriptions on those people who are obvious—that is, those who are a party to the case—but anybody else has to make an application, and a decision is made about whether it is appropriate that the court’s resources are used to provide that material. As I have said, I think the Chief Magistrate has indicated that he will err on the side of encouraging his judicial officers to make that information more readily available. Right now we say that it is appropriate that we use the resources that are available to us to have a senior person in the judicial system make that decision.

We are not saying that people cannot access the material; we are not saying that no-one has the right to ask. We are saying that people have the right to ask and to have a decision made by the appropriate person.

Hon GIZ WATSON: My question then is: what is the anticipated difference in the timely provision of court records of proceedings if an applicant now has to wait for the court to make the decision rather than the registrar?

Hon Sue Ellery: Do you mean how long that will actually take?

Hon GIZ WATSON: Yes. I am thinking again about the media in particular, which, as we know, operate on a fairly quick turnaround. Today’s news is tomorrow’s fish and chip paper, or whatever the saying is. It seems to me that that is a very relevant point in the timely provision of the record of proceedings.

Hon SUE ELLERY: On page 39 of the bill, in clause 71(2), we set out the words that we seek to insert. There is a new subsection (9) dealing with the rules of the court. I am advised that it is anticipated that that would happen pretty much instantly. A form will be drawn up. A person will fill in the form with the details of the information he or she seeks and the reasons for the application. I am told that that could happen as quickly as within 10 minutes; it is an instant process. The rules of the court, as set out in proposed new subsection (9), would establish the process for that.

The CHAIRMAN: Hon Giz Watson?

Hon GIZ WATSON: I am sorry, Mr Chairman. I thought a further bit of information might be forthcoming. I guess I am comforted somewhat by the fact that there would not be a delay. However, I come back to the fundamental point: why should the public record of a public proceeding not be automatically provided to any interested party? Perhaps it goes beyond this amendment, but it seems to me that that is an automatic entitlement, unless a clear case is made that there would be a serious risk to the parties to the case in having that information revealed. It seems to me that the onus should be the other way around. I have heard many times the argument that it will clog up the court with multiple requests for records of proceedings. That claim has been made. I have not seen any evidence of that. It might be a fear, but that must be balanced against what I think is a fundamental principle; that is, the proceedings of the court are heard in public, and I guess the decision has been made, if they are heard in public, that there is no risk to the public in hearing them, and there is nothing that needs to be kept confidential. Why, then, does every citizen of Western Australia not have an automatic right to access those records of proceedings?

Perhaps it is a principle or policy that I am challenging here. I believe the claim that it will impose some sort of administrative burden is just not defensible. Those transcripts are produced and stored electronically, and in the one-second flick of a switch they can be sent through to a printer. As much as I appreciate that some people with an unhealthy interest in court cases might spend half their lives at the court, there are not many of them. I am sure the court has the capacity to say, “This is a vexatious or unreasonable request because in the past two days you have asked for 100 copies of proceedings.”

The principle that is being restricted here is a really important one. I do not accept that a case has been made out for its restriction and why access should not be kept as open as possible and provided in the most timely and efficient way that the court can provide it. I have noted the minister's comments that the Chief Justice wants the system to be open. I do not know whether it is possible for the minister to elaborate on how that is intended to occur. It seems to me that the measures we are debating today, such as electronic access—that is, putting transcripts of proceedings on the website—would resolve these questions. The minister would then not need to include a provision in the bill for someone to apply for the transcripts of the proceedings to be made available, because that person could access them electronically. I do not know whether the minister can indicate where the Chief Justice is intending to go with this proposed new subsection. If that is the intention of the Chief Justice, this sort of legislation will be an impediment to that sort of initiative and I believe it would be a retrograde step.

Hon SUE ELLERY: I acknowledge that the honourable member believes the case has not been made out. Clearly it is the case. I said a little while ago, when the member said that we were having a superfluous argument about the inconsistencies and deficiencies, that the difference between us is that the government's position is that access to those records to someone other than a direct party needs to be managed. That is the difference between us. We say that we are heading in a more open direction. I am not able to give the member more details about the views of the Chief Magistrate, although from my dealings with him he is not the kind of person who would object to providing that kind of information himself. However, I cannot give the member more detail about what he said.

The difference between us is that we say we need to get the balance right between managing the resources of the courts and making sure that the decision is made at the appropriate level. All we are saying is that anyone who is party to a case has access; anyone who is not must ask for it. A decision will then be made in a timely fashion about whether there is some reason not to release that information. I do not think I can put the argument any other way. That is the fundamental point of difference between us. I acknowledge, as the member said, that the starting point is that everybody should get the information and that only by exception should they not get it. We say that anybody who is a direct party to the case should get it absolutely; anybody else must ask for it, and a determination will be made on whether there is any reason that person should not get it. The difference between us is how that release process is managed.

Hon GIZ WATSON: I will cease and desist shortly. However, it seems to me that the question is: what are the grounds for refusing to provide the transcript of proceedings? Is there any restriction; is there any guidance on what can or cannot be used; or can the court simply say no, without giving reason?

Hon SUE ELLERY: It is as broad as there is good reason. Proposed subsection (8) reads —

If on an application by a person the Court is satisfied there is a good reason to do so, it may give the person leave, either unconditionally or on any conditions the Court imposes, to inspect, obtain a copy of, view or listen to, any information held by the Court . . .

That is a fairly broad catch-all good reason.

Hon SIMON O'BRIEN: I have a bit to say about this clause on behalf of the opposition. It is an area that has been visited before. To first examine the provisions that we are talking about in this clause we must go, firstly, to section 33 of the principal act—the Magistrates Court Act 2004. Section 33 deals with access to court records. Subsection (2) reads —

This section is subject to any other written law that relates to the possession or publication of documents and other records or to the possession of any thing.

That will not change under what is proposed in clause 71 of the bill before the chamber. It is also proposed that subsection (3) will not change and it relates to the entitlement of a party to a case to, on request, inspect or obtain a copy of a whole lot of documents, transcripts and orders made by the court. I think members understand who is a party to a case—it is a person who is principally involved in the case either as a defendant and, in a civil case, a litigant or an appellant, but somebody who is directly involved as a material party to the case. It is not proposed to change that provision of the act, and that is not what we are arguing about. However, members must understand that that provision is there separately and it will remain in the legislation.

Section 33(4) of the Magistrates Court Act extends the capacity of a party to a case to obtain some further things by leave of the court. It talks about inspecting and obtaining copies of any document held by the court—it might be a prosecution exhibit or something—and to inspect any other things tendered in court, and that could be an exhibit that is not a document, or, indeed, to listen to or view electronic recordings extended to the court in the case. Subsection (3) refers to transcripts of those recordings, which can come as a matter of course, and, by leave under subsection (4), the court can allow a party to a case to listen to or view any electronic recording. That will not change either. However, it is proposed to change the next two subsections—subsections (5) and (6)—by repealing them. For the benefit of members, I am trying to reduce this down to the absolute gist of what we are talking about. Subsection (5) states —

In respect of criminal proceedings in the Court, where a conviction or order is made, or a charge is dismissed, any party interested therein is entitled on request —

- (a) to receive a copy of —
 - (i) the prosecution notice containing the charge;
 - (ii) the record of proceedings;
 - (iii) any statement of the accused's convictions that is tendered in the proceedings; and
 - (iv) the conviction or order, from the officer who has custody thereof, subject to payment of an amount calculated in such manner as is prescribed by regulations; and
- (b) to view any exhibit in the proceedings that is in the possession of an officer of a court and that is not reasonably capable of being copied, at a time and place appointed by that officer.

Subsection (6) provides the definition of “record of proceedings”, which I referred to in the last subsection. Obviously, if we repeal subsection (5), it seems reasonable in that context to repeal subsection (6). I will talk only about subsection (5) from now on, but I will refer to the two because they go together. I will come back to those subsections in a minute.

I will summarise section 33(7) rather than read it all into the record. It essentially gives certain people the entitlement, on request, to inspect or obtain a copy of any document that is part of the court's records and any document received by the court in sentencing proceedings. The subsection goes on, in paragraphs (a) to (i), to list the entitled people, which include a party to the proceedings, the Commissioner of Police, the Director of Public Prosecutions, the Corruption and Crime Commissioner, and so on. That matter is not in debate now. Members who are listening to the debate but not actively participating in it need to be aware of that.

Now we come to subsection (8), which is also proposed to be repealed. It states —

Subject to this section, the rules of court may provide for unconditional or conditional access to records and things held by the Court by parties to cases and by other persons.

What exists now is a capacity, subject to the remainder of the section, for the rules of court to provide for unconditional or conditional access by people, be they a party to a case or other persons. Indeed, the conditions for who can access those records and things are contained in the rules of court. It is proposed that that subsection be repealed and another be inserted; in other words, it will be replaced. Proposed new subsection (8) in the bill states —

If on an application by a person the Court is satisfied there is a good reason to do so, it may give the person leave, either unconditionally or on any conditions the Court imposes, to inspect, obtain a copy of, view or listen to, any information held by the Court in relation to any case that has been or is being dealt with by it.

That is a slightly longwinded version of current subsection (8) that has been extended and expanded upon slightly. It is accompanied by proposed new subsection (9), which refers to what the rules of court may do in prohibiting and regulating access to information and entitling a person to access to or to obtain a copy of any such information. The two new subsections (8) and (9) go together. In my mind, quite clearly there is a direct relationship between the three-line subsection (8) that is proposed to be repealed and the 12-line subsections (8) and (9) that are proposed to be inserted.

There is a very direct relationship between the two, and in my view the spirit of them is the same or significantly the same. The bill also prescribes that subsection (9) will be repealed and it proposes a new subsection (12). Upon examination, what we are repealing are the words in existing subsection (9), which read —

If under this section or the regulations a document may be supplied to a person it may, at the request of the person, be supplied in an electronic form.

We are taking that out and inserting new subsection (12), which reads —

If under this section, rules of court, or the regulations, a document may be supplied to a person, it may, at the request of the person, be supplied in an electronic form.

There is not a heck of a lot of difference there, so I do not intend spending any time looking at that provision. The wording has been slightly rearranged and so has its pecking order as a subsection. Where does that leave us? It basically takes us right the way back to the existing section 33(5), which is to be repealed. That is what it all boils down to in substantial effect. I think Hon Giz Watson would agree with that in general terms. I will therefore now focus my remarks only on section 33(5), because that seems to be the test of whether or not the

chamber will approve this part of the bill. Subsection (5) has a bit of a history. I do not have the old act readily to hand, but I believe it goes back to section 148 of the old Justices Act 1902.

Hon Sue Ellery: That is set out on the front page of the document you have.

Hon SIMON O'BRIEN: Indeed it is. It was revisited when the committee looked at the Magistrates Court Bill in 2003. There is debate on the public record, to which Hon Giz Watson referred, about the comments of Hon Peter Foss. At that time an amendment was passed in this place that inserted section 33(5). Section 33(5), which the government proposes now to take out, was the subject of some argument then. Indeed, the minister was a member of this house then, I was a member of this house then, Hon Peter Foss was a member of this house then, although he is no longer, and Hon Giz Watson was a member of this house then and was, I notice from the record, involved in that very debate. Section 33(5) is a provision with a history that goes back to whenever it was inserted in the provisions of the Justices Act 1902. That might have been from day one or it might have been an amendment at some other time, but certainly the house actively considered it on some very recent occasions. It considered it via a standing committee, which produced a recommendation that the words of the current section 33(5) be inserted into the bill. When the house considered the 2003 bill, the government—the same government we have now, God bless it!—and Hon Peter Foss on behalf of the opposition —

Hon Sue Ellery: God bless him!

Hon SIMON O'BRIEN: Indeed. They disagreed on the adoption of that recommendation to insert section 33(5). We have the record, part of which Hon Giz Watson read out earlier this evening. Hon Peter Foss insisted, as he was wont to do, that these words recommended by the committee be put into the principal act that we are now proposing to amend by this bill.

At the time the government was not in favour of that, but it could see the will of the chamber, and the record records that, without too much fuss, the amendment was moved, briefly discussed, and passed. This enduring provision has been around for some considerable time. I remind the chamber what section 33(5) is all about. It is about “any party interested therein”. I highlight those words verbally—namely, any party interested therein, and the entitlement of any party interested therein. Section 33(5) is about an entitlement to receive a copy of certain documents related to criminal proceedings in a court where the matter is being dealt with and a conviction is made, an order is made or a charge is dismissed. Upon payment of an administrative fee, any party interested therein can request and receive a whole lot of documents on the file. The argument all boils down to this capacity for any party interested therein to obtain free access to all of that information upon request, which is what Hon Giz Watson is proposing in her argument, or the argument of the government, which is to expunge this provision from the statute.

Two things then need to be considered. The first is the question of “any party interested therein”. I think that definition needs to be revisited, and I propose to do that now. I touched on, as other members have, the question of a party to a case. I think all members understand what is meant by the term “a party to a case”. In the course of considering this bill, I have also been invited to consider the question of a “party with an interest in the proceedings”. I think it would be the government’s view that a party with an interest in the proceedings does not just mean anyone with some sort of vicarious —

Hon Sue Ellery: Curiosity.

Hon SIMON O'BRIEN: — curiosity, or someone who just wants to know what is happening in a juicy case, or someone with that sort of interest. An interest, in the sense of “a party with an interest in the proceedings”, means someone who has a direct or indirect interest in the outcome. When one thinks about it, that could be a whole lot of classes of persons. Maybe it could extend to a family member of the accused. Certainly it could extend to a victim of crime. The family of a victim of crime certainly could be a party with an interest in proceedings. Perhaps someone with an ongoing interest in the outcome because it may impact on them financially, or it may impact on their employment—who knows? A party with an interest in the proceedings does not mean just anyone out there in the public who is a stickybeak and wants to know what is happening in the case of *Smith v Jones*, or in a criminal case; *Ellery v The Queen*, for example.

Those are not the words used in existing section 33(5). The words used are not “a party to proceedings”; they are not “a party with an interest in the proceedings”. The wording in the current provision is “any party interested therein”. What does that mean? I think the government wants it to mean a party with an interest. I think Hon Giz Watson is arguing that “any party interested therein” might in fact just mean any member of the public. It could be someone in the media or someone who wants to access the public record and to know what the court thinks on a particular matter. I think I am right; Hon Giz Watson is indicating that that is what she thinks. That is the difference; that is what it all boils down to.

We now need to go to what was in the mind of the chamber back when Hon Peter Foss successfully moved this amendment. Looking at the records of debate, it appears to me that what Hon Peter Foss and others who supported him, including Hon Giz Watson, had in mind was in fact that the term “any party interested therein”

could and did mean a member of the public who simply wanted to know. I am sure about that for the reason that the context of the debate is about the widening of access to court records. That is what it says. I have gone through at some length existing section 35 of the principal act and I have highlighted all the parts that are not going to change. I have also gone through the parts of section 33 that are proposed to be changed, which are subsections (8) and (9). I have expressed the view that they are to be replaced with equivalent new subsections (8), (9) and (12), which address the same matters. I now find that we are left with one thing in isolation with regard to section 33, and that is the repeal of subsections (5) and (6). It does not appear that they will be replaced. It appears that the legislation the government proposes will actually dramatically narrow the accessibility of information. That is not what this chamber intended several years ago when section 33(5) was placed in the principal act. That is not to say that we should not revisit it with a view to taking it out. However, I do not know that a compelling reason to do so has been given to the chamber.

Reference has been made to the Titelius case, which dealt with access to court information relating to a restraining order between a couple, one or each of whom was a public figure. The person who obtained the information relating to the violence restraining order or some such order was, in fact, not a party to the case. He was not a party with an interest in the case; he was simply a party who was interested therein. I actually thought what that person did was disgraceful. The person deliberately set out to use someone's difficult domestic circumstances to attack a person in public. Whatever the person's motive, that is what happened. However, I do not think that had anything to do with the act in question or the amendments that are proposed in this bill. The Titelius case preceded the proceedings in this house in Hon Peter Foss's day; in fact, I think, by quite a few years. Incidentally, I notice from the excerpt that you were in the chair then, Mr Chairman, so if you are experiencing a sense of *deja vu*, I do not blame you!

The CHAIRMAN: I have not left the chair; I have been sitting here for four years!

Hon SIMON O'BRIEN: It might seem that way, Mr Chairman, but I have been on my feet for only a little while!

All of what was known of the Titelius case when it occurred was known when this matter was last debated, so members will have been cognisant of it. I do not think what I call the Foss amendment, or the committee's amendment, section 33(5), was anything to do with the Titelius case or anything like it. I think it was about broadening access to court records by saying that any record of what happened in the court, including the prosecution notice containing the charge, the record of proceedings, a statement of the accused's convictions tendered in the proceedings and the conviction or order, or, indeed, the viewing of exhibits, is a matter for public record, as Hon Giz Watson argued. I think she argued that four or five years ago, as I think did Hon Peter Foss. With all that in mind, it is now up to the government to convince us that section 33(5) is somehow superfluous because, in my view, it is not replaced by proposed section 33(8). That deals with the rearrangement of an existing provision. The repeal of section 33(5) and (6) would be a radical step and the government needs to justify it.

Before I conclude, which I mercifully will in a second, Mr Chairman, I notice in some supplementary material provided to me that there are some ways in which section 33(5) is now out of kilter with some other provisions that relate to the reference to paying a fee. There is other capacity for fees to be prescribed, and definitions of "record of proceedings" are perhaps unnecessary, as the same area is covered somewhere else. However, they are minor drafting matters. If the government needs to tidy up the legislation by making minor amendments to address those matters, the opposition will support it without batting an eyelid. However, on the basic principle of whether section 33(5) should be repealed, we say that, as we previously supported the insertion of 33(5), we will not agree to the repeal of the provisions of 33(5) until the government tells us why it is necessary to do so. I do not believe we have revisited that argument. If the minister thinks we have and we have reached a stage whereby we will have to agree to disagree, that will be the end of the matter.

I think I have outlined the opposition's position. I have taken some time to do it but I am sure a jolly lot less time than Hon Peter Foss would have taken.

The CHAIRMAN: I do not think so!

Hon SIMON O'BRIEN: I want to emulate my icons, Mr Chairman.

The question that remains before the Chair is that the words proposed to be deleted be deleted. In view of what I have said, I do not know now what the government wants to do. It may wish, for example, to put the subclauses separately, or it may intend to continue the debate by introducing some new argument that will radically change the opposition's view.

Hon SUE ELLERY: I thank the honourable member for taking us back, in a very methodical fashion, through the circumstances that led to the words that appear in the Magistrates Court Act 2004. I concur entirely with his analysis of what the house considered at the time, and how those words came to be. I am not really adding anything new to the debate, so if the member was expecting that, I am sorry, but we differ in that the member's

position is that the government, by seeking to repeal sections 33(5) and 33(6) of the Magistrates Court Act—section 33(6) is consequential on section 33(5)—and the argument around the words “any party interested therein”, is seeking to narrow access to records. My argument is that the government is seeking to manage access to records. Hon Simon O’Brien and Hon Giz Watson may well argue that the consequence of what I call management is that access is narrowed. We will have to agree to disagree on that. Proposed section 33(8) reads —

If on an application by a person the Court is satisfied there is a good reason to do so, it may give the person leave, either unconditionally or on any conditions the Court imposes, to inspect, obtain a copy of, view or listen to, any information held by the Court in relation to any case that has been or is being dealt with by it.

The key words are “any information held by the Court”. Existing section 33(8) is narrower than that. It reads —

Subject to this section, the rules of court may provide for unconditional or conditional access to records and things held by the Court by parties to cases and by other persons.

We say that the words “any information held by the Court” are broader than the words that presently appear in section 33(8).

The essential difference between us remains. If the will of the committee is such that it does not want to make any changes that would change the way we manage access to information, it will not support the government’s proposition. It will stand by the position taken back in the 2003 debate that held that any party interested could have access to the records. The government says that that is not reasonable, and needs to be managed. In fact, we think it can be managed and that people can have access to records. The decision about ensuring that the court’s resources are not being wasted, for example, is one that the court is entitled to make. However, there is no question that we are revisiting the argument that was made back in 2003, and we do not resile from that.

An argument about consistency has also been drawn to my attention. If the government was of the view that it is fair and reasonable use of the resources of the court to allow completely unmanaged access to records at any time, it would change every other bit. The consistency argument is an important one. We do not apply the level of access that the house imposed in 2003 to any of the other component parts of the judiciary system in Western Australia. There is an argument about consistency.

Hon Simon O’Brien: Do you mean in criminal versus civil cases, for example?

Hon SUE ELLERY: That is right; we do not. The house made a decision that it would treat one part of the jurisdiction differently from the way it treated other parts. I cannot recall from the debate at the time whether the house considered that point in any detail. However, we are saying that we want to treat one part of the judicial system differently from the rest. That is not an insubstantial argument; it is an important argument.

The substantive point of difference between us, and the question that we need to decide, is: do we agree or not agree that the court is entitled to manage the way in which access to information is provided? Whichever way we decide that question, that is the way the legislation will continue. I am convinced that I am not able to convince Hon Giz Watson. I am not so sure about Hon Simon O’Brien. It is the case that we need to think about the two components of that question. Is it reasonable to impose a set of provisions around access to court records and materials for only one part of the judiciary? Is it reasonable to say the court is not entitled to manage the way in which access to information is provided? That question rests with the house.

Hon SIMON O’BRIEN: I congratulate the minister! That was a really good try, but we are not falling for it! I am sure that will restore the minister’s faith in us! If the minister wants to categorise it as convincing the house, we are open to be convinced. The minister might see the Greens as intransigent and us as reasonable and open. If so, that is good; the minister has learnt something in the process. However, we cannot let this matter proceed to its finality in a moment without addressing the minister’s point that if we disagree with the government’s amendment, that means that we are not concerned about whether the court can logistically manage its administrative affairs. That is not the case at all. We do not want the court to be overwhelmed by people who impose an unreasonable and disruptive administrative burden. That is why long ago the Parliament in its wisdom made provision in this very section of the act for fees to be charged to cover any such costs. Those fees are capable of being prescribed. That means that the level of fee is entirely in the government’s hands. The remedy in terms of administrative burden rests with the government as well. Will there be an administrative burden? Clearly there will be an administrative burden. Is it an excessive level of extra burden, or one that the government cannot manage? It is not if the government has the power to raise the funds to cover those costs. Therefore, it is a bit naughty of the minister to suggest that if we oppose the repeal of this subsection, we are demonstrating our flagrant disregard for the administrative burden that will be placed upon the court. Of course it does not mean that at all. It means that we are reasserting the need to retain the provisions that are contained in the statute book of Western Australia. That is where the matter will remain, until the government can

demonstrate why we should change our position. The minister did point out that I am responsive to reasonable argument. However, I do not think the government has demonstrated that just yet. The way forward from here —

The CHAIRMAN: Order! I am also looking for a way forward. I recognise that the committee has an issue with clauses 71 and 72. I will be leaving the chair in five minutes, as the standing orders require me to do. I am interested to know from the committee whether members wish to speak to any other clauses in the bill. If not, then I suggest that prior to five to 10, we deal with the balance of the bill, and that will leave clauses 71 and 72 outstanding overnight.

If clause 71(1) is defeated, the consequential ramifications must be taken into account. However, that cannot be done in five minutes. I invite the Committee of the Whole to consider that proposition. Do members wish to speak to any clause between clauses 73 and 132?

Hon Simon O'Brien: I wish to speak to clause 109.

The CHAIRMAN: The minister may wish to defer clauses 71 and 72 until after the consideration of clause 132 so that we can make some progress, because some cross-table discussions may need to take place overnight.

Further consideration of the clause postponed until after consideration of clause 132, on motion by Hon Sue Ellery (Minister for Child Protection).

Clause 72 postponed until after consideration of clause 132, on motion by Hon Sue Ellery (Minister for Child Protection).

Clauses 73 to 108 put and passed.

Clause 109: Schedule 1 amended —

Hon SIMON O'BRIEN: I will be quick, Mr Chairman, because your proposed way ahead is very good and the chamber wants to honour it. Clause 109 amends schedule 1 by inserting new clause 5A, which provides that the minister, in terms of the clause's heading, may discharge certain prisoners from old parole terms. Concern has been expressed that the government is going soft on prisoners. Concern has also been expressed about the ability for the penalty of imprisonment imposed by a court to be varied—indeed, slashed by up to a third—by a ministerial decision. I understand that the reason for this amendment is that a justice in the system—Justice French, I think it was—brought this matter to the government's attention. In effect, what may happen is that a person serving a parole term under a former sentencing regime may be recommitted to prison because he commits a subsequent offence. If that happens, in effect he has to serve the entirety of his head-term, which may be for a very serious offence that attracted a head-term of 10 years, with the subsequent offence being jaywalking, for example. I do not mean to be flippant, but I am thinking of a minor matter. The penalty for that latest offence can be extraordinarily disproportionately heavy if it means going back to prison for three years for something that would normally incur a minor penalty. If that is all that is intended with this provision, the opposition will support it. However, I want it on the record that that it is the intent of the government's proposed amendment.

Hon SUE ELLERY: It is indeed the case that Judge French, who is the chair of the Prisoners Review Board, raised the specific concern about the impact of the loss of remission after parole cancellation for prisoners sentenced prior to the proclamation of the Sentence Administration Act in August 2003. The honourable member gave the example of a person committing a subsequent offence of a far less serious nature than the original offence but with that having the effect of ensuring that one-third remission of the sentence is lost and the prisoner is not entitled to be released until the whole of the term has been served. In many cases, that result is completely out of proportion with the offence that triggered the cancellation. It has significant implications for the way that the board is then able to deal with matters because the loss of remission is permanent. Although there are many cases when the subsequent offending that results in the cancellation of parole is serious, it does not always warrant the additional time, so the description that the honourable member gave is completely accurate.

Clause put and passed.

Clauses 110 to 132 put and passed.

Progress reported and leave granted to sit again, pursuant to standing orders.

ADJOURNMENT OF THE HOUSE

HON KIM CHANCE (Agricultural — Leader of the House) [9.57 pm]: I move —

That the house do now adjourn.

Assaults on Police Officer – Adjournment Debate

HON BRIAN ELLIS (Agricultural) [9.57 pm]: I am prompted to speak tonight because of an answer to a question I asked of the minister representing the Minister for Police and Emergency Services during question