CRIMINAL INVESTIGATION (IDENTIFYING PEOPLE) AMENDMENT BILL 2013

Second Reading

Resumed from 20 June.

MRS M.H. ROBERTS (Midland) [4.10 pm]: This bill amends the Criminal Investigation (Identifying People) Act 2002. When this legislation was introduced in 2002 by me as then Minister for Police, Western Australia very much led the nation in this area. We were one of the first states to adopt this; in fact, we were one of the first states to sign up to arrangements with other states, including the Northern Territory, to enable us to share in identifying particulars through the national database. This was a quantum leap forward in policing at the time—arguably the biggest leap forward since the taking of fingerprints was implemented many decades before that to enable forensic details from crime scenes to be kept on a database. Those identifying particulars of fingerprints could be taken from people who had been convicted of crimes and could be stored on the database and matched with prints taken from new crime scenes. But, of course, time moved on and, with the availability of DNA technology, for the first time we were able to relatively cheaply take DNA samples from people suspected of crimes and take samples from crime scenes and marry them up. It was a great step forward, which then led to the establishment of the national database. Indeed, I was party to discussions at a national level with police ministers from throughout the country.

Former Liberal Minister for Police Kevin Prince was involved in some of the earlier discussions. In the dying days of the Court government he introduced an earlier version of the Criminal Investigation (Identifying People) Act 2002, but did not introduce it in a time frame that allowed it to be dealt with before the election in February 2001. The 2002 bill certainly varied in some key areas from the legislation Hon Kevin Prince introduced. I think I identified those differences in my second reading speech when I made it more than 10 years ago. One of the areas in which we differed from the legislation proposed by the Liberal Party was the qualification of the length of jail time associated with the crime a person was suspected of committing. To word that a little more clearly, in the draft national plan introduced by Hon Kevin Prince, before DNA could be taken from a person they had to have been either convicted of or charged with an offence that was punishable by five year's imprisonment or more. The bill that became law in 2002 provides that someone needs to be charged with or convicted of a crime that is punishable by a jail term of only one year or longer. To give some context to this, part of the reason for that change is not that everyone who is found guilty of or charged with an offence punishable by one year or more in jail is necessarily some kind of notorious felon, but we knew from an experience in the United Kingdom, where the law had been operating for a few years before it began operating in Australia, that whilst not all persons who committed what might be regarded as more bread-and-butter crimes such as car theft, break-ins or other kinds of minor theft progressed to very serious crimes such as murder, rape, armed hold-ups or serious assaults, just about everyone who commits those kinds of vastly more serious crimes started by doing more minor crimes.

It is useful to have those DNA particulars on the database. I note that the then member for Kalgoorlie said some years later, "Why don't you take everyone's DNA? I wouldn't mind having mine taken; we could have a huge database and if you've got nothing to hide, you should have nothing to fear." But there is a cost associated with taking DNA samples and all the intelligence information that was coming from the United Kingdom and other overseas jurisdictions was that the real value in getting a match from a crime scene to a database was generally best achieved by having a narrower pool, and that persons who had been convicted of or charged with offences should, sensibly, be a part of that pool. In the United Kingdom, for example, current DNA samples taken from crime scenes involving people who had been charged with and then convicted of offences such as child abuse, rape, murder and so forth were matched to historic DNA taken some years before from a crime of car theft. It makes sense to have that strong database.

An anomaly in the original United Kingdom legislation provided that if someone charged with a crime was found to be not guilty, their DNA data was expunged from the database. That happened as of law. In a fairly famous case of a disgusting and brutal rape and murder of a young girl, which outraged people in the United Kingdom, at some stage the police managed to find a match to the offender's DNA on the database. The only problem was that the DNA on the database belonged to someone who had been found not guilty of a crime, so his DNA was supposed to have been expunged from the database. Although the police gained a conviction for that brutal rape and murder, the offender appealed that decision and the appeal was upheld in the higher court. The law had not been followed; that DNA was supposed to have been expunged from the database and therefore the match should not have been possible. On a point of law the appeal was granted and that person, who, effectively, was known to have brutally raped and killed a young girl, was set free by the British courts.

Understandably, that caused considerable outrage, and with that there was a willingness in the community in the United Kingdom for DNA to be retained as part of a database of persons who had been charged but not actually

convicted of crimes. That was one of the things we took into account in those early days in bringing the 2002 bill before the Parliament. The bill Kevin Prince brought before the Parliament in the dying days of the Court government was based on the same principle, being that if people were found not guilty, their DNA information would be deleted from the database. We did not see a lot of sense in that because of the expense that has to be gone to in taking it, and given that the advice from the United Kingdom and elsewhere was that although there is a high percentage of a hit or a match from a DNA sample at a crime scene with a database made up of people who have been convicted of crimes, there is a much higher chance of having a hit or a match if that database also includes the subset of people who have been charged with a crime but been found not guilty. That actually makes sense when we think about it. We know that under our system of justice, a lot of people who are found not guilty are not necessarily innocent. Sometimes we hear people who are not well informed saying that someone has been found innocent of a crime. As I think lawyers would tell us, people are not found innocent, they are found to be not guilty; on the balance of probabilities, the case has not been proven. Our system of law works on the premise that it is better that 10 guilty men go free than one innocent man gets punished, and it is under that system that cases have to be proved beyond a reasonable doubt. Under our system of law we do not want the injustice of someone who is innocent of a crime being convicted. The balance of probabilities goes in favour of the defendant. But the worldwide experience has been that amongst that subset of persons who have been charged with a serious crime there is an extraordinarily higher hit rate or match rate from crime scenes with that pool of people than there is with the general community. It is not quite as high as it is with convicted persons, but it is certainly many times higher than for the general community.

Having said that by way of introduction, a lot of cold cases have been solved in Western Australia through the use of DNA; cold cases that would not have been solved were it not for the legislation brought into this house in 2002. But I think it is fair to say that we were very much learning about the new technology and its possibilities at that stage, and we were learning what a valuable tool it could be in the investigation and solving of crimes. We looked at the national draft model bill that was available—I think it was originally drafted in New South Wales—and we modified it for Western Australian use but made sure it was still compatible with building a national database. There were some anomalies, and I suspect there still are in terms of the criteria used for the taking of DNA in one state compared with another. I know that some other states went with the five-year limit and only took DNA from persons charged with or convicted of an offence carrying a five-year penalty, not the one-year penalty we put in place in Western Australia. I know that other states expunged DNA from the database, which reminds me that I did not finish off on that point. What we put in the 2002 legislation was that if requested —

The DEPUTY SPEAKER: Order, member. Can the member for Butler please acknowledge the Chair?

Mrs M.H. ROBERTS: — someone who had been found not guilty of a crime could make application to the commissioner to have their DNA removed from the database. In practice, we suspected that most people would not take that step, and that we certainly would not end up with the anomaly that had occurred in the UK, which is that if there actually happened to still be someone's DNA on the database and there happened to be a match with a serious crime, that somehow that case would be lost on appeal or that the case would not stand up because of that technicality.

I will fast forward a little. Because this was such innovative legislation at the time, a review clause was included in the bill that required the act to be reviewed within five years for concerns that were twofold. One was about the technology and how fast the technology was changing in terms of what identifying particulars could be compared from crime scenes with the DNA of suspect individuals, and the other was how this would pan out in terms of civil liberties. Although that was not my primary concern, there were certainly some in the community who saw this as some kind of big brother legislation, and thought that suddenly there was going to be this secret database of people's DNA information, and that somehow the DNA could be misused or somehow DNA was going to get cross-contaminated or planted at crime scenes or whatever. There were certainly civil libertarian concerns about it at the time. For all those reasons, the five-year review clause was included.

What happened was that the review took longer to conclude than it perhaps reasonably should have, and I note that it was not until April 2009 that Hon Robert Anderson, QC, handed down the report of the reference group on the statutory review of the Criminal Investigation (Identifying People) Act 2002. He made 31 recommendations and 15 other findings in respect of that act. Some of those recommendations require legislative amendment, hence we find ourselves in the position of having this bill before us today.

I have no argument in terms of the thrust of the Criminal Investigation (Identifying People) Amendment Bill 2013, but I certainly have some criticism of how long it has taken this government to act on it, keeping in mind that the government has now been in place for some five years in total and only now are we seeing these recommendations that came out of that 2009 review, which I remind people was some four years ago. Four years ago, some very sensible recommendations were made, but it has taken this government four years to put them

before the Parliament. Yes, it may be true that the former government could have acted a bit quicker or gone a bit further in 2007 or 2008, but the fact of the matter is I think those arguments can no longer hold any water. This government has had five years' responsibility as the government of the day. Although the previous minister put some amendments before the Parliament in, I think, 2011, the amendments to the legislation the current minister is arguing for could have been brought before the Parliament last year, and maybe would have been, had we not seen the change of minister midyear last year.

I will deal with some of the more particular issues in the bill. I have talked somewhat about the DNA and what a major step forward that was in solving crimes. When this act was put in place it had to be accompanied by considerable government expenditure in the budget. The previous government allocated $1 million to implement this act. In our first budget we allocated something like $20 million or more towards the collection of DNA from crime scenes and from suspects and prisoners. There was considerable cost in training police officers in the taking of DNA. Another area that we had some argument about partly impacted on civil liberties and partly on cost; that is, who could take a DNA sample and who could take a buccal mouth swab? There was a requirement in the original draft for a nurse or medical practitioner. We determined that police officers could be trained in that process but it required considerable training. I am disturbed to find that in the course of recent years, under the regime of the current government, a huge percentage of crime scenes have not had identifying particulars taken from them that could have been and should have been taken as a matter of course. In a sense even worse still, persons charged with crimes as well as convicted persons could have, and I would say should have, had their DNA and fingerprints taken, but we now find that in a large percentage of cases those identifying particulars were not taken. I find that inexcusable. I note that senior police officers have said the same thing. I think it was Deputy Commissioner Chris Dawson who commented that he did not know why DNA samples had not been taken from charged persons in many circumstances when they should have been. He did not know why they were not taken as a matter of routine. We then heard the deputy commissioner, the Minister for Police and others say that they were investigating and reviewing this. Hopefully they are on top of it now. It remains a fact that for a couple of years at least, up until about a year ago, an unacceptable percentage of people charged with a crime did not have their identifying particulars taken as police had a right to take under this act. I do not think we still have the answer as to why that anomaly occurred. Some people speculated it was budget cuts or that officers are under pressure to get to the next case and the next crime scene to deal with the next person. Others suggested it was a lack of training; that officers were not aware that this was a requirement that had to be fulfilled. Whatever the answer, I think it is unacceptable. The fact of the matter is there is no more damning evidence than forensic evidence from a crime scene linked to a person whose particulars are on the database.

The amendment bill before us today takes further steps forward; steps that were recommended four years ago by Hon Robert Anderson, QC. One area in which this amending bill makes an advance is in biometrics and in looking at future directions such as new methods of identification. There is reference to other identifying particulars such as iris scanning, computerised voice recognition or other kinds of facial biometrics or whatever the technical terms are. A lot of people love watching crime shows on television. Whilst there is a big gap between some of those crime shows and real life, it gives people a bit of an idea of where new science is going and how this could assist in putting people who are responsible for serious crimes behind bars. The bill also corrects a few anomalies, albeit, I would say, in a pretty tardy fashion given that the recommendation has been around for four years, in taking identifying particulars from convicted persons. I am told that other Australian jurisdictions already have this power. The minister can advise me if she is aware of any jurisdiction that has not done it. We might be the second last state to make these amendments. Maybe the minister knows of somewhere like the Northern Territory that has not brought these amendments into their Parliaments and had them passed. Most other Australian Parliaments have already passed the provisions outlined in this legislation. I am just talking about taking identifying particulars from a convicted person. I understand that most of the other states already have that provision in place.

In the first bill introduced to Parliament in 2002 we were very cautious about the area of juveniles. This was new technology and a new way forward in policing. As I alluded to, some people saw this as a big brother thing. When legislation like this is new, we are justifiably concerned about the circumstances in which identifying particulars are taken from juveniles. There was an argument about who was a responsible person, how we would get permission from a responsible person and so forth. Recommendation 24 of the Anderson report identified a flaw in the legislation. There was no provision in the act applying to an uncharged juvenile suspect when a responsible person could not be found or there was no responsible person. The current act only provides a trigger to obtain a warrant for a child suspect when the responsible person for the child suspect does not consent or withdraws consent. The bill addresses the issue of no responsible person or where a responsible person cannot be found within a reasonable period or there is an impractical request. We were certainly right to look at those matters very cautiously, but in practice this anomaly in the legislation is not necessarily to the advantage of juveniles. The proposal here makes sense.

There are provisions in the bill dealing with missing persons and unknown deceased persons, and the ability to take DNA or other identifying particulars in those circumstances, which makes sense. There are some other more technical provisions. By and large, the opposition certainly supports this advance. However, we would want an assurance that there is money in the budget for officers to be appropriately trained and updated in the new legislation once it goes through Parliament. Officers need to be made aware of the provisions of the law in such an area, because when they act in error or they do not follow the letter of the law, it can always leave an opening for a lawyer defending an accused person to highlight an inadequacy in the way an officer has gone about a procedure or circumstance and there is an argument about a point of law, meaning that someone goes unpunished for committing a crime. Therefore, it is very important that police officers are appropriately updated about the new legislation when it goes before the Parliament.

Such an area is very hands-on for police officers. I would hope that when the Criminal Investigation (Identifying People) Bill 2013 is enacted, most of them utilise the provisions on a very regular basis in their day-to-day duties; that is, by taking identifying particulars from crime scenes and from persons charged with serious crimes resulting in a sentence of a year or more in jail. It is important that police officers follow not only the letter of the law, but also the correct procedures, and not leave openings for people to potentially get around the law on a fine point of law.

Another important area is that when Parliament gives powers to police so that we can see best practice, we want to see that the processes are followed and that the law is utilised in every circumstance. I will allude to the potential cost in police time. For example, in recent years there have been hundreds of cases when DNA has not been taken when it could have been. The DNA that would have been taken from those people could, in the future, have been linked to a crime scene, resulting in the crime being solved very quickly. If the police had taken DNA from a crime scene and linked it back to one of those hundreds of cases in which the DNA was not taken from the suspect, they could potentially have solved the crime in a day. Without the DNA match, that would be a crime—even a serious crime—in which the police expended resources for weeks, months or, in extreme cases, years. Police do not give up on serious cases such as murder too easily and those cases do remain open. The potential is that the DNA that was missed and could have been taken last year or the year before could have been the DNA that matched a suspect of a future murder case. A crime that the police spent weeks and months working on involving a whole dedicated task force could have been solved had the identifying particulars been taken from a suspect back in 2010, when police were failing to take DNA and fingerprints from all suspects, although they were legally entitled to do so. That is one area for which the minister needs to give some assurance; namely, that as a matter of routine the police will take these identifying particulars from persons who are charged with crimes punishable by a year or more in jail. We need an assurance that it will not be ad hoc, that people will not be missed out and that this information will be collected for that database, because that database is incredibly vital in solving future crimes. When forensic evidence is provided and the police have identifying information, such as identifying particular matches, there is not only a much higher percentage of guilty pleas, which will also save on court time, but also a much higher rate of conviction.

I commend the Minister for Police for bringing the legislation forward, albeit somewhat tardily. My colleagues and I look forward to asking the minister a few more questions during the consideration in detail stage. I will also seek her reassurances that there will be 100 per cent compliance by police in taking identifying particulars from accused persons from whom they are entitled to take the particulars, and also about the money that is available in the budget for training officers about the new amendments to the legislation.

MR J.R. QUIGLEY (Butler) [4.45 pm]: I endorse and support all of my learned friend's comments. She is not only the member for Midland, but also the shadow police spokesperson. I note that we will be supporting the Criminal Investigation (Identifying People) Amendment Bill 2013. I will bring to this chamber some personal, professional experience with identifying people during a criminal investigation. Of course, DNA has been a huge advance in criminal investigation. It makes some cases, when the police have a mere circumstantial case or a strong suspicion of criminality by a particular person, conclusive by inextricably linking the accused to the crime. We have seen that occur time and again. It occurred recently in a very nasty historical rape case in which DNA was recovered from the bedsheets of the victim and the accused was put upon to say, "Well, perhaps it got there when I was a salesman at a shop selling bed linen." It was an extraordinary excuse to get around what was an inextricable and unbreakable link between him and the crime. The court was subsequently told after the conviction that he had a prior history. The jury did not know that history and were compelled to convict on the strength of the DNA evidence.

DNA evidence can work both ways. It can work to tie an accused to a crime or to exclude a person who was under heavy suspicion for a crime. When the police suspect someone during the course of an investigation, the gathering of bodily samples might work—despite the police suspicion or belief that the person was the culprit—in the suspect's favour by excluding them from the crime. The director of the Innocence Project, a professor

from New York, has been out lecturing in Western Australia on its use of DNA. The Innocence Project in the United States of America has literally worked towards and secured the freedom and release of dozens—I do not mean one or two, but dozens—of people on death row who were wrongfully convicted of murder.

Mr P. Abetz: Scary.

Mr J.R. QUIGLEY: It is scary. I asked a person from the Innocence Committee of America, "You have a population of nearly 250 million-odd people in America. How do you choose which cases you will take up?" I was told that it only ever takes on board a case when there is DNA evidence that excludes the convicted person from being the culprit. I recently read in the newspaper of a person in the southern states of America who was released after spending some 30 years in prison. Most of that time was spent on death row. He was released by the fact that the DNA evidence proved that he was not involved. Therefore, it is crucial that once the bodily samples are taken, they are properly preserved and investigating officers keep a proper record of them, not just at the time of the trial, but also through the years. I am concerned that that does not happen. Take the Mallard case, for example. Identifying material can include not only DNA, but also hair and fingerprints—a whole range of materials come within the classification of identifying material. In the Mallard case, of course, in which the police had a strong belief that Mallard was the culprit, they had collected identifying material at the scene of the murder that included the blood of the deceased, the late Pamela Lawrence, and prints taken from her glass-top showcase.

During the course of the trial of Mallard and the subsequent appeals, the police did not disclose the identifying materials that they had gathered. We all know—I do not want to dwell on this; it is a matter of common public knowledge now as a result of the Corruption and Crime Commission inquiry—that Andrew Mallard was indeed innocent of the crime for which he spent 11 or 12 years in prison. But the important point I wish to make here is that all the while throughout the trial and during his conviction, the police were in possession of an identifying mark—that is, the palm print of the late Simon Rochford, who had eight days later murdered his girlfriend. When he had been in Pamela Lawrence's shop, he had obviously touched the top of the counter and left his palm print. Despite the many subpoenas that had been served upon the police for the production of all prints taken from that scene, the police never produced that palm print. It was not until the matter had been raised in this chamber and had become a matter of some publicity, and also, I might add, until the High Court of Australia had looked at it and overturned the conviction of Mallard and sent him back for retrial, that the police commissioned a cold case review expert from the United Kingdom to relook at the matter together with the cold case team in Perth. They found in a particular officer's drawer in another station—that officer had been with the fingerprint bureau—the palm print of Simon Rochford. There had never been a proper cataloguing of the identification mark of the true murderer. Had that been revealed at the time of the trial, and, indeed, at the time of the previous appeals, a citizen of Western Australia—an Australian—would never have spent more than a dozen years locked up in a jail for a crime he did not commit.

At the time that that happened—I am now taking the chamber back to late 2005 when I made that speech, and I think the CCC conducted its investigations during 2007—the Commissioner of Police said, "All of those matters are historical. That relates to a murder that happened in 1995. We don't act in that way today." Of course, in late 2007—I think it was October or November 2007—the police arrested one Scott Austic and charged him with the murder of a woman in Boddington, I believe it was. I will not mention her name. She is an Indigenous person and I will honour the Indigenous custom of not mentioning the name of the dead. However, to briefly remind the chamber, she was an Indigenous woman with whom this local had been having a longstanding sexual affair. He had never been seen in public with her. It was one of those secret sort of relationships. She had become pregnant. She was in an advanced state of pregnancy and he had been contacting her, asking her to terminate the pregnancy.

Austic was a local in his early 20s. He used to visit her place regularly after he had been out drinking and have sex with her. This particular Sunday evening he went to her place. That is common ground. He had sex with her and then he went home, after first having consumed a quantity of alcohol. His story is that he went to bed and did not return to her place. Later that night, we know that she, naked and screaming, ran out onto her street, ran up the road, bleeding everywhere, and collapsed and died, with about 22 stab wounds to her body. The local police—I think it was the Boddington police—quickly moved in and secured her premises that night as a crime scene, and quickly moved on Scott Austic's premises and sealed them off as he was a person of interest, which was appropriate. The local police then photographed his house, and photographed tables and all around his house, and they photographed her house.

We know—I am coming back to the point of the Criminal Investigation (Identifying People) Amendment Bill—that at his trial the detectives put forward a photograph of the table at the back of his house upon which laid a packet of Winfield cigarettes with a blood smudge. The DNA of that blood matched the deceased's blood, and

he was known to smoke Winfield cigarettes. So the police put to the jury a compelling case that he had in fact visited her house after she had commenced bleeding and that the jury could therefore infer that he was there at the time of the murder.

During a subsequent reinvestigation of this case by His Excellency the Governor, as he now is—this was in his former capacity as a Queen's Counsel—Mr Malcolm McCusker, QC, he was able to discover that a previous police photograph had never been disclosed to the jury and never disclosed to the defence. The previous photograph was taken 40 hours before the detectives took their photograph, and that photograph of the same table 40 hours before disclosed that there was no packet of cigarettes on that table with the identifying material on the cigarette packet. Furthermore, the police found at the back gate of the house that night what they said was the murder weapon—a knife that they said belonged to the accused, Scott Austic—but it was never disclosed that between the night of the murder and the time the detectives located that knife, the local police had the local State Emergency Service conduct a pattern search of the block of land upon which that knife was found and that those SES searchers had said that if there had been a knife there on that clear ground, they would have seen it.

To get back to the DNA aspect of this bill, two further samples of blood were produced in front of the jury. One was a sample said to be human blood taken from Scott Austic's thong, and the police said that they could not exclude it being the deceased's blood. They could neither confirm nor exclude it. They put it before the jury to say that it was human blood, but they did not know whether it was the deceased's blood. That was a very clear sample of the blood, but the DNA was equivocal in that regard, and the jury was left to make up its own mind about that. The further area of blood that was noticed on that night was a very large amount of blood between the deceased's bed and the front door. This poor woman was bleeding profusely as she ran from that house. The crime scene investigators noted that through this blood were footprints. Members might recall that at the start of my speech I detailed how she was naked and fled from that house after she was so brutally stabbed. She fled through there, and they noticed footprints through the house. Obviously, after the coroner did his work, they took impressions of the deceased's footprint and went back to match it with the footprints in the blood. The police then produced a diagram that showed two sets of footprints in that blood. One set of footprints said to be the deceased's footprints matched back to her, I hate to say it, dead body—the impressions that the coroner was able to get—and another set of footprints that they could not identify at that stage. The officers then went to Casuarina Prison and asked Scott Austic—as will be further available under this bill that is now before the chamber—whether he would give them impressions of his foot. He said, "I didn't do the murder." He said he was happy to give impressions of his foot, so he gave them impressions of his foot on a pad with ink and everything that they asked for. That was never raised at trial at all. Do members not think that if those prints had matched the second set of prints in the blood that the police would not have raised that in a flash? They never raised it.

Mr McCusker and the team of lawyers working on the case, and subsequently me, have pursued the police for the forensic report on that second set of footprints. As that famous race caller, Bert Bryant, who used to call the races at Randwick when I was a lad at the races on Saturday morning, used to say, "It is London to a brick on, ladies and gentlemen", that the murderer was the person who ran out of the house and made that second set of footprints in the blood—London to a brick on. But when we write to the police and say, "Can we have a look at the forensic examination of that second set of footprints? Can we have a look at the prints you took from Austic?", they say, "We have now no longer got those available." When we say, "What do you mean?", they say, "We can't locate them?" That is exactly the same answer they gave in the Mallard case in respect of the print. It is a disgrace!

As I said at the start of this speech, it is all very well to go around collecting identifying material, but this identifying material cuts both ways. It can both convict the lying accused who lies that he did not do the offence; equally it can exculpate the innocent who are wrongly accused.

Mr McCusker, QC, our Governor, in the last job he did before he went to Government House, drew the petition to the Attorney General pleading that the government refer this case back to the Court of Appeal. This was handed to the former Attorney General Hon Christian Porter in January 2012.

[Member's time extended.]

Mr J.R. QUIGLEY: It was such a compelling case that here was the cigarette packet with the identifying material on it presented to the jury by way of a photograph taken on the night by the local police showing no cigarette packet on the table; and here is a photograph taken by the police 40 hours later, not only with the Winfield cigarette packet on it but also with a smudge of blood of the deceased. Incredible! This was never disclosed to the defence and was an important matter that should have been put before the jury. This is the very thing that the High Court of Australia criticised in Grey's case and in Mallard's case, and one would think as a matter of routine, this matter, in the interests of justice and in the interests of all Western Australians who are

interested in justice, should have been referred to the Court of Appeal. It is not for this chamber, for any minister, for the Premier or for this Parliament to decide whether Austic is innocent or guilty of the crime as charged; it is for the Court of Appeal to decide that and it should go back to the Court of Appeal. I call on the government to urgently refer this matter back to the Court of Appeal and to let the Chief Justice and the President of the Court of Appeal review the matters to which I refer.

I was alarmed shortly prior to the resignation of Hon Christian Porter from his responsibilities as the Attorney General when I approached him and asked him where the case of Austic was up to. The Governor had referred this matter and had delayed going to Government House so that he could finish this job. The Governor placed such a high importance on this petition and upon the matter being referred to the Court of Appeal that he wanted to see this off as his last job. I therefore approached the Attorney General, who said, "We saw that. We saw what Mr McCusker had said and so we have asked the police to investigate it." This is the very thing that should not happen. The police should not be asked to reinvestigate their own case. This is what we have the Corruption and Crime Commission for. I was absolutely dumbfounded at the time that here was a government that talked about accountability and transparency, and here was its response to allegations of police misconduct, because even if there is some explanation of how this Winfield cigarette packet got onto the table 40 hours later, it begs for an explanation—and the fact that the earlier photograph was not disclosed to the defence prior to the trial of Austic constitutes misconduct. Clearly, I say that with confidence on the findings of the CCC in the Mallard case.

I therefore then approached the CCC to see whether it had heard about the Austic case. It said, "We can't tell you whether we've heard about it or not, but what's it about?" I then showed the CCC Mr McCusker's petition. The strong and inescapable inference is that the CCC had not been told about it. But by this time it was on the front page of *The West Australian* newspaper because I had taken these photographs out into the public arena and said, "This is a matter of grave concern." As soon as this petition was raised and sent to the police commissioner for reinvestigation, the commissioner would have had to do two things. The first is to inform his minister of this very serious matter, and the second is to advise the CCC immediately. This was not a trifling matter. This was not a light matter. This was a matter with coloured photographs appended to the petition—a petition prepared by the most eminent jurist in our state who is now our Governor. That should have happened. That did not happen. It is a very serious matter that the police did not refer this to the CCC once the Attorney General had raised it. I do not think it was proper that the Attorney General sent it to the police to reinvestigate their own allegations of misconduct against themselves. This is the very reason, of course, why the opposition and Hon Nick Goiran of the upper house and other learned members of this Parliament oppose a partnership between the CCC and the police. There has to be an independent oversight body.

I approached the CCC to look at this matter, and I was subsequently criticised by the Attorney General who said, "I was on the cusp of making the decision in this matter before you stuck your bib in and referred it to the CCC", as though I had done something improper. The impropriety is that when the police got the allegations and started to investigate them, they should have immediately informed the CCC of what they were doing and given the CCC the option of either overviewing the investigation or conducting an investigation itself. The government, or the Attorney General, seeks to lay any blame at my feet for any further delay—what an outrage!

The CCC then wrote to me saying, "If we assess this matter, do you realise or does Mr Austic realise that this could delay the process somewhat, because if we're looking at it, the Attorney General might not want to make a decision until we've looked at it?" In November last year I sent this matter to the CCC. Straight after the election, I telephoned the CCC and said, "We've heard nothing in four months. Where's it up to?" The CCC said, "We are on the cusp of reporting to the Attorney General and he should hear in a week or so."

I have contacted the Attorney General a couple of times on an informal basis to ask what is happening and he said, "Well, I haven't heard anything myself from the CCC and if you hadn't have interfered in the first place, I could have made a decision." We do not know what that decision would have been. That decision would have been made on a police report, so God knows what it was. We do know that when the police reinvestigated their own conduct in the Mallard case, they gave themselves a merit stamp and said, "He's the guilty party and we're a good police force and we've done nothing wrong. We give ourselves a merit stamp and let Mallard rot in jail." In this particular case, the circumstances are so compelling that the time is up. This murder happened in 2007. If Austic did not do it, there is a murderer—that is, whoever planted those footsteps in the blood—going around in this community unpunished. The same thing happened with Simon Rochford. While the police were insisting, on their forensic examination, that Mallard was guilty, we now know beyond a reasonable doubt that Simon Rochford was guilty. As I said, the DNA can be used to convict those who are seeking to dishonestly avoid conviction or exculpate those people who have wrongfully been accused of a crime. It works both ways. That is the power of this legislation. That is why we support this legislation strongly—it takes the matters beyond suspicion to matters of certainty.

This matter of Austic has been left lingering too long. As I said, our Governor signed off on this. It was the last thing he did before he took up his appointment as our Governor. It has been with the government now since January 2012, which is nearly 18 months ago. All this while the Court of Appeal could have looked at this matter and decided whether it should have been tried or a conviction confirmed. Justice in this society depends on how much money one has. Scott Austic was on legal aid. He was struggling. He has not been able to conduct himself through private practice by engaging highly qualified eastern states Queen's Counsel et cetera—the best silks in the land to challenge court rulings. He has had to rely upon those who have come forward to offer their services pro bono to say that this conviction is unsafe. On the cards, it is unsafe because the identifying material that was collected is the subject of grave suspicion given that the photographs of the table were taken by the Boddington police—I am sure it was the Boddington police—on the morning after the murder with no cigarette packet on the table, no blood smudges with the DNA of the deceased on that table and no other material on that table. Forty hours later, police from Perth were able to photograph the same table in premises that had been sealed off by the police. People were not allowed into those premises. The police photographed the Winfield cigarette packets on the table with the blood smudge of the deceased. I am sure that this would concern the minister. I am not having a go at the minister but I am sure that the minister cannot ask her own commissioner about it. If she asked the commissioner about it, he would say that that matter is with the CCC and the CCC is in a state of gridlock on it. I rang the CCC soon after the election because I did not want to raise it during the election period, and they said that within a week they will be back to the Attorney General.

This matter goes right to the heart of the administration of criminal justice and what use can be made of the sorts of materials that are being collected by the police during their investigation. The petition by Mr McCusker, QC, says that that cigarette packet with the blood containing the DNA of the deceased on it was planted there and that this conviction was obtained by a perversion of the course of justice by the improper placement of DNA on the table. That is not the member for Butler's allegation; that is in the petition settled by the most eminent jurist in the state of Western Australia, who is now His Excellency the Governor of Western Australia, Mr Malcolm McCusker, QC, AO.

We support this legislation but I urge all members and the minister to bear in mind that the integrity of the DNA material has to be protected not only through the investigation but also after it. What has happened to the forensic analysis of the bloodied footprints through the blood of the deceased? As I said, it is London to a brick on that whoever followed that poor woman out of that house while she was bleeding before collapsing and dying made that second set of footprints and is the murderer. When we write to the police asking where the forensic analysis of those identifying marks is, they say it cannot be located.

MR P. ABETZ (Southern River) [5.16 pm]: I would like to make a small contribution to the Criminal Investigation (Identifying People) Amendment Bill 2013. My contribution will certainly not be as colourful as that of the member for Butler. I support the bill because I think it is important that we make provision to allow police to make use of whatever new techniques are available to help identify people, and, as the member for Butler pointed out, both from the perspective of eliminating suspects as well as helping to identify those who commit the crimes. I am certainly not expert on these things and I do not want to particularly focus on that. In terms of identifying people, there is that scientific evidence but there is also an issue that I want to approach; that is, who are the people who are committing our crimes? Unfortunately, young people are so grossly overrepresented in criminal arrests. A report prepared by Edith Cowan University in March 2010 for the Department of Corrective Services states —

> In Australia, one in every twenty young people is arrested for property or violent crime each year and each successive record puts them at higher risk until they are considered persistent or chronic offenders …

In a recent report on the Children's Court of Western Australia, a team of researchers from the University of Western Australia established that —

> The ratio of the total number of defendants to percentage of the population clearly demonstrates that Western Australia is processing far more children through the Children's Court than any other State or Territory …

Members in this place may be familiar with the Drug Use Monitoring in Australia program that has been running since 1999. It is Australia's largest and longest running ongoing survey of police detainees across the nation. In the 2009–10 report, DUMA reported that out of a total of 7 575 adult detainees, 14 per cent were aged 18 to 20 years, and 21 per cent were aged 21 to 25. In other words, 35 per cent of all adult detainees were under 26 years old.

One of the other interesting factors is that criminal identification also reveals the presence of a significant number of drug users. The same DUMA report states that 23 per cent of detainees test positive for benzodiazepines, 46 per cent to cannabis and 16 per cent to amphetamines. Almost half—in fact, 47 per cent—of adult police detainees report having drunk alcohol in 48 hours before their arrest, and, although results have fluctuated, there has been a general increase in recent alcohol use since the data first started to be collected in 2001. Roughly half of the detainees confirmed that they had been abusing substances just prior to their current offence. I think that is an issue that ought to be of concern to all of us in the community. It is clear that a large proportion of Western Australian criminals are young, heavy drinkers and drug users. Furthermore, those most likely to reoffend, sadly, are the younger ones. Young people from dysfunctional families and from immigrant backgrounds are very much overrepresented. In this regard, a large-scale analysis of the risk of reoffending among young people was carried out in New South Wales in 2007. The analysis followed 392 offenders over a four-year period and it was found that males under the age of 14, of either Aboriginal, Torres Strait Islander or non–English speaking background, with a parent deceased or parents divorced, were most likely to reoffend. I think it is time that, while it is great that we assist our police with forensic evidence gathering abilities and techniques, we also need to address the rise of a new generation of delinquents who become criminals. We need to tackle that issue. It is often said that poor education is a major cause; it is certainly a contributing cause. Sadly, many people in prisons are illiterate. The schooling system has failed them or they have failed to use the schooling system—whichever way it goes.

One thing that we really need to address is the incidence of children who do not attend school regularly. This ought to become an issue for the Department for Child Protection because I believe that preventing a child from going to school and getting an education is a serious form of child abuse. Education means integration. Without education, there can be no integration. The lack of integration leads to ghettos, isolation, poverty, crime and a lack of opportunities. Beyond formal education and the teaching of English, I am convinced also that positive role models play a critical part in guiding our young people during their childhood and teenage years. It certainly has been established that fathers play a very, very important role. Leading sociological commentator, Bill Muehlenberg, recently had this to say on the issue of fatherlessness in our society —

> Fatherlessness is a growing problem in Australia and the Western world. Whether caused by divorce and broken families, or by deliberate single parenting, more and more children grow up without fathers. Indeed, 85 per cent of single parent families are fatherless families.

The importance of a father figure in the life of a child growing up has been well established. I think it is important that we as a government focus from a broad spectrum on how we can strengthen families and impress on men the importance of being a father to their children. Some of us in this house may be aware that Hon Nick Goiran gave a speech a little while back in which he called for the creation of a ministerial office for men's interests. In his speech he says —

> A minister for men's interests would facilitate a healthy masculinity and its affirmation of manhood and womanhood—healthy men and healthy women standing side by side, complementing one another rather than fostering a culture of sexism and reverse sexism.

I certainly concur with that. If the profile of a young delinquent is largely that of a 14-year-old boy without a father in his life, support needs to be provided to Western Australian families to assist them to function harmoniously and in the exercise of positive parental influence, particularly from fathers.

With those few comments, I conclude my remarks. I certainly support the bill, but as we look at equipping police with the ability to make use of the latest technology for identifying criminals and for making clear who is not guilty, we should not lose sight of the bigger picture of the need to address issues in our community to keep the crime rate low.

MR C.J. TALLENTIRE (Gosnells) [5.25 pm]: I rise to support this bill, as my colleagues have supported it. I begin by noting that it is the Criminal Investigation (Identifying People) Amendment Bill 2013. I want to raise a couple of issues. Although we are developing technologies to help us identify criminals, and keeping legislation up to date so that we can apply the technology—they are good things—I still hear of instances in which police officers have an inability or, seemingly, a lack of willingness to identify criminals. Over the weekend it was reported to me by constituents—not in my electorate—that there was a hooning incident on West Road in the electorate of my friend and colleague the member for Bassendean. Three young drunk males were driving a car and they broke the axle. The police came around but they were unable to apprehend one of the people because they all withheld their names so the police were unable to determine who the hoon offender was. Obviously, one was the driver and two were passengers but they were unable to be identified. If the minister's advisers are inclined to do so, I understand the registration number of the vehicle was 1CYZ165. That is one example that

shows, in fairly simple circumstances, a crime on the less severe end of the spectrum of criminality for which we are struggling to identify people.

I wanted to respond quickly to the points raised by the member for Southern River. If I understand him correctly, he said that 85 per cent of single-parent families are fatherless and that has some correlation to the rate of reoffending.

Mr P. Abetz: First-time offending.

Mr C.J. TALLENTIRE: There may be other factors involved also. It is not just the lack of a father figure. Poor economic circumstances can often well be the sad situation for those families. I think economic circumstances and, as the member for Southern River indicated, the lack of educational opportunities are also elements. That is something that needs to be considered. I do not think we can narrowly pin down the fact that offences being committed are connected to families that are apparently fatherless. Male adult figures may well be in a child's life, although their biological father may not live with them. I realise that is a matter in which the member has a strong interest and a high degree of expertise.

I wanted to focus on an issue I raised with the minister's advisers, and I thank them for the time they were able to give us, relating to the identification of people when a head garment is involved. It could be a fairly banal set of circumstances when someone is pulled over in a car and the police officers would like to have, and indeed need, the power to ask the person to remove a face covering. This is the point I want to make. The current legislation refers to the term "headwear", when I think it would be perfectly reasonable to change that to "face covering". In the minister's second reading speech in which she mentions this, she said that there are cases, "including when the subject person refuses to remove an obstruction that is preventing the officer from being able to identify the person's face." We know that biometrics—our own normal human interpersonal identification of other people—comes down to facial recognition. It is not about identifying someone by their head. Indeed, if we were to rely on identifying someone by their hair and hair colour—one day someone may have hair, on another day they may have a shaved head—we would be embarking on a route that would be highly unreliable for the identification of an individual. It would be much, much safer to use someone's facial pattern, whether through biometric analysis or normal human recognition. The use of facial recognition is what this should be about, so the empowering of officers to be able to ask someone to remove their headwear seems unnecessary. I am concerned—I know there is debate about this—about the circumstances of people wearing motorbike helmets, because of course a helmet prevents proper identification of the face. Likewise, a person wearing a hoodie and sunglasses cannot be identified; indeed, the hoodie may be worn in a way that obstructs the identification of the face.

I turn to people who are of one of the great Abrahamic faiths—Muslim people—and who may wear a hijab. Their driver's licence will most likely have a photo of them wearing that hijab. That hijab does not obstruct the ability of anyone to identify that person using their facial features. That is why I question the need for an officer to be empowered to ask for the removal of that head garment. Some clarification is needed here, and perhaps that could be done through either debate or consideration in detail. We need to be absolutely sure that the current wording of the Criminal Investigation (Identifying People) Amendment Bill 2013 does not lead to unnecessary embarrassment for people who take very seriously and hold dear maintaining a standard of hair covering afforded to them by a hijab. I think that is an important issue that we should consider, and there is no need to subject people to unnecessary embarrassment.

The burqa, which covers the whole face, is a different story. I note that the minister's second reading speech made reference to the New South Wales case that involved the wearing of a burqa, and that is a different matter. I think it is important that we are careful about our understanding, and I have a substantial number of women in my Gosnells electorate who could be disappointed if we were to fail to understand the actual definition. A niqab is similar to a burqa, but that garment exposes some of the face and the eye area. Again, I think it could be argued that that is not an adequate enough opening to allow for facial identification. I am happy to accept that in the case of a niqab or burqa, a more substantial removal of that head garment would have to be asked for, but certainly not for a hijab, which is very commonly worn by women from Indonesia, Malaysia and some Middle Eastern countries. It is a very attractive garment; the colours I see when I go to events are really quite stunning. These women are very fond of and fashion conscious about these garments and see them as a sign of their faith and perhaps as fashion accessories and hold them dear. I fully respect that, which is why I think it is important that the legislation contains the correct terminology, and that we do not put unnecessary emphasis in our legislation and talk about "headwear", when in fact we are talking about face coverings.

I conclude my remarks there, but I think the intent of the legislation in so many other areas that my colleagues have dealt with, such as the use of important new technologies, is a welcome development, and it is important

we have it. I look forward to the minister's response to the issues I have raised either in her second reading response or through the consideration in detail process.

MRS L.M. HARVEY (Scarborough — Minister for Police) [5.35 pm] — in reply: I thank members for their contributions to the second reading debate on the Criminal Investigation (Identifying People) Amendment Bill 2013. A number of issues were raised by members, who flagged that they will raise them again during consideration in detail; I look forward to those discussions.

I will start with the member for Gosnells, who raised matters regarding the removal of headwear for the purposes of identification. Consultation had been undertaken with particularly some of the Muslim communities who may be affected by the inclusion of this provision for the purposes of identifying someone. The reason the bill refers to the removal of headwear is that it can often cover particular identifying features. For example, some people may have lost part of their ear or have tattoos along the side of their face, and so for the purposes of identifying a person, should the police officers need to have all headwear removed to accurately identify that person, this bill will allow for that. Police officers have extensive cultural awareness training so that this can be done with consideration given to the religious beliefs of the person involved, and the act will allow for that identification to be conducted by a female officer if a woman prefers that. If that is realistically possible, then police officers will do that. With respect to the hooning incident that the member raised, I will certainly investigate further. The member gave a very detailed description, so we can follow that up. I appreciate the member raising that with me.

With respect to the comments of the member for Southern River regarding the importance of fathers, I do not think any person in this place would dispute the importance of a father figure in a person's life; those people who are lucky enough to still have their fathers with them probably still seek their counsel. But the social issues affecting young people and their entry into the criminal justice system is certainly something that is of great concern to the government, and we do have some cross-government policies that look at trying to reverse some of those trends. For the purposes of this bill, though, the important part with respect to juveniles is that it will streamline processes to allow police officers to take identifying particulars from juveniles when a responsible adult cannot easily be found. I think that for the purposes of identifying those juveniles who are involved in the commission of crimes or are suspects in crimes, it is very important for police to have that, if you like, piece of red tape removed to allow them to go about their business and identify those people with much more ease and in a more efficient manner.

The member for Midland raised that this bill was introduced quite some time ago, and that this is the second tranche of amendments in response to the April 2009 statutory review of the 2002 act. The statutory review, I think, was a really good document with some very sound recommendations. The government has taken up most of those recommendations, and some will perhaps be considered in a further tranche of amendments. The member also raised that there are presently some issues around the taking of identifying particulars. That was identified by an internal police audit. The internal police audit found that identifying particulars were taken by officers on only 31 per cent of occasions when they were entitled to take identifying particulars; that is, when the people they were dealing with fit the existing criteria for taking identifying particulars. Deputy Commissioner Dawson has taken that on and said that that is not good enough. He has started to improve training and processes with officers to ensure that they understand when identifying particulars need to be taken. He has undertaken to continue auditing that process until we get those figures up to an acceptable standard. Ideally, we want to achieve taking identifying particulars on every occasion that police have the ability to take those particulars because it —

Mrs M.H. Roberts: What is the current percentage, minister?

Mrs L.M. HARVEY: The percentage identified in the internal audit was that only 31 per cent of —

Mrs M.H. Roberts: Was that not a couple of years ago?

Mrs L.M. HARVEY: I cannot give the exact date but I was made aware of those figures in June. In June, the commissioner was responding to the results of that internal audit when he made some comments in the media about the performance of his team taking identifying particulars. There is certainly work to be done there.

The importance of this legislation is that it will clarify some of the processes and allow them to be streamlined. It will make much clearer when it is appropriate for officers to take identifying particulars. It will remove some of the obstacles for when identifying particulars can be taken legally. It will allow for better use of our DNA database to ensure that we can resolve crimes and get better court outcomes, and it will move closer to gaining faster convictions for criminal activity.

Certainly some of the processes that police officers have found themselves encumbered with regarding taking identifying particulars are being looked at as part of the police reform project. I put to this place that identifying particulars are not being taken as regularly as they can be, and indeed should be, because of the process around all the procedures police officers need to follow when they interact with an offender, or suspected offender, in the commission of a crime. Streamlining some of those processes and making much clearer what police officers need to do—perhaps removing some of the unnecessary duplication and red tape involved in those processes when police officers interact with offenders—will certainly ensure that important parts of that process, such as taking identifying particulars from people, will not be missed in the future.

In closing, I once again thank members for their remarks —

Mrs M.H. Roberts: Minister, can I highlight the fact that I asked what training will be provided to roll out the new bill?

Mrs L.M. HARVEY: The Commissioner of Police assures me that training in the processes will occur as part of the ongoing training program that officers go through. That has all been factored into the implementation phase of the bill once it goes through both houses of Parliament.

In closing, I thank members for their contributions and look forward to hearing their comments during consideration in detail.

Question put and passed.

Bill read a second time.

Leave denied to proceed forthwith to third reading.

Consideration in Detail

Clause 1: Short title —

Mrs M.H. ROBERTS: I thank the minister for answering some of the questions that I raised during the second reading stage. I asked about training in particular so that the minister could assure me that not only would officers be using the legislation on close to a 100 per cent basis, but also that they were properly trained in taking identifying particulars. I understand that when the legislation is amended, this training will form part of the training for new police cadets, who will graduate from the academy. I am well aware that when this legislation was first introduced there was a special rollout of additional training to all existing officers so that they would be equipped to take DNA samples and other identifying particulars. A range of other identifying particulars is now able to be taken. I am seeking an assurance from the minister, other than the blithe one that she has been assured by the Commissioner of Police that he can do everything that needs to be done when it needs to be done once the act becomes law, that this requires a budgetary allocation. Additional money needs to be allocated to train existing officers in these procedures, not new officers going through the academy. I ask the minister whether the government has allocated any money for this purpose, or does the Commissioner of Police need to find that money from internal resources?

Mrs L.M. HARVEY: I thank the member for the question. Should new methods of taking identifying particulars occur in the future—for instance, for biometric analysis and taking antibodies—substantive training would be needed to ensure that officers are acquainted with the new process. At the moment it is not envisaged that a new tranche of training is needed because the changes are mainly to streamline the consent processes. In response to the internal audit conducted by the police, they have significantly improved the opportunities for training and have been updating officers about their requirements under the Criminal Investigation (Identifying People) Act 2002. Also, a package is available through the police online portal that allows them to go through online training modules to update themselves about what is required to comply with the current act. Once this legislation has been through the appropriate processes of Parliament, those changes to the consent procedures will be updated through the online portal. Officers will be advised to ensure that they are abreast of those changes and that they understand the requirements under the new act.

Clause put and passed.

Clause 2: Commencement —

Mrs M.H. ROBERTS: This clause deals with the commencement of the act. Generally, most bills come into law on the day that they receive royal assent, but I notice some differentials in clause 2(b) and (c). Paragraph (b) states —

> section 28—on a day fixed by proclamation;

Paragraph (c) states —

> the rest of the Act—on the day after assent day.

I looked at the explanatory memorandum that has been provided, and it says that clauses 1 and 2 come into operation on assent. That is interesting because it is clause 2, and then it says that clauses 1 and 2 come into operation on assent, so I am not sure whether that is an accurate statement. The explanatory memorandum states —

> **Clause 2. Commencement**
>
> Clauses 1 and 2 come into operation on Assent.

Be that as it may, it then states —

> Clause 28 of the Bill comes into operation on a day fixed by proclamation. Clause 28 has been separated out in this clause so that it can come into operation after regulations, that will prescribe the relevant DNA Database index definitions, have come into force. If section 28 was to come into force before the regulations, it would delete the current index definitions in the Act leaving an anomaly in the definition of DNA Database.
>
> The remainder of the Act comes into operation on the day after the Act receives Royal Assent.

If we look to clause 28, it is headed "Section 76 amended" and states —

> (1) In section 76 delete the definitions of:

Then it deletes all those definitions. Subclause (2) states —

> (2) In section 76 in the definition of ***DNA database***:
>
> (a) delete paragraph (a);

And so forth. I wonder whether the minister can explain in simple English the impact of this special requirement for section 28 to come into operation on a day fixed by proclamation.

Mrs L.M. HARVEY: Section 28 refers to the DNA database and the statistical database, and some of those index definitions need to be set by regulation, so we need to prescribe those by regulation and have them proclaimed before we delete the existing index definitions to ensure that we have a current definition of a DNA database active at any given time. We need to ensure that there is some continuity of the index definitions, and we need to make sure that our new definitions are prescribed by regulation and are ready to roll before we delete the old definitions.

Mrs M.H. ROBERTS: Further on the commencement, since we need to prescribe those definitions in regulations that will need to be tabled in the Parliament, does the minister have drafts of those definitions available; and, if she does, can they be made available to the opposition?

Mrs L.M. HARVEY: Yes, we have drafts of the index definitions and I am happy to provide them to the member. Obviously, sometimes things can be amended in this place, so we do not want to be presumptive in assuming that our index definitions as per the intention of the legislation are necessarily going to be passed as we would —

Mrs M.H. Roberts: If you were to table them as a draft, that is the spirit in which they would be accepted.

Mrs L.M. HARVEY: I am happy to table them as a draft. Just to be clear, what I will table for the house is the draft existing index definitions with the proposed deletions and additions, at the request of the member for Midland.

[See paper 507.]

Mrs M.H. ROBERTS: I thank the minister for providing those. I think that is quite useful in making progress. Of course, clause 2 deals with the commencement of the act, and I anticipate, given the opposition supports this bill, that, hopefully, this bill may pass this place today. If it does not pass today, it will certainly pass before the end of the week, I would have thought, but that is entirely in the government's hands. If this bill is left open for debate later this evening, I think there is every chance that it would pass in the one day. That said, it will pass very shortly and it will then go to the upper house. I would expect that the legislation, if it has any priority with the government—I note that there is not terribly much legislation on the Legislative Council's agenda—should be dealt with by the Legislative Council relatively expeditiously. That being the case, when would the government be seeking royal assent for this bill? Also, given that section 28 is to come into operation on a day fixed by proclamation, and I understand that there will be the requirement to table the regulations, approximately

how long, let us say in a best-case scenario, after royal assent would the minister expect the proclamation of section 28?

Mrs L.M. HARVEY: The best assurance I can give the member is that the government wishes to deal with this as expeditiously as possible. I appreciate the cooperation of the opposition and its intent to see this legislation pass through this place, after due consideration, in an expeditious manner. I would not care to predict a date for proclamation of the bill or the day of royal assent, because even though the government has some control over the management of business through both houses of Parliament, I do not have the power to control the contributions of the members in the other place to the debate on the bill, and it is certainly an area of legislation that is of high interest to a number of members. The best assurance I can give the member is that the government will seek to have the regulations prescribed and follow the processes of Parliament and have the bill ready for proclamation and assent as quickly as possible after it has passed through this place.

Mrs M.H. ROBERTS: Further on the same point, I fully understand that the minister cannot guarantee when something will get passed by the Legislative Council, so what I am really seeking to find out from the minister is how long she anticipates it will take her to seek assent after the bill has gone through the Legislative Council. In the past five years I have seen examples of bills that have gone through this house and two years later, having passed the Parliament, they have not received proclamation or royal assent. That is what I am seeking. I do not know why some of the legislation that is so urgently put before the house here has not been given royal assent a year or two later. Sometimes there may be budgetary considerations; sometimes there may well be other considerations. I really want to find out whether the minister sees any impediment to seeking royal assent expeditiously—that is, within a month or two at the latest after the bill has gone through the Legislative Council. Again, I reiterate the second part of my question, which was: how long does the minister anticipate it would be between royal assent and the proclamation of section 28, those matters being within the minister's control?

Mrs L.M. HARVEY: WA Police has been in consultation with PathWest and agreement has been reached on the indexes that would form the main tranche of regulatory requirements or regulations that would need to be drafted. We would expect that to be a few months.

Sitting suspended from 6.00 to 7.00 pm

Mrs L.M. HARVEY: I will just finish my remarks from before the dinner break. It is the intention of the government and it is certainly my intention to have this bill proclaimed as soon as is physically possible after it has passed through both houses of Parliament. We envisage that that will potentially take as little as two months from the day on which the legislation passes through these houses of Parliament until it can be proclaimed and royal assent obtained.

Ms J.M. FREEMAN: I want to ask about proposed subsection (4A)(c), which states —

> to remove any headwear worn by the person;

I understand from speaking to the minister's advisers during the briefing that this paragraph primarily concerns helmets. The explanatory memorandum outlines that this mostly concerns the removal of face coverings so that people can be identified.

The ACTING SPEAKER (Mr I.M. Britza): Member, we are discussing clause 2. Can you tell me where this matter relates to the commencement clause?

Ms J.M. FREEMAN: I am talking about clause (2)(4A)(c), which states —

> (2) After section 16(3) insert:
>
> (4A) If —
>
> …
>
> the officer may request the person —
>
> (c) to remove any headwear …

Mrs M.H. Roberts: We are dealing with part 1. We are on page 2 of the bill.

The ACTING SPEAKER: We are discussing clause 2 on page 2.

Ms J.M. FREEMAN: I am much further down. Are we on clause 2, "Commencement"?

The ACTING SPEAKER: Yes.

Mrs M.H. ROBERTS: Minister, thank you for continuing your answer to the question that I asked before the dinner break. I am pleased to hear that the minister thinks that assent can be obtained in as little as two months after the bill has passed through both houses. The second part of my question concerns paragraph (b), which

states that clause 28 will come into operation on a day fixed by proclamation. What does the minister anticipate will be the interval between the granting of royal assent and proclamation of clause 28?

Mrs L.M. HARVEY: We will work on getting the regulations drafted and tabled as per the usual processes. As soon as that has occurred, we will be seeking proclamation of clause 28.

Mrs M.H. ROBERTS: Other than getting the regulations passed by the Parliament, can the minister see any further reason to delay the implementation of this legislation?

Mrs L.M. HARVEY: Not at this stage, no.

Clause put and passed.

Clause 3 put and passed.

Clause 4: Section 3 amended —

Mrs M.H. ROBERTS: Clause 4 has a number of parts. I read through the explanatory memorandum to the bill. I note that the bill will include in the definition of "face" the iris or retina. That amendment will be included in the principal act. Why will that level of detail be put in the act rather than in the regulations? Further identifying features may need to be included in the legislation in the future, which will require an amendment to the act. Such a change could have been made more simply by amending the regulations, had the minister chosen to go down that path.

Mrs L.M. HARVEY: The reason "iris or retina" is being included in the definition of "face" is that under the existing act, there is an ability to photograph a person's face and therefore to photograph a person's iris or retina. This amendment basically brings what is happening under the existing legislation into the new legislation to make it more contemporary.

Mrs M.H. ROBERTS: I understand that when people visit prisons in Western Australia, and elsewhere for that matter, they can be subjected to iris or retina scanning—some kind of eye scanning—and that that happens routinely so far as I am aware. Is this likely to be used in the immediate future or any time soon by Western Australia Police or is this just, to quote a famous TV series, about future proofing the legislation?

Mrs L.M. HARVEY: At the moment it is, to use the cliché, about future proofing the legislation.

Mrs M.H. Roberts: I blame the ABC and *The Office* for that!

Mrs L.M. HARVEY: Indeed. While the ability to photograph and scan irises and retinas is available, we do not at present have a database that captures and matches that information. This amendment is about enabling us to store that information in the event that a future database will be built to capture the information and to enable us to use those identifying particulars in a more meaningful way.

Clause put and passed.

Clause 5: Section 7A inserted —

Mrs M.H. ROBERTS: Clause 5 inserts a new section 7A after section 6, headed "Requesting or informing people under this Act". The proposed section states —

> Unless expressly provided otherwise, if this Act permits a person to make a request to another person or requires a person to inform another person, the request or information may be given to the other person orally or in writing.

What is the background to this amendment and why is it necessary?

Mrs L.M. HARVEY: It is just to streamline the processes. If somebody can understand the information, the officers will provide that information in a written format, but it also allows the request to be made orally. Officers may be able to better communicate with a person through a conversation with that person and will obtain their consent that way. It allows the officers to use that format or a written format. This just formalises the ability for officers to obtain consent either orally or via written format.

Mrs M.H. ROBERTS: There are people in our community for whom English is not a first language, so their ability to necessarily comprehend something orally is not perhaps as good as it would be if it were in writing. If something is in writing, it also gives people something to take away and to perhaps show to a lawyer or, indeed, to somebody who has a better grasp of the English language than someone for whom English is not a first language. I really want to know whether there have been circumstances that have necessitated this amendment or whether this is an amendment that might actually be detrimental to people for whom English is not a first language.

Mrs L.M. HARVEY: The requirement of the legislation is that the officers are obtaining informed consent. Should they wish to use that data, they need to be able to show that the person who consented to have their identifying particulars taken understood what they were consenting to. The police officers use interpreters for those for whom English is a second language. They would use those interpreters to ensure that whoever they are dealing with would be able to give informed consent before they could progress towards taking those identifying particulars.

Mr J.R. QUIGLEY: Does not the section, as explained in the explanatory memorandum, really take away the notion of true consent—that is, under the legislation, if a person does not reply, they are deemed to have consented; therefore the person is taken not to have consented to undergo it? The notion of someone having to consent to the procedures is really being taken away by this legislation, is it not?

Mrs L.M. HARVEY: No. If a person does not comply with the procedure, then he or she is deemed to have not consented for the purposes of the act.

Mr J.R. Quigley: And then under the legislation, if they have not consented?

Mrs L.M. HARVEY: Depending on the circumstances prescribed within the Criminal Investigation (Identifying People) Act—that is, the various different scenarios—if the police officers have the ability to take the identifying particulars without consent, they can. But if a reasonable request has been made to obtain consent and that consent is refused, then they are deemed to have not consented for the purposes of the act to the taking of identifying particulars.

Mrs M.H. ROBERTS: For the benefit of the member for Butler, if I could round that off by saying that my understanding is that whilst a person is deemed to have not consented under the act, if the act says that their consent is not necessary, those particulars will be taken in any event. A note will be taken of the fact that the person did not consent.

Mrs L.M. HARVEY: Indeed, the member for Midland is correct; that is the process that will be followed; whereby, if the person is deemed to have not consented, then the police officers are authorised to take those identifying particulars. It would be noted that the person did not consent to the procedure. There are other further offences that the member would be well aware of. There is not an offence written into the legislation for not consenting to giving identifying particulars, but the offence would be obstruction if a person was being deliberately obstructionist and not generally complying with the police.

Mr J.R. QUIGLEY: That gets back to what the member for Midland raised about people who do not have English as their first language. The minister said that the police will communicate to them in their own language, but there is no requirement in this legislation for them to do so, is there?

Mrs L.M. HARVEY: There is the requirement; that is, it is for the police officers to obtain informed consent and the onus is on the police officers to ensure that they have followed the act as we have intended.

Mr J.R. Quigley: If they don't reply.

Mrs L.M. HARVEY: The disincentive for the police in obtaining identifying particulars in other circumstances is that those identifying particulars may not necessarily be used or be admissible in a court for the purposes that the police took the particulars from the person in the first place. There is very much an incentive for the police to follow the rules because if they do not follow the rules, then the particulars they are obtaining are of no use to them regardless.

Mr J.R. QUIGLEY: Is the minister saying that in the legislation it says if the particulars are obtained without consent they cannot be used in court? Is that the effect of what the minister is saying?

Mrs L.M. Harvey: No.

Mr J.R. QUIGLEY: If the particulars are taken, the incentive is that to get informed consent, the particulars can be used against the person in proceedings, but if they are not taken with consent—that is, if they are taken without consent—then the particulars will not be able to be used?

Mrs L.M. HARVEY: No, no, that is not what I said. What I said is that if the identifying particulars are gathered from a person outside the provisions that we have laid out in this act, then they are not to be used as an advantage to the police by allowing them to use them for their purposes.

Mr J.R. Quigley: Why not?

Mrs L.M. HARVEY: Because they would be illegally obtained. If we go further into this bill, there are other circumstances around the taking of identifying particulars. For instance, as we get further into the bill around volunteers—that is, if a person is volunteering to participate in the taking of identifying particulars and they do

not consent—the police have no power whatsoever to take identifying particulars from that person, who may have volunteered to be part of that procedure but who withdrew his or her consent.

Mr J.R. QUIGLEY: If they do not consent, the police cannot take the identifying particulars? I will check *Hansard*, but if I understand what the minister has said, if the person withdraws their consent, the police cannot go ahead and take their identifying particulars?

Mrs L.M. HARVEY: We are probably a little bit ahead of ourselves, but there are certain circumstances in which police can take identifying particulars when the prospective offender has not actually consented, and that is in the case of uncharged suspects and charged suspects. But there are other circumstances in which the act precludes police from taking identifying particulars without consent; it depends on the circumstances. However, as we get further through this legislation, members will see that those circumstances are prescribed for particular persons whom the police are dealing with.

Mr J.R. QUIGLEY: What concerns me is that the existing section 7, which will follow proposed section 7A in the amended legislation, does not require the police to communicate in a manner capable of being understood by the suspect. I will get to the differentiation between those cases where consent is taken and those cases where consent is not, but here it is deemed if the suspect does not reply, he or she is taken to have consented to undergoing it. Therefore, if a person does not reply, he or she is deemed not to have consented to undergoing it. But what difference does that make in the gathering of the sample that it could be put to? The High Court in Bunning v Cross has said that one has to look at the public purpose in the end of prosecuting offenders.

Mrs L.M. HARVEY: It would depend on the circumstances. If all that this amendment does is allow the police to obtain consent for the taking of identifying particulars, either orally or in a written format, that is what we are changing in this legislation. If the person does not consent, then in the case of an uncharged suspect the police would have to apply for a warrant to take those identifying particulars from the person. In the case of a charged suspect, this legislation enables police to take the identifying particulars anyway. In the case of a volunteer, it means that police are precluded from taking those identifying particulars or that sample.

Mr J.R. QUIGLEY: But the point the member for Midland was raising under clause 5, which is currently before the house, is that proposed section 7A does not require the person to inform another person in a manner that will be understood by the person to whom the request is being made—that is, in the case of a person who is foreign-language speaking. It does not require the request to be made in a language or in a form—in the case of a person who is deaf or mute—to be effectively communicated with.

Mrs L.M. HARVEY: We are not providing information to people around the taking of identifying particulars; we are informing people of the requirements of this legislation, and that is informed consent. In respect of informed consent, the person needs to understand what the police are doing. In order for them to understand this procedure, the procedure needs to be explained to them in a format that allows them to understand and to be fully informed, whether through an interpreter—an Auslan interpretation—or whatever else it might be.

Clause put and passed.

Clause 6 put and passed.

Clause 7: Section 8 amended —

Mr J.R. QUIGLEY: I have a question in relation to proposed section 8(2). This relates only to deceased people, and empowers the coroner or the —

Mrs L.M. Harvey: We wouldn't want to take a sample of bone or teeth from a non-deceased person!

Mr J.R. QUIGLEY: Well, I do not know; I would not put it past the minister, but in this legislation it is proposed to take it only from a deceased person.

Mrs L.M. Harvey: It's an offensive assertion to say that I would be taking someone's teeth and bones forcibly for the purposes of this legislation; highly offensive.

Mr J.R. QUIGLEY: Okay; only in relation to deceased persons.

Clause put and passed.

Clause 8: Section 9 amended —

Mr J.R. QUIGLEY: In relation to regulations, I think it was said in the second reading speech or in the report that science is developing exponentially, and that allows the minister, by regulation, to include further procedures that are not currently contemplated.

Mrs L.M. Harvey: That's correct.

Mr J.R. QUIGLEY: These will come before regulations, and this chamber will then have the opportunity to move motions of disallowance.

Mrs L.M. Harvey: Indeed, yes.

Clause put and passed.

Clause 9: Section 11 amended —

Mr J.R. QUIGLEY: In my contribution to the second reading debate I pointed out that there is a procedure under the proposed amendment to section 9 for the collection of the material. What does not seem to be included is the recording of the collection of the material or any requirement under those amendments for any log to be kept of exactly what has been collected. I mentioned in my contribution to the second reading debate that I had examples—I put two before the house—of forensic materials simply going missing and the department denying all knowledge of the existence of forensic procedures in relation to those materials. What log is kept in relation to the samples collected in respect of a particular offence?

Mrs L.M. Harvey: All that clause 9 seeks to do is to allow, through the prescribing of regulations, other forms of identifying particulars that can be taken.

Mr J.R. QUIGLEY: Clause 8, which amends section 9, changes the definition of the sample. Proposed section 9 sets out the sample that has been collected and what the officer must ensure. What logs are kept of any identifying particular prescribed for the purposes of this definition, or the DNA profile of that person? That is what is concerning me. What records are kept of these collections?

Mrs L.M. Harvey: All that this amendment seeks to do is to enable police officers to take a sample of something other than DNA and to allow the police to then provide that sample from the person from whom that sample has been taken.

Clause put and passed.

Clause 10: Section 16 amended —

Ms J.M. FREEMAN: I want to ask the minister about clause 10. I had the opportunity to meet with the minister's advisers, and I thank the minister very much for making them available. I was told that the reason that the minister did not refer to headwear as "face covering" was because of the definition of "headwear". Proposed section 16(4A) states, in part —

> (c) to remove any headwear worn by the person;
>
> …
>
> to enable the officer to see the person's head or verify the correctness of any personal detail, or any evidence of any personal detail, given by the person.

I understand that that provision was primarily for the identification of people wearing motorcycle helmets. However, the minister in her second reading speech talked about amendments arising out of a New South Wales case in which a woman wearing a burqa was not able to be identified as a person who had made a false report to police. I am wondering whether the minister understands that the woman wearing the burqa actually did raise her veil when asked to; she complied. When the police officer asked her to do so again, in what she regarded to be a threatening manner, and reached into the car—she had been stopped for a breathalyser test—she told him that it was not allowed and that she felt very uncomfortable about it. The exchange got very heated; in fact, it can be seen on video. However, she did raise her burqa further so that her face could be seen. I am trying to work out whether the minister is aware that the actual issue is that when she went to make a complaint, the police alleged that she was not actually the complainant. On appeal, she was found not to have made a false report. The incident that the minister is trying to stop was actually an incident that, in fact, should never have occurred. My concern—I would like the minister to put this on the record—is that it would only be to verify personal details. In the case of someone wearing a burqa, it should only have to be the face; there should be no necessity to remove the actual scarf from that person. There should be no necessity to remove the scarf from that person because it is clear that a person's identity can be verified from the face in the photo on their licence, and that is how it should be done. I want it made clear that, as a result of this legislation, a police officer cannot direct someone to remove their hijab—which is just the scarf; it leaves all the face exposed and the hair is pulled behind—because it is very important to women practising their faith in Islam that they do not show their hair to anyone other than family members, and particularly not to males.

I also want to talk about what that means for the burqa. However, in the first instance I want complete clarity, given that in the New South Wales case the minister cited, the woman wearing the burqa lifted her burqa to show her face. In the video, it can be seen she lifts it. It was not shown; only the back of the car can be seen. The

police officer ended up giving the woman a ticket because the P-plate on the back of her car was obscured by her numberplate. The officer asked the woman to lift her burqa, and she said she felt uncomfortable but did so so he could identify her. The police officer then said forcibly that she had to lift the burqa, so she did it again. He then went and checked her car and gave her a ticket because her P-plate was obscured. She said her P-plate had not been obscured. She became very upset and distressed by what had occurred and she subsequently put in a complaint. Tonight we are in this place looking at a piece of legislation that supposedly came about because someone was misleading someone. The issue has never been shown or proven in the New South Wales matter. I have spoken to the Islamic community and the Muslim Women Support Centre, and they say that as long as things are done respectfully and in full acknowledgement of the law, also acknowledging the fact that the women want to comply with Australian law, it should not be necessary for them to be asked to remove their scarf. I want some clarification.

Mrs L.M. HARVEY: This legislation is not designed to address the circumstances of the case the member refers to. However, that case led to discussion within police about how they could identify people, and we had no power to compel anybody to remove a face covering for the purposes of identification. Proposed section 16 applies only when somebody is making a complaint to police or about police or in the provision of an offence or for the particular purpose of identifying people. To give the member some comfort, our requirements will be consistent with those of passports and drivers' licences. For the purposes of this legislation, police would only require the removal of headwear that obscured the identification material available to police to determine who the person was. For instance, if the police were identifying somebody from a passport photo that had a person's face with a scarf around it and the person could be identified without them having to remove the scarf, there would be no requirement to use this legislation to have that person remove the scarf, because police should be able to identify the person with the identification papers whether that be a passport or a driver's licence or whatever had been provided. The police community diversity division is currently working through a range of protocols and procedures to ensure that police officers fully understand how this legislation will be used. The requirement to remove headwear, headgear or a facial covering is only for the purposes of being able to identify that person in the circumstances prescribed in the legislation.

Ms J.M. FREEMAN: Can the minister confirm to me that if the photo of a person on their licence or passport shows them with just the hijab, not a burqa—we will not go to the burqa at this point in time—which may be a hijab with a tight piece around it with no hair visible, that person will not be required by police, under this legislation, to remove their hijab?

Mrs L.M. HARVEY: Although the legislation allows it, it is highly unlikely that that request would ever be required or made, because the only reason for this provision is to allow police to properly identify that the person in front of them is the person they say they are. I have some examples of photographs of Muslim women with headscarves covering all of their hair. If police officers have that person present and they can identify them from the photograph without the person having to remove their headwear, police will not require the person to remove it. However, should the police need further identification, for instance if this person has another identifying feature that police would need to identify that might be under the headscarf, this legislation would be able to be used. But for a traffic stop, for instance, it would be highly unlikely that people would be required to remove their headwear for the purposes of identification under this legislation.

Ms J.M. FREEMAN: I am sorry, minister; I do not think that is good enough. It could be said a person has an identifying mark like a scar on their arm and be asked to remove their T-shirt, and that is obviously not in the legislation. If someone has an identifying photo on their licence and they are wearing a hijab in it, the minister needs to stand up in this place and say that that person will not be required to remove their hijab if it is worn in the identifying photo on their passport or otherwise. There is no reason that police need to use that power to request that a woman wearing hijab remove it against her belief if she has an identifying photo that has her with a hijab on. It is very important that the minister stand up and say that. I do not want to hear the minister say it is unlikely, I want to hear that it is not the intent. Does that mean that I have to have my hair cut in a certain way to be able to be identified? These people have their photographs taken and they appear on their identifying passport or driver's licence. It should be very clear that they will not be required to remove their headwear. This would also mean that police officers are not at risk of having what happened in New South Wales happen to them. The police officer in New South Wales who stopped a woman for a breath test had no power. She gave him her driver's licence and he said he needed to identify her and asked her to lift her burqa. She lifted it and the officer said that was not enough and leaned into the car, and that is when the situation became difficult.

I would think that for the purpose of protecting police officers, the minister would want to make it really clear that if the face is what is seen in the photo, there is no reason to ask for the removal of a headdress. I understand that this provision is primarily for motorcycle helmets, which must be removed rather than the visor simply flicked up. However, in the case of a woman with a hijab on, there should be absolutely no necessity to remove

it. The minister should make it clear today in Parliament that if a woman wearing a hijab is identifiable, and a hijab is worn in her passport photo, she will not be required to remove the hijab for the purposes of identification.

Mrs L.M. HARVEY: Just to be really clear, the inclusion of headwear in this legislation needs to be taken in the context of proposed section 16(2), which states that a police officer can only use this provision as follows —

> (2) If an officer reasonably suspects that a person whose personal details are unknown to the officer —
>
> (a) has committed or is committing or is about to commit an offence; or
>
> (b) may be able to assist in the investigation of an offence or a suspected offence,
>
> the officer may request the person to give the officer any or all of the person's personal details.

We have had consultation on this. Sheikh Fehmi Naji Imam has said —

> … if an officer has to verify the identity of a woman who wears the *Niqab** whilst she is travelling in the street and there is no female officer(s) present then she may remove the face covering for the purpose and duration of identification.

Ms J.M. Freeman: But that's a niqab. I'm not talking about a niqab; I'm talking about a burqa.

Mrs L.M. HARVEY: I have not finished. We would be using the same protocols that are in place with the passport office and with the transport authority, whereby if the person can be identified and the police can determine who the person in front of them is from the passport photo or driver's licence photo, regardless of whether they are wearing a scarf, they are not going to require—the policy would preclude them from being able to demand it—the removal of any headwear. They can only demand the removal of headwear in prescribed circumstances as per the act and there will be very strict policy guidelines about how police are to deal with these circumstances. I am confident that the consultation we have had through the community diversity division and the information sharing that has been going on between police and the communities that may or may not be affected by this will have us settle on the right position that is not going to infringe people's religious freedom or personal rights.

Ms J.M. FREEMAN: I thank the minister for that. I am glad it will not infringe people's personal rights or religious freedoms. I think it is very important to put that on *Hansard* on the basis that our equal opportunity laws are quite limited in those particular areas. It is very important to make it clear that if they are identifiable and they are wearing a hijab, that will not be required to be removed. When the minister stood, she talked about the niqab; I suppose I talk about the burqa. I always think that the niqab is the one that actually covers the eyes as well. So when the minister is talking about the niqab, is she talking about the hijab scarf? I just need to clarify that. My understanding is that if we are talking about a burqa, they will raise it up so that their face can be seen and that will be done in an appropriate manner. That is a different question. I understand that if someone is wearing a burqa that covers the whole face that there may be necessity to ask that to be lifted, and that has to be done in a sensitive and culturally appropriate way. My issue was very much that if a woman was wearing a scarf, or the hijab as I know it, she would not be requested to take off her scarf or hijab; however, if it is a burqa, I understand that it will be lifted so that the face can be seen. For me there are actually two issues. I understand that the Islamic community is saying that if they do cover their whole face, it is acknowledged that they will have to raise the covering, and they do that in the community for passport photos and various other aspects of identification. I understand that the minister is telling me that if they are wearing a hijab, which is just a scarf covering their hair, their personal and religious rights will not be invaded, or I suppose taken from them, and that on the basis that that is what is in the photo on their licence or passport, they will not be requested to remove it. I am pleased to hear that. If the minister just wants to clarify for me what will happen in the case of the burqa or the niqab, as I understand, that would be helpful.

Mrs L.M. HARVEY: For the purposes of the identification of someone wearing a burqa, they would need to remove the facial covering back to the format that appears on their form of identification, which, for the purposes of identification in this state, I believe from drivers' licences and passports, is the entire face being visible.

Clause put and passed.

Clause 11: Section 17 amended —

Mrs M.H. ROBERTS: Clause 11 amends section 17 and inserts new paragraph (f), which states —

> an identifying particular of the person that is prescribed for the purposes of this definition;

Is that identifying particular prescribed in the act or in the regulations? Can the minister provide some clarity on that?

Mrs L.M. HARVEY: That will be prescribed via regulation.

Clause put and passed.

Clauses 12 and 13 put and passed.

Clause 14: Section 34 amended —

Mrs M.H. ROBERTS: Clause 14 refers to the "measurement of any identifying feature of the person". Can the minister give the house some guidance as to what identifying features may need to be measured?

Mrs L.M. HARVEY: That would be scars, tattoos or other identifiers—birthmarks.

Clause put and passed.

Clause 15: Section 38 amended —

Mrs M.H. ROBERTS: The explanatory memorandum refers to a drafting anomaly. Has this drafting anomaly led to any unintended consequences or has it been inconsequential?

Mrs L.M. HARVEY: At this point there have been no consequences of that anomaly.

Clause put and passed.

Clause 16: Section 40 amended —

Mrs M.H. ROBERTS: This clause refers to a suspect who is a protected person. My recollection of the protected person definition is a child or an incapable person. Are there any persons other than children or incapable people who would fall within that definition? Why will this proposed subsection be inserted at this time?

Mrs L.M. HARVEY: This applies only to incapable people or juveniles. This provision streamlines the processes and allows police in the absence of finding a responsible person for the incapable person or juvenile to proceed to the next stage on the issuance of a warrant.

Clause put and passed.

Clause 17 put and passed.

Clause 18: Section 47 amended —

Mrs M.H. ROBERTS: Proposed paragraph (da) states —

> an impression of an identifying feature of the suspect (including a dental impression);

Are there any other kinds of impressions of identifying features or is a dental impression the only impression?

Mrs L.M. HARVEY: An impression taken of hands or feet or potentially an injury, a scar of some sort, could be used for the purposes of identification.

Mrs M.H. ROBERTS: I just wonder, given that impression seems to be fairly clear in the example of a dental impression, why that was specified. Is there any impact of specifying that kind of impression but not specifying other kinds of impression? I notice proposed paragraph (db) immediately underneath refers to —

> a sample of the suspect's hair taken for purposes other than obtaining the suspect's DNA profile;

What would those other purposes be?

Mrs L.M. HARVEY: The act defines a dental impression as an intimate procedure. It provides that an impression can be taken in certain circumstances, but it precludes taking a dental impression because it is an intimate procedure, so this clause includes a dental impression as an identifying particular.

A sample of hair could be obtained for a number of reasons; for example, to determine the colour of hair, its chemical composition or what it has been exposed to.

Mrs M.H. ROBERTS: I thank the minister for her answer. The minister said that a dental impression is an intimate impression, whereas a hand or a foot is not; so I take it that anything else that might be determined to be an intimate impression would be excluded, partly because this clause specifies a dental impression.

Mrs L.M. HARVEY: If an impression of a person's private part was taken, it would be an intimate procedure; so in this case we have included a dental impression because it is not defined as a private part.

Mrs M.H. Roberts: Is the minister saying that other intimate impressions would not be permitted under this section of the act?

Mrs L.M. HARVEY: It is not permitted under this section of the act. It comes down to the definition of a private part. A dental impression is not determined to be a person's private part but it is an intimate procedure. The police have the ability to take an impression of a private part, which is an intimate procedure. We have included a dental impression in this clause because it is classified as an intimate procedure and it is allowed in this part for a charged suspect in these circumstances.

Mrs M.H. ROBERTS: Can the minister give an example of any other intimate procedure that might involve taking an impression?

Mrs L.M. HARVEY: It could be an impression of an injury to a private part. Is the member referring to an impression of an intimate part?

Mrs M.H. Roberts: Proposed section 47(da) refers to an impression of an identifying feature.

Mrs L.M. HARVEY: This clause will allow for an impression to be taken of a suspect's identifying feature, including a dental impression.

Mrs M.H. Roberts: I am trying to clarify whether the minister is saying it does not provide for other intimate impressions.

Mrs L.M. HARVEY: It does allow for that, but it prescribes the different circumstances. In the case of a suspect charged with a serious offence, this basically determines an identifying particular and includes each of those different areas and relates to an impression of an identifying feature of a suspect, including a dental impression. We have included a dental impression in this clause because it is an intimate procedure under this section of the act, but if the member looks further down, she will see that there are other lists of identifying particulars and it allows for the taking impressions of intimate identifying particulars in other circumstances.

Mrs M.H. ROBERTS: I am not a lawyer; I am just seeking some clarification here. Sometimes acts are written in what is called ultra vires style and if we specify things, in a legal sense, we can be eliminating other things. I am concerned that when we specify a dental impression as something that is included, we are actually limiting what can be collected rather than expanding it.

Mrs L.M. HARVEY: No. In these circumstances, we do not believe that is the case and we are expanding the ability by including the dental impression in those circumstances.

Clause put and passed.

Clauses 19 to 21 put and passed.

Clause 22: Part 8A inserted —

Mrs M.H. ROBERTS: Proposed part 8A deals with identifying particulars of serious offenders and details how the procedures are to be done—that is, how identifying particulars may be taken. Under proposed section 52C, identifying particulars may be taken —

> (1) If a police officer reasonably suspects a person is a serious offender and his or her identifying particulars —
>
> (a) are not held or may not be held by the WA Police; or
>
> (b) are or may be needed to verify the person's identity …

I am a bit puzzled why it states "reasonably suspects" and why the police would not know whether the person was an offender, if they have not charged that person. Also, what happens if the reasonable suspicion of the police officer turns out to be incorrect?

Mrs L.M. HARVEY: This is based on putting in place protections for police officers to put the onus of reasonable suspicion on police officers before they move into this area of taking identifying particulars from people who may or may not be serious offenders. Police officers would have to have a reasonable suspicion. In reality, they would have a record of that person as being a serious offender. Basically, this will ensure that they hit that burden of proof of reasonable suspicion before they can take that next step of taking identifying particulars from a person they suspect to be a serious offender.

Mrs M.H. ROBERTS: That is an interesting choice of words "to hit that burden of proof" that they are a serious offender. What happens if the person turns out not to be a serious offender? There may be a circumstance in which there might be harassment of an individual by police, who may subject an individual to these identifying procedures, but at the end of the day they might say, "Sorry, mate! You're not who we thought you were—bad luck!" What recourse does that person then have to go before a magistrate or whatever? Why would not the

procedure be that if they have some reasonable suspicion about a person, they take the case to a magistrate in order get the particulars?

Mrs L.M. HARVEY: My terminology in saying "burden of proof" was incorrect. It is more a threshold test of reasonable suspicion for the police to take identifying particulars in those circumstances. If the identifying particulars were unlawfully obtained, there are sanctions for police officers should they engage in that activity. The sample cannot be kept. Yes, there would be an inconvenience to the person, but the sample cannot be kept by police and there are sanctions for police officers who do not follow the criteria appropriately.

Mrs M.H. ROBERTS: I will deal with the last part first. What are the sanctions for police officers? Secondly, the minister referred to a threshold test; is that an empirical thing? How is the threshold determined? When there is a dispute about whether any threshold has been met, who would sit in judgement on that? Given that someone may be subject to various procedures, it is all very well to say that the identifying particulars would be destroyed, but their privacy may well have been invaded at the very least, so what recourse would they have?

Mrs L.M. HARVEY: Section 83 of the act is quite a detailed provision about the admissibility of evidence and what applies when evidence has been obtained illegally. There would be disciplinary sanctions against a police officer who did not follow the procedures laid out in the act in recording identifying particulars in those circumstances.

Mrs M.H. ROBERTS: I thank the minister for her explanation, but it does not really answer the question I asked. I am well aware that evidence taken illegally cannot be used in court against someone. That is pretty obvious. I will play devil's advocate. Let us say that a police officer has determined that a threshold has been met that, potentially, empirically had not been met and the police officer detained the person and took their particulars and it was determined to be vexatious. I am not asking whether any identifying particulars could be kept and used against them; it is obvious that they could not. I am asking what protections are in the bill for someone who is incorrectly subjected to this procedure when an officer alleges that they thought the person met the threshold but it turned out that they did not?

Mrs L.M. HARVEY: If a sample has been unlawfully obtained or there is a vexatious aspect to obtaining the identifying particular, obviously there are civil remedies available to people. But there is a penalty of imprisonment for up to two years for the improper use of information and there is a penalty of imprisonment for up to two years for the illegal use of identifying information, which, I put to the member, is a pretty significant disincentive to abuse the ability to take identifying particulars.

Clause put and passed.

Clauses 23 to 25 put and passed.

Clause 26: Section 67 amended —

Mrs M.H. ROBERTS: Clause 26(2) states in part —

> Part 7 as if the references in subsection (1)(a) and (b) to "as soon as it is obtained" were deleted.

Why has that provision been put in the bill? What is the significance of the words "as soon as it is obtained"?

Mrs L.M. HARVEY: This is quite a complicated area to explain. It applies to the retrospectivity of the identifying particular that has been obtained. Under this provision, it is determined that consent has been given and that the identifying particular taken in a sample can be used at a future date to allow further analysis for the purpose of a new identification procedure. If a sample were taken in 2013 and held and a procedure were developed in 2018 to allow better analysis of that sample, this provision will allow that sample to be used in 2018 for the purpose of the new procedure with the identifying particular.

Mrs M.H. ROBERTS: When the minister made reference to this matter, she used the words "consent has been given" and then she referred to a sample that might be taken now and some further analysis being done in the future. I wonder whether the words "consent has been given" are in any way relevant or whether they are irrelevant and whether consent is not really an issue in the retrospectivity of this provision.

Mrs L.M. HARVEY: The member is quite right; the consent for obtaining the sample would have been given when the sample was taken, but this provision allows the sample to be used at a future date with a different procedure for the purpose of further identification. Further consent would not be required to use another process for the purpose of better clarification of that sample.

Mrs M.H. ROBERTS: Earlier the member for Butler referred to the fact that consent does not have to be given. In many circumstances, the identifying particular sample will be taken without consent. The person will not have

consented, but by law the police will be able to take that identifying information. Will this provision apply equally to people who have not given their consent but whose identifying information has been taken lawfully?

Mrs L.M. HARVEY: The answer to the question is yes.

Clause put and passed.

Clause 27 put and passed.

Clause 28: Section 76 amended —

Mrs M.H. ROBERTS: Clause 28 is the clause referred to in clause 2. Section 28 comes into effect on a later day than the royal assent; that is, a date to be affixed by proclamation. I understand that there are certain deleted definitions and that new ones are to be inserted. I seek clarification. We will await the regulations, and I thank the minister for giving me a copy of the draft regulations and for tabling those in the house tonight, but I seek further clarification about how this will operate.

Mrs L.M. HARVEY: The definitions are to be removed from the legislation and put into regulation, because some of these index definitions and descriptions are not referred to in the act and the amended legislation but they are used by PathWest and by other databases that WA Police have a link into via PathWest. We want the ability to prescribe by regulation and to remove indexes that become obsolete without having to amend legislation but by amending via regulation.

Mrs M.H. ROBERTS: My recollection is that the reason these indexes were specified in the substantive legislation in the first instance was because of concerns about the security of those indexes, the availability of information and who could access the various indexes. I understand PathWest's involvement, but I believe that is an area that is still of some concern to people. Those concerns may be raised when the regulations are looked at. I understand the flexibility afforded by the regulations, but I also understand people's concerns about the security of these indexes and the comfort that might be afforded by specifying them in this substantive legislation.

Mrs L.M. HARVEY: The act refers to the DNA database, but the regulations refer to the indexes that sit underneath the database. Therefore, the protection of people's information is still covered by the legislation. PathWest still controls the database. WA Police do not control the database, so the security around the database is still intact and its integrity remains.

Clause put and passed.

Clauses 29 and 30 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

MRS L.M. HARVEY (Scarborough — Minister for Police) [8.17 pm]: I move —

> That the bill be now read a third time.

I thank members for their cooperation and contribution to the debate on the Criminal Investigation (Identifying People) Amendment Bill 2013. This legislation has been around for a while and I am pleased that with the cooperation of the opposition we have seen its swift progress through this house. Hopefully similar progress will be achieved in the other place so that we can get on with simplifying these procedures for police officers and improving the flexibility in the arrangements around the taking of identifying particulars in the management of DNA databases to allow police to better protect the community. I thank members for their contributions and cooperation and for the interesting points raised during consideration in detail.

Question put and passed.

Bill read a third time and transmitted to the Council.