STANDING COMMITTEE ON LEGISLATION

CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 2 MAY 2007

Members
Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Peter Collier
Hon Sally Talbot

Hon Donna Faragher
(Substitute Member for Hon Ken Baston for Inquiry)

Hearing commenced at 10.07 am

PRIOR, MR JOHN
Councillor, Law Society of WA, examined:

FORDHAM, ASSOCIATE PROFESSOR JUDITH
President, Criminal Lawyers' Association, examined:

Hon GIZ WATSON: On behalf of the committee I would like to welcome you to the meeting and thank you for attending to assist the committee with its inquiries. There are a few formalities before our discussions commence. Would you please state the capacity in which you appear before the committee?

Ms Fordham: I am here in my capacity as president of the Criminal Lawyers' Association of Western Australia.

Mr Prior: I am based at Francis Burt Chambers, and I am a councillor of the Law Society of Western Australia and also the convener of the Criminal Law Committee. I am also a member of the Criminal Lawyers' Association and a former past president. I am here in my capacity as a representative of the Law Society of Western Australia.

Hon GIZ WATSON: You will have signed a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

Hon GIZ WATSON: Today's discussions are public and they are being recorded. A copy of the transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask the committee to consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue. Would either of you like make an opening statement to the committee?

Mr Prior: Perhaps I could make a few brief comments. The Law Society of Western Australia gave a submission to the state Attorney General in relation to this bill. The focus was on four particular areas and really endorsed the Criminal Lawyers' Association's submission to some extent in that that was done first in time, so that was annexed to it. There are four parts of this bill that we would consider contentious, and I suspect they are the live issues for the committee's concern. The first is what I might call the encroachments on the rule against double jeopardy, which is part 4 of the bill, which concerns some significant amendments to the Criminal Appeals Act. We have some concerns about that. The second issue was clause 28, and I think probably still is clause 28, of the bill, which is the amendment to section 143 of the Criminal Procedure Act. That is an amendment that seeks to restrict the legislative right that has been applied under the Criminal Procedure Act for defence counsel to make opening addresses to the jury. The third issue is proposed section 36BE of the Evidence Act, which I think is clause 41 of the bill, which is, in cases of child sex offences, being able to call expert evidence to give evidence in the areas identified in that clause. The fourth area is the amendments to section 321A of the Criminal Code in relation to sexual offences involving a child where there has been what I might call an ongoing relationship of sexual abuse and where there have been numerous offences. So, from where I sit, other amendments are suggested by the bill to various criminal legislation and I am happy to address you about them if I

can. They are generally considered not that contentious from the Law Society's position, so it would support the amendments.

Hon GIZ WATSON: Thank you very much, Mr Prior. We certainly have some questions which pertain to the areas you have mentioned. We might address those questions to you and see whether they cover the ground. If you feel at the end that we have not covered something, please say so and we will ask you again.

Ms Fordham: Could I add that from the Criminal Lawyers' Association's point of view, as Mr Prior has laid out, the Law Society has to a reasonably large extent adopted and endorsed the Criminal Lawyers' Association's position, so I am not going to repeat effectively everything he said if we agree with it. You can take that as my opening statement.

Hon GIZ WATSON: Thank you very much. I will start by referring to clause 10 of the bill, which proposes to repeal and replace section 321A of the Criminal Code, which deals with the offence of having a sexual relationship with a child under the age of 16 years. On pages 1 and 2 of the society's letter to the Attorney General dated 15 September 2004, the society indicated that it does not support clause 10 on the basis that it reduces the prosecution's requirement to particularise the sexual acts alleged to constitute the offence, which effectively reduces the prosecution's obligation to prove its allegations. However, the current section 321A(5) of the code appears to require the same level of particularisation of the sexual acts as is proposed by the bill. Current section 321A(5) reads as follows -

> In proceedings on an indictment charging an offence under subsection (3) it is not necessary to specify the dates, or in any other way to particularise the circumstances, of the alleged acts.

The Director of Public Prosecutions has also advised the committee that the current formulation of section 321A already provides that it is not necessary to specify dates or particularise the circumstances of the sexual relationship, and that the amendments will only make it clear that the particularisation is not needed in either the indictment or in the course of proceedings. Do you have any comment on that?

Mr Prior: I would agree with all that, and I understand the Director of Public Prosecutions has also orally addressed the committee already. I would like to make clear, and it has probably been made clear by the Director of Public Prosecutions, is that the use of section 321A in my experience as a charge or an offence is limited. Generally the DPP, if it has evidence of specific acts of sexual abuse, will charge with the specific act; that is, indecent assault, sexual penetration of a child and so on. You will note that as it presently exists, subsection (6) says an indictment for an offence under this section is to be signed by the Director of Public Prosecutions or the Deputy Director of Public Prosecutions. My submission in relation to that is that shows there is a significant fetter, as it presently exists, on that legislation on prosecuting of these types of charges because of the sheer fact that there is not particularisation. The problem from an accused's perspective, in simple terms of a lack of particularisation, is that unfortunately with child sex abuse or child sexual relationship charges, many of them are of historical origin. That is, the child will go and complain to mum, teacher, dad, whatever and it may be many years after the offence. Normally with an accused person, a complaint is made against them of a criminal offence within a reasonable time after the alleged offence was committed. In those sorts of circumstances, an accused person can be told it happened years and years ago. In terms of whether they have, for example, an alibi defence - I was not there, I did not do it, I was in another country or another place - the longer the time span, the more difficult it is. If there is a child sexual relationship offence that does not specify and says that in these general years a person engaged in an unlawful relationship of a sexual nature with a child under 16, it becomes very vague for the accused and it is difficult for the accused to defend. Going back to Hon Giz Watson's question to me, to some extent the question is the answer. Why do we

need the amendment? If the DPP has to particularise already - there has been some reference to a couple of High Court decisions and Judith is probably the better person to address you on that.

Ms Fordham: In fact, I have something else to say. I do not think we need to talk about KBT other than to say it is a decision of the High Court that points up the inherent unfairness of the lack of particularity in such charges. One would imagine that the High Court would have a good handle, so to speak, on what is fair and what is not. Our legislature at the moment is proposing to legislate away the High Court's point of view. Going back to the original question, the Criminal Lawyers' Association does see a significant difference between the effect of current subsection (5) and proposed subsection (8). The current subsection (5) basically says it is not necessary to specify dates or in any other way to particularise the circumstances. The proposed subsection (8) says not that it is not necessary, but it prevents the court in any circumstances from ordering the prosecutor to provide particulars of the act. There are two significant distinctions: one is that the legislation as it stands says it is not necessary - this is only in relation to dates and circumstances - but the proposal says the court cannot tell the prosecutor to provide particulars of the acts, as opposed to the dates and circumstances. "Circumstances" is usually understood to mean where it happened or what was going on at the time, that sort of thing. Not only is there no particular requirement to specify dates or circumstances - where you were and what time of day it was, that sort of thing - but also the accused is now not going to be entitled to know the act he is supposed to have done. They will not be told anything if this amendment is passed. We see that as extraordinary. How could any accused possibly defend a charge while not knowing the dates or the circumstances and not even knowing the act?

[10.20 am]

I mean, what is left? Nothing, as far as we can tell. It is extraordinary that the court is not empowered. Surely the judge should have the discretion, or the court should have the power, in circumstances in which it is clearly possible, for example, for the state to provide particulars of any sort, to say, "You have those particulars. Do not keep them up your sleeve. You may as well tell the defence." If the state cannot provide those particulars, that is another matter. This now says that the court cannot order the prosecutor to do so. That means we may have the extraordinary circumstance in which the prosecutor may know the precise acts, because the complainant may have been quite precise about that but may for whatever reason not have given a statement, and thereby, by virtue of full disclosure, nothing has been provided, yet the prosecutor may simply refuse to provide the particulars. I am not suggesting most prosecutors would do that. However, it would be an extraordinary state of the law if this did come to pass.

Hon GIZ WATSON: Would the submission from the Law Society and the Criminal Lawyers' Association be that this amendment is best left out and the section left as it is?

Mr Priorr: Yes. It is not required. It is unnecessary. To go back to what I said before, I have done a lot of child sex cases, unfortunately, but I have never had a case of that nature. In my experience, the preferred option for the DPP - I prosecute also for the DPP - is to go for the specific act, because it helps the prosecutor, and the investigating police officer as well, to know what evidence we are trying to collect for this act, and to have some more tangible target to show to a jury. Therefore, we think this is an unnecessary amendment.

Hon GIZ WATSON: What would be your view, if you look at the existing section 321A(5), and if that was amended - forget that question. I think it does cover those circumstances.

Ms Fordham: From the point of view of the Criminal Lawyers' Association, the distinction is that at the moment, the legislation reads "dates or circumstances". The proposal is that it will read "acts" as well.

Mr Prior: Yes - what did I do to the child? As simple as that.

Ms Fordham: Normally, there is a reason - one would hope - for the use of particular words in legislation. That is certainly the premise upon which the courts operate. Acts would be seen as distinct from circumstances.

Hon DONNA FARAGHER: My apologies, because I should have a copy of the act in front of me. Are you telling me that subsection (8) will be a completely new proposed subsection to the act?

Ms Fordham: The entire section 321A is proposed to be repealed and substituted, as I read it, by a new section 321A. What I am pointing out is that the current section 321A(5), which says that it is not necessary on an indictment to specify dates or particularise circumstances, is proposed to be replaced by new section 321A(8), which says a court cannot order the prosecutor to give a person charged particulars of the acts. We see that as being widely different.

Mr Prior: I appreciate that you do not have a copy of the act in front of you. Section 321A(8) as it reads now would become section 321A(9), which talks about defences if there is a three-year gap between the complainant and the defendant and the defendant thought the complainant was over a certain age. That section will just be pushed down, so effectively it is an entirely new section.

Hon GIZ WATSON: On page 3 of the association's submission, it is suggested that a charge of persistent sexual conduct and specific charges laid pursuant to proposed section 321A(6) would be duplicitous. The DPP advised the committee that these charges would not be declared duplicitous, because they are implicitly authorised by the proposed subsection. If, in the worst-case scenario, the charges were declared to be duplicitous, the prosecution would have to elect which charge it would proceed with. Do you have a view on that?

Ms Fordham: I understand you have -

Hon GIZ WATSON: Would you like me to run that by you again?

Ms Fordham: No. I am happy with that. It is just that you have addressed your question to the association's submission. However, our submission is very similar.

Hon GIZ WATSON: Are you able to answer that?

Ms Fordham: Yes. Now I do need you to run it past me again! Sorry.

Hon GIZ WATSON: On page 3 of the society's submission, it is suggested that a charge of persistent sexual conduct and specific charges laid pursuant to proposed section 321A(6) would be duplicitous. The DPP advised the committee that these charges would not be declared duplicitous, because they are implicitly authorised by the proposed subsection. If, in the worst-case scenario, the charges were declared to be duplicitous, the prosecution would have to elect which charge it would proceed with. I am seeking your response to that.

Ms Fordham: I would say two things. In my experience, the DPP is not protected from charges being duplicitous, because of an argument that the DPP may make at first instance that the charges are implicitly authorised by a particular subsection. That does not, as a matter of logic, prevent charges from being duplicitous. Were that subsection designed to overcome a concern about duplicity, the legislature would have said so, and should have said so, explicitly. As a matter of statutory interpretation, I simply do not agree with the DPP's point of view. What was the second part of the question?

Hon GIZ WATSON: The second part of the question, which I actually have not given to you yet, is: what are the ramifications for charges which are found to be duplicitous? Can the prosecution simply elect which charge to proceed with, or will both, or all, charges be struck out?

Ms Fordham: In fact, the second half I was going to answer - I have just remembered it - by saying that the DPP has said that it would simply be ordered to elect the charges upon which it was going to proceed. That is on the assumption that that duplicity is picked up at first instance. It is also on the assumption that the judge concerned is alive to the duplicity and is convinced by that

argument. What we are looking at is the prospect of a lot of appeals if the judge rules against the request that the DPP elect upon which charge it is going to proceed. Mr Prior may want to add to that.

Mr Prior: I agree.

Ms Fordham: He agrees!

Hon GIZ WATSON: Clause 28 of the bill proposes to amend section 143 of the Criminal Procedure Act 2004, which deals with the opening addresses that may be given in a trial before any evidence is given. It is proposed to limit the defence to an opening address that outlines the essence of the defence case. The committee has been advised by both the DPP and the Chief Judge of the District Court that the Chief Judge is concerned about the length of some defence opening addresses, the wide scope of matters that are discussed during some of these opening addresses, and the potential to confuse jurors when irrelevant matters are discussed during some of these opening addresses. I believe we have provided you with a copy of that letter.

Mr Prior: We have a copy of the Chief Judge's letter. If I can address that - I cannot be disrespectful to the Chief Judge, who does an excellent job, and has for many years - I am not too sure whether she is expressing her personal opinion there, or the opinion of the court. I have spoken to a few judges of the District Court, anonymously. They may take a differing view in terms of the bill. If I can go backwards, in, I think, May 2005, the Criminal Procedure Act was proclaimed. Prior to that, defence counsel had no legislative right to open to a jury. The prosecution had that right, but not the defence. Prior to that, some judges let defence counsel do that anyway - some. I have certainly done plenty of cases where I applied, and whatever. Different lawyers have different styles. Some people may have abused, and probably now with the amendments will abuse, that right. For example, I have heard an anecdotal story - I think it is right - that one defence counsel got up and said in his opening address to the jury, "This is how a criminal trial works. The prosecution bowls; we bat", and sat down. I mean, he was implicitly saying the prosecution has got to present the attack, and we defend it.
[10.30 am]

One would hope that parliament intended to give as a legislative right under section 153 of the Criminal Procedure Act the possibility for juries, hearing both sides - prosecution and defence - to have a good idea, early in the trial, of what the trial is going to be about. For example, "This is a trial of assault occasioning bodily harm. Ladies and gentlemen of the jury, I am the defence counsel." The issue is going to be accident, self defence or something like that. The bill does not seek to abolish that right. My understanding is that clause 28 seeks to restrict the right to the accused's defence. What I am a little concerned about at the end of the day is what the Court of Appeal and individual judges would say if that amendment was assented to and became law, because I think some judges will say that it is much the same as what the act presently reads. What is the accused's defence? Is it a factual defence? If we go back to basics, many defences are this: "I am presumed innocent. The prosecution has the burden of proof and has to prove it to a high standard, beyond reasonable doubt, and therefore that is what we are here for - you prove it; you are the state."

I have read some of the parliamentary debates and the focus, it would seem, in Parliament is saying, "We've got to stop defence from saying that." I asked myself, "Since when has the prosecution had the right to those concepts?" They are concepts that apply to any accused person in any criminal trial, and why can defence counsel not talk about it? Going back to the Chief Judge's letter, short as it is, I think what she is implicitly saying is that people generally abuse the right in the sense that they make inflammatory statements and so on. I do not know that amending the act to say that the accused or his or her counsel can outline the accused's defence is going to stop that. What is the remedy? The remedy is that judges are at liberty - they are the judges of the law - to address juries and say, "What Mr Prior said in his opening address was unnecessary." I suggest that it probably

has a negative impact on the accused's case for juries to hear that sort of thing. If it is really bad, the judiciary can report a counsel to the Legal Practice Board. However, the advantage of an opening address, if it is done properly by a defence counsel in particular, is that it focuses juries on the key issues, and it may effectively lessen the length of a trial. That has significant public utility. That will probably, in some cases, reduce a trial by half a day, a day or whatever, so juries can then come back and have a look at it. I have heard complaints from the judiciary about defence counsel opening by saying, "We're going to call all this evidence; we're going to do this, we're going to do that," and then they do not call any evidence because the accused comes along at the end of the prosecution case and his adviser thinks, "Jeez, the prosecution case is looking pretty weak; I don't think I'll testify any more." The jury has heard a defence counsel saying, "We're going to call this; you're going to hear this," and it never happens. I can totally understand judges - such as the Chief Judge - criticising that behaviour. However, the problem in amending the act to say that one can talk only about the accused's defence is that those sorts of defence counsels will still do that. They will say, "I talked about the defence," but the judge will say, "You didn't have a defence as such; you just put the prosecution at proof."

Finally, I will just say this: I accept the criticism, but I look at it, to use an analogy - member Collier would probably appreciate this more than anyone - as punishing the class for the individual's bad behaviour. My experience, whether prosecuting or defending - I am talking about defending a co-accused - is that I have not seen people encroach over what is permissible, but it obviously happens, from what the Chief Judge has said and what I have heard anecdotally. There are other remedies. Why give something in 2005 and two years down the track say, "We're taking that right back," or "We're winding that right back."? I think it is a bit too early to have an amendment of that nature. If there is a real problem, quite frankly, I do not think the amendment goes far enough. If that is the real concern - I am not suggesting this for one minute - just abolish section 143.

Hon PETER COLLIER: Can I just pick up on something you said, Mr Prior? You said that some defence counsel may offer inflammatory comments etc, and that may have been justification for the Chief Judge's comments in the letter. From your experience, how common would that be?

Mr Prior: I probably cannot answer that accurately, because in the majority of cases I do, I am usually the prosecutor or the defence counsel, and there are not many co-accused. Usually, I am singularly there, so it is difficult, really, for me to answer that. I could only answer it from my prosecution experience of the past two years, since we have had that right. I have not seen it happen, but I have been told by judges and senior barristers that it does happen, and I have been given examples of cases in which people make melodramatic comments, or the other option is that they make comments about facts or evidence that is not going to happen. I am not suggesting that I should be the role model, but the way I open a case - I do not think I have ever given an opening address longer than half an hour; generally it is five to 15 minutes - would be by saying, "The prosecution case is going to be about this issue; we are focusing on this element of the charge or charges," or "Please understand that the prosecution has the burden of proof."

I will give the committee a good example. A colleague of mine, Hylton Quayle, represented one of the two gentlemen convicted of some very serious child sex offences a couple of weeks ago. I am sure we are all aware of the case I am talking about. In his opening address - I accept that a judge can do this as well - he said, "You are going to hear some horrific things." I am paraphrasing what he said: "You are going to think these people are horrible. You have heard that they have pleaded guilty, but please remember what the charge is and please judge on the evidence." That was the tone of his opening address. I consider that to be quite appropriate, and it is not an answer to say that it should just be left to the judge to do that, because the judge does not know what the defence is at that point and is not obliged to be told.

Ms Fordham: I have several things to add to that, if I may. Firstly, I have experienced several trials in which there have been co-accused so I have heard other counsel open. I was involved in a

trial in which defence counsel opened in a particularly silly way, making a fairly emotive address and suggesting that certain witnesses would say this, that and the other, and indeed, those witnesses did not say that. The solution was inherent in the trial, and that was that the defence counsel had egg all over his face and therefore all over his client's face, because the prosecution could comment at the end - as could the judge, if he or she wanted to - that the defence said they would come up with all this stuff and it simply did not happen. There is an inherent punishment in the system, if you like, for someone who is going to be silly and go too far.

The second thing is, of course, that there is no property in the law, and if, as the explanatory notes suggest, part of this is to allow only the prosecution to talk about the law, onus of proof, standard of proof and so forth, my comment is simply, since when is there property in the law? If the concept of onus and standard of proof are important - they certainly ought to be, in a trial - why should not anybody, including the judge, defence counsel and prosecution, have something to say about that? I can simply see no reason in principle whatever, other than a deliberate choice to further handicap the defence in its defence of the matter. The might of the state is already arrayed against an individual. There is simply no logical reason the defence should not be permitted to effectively say what it wants, with the proviso, as Mr Prior has pointed out, that if somebody goes too far and is utterly unprofessional or silly, there is firstly a solution within the trial process itself, as I have already outlined and, secondly, there are complaints of unprofessional conduct. That sort of thing can occur. Legislation is not necessary to proscribe the behaviour of the very few. Again, in my experience, many defence counsels do not even choose to open; they choose to keep their powder dry and simply say nothing. Most would open very briefly in an attempt to tell the jury what the issues are. To put another hat on for a moment, as many committee members probably know, I am currently engaged in some jury research with the permission of the Attorney General.

[10.40 am]

I have not discussed the issue of whether defence counsel should open or not, but the view of jurors is generally, "We really want to know what the issues are beforehand." Those who are allowed to take notes - some still are not, but most are - say, "We want to know what to take notes about. We want to focus what we are thinking about. We want to know what the issues are in the trial." Why should the issues be kept a secret from the jury? Certainly, the proposal is that the defence can say what the essence of the defence case is, but if, for example, the onus and standard of proof are crucial to the defence, why should the defence not be able to say that and have the jury focusing on that particular issue?

There are other things that would lead the defence into talking about the law. For example, let us imagine a case of possession of heroin, intent to sell or supply. There is a legislative provision that suggests that if you have over a certain amount, then you are deemed to be selling or supplying. Defence counsel is going to have to get into talking about the law in order to outline the essence of the defence, if the defence is yes, the accused had it, but, indeed, they were going to use it for their personal use or something like that. The jury is going to have to know the law. The core of a criminal trial is the jury, and if addresses assist in focusing the jury on exactly what the bones of contention are, including what matters of law are going to be crucial for it to pay attention to, then there is no reason whatever - I cannot even think of a hypothetical one to attack - that defence should not be permitted to deal with it.

Hon PETER COLLIER: So instances of unprofessional conduct on behalf of defence counsel would be very rare, if at all?

Ms Fordham: In opening addresses?

Hon PETER COLLIER: Yes.

Ms Fordham: I would have thought it would be very rare, and I would also say that instances of unprofessional conduct on behalf of prosecutors are very rare, but they exist on both sides. I have

heard prosecutors give extraordinarily passionate, inflammatory opening addresses, which in my personal view are quite unprofessional, but there are solutions to that. You have always got people who try to go one little step too far, whether they be prosecutors or defence lawyers.

Mr Prior: People who do that are generally serial offenders, so most judges I know, when they know the defence or prosecution counsel is one of those serial offenders whom they know, will watch a lot more of what counsel is doing, what they are allowed to do, what they are supposed to do and what they cannot do at the beginning of the trial. Some people, I am sure, have notional little black books on the bench of whom they know to keep an eye on.

Ms Fordham: The other thing is that the judges, of course, still have that overriding role as referee to ensure that the trial is fair, so if someone is obviously going troppo, so to speak, in their opening address, the judge can and will and does intervene. I have seen it happen.

Mr Prior: There is nothing worse, from a defence or a prosecution perspective. It has happened; I have seen it. It happened to me once, but it was because my mobile phone was on, unbeknown to me. To have a judge interrupt your opening or closing address when you are addressing a jury I reckon is devastating - that is my view - because the jury just thinks, "What is this person doing? He's already been pulled up by the judge." I do not see any reason, if they say something outrageous, that a judge in relevant circumstances could not interrupt and say, "Look, Mr Prior, I note that you have just said that, but I take some issue with you doing that."

Hon GIZ WATSON: Just to be clear on that, the judge can actually intervene at any point in time?

Mr Prior: Yes.

Hon GIZ WATSON: He would not have to wait for the defence to finish?

Ms Fordham: No.

Mr Prior: It depends how bad the infringement is.

Ms Fordham: He can and does, and likewise in closings.

Mr Prior: You might get a lesser level infringement when the judge will wait, then get the jury out - this happens a lot with closing addresses - and say, "Well, look, Mr Prior, you said this and this. There was no evidence of that. I'm going to direct the jury now in my closing direction to them and my charge that there was no evidence of that, and Mr Prior said that and you should disregard that." I always think that, with the accused, you can feel his or her eyes burning through the back of your head at that stage, but I always think that is pretty bad for the accused and the counsel involved.

Hon DONNA FARAGHER: **Ms Fordham**, I would just like to pick up on what you were saying with respect to the research you were doing outside your professional experience. You were talking about jurors and you said that it actually assists them.

Ms Fordham: Yes.

Hon DONNA FARAGHER: I note that in the Chief Judge's letter she states that they frequently confuse jurors who have no experience with the system and have some difficulty in working out what exactly it is they should be concentrating upon. Do you have a comment on that? She said frequently confusing jurors, which would appear to be somewhat in conflict with what you are suggesting.

Ms Fordham: I do not believe the Chief Judge has spoken to any jurors about it. I would like to know what the Chief Judge's evidence is for that comment, with respect to her. Many people hold views about jurors and whether they are likely to be bamboozled, confused or anything of that nature. The whole point about my research is that I am permitted to ask those very people about their level of confusion. My research currently is focused on expert evidence, but of course the comments that these jurors make are capable of general application, and, indeed, I do not try to restrict them. I think the Chief Judge is really saying that, as a matter of logic, if a defence counsel

waffles on about something that is not relevant or is barely relevant, it has the potential for confusion, and that is a sensible comment; but, again, defence counsel who waffle on over things that are not relevant or that are barely relevant are going to be fairly useless defence counsel anyhow, and I do not know that legislating is going to improve the advocacy ability of certain defence counsel or certain prosecutors. It is not the solution.

I could not be more definite that telling the jurors in advance what the issues are must and does help them, and the feedback I have had is that that is precisely what they need. In trials in which the issues are not clear to start with, they do complain that they are confused. That is the concern the Chief Judge has; that is, jurors being confused. The way to solve it is not to prevent anybody telling the jury or not to prevent one side telling the jury, whether it be law or the essence of the defence, what the issues are; it is to allow them to tell the jury what the issues are. Therefore, I take on board the Chief Judge's comment, but that is my perspective on it.

Hon GIZ WATSON: Could I have just one further clarification perhaps of this? Obviously, the amendment is to change the wording from "about the accused's case" to "that outlines the accused's defence", which is a narrowing. Obviously, there is some conjecture about whether there is a problem and how big the problem is. Do you think that the accusation is that it is using up too much of the time or that it is allowing the defence to scope general matters of legality and justice?

Mr Prior: "About" as opposed to "outline", to me, is exactly what you implied in your opening comment is less information. God help the Court of Appeal when someone encroaches, if this is amended, trying to work out what is an outline and what is not, and what is "about". To go back to your question, if it is about reducing time, to me, the opening address is ultimately a tool that reduces time significantly at the end, because the jury knows, to cut to the chase, what is at issue. It might mean, for example, that the jury spends two hours considering its verdict, not five, because it will say, "Mr Prior, the defence counsel, told us that we should be focusing only on whether this was an accident, not on whether the person suffered bodily harm. Mr Prior told us that it's only about consent." They accept it is not disputed, and it has never been disputed. "We've been here for five days, but we were told on Monday morning at quarter past 10 that the accused accepts that he sexually penetrated the complainant. It's only an issue of consent." If that is the focus, I just think that is misconceived. Two lawyers - one has just recently been appointed to the District Court - Ron Cannon and Michael Bowden, who is now Judge Michael Bowden of the District Court, were the original exponents of making opening addresses. The other thing that I think has been forgotten in all this is the provision in the Evidence Act - section 32, I think it is - whereby an accused person, or his counsel, can make admissions, and usually that is done, logically, in the beginning.

[10.50 am]

You might get an argument, if this is amended, by a defence counsel: "I didn't talk about the case; I was just giving detailed advice to the jury about what the admissions made are and I have not breached section 143, Your Honour. I am doing what I am entitled to do under section 32 of the Evidence Act." What people say is that it is being regularly breached; that is, the legislative right that defence counsel have. Let us get realistic about it and just abolish the right - I am not suggesting that for one minute, of course, but I think that this does not achieve much at all.

Ms Fordham: If you look at the explanatory notes, which is our only clue as to the intention behind this proposed amendment, seem to suggest that the amendment is to effectively prevent the defence from elaborating on matters of law. It is actually hard to tell. It says -

> This amendment recognises that the Prosecution has a different role and function to the defence. While it is appropriate that the Prosecutor explain to the jury the State's role in terms of the onus and standard of proof and in regard to its obligation to the Court, imparts no advantage for the Prosecution case, and the entitlement to elaborate on those impartial matters is appropriately afforded and reserved for the State.

My first question is why it is appropriate. There is no reason given; there is no basis for that bald assertion that it is appropriate. Why?

Mr Prior: This legislative right has existed only for two years. Let us go back to the basics. Has there been a dossier of abuse regularly in the past 22 months or whatever that people have had this right?

Ms Fordham: What I am trying to say is that we cannot really tell from the explanatory notes what the problem is. The problem the Chief Judge seems to be addressing is different from the problem. She seems to be talking about inflammatory statements and confusion yet the explanatory notes are talking about whether the defence should open on matters of law. I think, in a sense, we are trying to answer both perceived problems. If the only reason for the proposed amendment is that the state should talk about onus and standard of proof and the defence should not, my question there is: why not? If onus and standard happen to be the absolute core of the defence case, why should the defence not say, "Members of the jury, we are going to agree with most of the evidence you are going to hear so if you are waiting for disagreement and a different perspective you are not going to hear it. Our position is simply that on the state's case they are to be unable to prove the offence charged." The jury then knows to look at the evidence from a certain perspective. Why hide that until the very end and have them then attempt to somehow rethink everything they have heard with that perspective in mind? Do not forget, of course, that the defence is going to be allowed to say these sorts of things at the end in their closing. If they are going to say that at the end, why cannot they say that at the beginning? What is the big secret? Why keep it from the jury?

The CHAIR: I appreciate what Mr Prior says about the impact of this being very much at the margins. I was listening to the examples he was giving about what might be contained in the defence outline. It does not seem to me that, with this amendment, any of the examples he is giving would actually be precluded.

Mr Prior: Exactly.

The CHAIR: I suppose what you are saying to us is what a defence counsel might properly draw to the attention of the jury. Those matters that might properly be drawn to the attention of the jury will not be precluded.

Mr Prior: I suppose I would say that it is almost semantics: "about" or "outline" - what is the difference, really? I am not criticising parliamentary draftsmen but I agree with what you are saying: all the examples I have given you are an outline. Arguably, you could have a technical legal argument: "Oh no, that wasn't an outline, Mr Prior. You started talking about acts and things." I would say, "Yes, I did, Your Honour. I started talking about the admissions my client has instructed me to make under section 32 of the Evidence Act." You then have a competing set of legislative rights. That will be interesting. To go back to committee member Watson's comment that you do not have to be a lawyer, I think we all agree that it is probably a lesser statement. We do not have the statistics on this but we could probably indirectly obtain them by looking at transcripts. Since that right has been existing what is the average length of a defence counsel's opening address? I would be surprised if it is more than about 20 minutes on average.

Ms Fordham: If that; I would guess that it is perhaps 10. That is my experience anyway.

Mr Prior: Some people would argue that if it only took 10 minutes, whether it was "about" or an "outline", it must have been an outline because the defence case might take two days.

Hon PETER COLLIER: That is the point I brought up earlier. I am interested to know whether it is commonplace.

Mr Prior: I do not know whether you would be able to get this but Spark and Cannon are the court transcribers in the District Court, which does the bulk of criminal jury trials, which is where this section will regularly apply. They keep a time sheet of the day-to-day proceedings. I do not know whether the committee can access that. You could ask them to isolate how many defence addresses

have been made in the past 12 months in criminal trials before a jury and what has been the average length.

Ms Fordham: You are talking about saving time or wasting time. You would also have to measure something that you will not be able to measure and that is how long did the jury deliberate for and did that address assist them to narrow the issue such that the deliberations were shorter. That is never going to be able to be measured.

Mr Prior: If we are talking about length, the inflammatory statement that the Chief Judge is talking about may only be one line. I will give you one example. I am defending someone on a home invasion. He has assaulted someone who was burgling his house. I get up and my opening address is "A man's home is his castle." I then sit down. Does that offend the existing provisions or the proposed amendment?

The CHAIR: Sounds like the title of a very popular movie.

Mr Prior: To go back to what Judith said, when you look at the explanatory notes I do not think anyone really knows what we are getting at here. I think what the Chief Judge was talking about in her letter, I assume, and, with the greatest respect, what the Attorney General was talking about in his second reading speech, may not be the same thing in terms of abuse.

Hon GIZ WATSON: Thank you for that. We now go to clause 34, which inserts a new paragraph into section 24 of the Criminal Appeals Act. This issue is to do with double jeopardy. On page 3 of the submission from the Criminal Lawyers' Association you refer to the erosion of the rule against double jeopardy. The DPP has argued that whether erosion is occurring depends on your definition of the term "double jeopardy". The DPP argues that if your theory is that it means once a person has been validly acquitted after a proper prosecution, then this does not infringe double jeopardy because there has not been a proper prosecution. Do you have a response to that particular argument?

Mr Prior: Their definition of "valid" means there was no error of fact and/or law, which is what the clause proposes by way of amending the provisions of the Criminal Appeals Act. They just say yes. The problem with that is, for a start, a jury acquittal is a "not guilty" or "we cannot come to a decision" - there is no reason. Appeals against convictions from a defence perspective are usually for errors of fact and/or law or refer to "unsafe" or "unsatisfactory" - those sorts of grounds. From a prosecuting perspective and from a victim's right perspective, you could ask why do we not have the same rights. To go back to the comment made from the state DPP, it was not a valid conviction because there was an error of law or fact and, therefore, it might have affected the jury's verdict. We will never usually know because we do not get reasons. The problem with all this is the age-old comments you will hear from lawyers, which is that the double jeopardy principle is there for two reasons: finality in proceedings and the state's unlimited resources in prosecuting. I think that people in this day and age say that lawyers get a bit precious about some of the old comments about double jeopardy, for example, and some of the other fundamental criminal law principles but they have been there for hundreds of years and have served the public well.
[11.00 am]

The problem with this bill is that it covers crimes with a maximum penalty of 14 years' imprisonment or more, and that is a lot of crimes in the District Court. Therefore, by definition, it gives the prosecution the right to many possible appeals. Secondly, I accept that it is at the DPP's discretion, but that is not legislated, so it is like a Governor proclaiming regulations. Parliament is not scrutinising what it is doing. Will that discretion be influenced by what is on the front page of the following morning's paper? I am not being disrespectful to the present DPP or any other DPP; I am just saying that that is a fact of life. The problem with this is that there is no limitation, for a start. Theoretically, you could have a retrial under these provisions, and the next judge, whether it is the same judge or not, makes a different error, and there is another appeal, and it could go on

forever. There is no limitation. People will say that the DPP will exercise his discretion but, once again, where is that in the legislation?

There is a provision for costs, but it covers only the accused's reasonable costs of the appeal. If this provision becomes law, if the judge makes a stuff-up by way of an error of fact or law, so you have paid for that trial and the stuff-up, you might get the reasonable costs for the appeal, and then you have to fund the next trial. In other words, you have to pay for two trials out of your own pocket. There is a provision for costs, but only for the reasonable costs of the appeal. That is the other problem. What is the reasonable cost of the appeal? It may only be the legal aid scale. From my perspective, I am lucky, because I have been doing this for a while. I do not do much legal aid work these days, because I am lucky enough to get clients who can afford representation. This will penalise those people who cannot afford representation. If some very knowledgeable QC on criminal law does the trial the first time around, that person will probably be able to pay for the QC to be respondent on his behalf to the appeal, to try to fight it so that the appeal fails and, if it succeeds, represent him on the retrial. This is another example of where, unfortunately, criminal justice will be relative to how much you can spend. That is our concern. I must say, however, that the Law Society's submission, if you analyse it, is a bit different from that of the Criminal Lawyers' Association. The criminal lawyers say, "No, we do not want this, because it is just a fundamental encroachment on the double jeopardy principle." The Law Society, because it is a wider group of lawyers - I am not being disrespectful to the Criminal Lawyers' Association - say "We agree with that proposal to not have this amendment, but if you do have it -." We say that it is inevitable, because other states and territories are looking at it, and the federal Attorney General is looking at it.

If you have not heard any submissions on this, I would encourage you to look at the New South Wales act, which has just been passed. There are three ways you can have encroachments on the rule of double jeopardy as it presently exists, to my knowledge, in the states and territories. One, you have the right to retrials or appeals on tainted acquittals; that is, acquittals in which the jury has been suborned, bribed or threatened, or there has been perjured evidence. I do not have any problem personally with that sort of situation. There is the New South Wales model, in which there may be new evidence that was not previously available; for example, hypothetically tomorrow some scientist invents DNA analysis, and therefore they go back and find a DNA match on something. That is not what this bill is about. The amendment in this bill is about trying to make the prosecution have the same rights as the defence. It is only applied to errors of fact or law, although admittedly it must be a crime punishable by 14 years or more imprisonment as the maximum penalty. I understand that there are a lot of votes in this. Crime and punishment is a good issue to get a lot of votes out of. The state Attorney General says, "Why cannot the victims have the same rights?" Victims of crime are victims; they are witnesses. They are not paying for the prosecutor; the defence is. There is a presumption of innocence, the prosecution has the onus of proof, and the standard of proof is high - beyond reasonable doubt.

The CHAIR: However, if the judge makes a mistake, should the state not be entitled to say it wants to have that matter reviewed?

Mr Prior: The way this is worded, if I wanted to be ridiculous about it, refers to an error of fact or law. If the judge makes a mistake on a fact, I reckon I could find in any charge, if you challenge me now, an error of fact in any trial going on today, tomorrow or the next day. I could be ridiculous -

The CHAIR: Would that not be an error of fact or law that would warrant the overturning of that acquittal?

Mr Prior: It depends. The proof of the pudding will be the DPP exercising his or her discretion, but once you have such a wide legislative right, will it ever be wound back, and how will it be policed? Practically, I just shudder at the prospect. I walk out of court after very difficult trials and, if this legislation is proclaimed, I will be saying to every accused after a not guilty verdict - we have

all seen it on TV or whatever - not to get too excited for the next 21 days, because someone will look at the verdict. I know a couple of QCs who do a lot more appellant work than I who seem to be able to find an error of fact or law in just about every judge's charge to a jury. Whether they ultimately succeed is another issue. Unfortunately, the accused person has already paid - sometimes, not always - for round one. If they are not paying - that is, they are represented on legal aid - think about what this potentially could do to legal aid resources, because legal aid may have to pay for the appeals and also the retrial. I accept that that may not directly answer your question about fact or law. Why should the other side - the prosecution - not have that right? It goes back to finality in proceedings, when it is the state against the individual - the unlimited versus the limited resources.

Ms Fordham: I was also going to underline the point about legal aid. I endorse what Mr Prior said, and what the Criminal Lawyers' Association has said. It has set this out in considerable detail in the submission. However, to add to that, the concern is that when and if someone is awarded costs on an unsuccessful prosecution appeal, they are only, as we said, reasonable costs, and the question is, what is reasonable? Usually, in fact I would have thought almost always, it is far less than what the accused has actually paid. If such an amendment were to be passed, we would be asking that there also be legislation providing for indemnity costs for the successful defendant. Let us imagine that someone has gone through two trials - there has been an appeal and a retrial, and, after the second trial the accused is successful, and there is no third trial. Perhaps the DPP has decided that enough is enough. That person may have lost his house, his life savings, and his livelihood, more than likely. He has probably lost his job in the process, either by virtue of being charged or being unavailable for work for significant periods of time. Indemnity costs would be a very appropriate piece of legislation. It would be nice if that happened, but I doubt that it would ever happen.

The CHAIR: Where else do indemnity costs operate?

Mr Prior: Only in civil trials. In criminal proceedings, you can only recover your costs as a successful accused person; that is, you have not been convicted, in the Magistrates Court, under the Official Prosecutions (Accused's Costs) Act 1973. When you are in the superior court - the District Court or the Supreme Court - if you are acquitted, with no cost provisions, and sometimes you do not get bail, so no-one is saying thank you very much for the 12 or 18 months you spent in custody waiting for your trial because it was a serious offence or you are a schedule 2, there are other issues. There is one issue that nobody has put in a submission - the bail issue. What would happen if the person, because of the serious nature of the crime, did not get bail first time around, leading up to the trial, that person was acquitted, but the state appealed under these provisions? Arguably the state could make an application that the person be placed in custody or that bail not be set, because it is saying there was an error and he should not have been acquitted, and he spent 12 months in custody waiting for the trial so put him back in custody while the appeal is on and while the next retrial is on. So he will put him back in while the appeal is on and while the next retrial is on. The retrial might result in an acquittal.

[11.10 am]

The CHAIR: Does not an acquittal stand until it is overturned?

Mr Prior: Not necessarily. I will give the committee the reverse analogy - a conviction. There is the odd case in which there is an appeal against conviction. A person who has been convicted and is in custody can go along to the Court of Appeal and get bail pending his appeal. It can be argued that the appeal case is so strong or whatever. That is the reverse of what had been put to us. To answer the question: let us say that the appeal succeeds by the state and there is a retrial. If I were a state prosecutor, I would say that I want this man arrested now because he was not on bail last time around, so he should not be on bail this time around. Ultimately that man or lady may still get acquittal on trial two and then they have done another 12 or 18 months in custody. There was a

pretty bad case recently about a juvenile accused that got a lot of publicity. He spent a bit of time in custody and he was ultimately acquitted. If we focus on that case - I think everybody knows the case - I would like to see the judge's charge to jury, because I reckon if you challenged me to find an error of fact or law on behalf of the state, I could probably find one and say, "Let us appeal that one." I am talking about the court, but it is not the court of public sentiment. The public sentiment I have heard is: why the hell did that go that far?

Ms Fordham: People can remain in custody for a very long time throughout the appeals processes. It is not the same situation, but an ex-client of mine is doing approximately his eighth or ninth year in custody, still waiting for a trial. The reason is that he has had a trial and there has been an appeal that was unsuccessful and an appeal to the High Court that was successful and he is now back in the trial process. Because of the nature of his offending he does not and will not get bail. By the time he is finally dealt with on that charge again, he could have been in custody for close to 10 years. It is not the same circumstance, but I can envisage that sort of thing perhaps arising.

Mr Prior: I hate to say this, but because this is so far away from the other models I have talked about - tainted acquittal or right of appeal on which there is an encroachment on the double jeopardy principle and/or new unavailable evidence such as forensic technology or whatever; so far away from any other Westminster system - it would be interesting to see what the reaction to it is, not that we are concerned about Victoria and New South Wales, but a lot of Western countries will say it is unbelievable what Western Australia has in terms of appeal rights.

Ms Fordham: There are very strong arguments in favour of, for example, new technology. Let us imagine that we have the advent of some sort of technology equivalent to the DNA technology of the past 10 to 15 years. There are strong arguments in favour of perhaps a limited right to re-prosecute in those circumstances. I am not saying that we endorse that, but the arguments are entirely different on an entirely different logical foundation that is eminently arguable. This is different.

Mr Prior: The committee may have seen this - it gives both sides of the fence. I will hand this up. It is an article that was in *Brief* in April 2003 by Stephen Hall, SC, whom the committee may know, that reconsiders the ruling. It talks about the different models. It is a nice thumbnail sketch of the options. I will hand it over. I also have another paper that a colleague of mine, Philip Urquhart, an-ex DPP prosecutor, delivered. This was a paper he delivered at a legal seminar that actually refers to that. It gives the differences between the types of models. It does not talk about the model that is proposed in the bill, but refers to the other types, one of which has been adopted by New South Wales.

Hon GIZ WATSON: Having looked at the New South Wales model, a requirement is that it be fresh and compelling evidence and there is a set of criteria on how that is assessed.

Mr Prior: What is important about that is that it is in the legislation. It is not saying, "Let's let the DPP work that one out."

Hon GIZ WATSON: My additional question is: the proposition is that the DPP will be issuing guidelines.

Mr Prior: Yes.

Hon GIZ WATSON: Do you have a view on whether that will be a useful contribution?

Mr Prior: It is better than nothing, but I am concerned about its guidelines. It is not mandatory and it is not a piece of legislation. Guidelines are sometimes interpreted subjectively, depending on who the individual director of prosecution is and the matter. That is our concern. At the moment, the DPP has general prosecution guidelines on when they perhaps may not proceed with the prosecution, because of no reasonable prospects of conviction and so on. Sometimes, when we hear the reasons from case to case, we scratch our head and ask why that prosecution was the subject of a

non-prosecution notice and this one was not? Perhaps they know more than we know in defending people.

In his speeches to Parliament, the Attorney General has said, "There is the answer: the DPP, he or she, is a senior lawyer and they will follow the guidelines and so on." We are a bit concerned about that.

Hon GIZ WATSON: Are you aware of any case or cases in WA that created the impetus for this reform?

Mr Prior: I was involved in one this year. I appeared for the respondent in R v the State of Western Australia, for which the decision was handed down in February this year. It was an appeal under section 45 of the Criminal Procedure Act. It was what I call an Attorney General's reference. I think it was the first time that this Attorney General has done that for clarification of a legal issue. Under that provision, it did not affect the verdict - my client was acquitted - but it was to clarify whether the judge got the law right in addressing the jury and, in that particular case, whether the possession of an unlawful drug required to prosecute what was the level of knowledge by the prosecution. When the Attorney General decided in January 2005 that he would refer that matter, and it was a good decision on his behalf because it was an interesting legal point, it was also used in his media releases to say that this is the sort of thing we are looking at in the bill. That is a totally different thing. It is trying to get a legal clarification of an important legal principle. In that case, ultimately the Court of Appeal said the judge got it wrong, with respect, in his direction to the jury on the present law, in particular, in a couple of High Court cases - but, query, we will never know whether that affected the verdict. It was a Kalgoorlie jury and something else may have affected their decision - the evidence or anything, who knows?

Specifically, to answer the question about whether there is a case if there is a fundamental error, I would be surprised if the DPP could not point the committee to a couple of cases in which he would say there was such a bad legal error in this address to the jury that we think it should have been corrected. The problem is that in changing a principle such as the rule against double jeopardy so radically, as is proposed in this bill, where does it end? What are the checks and balances? My submission and the Law Society's submission indicate that the DPP guidelines are not good enough.

Ms Fordham: I am not aware of any such case, but again I have not looked at the cases in which I have been involved from the perspective of a potential prosecution of appeal against an error of law. It is important to say that if the judge has misdirected the jury on a matter of law, the prosecution and defence are always asked at the conclusion of the judge's charge to the jury, "Is there anything either of fact that I have got wrong or any error of law that I have got wrong?" The prosecution and the defence both have the opportunity to say to the judge, "Your Honour, you did misdirect the jury," and state the particular error.

There is already some check built into the system where the judge's attention at the time will and should be brought to any errors or facts of law that that judge has made. The judge can then choose whether it is important enough to bring the jury back to redirect them. Again, in my experience, in any errors that seem to be of real substance the judge will always bring them back. It is important to remember that there is that check already built in at the trial stage.

I should also say that there have been some high profile cases in the eastern states that relate to the fresh evidence circumstance where it looks as though someone has indeed walked free when it is clear that he did the deed. Again, those cases fall into a different and special category. I am not even aware of any of those in this state. If those types of cases existed, they could be dealt with by much more limited legislation that is similar to the New South Wales legislation. This legislation goes far and away beyond that. The financial burden for the respondent in facing those appeals, as well as the burden for the state, if legal aid then has to fund those appeals, which it would have to,

cannot be underestimated. There is also the fact that there eventually must be some finality. Some certainty and end to the process is needed, for everyone's sake.

[11.20 am]

Hon GIZ WATSON: Tasmania and New South Wales are the two jurisdictions where there are appeal procedures. My understanding is that both of those are limited to just one further retrial. Is that your understanding?

Ms Fordham: Yes.

Mr Prior: There is no limit here at all. That is a lesser concern of ours, although it is a concern.

Ms Fordham: Let us imagine that someone who is of enormous interest to the police seems to lead a charmed life and has a teflon skin and seems to never get convicted. I wonder whether that person would have more of the resources of the state thrown at him or her than someone else. Should there be one set of prosecution attitudes to one accused and another set for another accused? Clearly there should not be, but there is the potential for that to occur. Some people may find themselves - I am looking for a more neutral word but cannot find one - targeted, and others may walk free. It may be seen to be unfair between one accused and another.

Mr Prior: That sort of thing will not go into the DPP's guidelines. Unfortunately, people are human and there is a political process and a media process, and that may affect people's decisions.

Hon DONNA FARAGHER: Could I seek some clarification with respect to the costs? If someone is convicted and they seek to appeal that conviction through legal aid, would there not be additional costs?

Mr Prior: Yes, and there is no recompense for them. On criminal matters, the Court of Appeal has no power to award costs. If a person who is convicted of an indictable offence in the District Court or Supreme Court successfully appeals the decision, that person would pay for his trial and the appeal unless he received legal aid. Quite a lot of appeals are only retrials. A court might determine that a judge got something wrong, and so the court would order a retrial. An accused would pay for that trial as well.

Hon DONNA FARAGHER: In effect, legal aid would pay for that?

Mr Prior: If the person could not pay. The means test for legal aid, in simple terms, is whether a person can afford his own representation. In general terms, the means test is a matter of asking the person if he is unemployed or on a disability pension. If someone earns an income over $50 000 per annum and has assets, he probably would not pass the means test.

Ms Fordham: The other issue is: do you have a house? If so, we will take a mortgage on that, and can you borrow?

Mr Prior: The other point is whether it is a serious matter. Generally speaking, for the District Court or Supreme Court it must be an indictable matter or you have to have a disability. The problem also with legal aid and appeals - it will probably impinge on whether this legislation is passed - is it is an unfortunate fact of life that the legal aid scale for appellate work is so low that very few lawyers are appearing. The Court of Appeal has expressed concerns about the level of advocacy skills regularly appearing in that court. That is our highest court in the state. There is a good reason for that. It is because the legal aid scale is so low and a lot of people cannot afford the costs. I do not mind saying that I personally hardly ever go to that court now. There are a lot of other lawyers in the same boat. Legal aid pays for the work and you end up getting about $5 an hour.

Ms Fordham: I agree entirely.

Mr Prior: In the context of this bill, the state says it wants to appeal under the provisions of this bill and we will pay reasonable costs. What is reasonable, as Judith said? My other concern is who

will do it? Who will appear as the respondent/defence counsel? Will it be the same quality lawyer that did the trial? What happens with the retrial if it is successful?

Hon GIZ WATSON: I will move to another component of this clause; that is, the insertion of proposed subparagraph 24(2)(d)(da) into the Criminal Appeals Act. The proposed subparagraph refers to a -

> statutory penalty for which is or includes imprisonment for 14 years or more or life, . . .

You have suggested an amendment to that to provide for a penalty of 20 years rather than 14 years. You might be interested to know that our researcher has indicated there are 96 charges that attract a penalty of 14 years or more. That is quite a substantial number of charges. What is the rationale for your proposal?

Mr Prior: The rationale is it is a compromise, obviously. If you look at the other models like tainted acquittals or new forensic evidence or technology or whatever, usually one of the conditions is it must be an offence that involves life imprisonment, which is usually a case of murder or very serious drug importations or things like that. We have said that given it is a fundamental encroachment on a basic legal right - the principle against double jeopardy - it should be limited to 20 years. The only reason we picked 20 years is it is a much smaller category. You said that 96 charges attract a 14-year penalty. I am interested to see what will happen, but I suspect it will come down to 20 for 20 years. I think that the New South Wales model might be limited to offences that involve only life imprisonment. That is mentioned in both of those papers of Mr Urquhart and Mr Hall. I have referred to different models. It shows how when governments have looked at amending the principle, they have placed some significant fetters on it. Generally speaking, the higher the penalties are as a maximum, the more serious is the offence, and so there should be more concern if someone is acquitted of a serious crime when there has been a fundamental error or there has been some evidentiary forensic evidence or a technological advancement that could strongly prove that a person committed an offence.

Hon GIZ WATSON: I will ask a further question to go back to the opening point on this matter. Would you disagree with the DPP that this amendment does not offend against double jeopardy?

Mr Prior: Most certainly. I am astounded that that was said because the lesser models, or the lesser infringements in the New South Wales model or the models mentioned in those two papers, all see that as an encroachment of the principle of double jeopardy. This is a much wider ranging right of the prosecution to appeal. Everyone is probably aware that - this might go back to a question I was asked before by one of the other members - the prosecution also has other rights of appeal. The prosecution can appeal a sentence that is manifestly inadequate. That is an encroachment against the law of double jeopardy but that right has existed for a long time in this state and in most other states. It is not used regularly, but it is used and it is used successfully if someone gets a sentence that the DPP thinks is not within the tariff of acceptable sentences that are regularly handed down for that offence.

[11.30 am]

So they have got that right. Then in the matter I mentioned of R v State of Western Australia, they have the right under section 45 of the Criminal Procedure Act to clarify an error of law. I suppose, what is the purpose of that? The purpose of that is if you were the DPP or the Attorney General and you considered there was a fundamental error that was continually occurring on a principle of law in the courts, have a test case, have an Attorney General's reference, get it clarified and if you are right about what you are proposing in your referral then everyone has to follow. Because of R v The State of Western Australia and since that decision has been handed down in February or April of this year, I am sure all the District Court judges are now charging juries differently on the element of knowledge in possession of an illegal drug under the Misuse of Drugs Act.

Hon GRAHAM GIFFARD: I just want to get a clear message from Mr Prior about your view of double jeopardy. It just seems to me that you are saying an acquittal is an acquittal.

Mr Prior: Yes.

Hon GRAHAM GIFFARD: And that is it.

Mr Prior: Yes.

Hon GRAHAM GIFFARD: By hook or by crook it is an acquittal.

Mr Prior: And it is a final decision.

Hon GRAHAM GIFFARD: That is right. An acquittal at the first instance is and should be a final decision.

Mr Prior: Yes, and then look at it from the other side of the fence. From a prosecution perspective, an acquittal is an acquittal for us as well, but what has happened is a judge has made a fundamental error of law. The answer to that may be this: the complainant, the witnesses and the prosecution are not on the same scale as the other side who have got the state against them with unlimited resources and their liberty at risk. I accept in serious crime people get injured psychologically, physically and all that. But sometimes we forget in the rhetoric of it all that a victim of a crime is a victim, yes, but they are a witness. It is the state that prosecutes the accused. I am not being disrespectful because I have been a victim of crime - we all have - but often when I prosecute I have the complainant come in, perhaps in a sex case or something, and say, "So you're my lawyer," and I am going, "No, I'm not, I'm just the prosecution counsel. I'm just calling you as a witness and hopefully you'll obtain some justice in the system."

Hon GRAHAM GIFFARD: I understand the distinction you are making between witnesses and the state, but I do not see the state as some anonymous, disinterested entity.

Mr Prior: No, but with unlimited resources.

Hon GRAHAM GIFFARD: I am not sure whether Robert Cock would describe his budget as "unlimited resources".

Mr Prior: Yes.

Hon GRAHAM GIFFARD: His evidence to us was that he estimates judgements about matters he pursues.

Mr Prior: Yes.

Hon GRAHAM GIFFARD: And he has to make judgements about things that are not a good return for his budget.

Mr Prior: That is a good example of what I am concerned about in the DPP guidelines. I would suspect - I think probably correctly, because he is a public servant at the end of the day - that in the DPP guidelines as to whether a matter would go on retrial or whether a prosecution should pursue, the expense involved might be a factor. I am not particularly clear, and I do not think it is in there in the guidelines, about budgetary figures or expense; they are more in general terms. That is my concern about guidelines, as opposed to legislation.

Ms Fordham: Another question which needs to be asked is: did this error of law actually lead to the acquittal? The jury is faced with all the evidence, everything which is said to them by defence counsel, prosecutors and the judge, and we have no way of knowing whether or not a particular error of law made by a particular judge actually led to the acquittal. There is absolutely no way of knowing that. So it is almost an assumption that there has been an error of law, and I agree it has to be significant. If it is a nothing error of law, if there is such a thing, then the equivalent of the current proviso is there in legislation. But how do we know that that error of law led to the acquittal? We do not know and we will never know.

Hon GRAHAM GIFFARD: Is that not what the appeal court is charged with, to make an assessment of them?

Mr Prior: Yes, objectively; I agree.

Ms Fordham: Not quite. There is a proposed section 33(2a) -

> Even if a ground of appeal might be decided in favour of the prosecutor, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

I think that is probably what you are referring to. That is not the same thing at all, because the unspoken assumption behind this proposed legislation is that an error of law has indeed led to an acquittal and that is why we should grant an appeal and have a retrial. But what if in fact it did not lead to the acquittal? Let us imagine that there was a significant error of law which may in the Court of Appeal's view have led to a miscarriage of justice. That would be enough to get it over the line; whereas what may have happened in fact might have been that the jury simply looked at all the witnesses and formed a very strong view about credibility and consistency and so forth and acquitted on that basis, and nothing the judge said, in fact, has affected their thinking in respect of the things which really mattered at the trial. The proposed section 33(2a) cannot possibly deal with that. We cannot know.

Mr Prior: Can I just say something about finality of proceedings? A lot of my submissions have been finality of proceedings for the accused - you get acquitted and it is all over. I think there is some finality of the proceedings also for public utility across the board. I have done prosecutions, for example, in sexual assault-rape style trials where the person has been acquitted and I am the prosecutor. This is not once or twice; it has happened a number of times. Because the complainant has not sat through to the end of the trial, you might ring them up and say that the accused was found not guilty, or whatever, and the reaction has been not, "Oh well, what can we do now?" The reaction has been, "Well, I've had my day in court. That's the system. Okay, fine."

Hon GRAHAM GIFFARD: That would be one of the witnesses you are talking about.

Mr Prior: Yes, like the victim, as such.

Hon GRAHAM GIFFARD: The witness.

Mr Prior: Yes, the complainant; whatever term we use. But, as I say, with finality in the proceedings, you often hear the family of a victim say, "We're waiting for the day in court. I wish the court backlogs weren't so long." What is that going to do? It is not as simple as saying that the person got acquitted, so we have to have another look at this. Sometimes it might not psychologically or socially be of that good benefit to them and all the other witnesses as well anyway if the matter keeps going on and on and on.

Ms Fordham: People's memories fade over time as well. I mean, the evidence is of lesser quality each time you go round. There is also the prospect of, if you like, the prosecution getting more practised; and whether that is good or bad, I do not know. One would hope the prosecutions were of very high quality to start with, but our fundamental concern is the money involved and, I agree, the finality for both. Again, I can say that both I and my family have been victims of crime. I am conscious of that. In fact I am a life member of an association which looks after victims of crime, so I am very conscious of that. There is also the concern that we cannot know why the acquittal occurred in the first place, and if we cannot know, it seems fairly thin to pick on an error of law to, if you like, have another go.

Hon DONNA FARAGHER: Could I just ask one question, and perhaps it becomes a little bit more general but I think it still relates to the issue? You mentioned, just in response to Hon Graham Giffard's question about double jeopardy in general, that an acquittal is an acquittal. But in respect of the New South Wales legislation in terms of fresh evidence, I would presume that that is from your point of view a clear erosion of the double jeopardy rule?

Mr Prior: Yes.

Hon DONNA FARAGHER: But would you be supportive of that?

Mr Prior: I think the time has come. That is why the Law Society's submission is a bit more conciliatory than the Criminal Lawyers' submission. The time has come. The former federal Minister for Justice told me that that was going to be a high priority issue for the state Attorneys General. To some extent New South Wales has jumped the gun and maybe Western Australia has, but they are all looking at different models. I do not think it is good in a federation that we all end up having different models. Yes, it is an erosion of double jeopardy but, as I said from the outset, people might perceive lawyers are sometimes a bit precious about some of these old fundamental legal privileges or rights. But I think the day and age has come because, the double jeopardy principle, to use the New South Wales example, ignores scientific advances in modern technology.

[11.40 am]

If there is something that is new, is not available, and very powerful evidentially in proving something, I think it is wrong just to ignore it. However, it should be limited as it has been in New South Wales. We are not talking about offences with a maximum penalty of 14 years or 20 years. I think their model is based on a maximum, which might be 20 years actually - I stand corrected - but if not, it is life imprisonment.

Ms Fordham: The criminal lawyers' committee's submissions are silent on that aspect about the advance of new technology. I can say that the reason for that is that the committee itself, as is probably the legal community generally, is somewhat divided on that issue, which is why I took care to say that I see that as an entirely different matter where there is quite legitimate room for considering alternatives and considering the possibility of an erosion. That is my personal view. I can tell you that the committee is quite divided, and that is what I think you would expect in the legal community generally. That itself is an indication that there is room for argument, whereas we see an across-the-board, effective removal of the principle against double jeopardy in any case where the judge has made an error of law or fact, to be repugnant.

Mr Prior: I will just hand something else up to the committee, which probably summarises my response to your question. It is from an editorial in *The Australian*, so you can obviously give that whatever weight you like. It is 20 years, not life, in New South Wales, but the by-line is "Double Jeopardy: It is only sensible that the law keep pace with technology". There is a little summary. Then it talks about a couple of infamous cases and it gives you the editorial perspective of what they think of the New South Wales amendment.

Hon GIZ WATSON: I have just a question with regard to the documents that you handed up. Is the second document, which is Mr Urquhart's paper, a public document?

Mr Prior: The reason I know about that document is because I actually gave a paper following him. It was Legalwise Seminar - that is the name of the group - that gave a continuing legal education seminar. There was myself, Mr Urquhart and someone else, but he is the author of the document. For clarification perhaps, Mr Urquhart is based at the same address as me, two doors down, 19th floor, Francis Burt Chambers. I did not tell him I was going to hand it up - he is in the middle of a murder trial - but I will tell him this afternoon. He is the author of the document, say, for the terms of admission of evidence.

Hon GIZ WATSON: What we might do is receive it in private and just confirm it. Did the article from *The Australian* have a date on it?

Mr Prior: It was in *The Australian* about three Saturdays ago. I just came across it accidentally because I was getting another article out for a client of mine who was getting a bit of publicity at the time, so it would be I think one of the April-

Hon GRAHAM GIFFARD: You were not drawn to the editorial piece below it?

Mr Prior: No, no.

Hon GIZ WATSON: You believe it was sometime in early April.

Mr Prior: Yes, April or late March. I am pretty sure it was a Saturday edition.

Hon GIZ WATSON: If I could draw your attention to clause 40, which proposes to insert section 35A into the Criminal Appeals Act 2004, it will provide that the state must pay the accused's reasonable costs of being legally represented in the Court of Appeal in an appeal commenced by the prosecution pursuant to the prosecution right of appeal which is to be introduced by the Bill. The society's submission on page 4 suggests that the accused's appeal costs should be paid on an indemnity basis. Could you please clarify for the committee what is meant by indemnity costs?

Ms Fordham: Can I help? I think that one came from us in the first place anyway. Indemnity simply means paying the respondents what it actually cost them rather than some notional, reasonable amount, which might be fixed according to legal aid scales, or some other scale, or by whoever makes the determination of the costs on the day and what they think is reasonable. It is amorphous, but our experience is that costs awarded in the event of an appellant or an accused being successful - and the accused, of course, are only awarded costs in the Magistrates Court - are usually significantly under what the real costs are. Now that begs the question: what if a respondent engages a team of silks from the eastern states at a cost of squillions of dollars? The response to that has to be, I would have thought, that that respondent is also risking that money going down the drain if they were to lose; so if they consider it appropriate to get themselves that sort of help and the state chooses to bring in this sort of legislation, then the state needs to wear the inevitable expense of a loss.

If these appeals are being taken where they do not have enormous merit, or where there is a real prospect of them failing, then maybe the state needs to think twice about actually pursuing those appeals. There is, if you like, a penalty for losing, but there is a penalty in most courts financially for losing; that is the way it is. Although I would not say the state has unlimited resources - that probably is going too far but it probably feels that way, I think, to many accused - the state is certainly capable of hauling in whatever resources and assistance it needs, and its potential resources are far greater than those of the accused. It is a matter in a particular case of whether those resources are spent or not. Having said that, were such a provision to come in, the financial concern would be alleviated somewhat with indemnity costs, in other words what it actually costs.

Mr Prior: I think also if that was the provision, there would be potential for the court to make an order that the costs be taxed, so, in other words, if you were successful as a respondent, to use Judith's example, and you had some very expensive QC from the eastern states, the best criminal lawyer in the land, the court would go, "No, I'm thinking his or her bill will cop a tax."

What is concerning about reasonable costs to me, is that it will end up being the legal aid cost scale. The legal aid cost scale is about $3 000, which you get paid for doing an appeal against conviction. A lot of people will say that at first glance that is a lot of money. These sorts of appeals, where there is a serious offence by definition, are trials that are going to be a week, two weeks or longer, so there is going to be a lot of transcript; $3 000 would not even cover charging $50 to $100 an hour for your reading time, let alone researching, going down there and arguing. Going back to my concern, with the on flow of reasonable costs, and if it is sort of interpreted on the legal aid scale, you will have what the Court of Appeal is now seeing; the juniorisation of appellant advocacy People are saying, "I am not going down there," because for the hard work you do, you are not getting properly paid. I mean, going down to the Court of Appeal is like doing an oral exam; you have got to know what you are on about in terms of your area of law. There are three people who probably know three or four times the amount of law that you know asking you questions nonstop. It is a very hard task.

Ms Fordham: It is very, very labour-intensive. There is an enormous amount of preparation because of the changes to the Court of Appeal system. There is an enormous amount of paperwork and an enormous amount of work that has to occur very early in the piece. It is extraordinarily labour-intensive, simply getting the thing ready to go down there and argue it as well. It is very, very expensive. It is probably getting slightly off the track - but the juniorisation of advocacy is a real concern at that point and this is only going to add to it.

Hon GIZ WATSON: You might have already answered this, but does the proposed section 35A satisfy the association's concern at the cost of an appeal?

[11.50 am]

Mr Prior: No, because we say that "reasonable costs" will probably be interpreted as bargain basement on the legal aid scale. If you want to look at the exact figures - the legal aid scale is a public document - there is a fixed scale and it has "appeal against sentence" and "appeal against conviction". Arguably, it will be a lesser amount because you are responding, so you do not have the running of the appeal. Quite often the respondent has to do a lot of work too. The bigger concern that I have already mentioned is that proposed section 35A of the Criminal Appeals Act is the only provision for costs. If the court says there should be a retrial, who pays for that? Of course, it is the accused. Who pays for the judge's stuff-up, as we could colloquially describe it? The accused.

Hon GIZ WATSON: I take you to clause 43, which inserts new section 36BE into the Evidence Act. According to the DPP, the Australian Law Reform Commission made this recommendation. What is your objection to its inclusion?

Mr Prior: The practical ramifications are that persons who have psychology/psychiatric qualifications specialising in child behaviour should start looking for a house in Eagle Bay now. As soon as this provision is brought in, there will be a new industry of experts. Unfortunately, child sex offences are very common in the courts. You would struggle to go to the District Court in any week, possibly in any day, and not find a trial going on with this sort of charge. Because of the wide-ranging power of what sort of evidence you can give, I suspect it will almost become par for the course that the DPP will call an expert of this nature for all these cases. The defence response will be, "We need an expert to check that expert's report," there will be applications to legal aid saying an extra $5 000 in funding is needed, or whatever it will cost, for an expert to check their expert report and, if necessary, testify. That will blow out legal aid. That is the first issue. What will that do? It will increase the cost of trials for everyone. It will also blow out the length of trials. There will be delays because trials will be listed later because an expert has to be arranged to write an expert report. We would all agree that when experts testify, they tend to be quite longwinded so we can add another day to the trial to cover the two experts who may be called. Going back to the basics, we think that a lot of things that are said that you can receive evidence on, not referring to what the Law Reform Commission has said, is the sort of stuff that jurors know. There are 12 jurors and, statistically, probably about nine of those have been parents. It is a matter of common knowledge and life experience. They do not need an expert to say that.

There is nothing stopping the DPP seeking to apply to have an expert of that nature called in for appropriate cases if you had a very young child or a very young child who acted under a disability. You could make an application to call for expert evidence, saying, "Here is your expert evidence, Your Honour. As a pre-trial ruling, please tell us if it is accepted." The defence may concede that and call its own expert. If this amendment is allowed, it almost gets to what lawyers call the ultimate issue of who is telling the truth. In some of the evidence that the experts would be allowed to give, they are ultimately saying, indirectly or expressly, "Ladies and gentlemen of the jury, you should believe this five-year-old." In most cases of this nature, it is who you believe. Occasionally, you have forensic or medical evidence. Proposed subsection (2) states -

> that is relevant to the proceedings is admissible in them notwithstanding that the evidence -

(c) relates to a fact in issue or to an ultimate issue in the proceedings; . . .

The ultimate issue is whether a person is guilty or not guilty. I am not trivialising the matter or demeaning experts of that nature. It is almost like saying, "Do we believe the expert because if we believe the expert, the person is guilty because they have just told us in one way or another that a five-year-old child does not lie about this sort of thing happening?" Judith may have a very different view of this because she has the difficult problem, or the advantage, as you have heard, of being involved in some research on the effect of experts. That is the particular research topic on juries, but also in a different capacity.

Ms Fordham: I am here as the representative of the Criminal Lawyers' Association. There is an agreement as to what the association should say, with which I may agree in whole or in part. I do not think it is appropriate for me to give particularly personal views. Let me take you back and say that the current law of expert evidence says that, for example, if something is a matter of common knowledge that members of the jury can figure out for themselves, expert evidence will not be called. That is a sensible way for the law to be because you do not want to extend trials, given the battles with experts and so forth, if it is something that the jury as 12 representatives of the community are perfectly able to work out for themselves. The current law of experts also says that if there is something that would assist the jury, which they are not able to figure out for themselves, expert evidence can be called. That is already the law without this legislation.

The difference in this legislation is that that evidence is to be admissible even if it relates to the end issue in the trial - basically, did this person do it or not or is the child telling the truth or not? The difficulty with that is that utterly usurps the jury's role. The jury is there to decide the ultimate issue. The jury is there to decide whether the accused is guilty or not guilty. The jury is there to make decisions on what they make of the facts in light of all the evidence, not just the expert evidence. If an expert is to be able to draw conclusions which relate to the jury's job, that presents an unprecedented encroachment upon the jury's role. The jury's role has always been very jealously guarded. The jury is what stands between the state and the individual, if you like. That is an extraordinary encroachment.

Having said that, what I can say from my research - obviously, I am somewhat limited in what I can say because the final conclusions have not been published yet - is that jurors in general are careful with expert evidence and cynical with expert evidence. They are cynical in the true sense of the word in that they judge it, balance it and do not necessarily swallow it holus-bolus because a person is an expert. Having said that, it is a fact that experts walk into court and in a juror's eyes have higher credibility than lay witnesses who may have reasons to lie or reasons to be mistaken. Experts do have more inherent credibility, at least to begin with. For that reason, an expert testifying on facts in issue, ultimate issue, credibility of complainant and so forth, represents a real encroachment upon the jury's role because of their inherent higher credibility. Having said that, I repeat that jurors do not simply swallow what experts have to say; they are careful with it. The experts have higher standing. I do not think I can emphasise too strongly the fact that that is the case and has always been. Just because something has always been so does not make it right. The absolute cornerstone of the criminal justice system is that the jury stands between the state and the accused and represents the people sitting in judgement on individuals within society.

Hon DONNA FARAGHER: I would like your thoughts on something. When the bill refers to evidence by an expert on the subject of child behaviour, it does not specify who that expert could be. I understand that New Zealand has a law in place where the expert has to be a child psychiatrist or a child psychologist, although it is changing its laws to bring them more in line with what is proposed here. If that provision remained in the bill - obviously you do not want it in there - what is your view on what would constitute an expert in this case?

[12.00 noon]

Mr Prior: Certainly I agree with that. Judith should answer this because she actually has some of those qualifications.

Ms Fordham: The law as it stands now is that one can become an expert by virtue of experience, qualifications or a combination of both. I think we can see the commonsense in that. We can reach our expertise in a particular way. My concern about prescribing particular sets of qualifications as leading to expertise is that that would automatically give certain people in possession of those qualifications an imprimatur as an acceptable expert. There are other fields of study. For example, do we say that a child psychiatrist is automatically an expert? Do we say that a psychologist who specifies in, say, education and learning has appropriate qualifications? You can conceive of, depending on the particular trial, that particular areas of learning might be the appropriate field of expertise. All any legislation could do I would have thought would be simply to say a child psychologist or child psychiatrist is considered to be an expert. It could not go any narrower than that. We would then have perhaps experts in child pathology or on insanity in children or juvenile onset schizophrenia somehow automatically being qualified to speak on this topic on which they have no expertise at all. It has always been for the judge to decide whether someone is appropriately experienced and qualified. Some of those decisions can be argued with, but I cannot see how the legislation could cover the field, and operate fairly.

Hon GIZ WATSON: In relation to the research you are undertaking, the Chief Justice appended the document in his submission to the committee. We want to confirm whether that should be a public document. I realise it is not your final document.

Ms Fordham: That can be a public document.

Hon GIZ WATSON: Are you okay with that?

Ms Fordham: Yes, I am. Can I clarify which one he appended so that I know exactly what I am talking about?

Hon GIZ WATSON: Perhaps we will just show you a copy of that.

Ms Fordham: Thank you; yes, that has been published by Oxford University Press and it is publicly available. Anyone can buy that. That was not a plug!

Hon GIZ WATSON: I take you to clause 72. This clause proposes to amend section 14 of the Suitors' Fund Act 1964 so that an accused's costs in a retrial, resulting from a prosecutor's appeal, which is proposed to be introduced by the bill, will be paid out of the Suitors' Fund. It appears that the effect of clause 72 will be that the accused will receive payment from the Suitors' Fund towards his or her costs of the retrial of an amount that is equivalent to the costs that he or she incurred in the original trial as determined by the Appeal Costs Board. On pages 3 to 4 of its submission, the society suggested that the accused's reasonable costs in a retrial should be paid by the state on an indemnity basis. I think you have already covered what you mean by indemnity basis.

Mr Prior: The Suitors' Fund is a waste of time. You almost need to employ a lawyer to do the application. People need to do the paperwork, know the procedure and know the legislation. In the olden days, for example - I am thinking of a trial in Broome or somewhere about five or six years ago when a cyclone went through when we were all ready to start the trial; the trial was abandoned because we all had to run away. I made an application to the court for a certificate under the Suitors' Fund, because, among other things, costs thrown away or whatever were wasted. The fund as it presently exists is limited. I do not think anyone gets more than about $2 000. There is a formal application process; it goes to the board; and it is time consuming and expensive. Most lawyers I know who know about the Suitors' Fund have given up on it.

Ms Fordham: Yes; I am with you.

Mr Prior: In terms of that - putting aside what we are suggesting - providing a solution to the problem about costs if there is a right of state appeals as proposed in this bill, it does not provide a solution unless they completely redraft the whole Suitors' Fund Act and rules.

Hon GIZ WATSON: On page 5 of the association's submission, it is suggested that there is a scale of remuneration under the Suitors' Fund Act but there does not appear to be any limits in section 14 on the amount payable to the accused for a retrial, except that it appears that the payment will be restricted to the costs incurred by the accused in the original trial as determined by the Appeal Costs Board. Do you have any comments on that?

Mr Prior: I think the answer to that impinges on my last answer; notwithstanding this is a Criminal Lawyers' Association submission, Judith suggested that I answer it.

What I just said to some extent answers it. It is suggested in the submission that there be a fixed scale so that we do not go through the painful process of having to make submissions to the Suitors' Fund Board justifying what the amount is so there is just "Fixed Cost - District Court trial X". That is a half-way house to solving the problem, but the next issue will be the money. My understanding of the Suitors' Fund is that it is a very small pool of money. For an average District Court trial for any matter - so let us talk about offences incurring 14 to 20 years - what is the cost? In real terms it could be $10 000 plus. There would have to be a huge input into the Suitors' Fund where the money would come from.

Ms Fordham: As a matter of practice, my advice to my unsuccessful clients - I think many lawyers would advise it - is that, "It's not even worth making application. You probably cannot manage to do it on your own; you will have to pay me to make the application and, by the time my costs for making the application come out, it is not worth anyone's bother. Leave the money in the Suitors' Fund; it is not worth it." I think that is a fairly common view.

Mr Prior: Yes.

Hon GIZ WATSON: Thank you. I refer to Part 4 of the bill, which amends the Criminal Appeals Act 2004. On page 4 of your submission you state -

> In any given case there are many reasons why a person might be acquitted, so it would be impossible to show that a Judge's error alone would inevitably have led to an acquittal . . .

I guess you have expanded on that to an extent. Is there anything further you would like to say on that?

Ms Fordham: No. Perhaps I could try to put it in a nutshell. I think I have expanded quite significantly on that. The answer to that, it has been suggested, is that it is in the equivalent of proviso where the Court of Appeal does not feel there has been a substantial miscarriage of justice, despite the judge's error, the appeal might not be allowed. Our position is that that is not an entire answer because it may be that, even though the judge made a substantial error of law, the reason in fact for the acquittal related to other things that were of significance in the case. Therefore, there is the prospect of a case in which the defence case is, for example, extremely strong; the judge, however, has made a significant error of law such that the Court of Appeal is unable to say that it has not led to a miscarriage of justice. Therefore, there is a retrial when in fact there is no real merit in the retrial in any case because the accused's position was indeed so strong. However, the ground of appeal was there and it was not something the Court of Appeal felt able to reject as knowing it had not led to a miscarriage of justice. I am really repeating what I have already said. I am not sure I have anything to add there. We simply cannot know what it was that led a jury to acquit. I can say that, even now, defence lawyers pick through judge's directions looking for errors to try to get an appeal up.
[12.10 pm]

In fact, it is the gist of the judge's directions, the tenor of them and the fundamentals that get through to the jury. Jurors do not go through the judge's directions and parse each sentence, pick

each word apart and look for hidden meanings. That is something lawyers do; I wish they wouldn't.

Mr Prior: Successful appeals against conviction are probably only about 10 per cent.

Ms Fordham: I would say, yes.

Mr Prior: That may to some extent use that argument the other way in terms of what is proposed and say that therefore the accused may not have to go through a retrial. They still have to go through the appeal. There are not a lot of appeals relative to - if we got the statistics of how many matters go to trial in the District Court and the Supreme Court each year and how many people appealed their convictions, it would be a very small subset, and of that subset about 10 appeals are successful, I reckon. We are probably talking about 20 a year, if that. There are also provisos. The court sometimes says that it thinks the judge made an error but there was not a miscarriage of justice because there was fundamentally an overwhelming case against the accused, appeal dismissed. One thing that comes out of what we have been saying about opening addresses and the right of appeal is that, and I think Judith is probably the best person in the state to endorse what I am saying, given her research, I think we have all - I am not talking about lawyers - underestimated the intelligence of juries over the years. The average juror probably at least went to year 10 at high school, and is literate. I just think this whole thing about lawyers being all smoke and mirrors and conjurors is wrong. Unfortunately because of the provisions of the Juries Act we do not go round asking jurors why they acquitted someone, but my personal experience in the 22 years I have been practising - I have done about 200 jury trials and have seen a lot of others - is that they probably got it right about 90 to 95 per cent of the time. That is using what I feel about the vibe of the whole case - law, facts, error and the flavour of the evidence.

Ms Fordham: I am comparing my numbers in terms of jurors' education to the ABS statistics. It is not easy because ABS has different cut-offs at different ages and so forth, but I can say with some confidence that the educational level of juries is better than the average educational level in the Western Australian community.

Hon GIZ WATSON: And some members of Parliament!

Ms Fordham: I say nothing!

Hon PETER COLLIER: Or the law fraternity.

Ms Fordham: Absolutely!

The CHAIR: Just using the language Mr Prior was using a minute ago about an appeal where there might be an overwhelming case against the accused -

Mr Prior: A very strong case against the accused whether they have said that technically there was some error of law and that is the appeal ground.

The CHAIR: I suppose what I am saying to you is that if you have a situation in a trial where there is an overwhelming case against the accused but the judge made an error and it was that error that convinced the jury to acquit, but because they were misdirected on law -

Mr Prior: But we will never know; that is the answer.

The CHAIR: You are talking about the ability of appeal courts to see that there was overwhelming evidence against the accused and the only thing that got him off was an error in the direction. Surely there should be an opportunity to correct that wrong.

Mr Prior: As a matter of justice, I suppose. The answer to that is, theoretically, yes. That then happens and the accused gets the reasonable costs under the provisions of these bills, which might be a mickey mouse lawyer, and there might be a retrial in which they are paying for what I described colloquially as a stuff up - error, mistake - and chucked into the mix they might go back

into custody. Ultimately, even if there is an overwhelming case, because it is only perception - we are not the 12 jurors - they still may be acquitted.

Ms Fordham: That is the fundamental question. The only justification for this could be if we can know that an error in fact led to an acquittal. We cannot know. The very fact that the court of appeal may take the view there is an overwhelming case against the accused does not mean that a judicial error has led to that acquittal. It does not follow. Juries will, for example, and always have - and that right has been jealously guarded; as I keep saying, the jury stands between the state and the individual - juries will sometimes give what is called a mercy verdict where the evidence, in fact, would lead them very strongly down a different path and yet they will acquit or convict of a lesser offence because of the particular circumstances of the offending. Things like the so-called mercy killings might fall into that category. Home invasion killings may fall into that category.

Mr Prior: Forget about the evidence, let's go on the emotion.

Ms Fordham: Well, not so much let's go on the emotion; let's go on what feels to us fundamentally to be right. That is something that is well recognised. Juries do that on occasions and it is something which has generally been supported as appropriate. I repeat, we cannot know. I have also known of juries who have seen things in the trial, in the evidence, which have not been noticed by either the defence or the prosecution and which are definitive of the result. Again I cannot be more specific than that, but juries have noticed something that was in the evidence that no-one has spotted and they have looked at it and said, hang on a minute, this leads us inevitably to guilt or to an acquittal. No court of appeal is going to be able to second-guess that, nor should it.

Mr Prior: The fact there are no jury reasons for acquittal is probably a fundamental reason why appeals against conviction very rarely succeed and why there is a high failure rate. Judges quite rightly say they want to make sure the error was fundamental because they are overturning a jury verdict that they do not know anything about. Look at it from the other end of the scale. There can now be trials by judge alone. There have been a couple of infamous cases involving former politicians, a former late Queen's Counsel and so on. When they are tried by a judge alone, he or she gives reasons. It is almost inevitable that there will be an appeal if people are not happy with the verdict, because they have all the reasons. The most recent one I can think of is the young girl who was murdered in the Geraldton sand dunes. That was heard by Justice Wallwork, as he then was, by himself. That has only recently come to an end in the High Court. It was always going to keep going because there were Justice Wallwork's reasons for people on either side of the fence to continually look at.

Ms Fordham: I would be interested in the number of appeals that are run by the DPP in judge-alone trials where there have been acquittals. I can only give you an anecdotal or impressionistic idea, but certainly it seems to me, and I may very well be wrong, but the numbers should be out there, that the prosecution very frequently, almost without exception, will appeal a judicial acquittal. It has also been my experience, and I could be corrected by real numbers, that those appeals against acquittal almost inevitably fail. A lot of money is being spent out there. The judge gives his reasons and therefore people can look at the reasoning and say, no, the judge got this wrong or the judge got that wrong. If they run an appeal, a court of appeal will knock that back. Meanwhile, of course, the accused has been through the expense of an additional appeal. I do not know what the numbers are but I think we are looking at significant money and with no result for the state, if I am correct that most of these appeals fail. I couch that by saying I do not know; it is simply my impression.

Hon GIZ WATSON: I have a couple more questions in relation to this part. You refer on page 5 of your submission to how, if a judicial error is not noticed by the prosecution prior to the judge's retirement, the matter can be referred to the court of appeal for resolution on an Attorney's reference, which you raised earlier. You then acknowledge that the perceived perpetrator is not re-

tried or punished but the error is never repeated. Whereas this fixes the judicial error, how does your stated view sit with the public interest imperative in terms of justice being done?
[12.20 pm]

Ms Fordham: It fixes the future in that that error ought not be repeated again. So, the public has an interest in all future trials being carried out in an appropriate manner. The public interest is always a balance. There is always a balance between continuing to pursue a particular accused, and looking after, if you like, the punishment of an individual offence. It comes back to the same sorts of principles - Rumpole's golden thread, if you like - and the fact that although occasionally people who are guilty will walk away, we need to balance that against the risk that innocent people will be convicted and not walk away. There will be occasional injustices in any system, no matter what rules apply. Those occasional injustices are part of the price we pay for having a system that is fair to most. That is probably my answer. There will be occasional injustices, but it is fair to most - the prosecution, the defence, the victims, the accused and the state.

Mr Prior: The Attorney General reference that I keep referring to as section 45 is actually section 47 of the Court of Appeal Act. The other reference should the State of WA v R. Unfortunately, I do not have the full citation, but that decision was handed down by the Court of Appeal, comprising President Steytler, and Justices Pullin and Wheeler, about two months ago.

Hon GIZ WATSON: You also say in your submission that the need for the proposed change has not been demonstrated. Do you wish to expand on that comment?

Ms Fordham: With respect, no, simply because I am not sure that I can say in what manner it has not been demonstrated. The point is that I am not aware of any particular case that would bring to light that need. I do not know where the impetus for these changes has come from. I simply cannot suggest anything against which I could argue, I suppose. That was the purpose of that comment.

Mr Prior: By analogy, if you look at Mr Hall's article, he talks about the infamous Carroll case that went all the way to the High Court. If you read through that case, I do not think any reasonable person would suggest that that is not a good case to advocate why there should be an amendment to the law against double jeopardy. That was a very serious crime, and there was a quite significant forensic evidential advancement that arguably would have convicted Mr Carroll of what he had been acquitted of.

Hon GIZ WATSON: Thank you very much for attending this morning. We appreciate your assistance.

Mr Prior: Thank you for giving us the opportunity of addressing you orally. We always enjoy the opportunity of assisting you orally above and beyond our written submissions.

Hon GIZ WATSON: It is much appreciated. Thank you.

Hearing concluded at 12.23 pm