FREEDOM OF INFORMATION AMENDMENT BILL 2003

Second Reading

Resumed from 22 October 2003.

MRS C.L. EDWARDES (Kingsley) [4.01 pm]: I support the Freedom of Information Amendment Bill 2003. I commend all members who have made this legislation possible, particularly the member for Churchlands, who introduced it. Whilst I could use my time to go through the history of this legislation, that to some extent has already been done by the member for Churchlands, so I will refrain from doing so, particularly given that the Government has indicated it will support this legislation. This Bill was originally introduced when members of the Government were in opposition. Therefore, we could not understand why the Government delayed this legislation when it came to power. The Information Commissioner herself indicated that there was no reason for Western Australia being out of step with the rest of the world, because the legislation provided a loophole for government departments and agencies to avoid what was the clear intent of the Freedom of Information Act to make information available. It was not until this matter had been taken to the Supreme Court that this became clear.

We support the amendment. I commend Peter Kasprzak for the work he has done. He has been dogged in his continuous pursuit to amend this legislation, which he has also done on behalf of all public servants who have wanted access to parts of their files. It was unreasonable, unfair and un-Australian that these people could not have access to that very important information. The many people who had looked at this legislation clearly identified that there was no justification for the cloak of secrecy surrounding it. I thank the Government and all those who have made this legislation possible for the people who will use it in future.

MR J.A. McGINTY (Fremantle - Attorney General) [4.04 pm]: Although we support this Bill, the sailing is not quite as smooth as members might have anticipated, as a result of part of the amendment that was moved in the upper House. We will support the Bill subject to an amendment. That amendment will apply to clause 4 of the Bill and will delete paragraph (b) of clause 5(1) of schedule 1 of the Act.

Mrs C.L. Edwardes: Which is?

Mr J.A. McGINTY: We will support paragraph (a), which is to change "reveal" to "prejudice", but paragraph (b) goes on to include the words "or a possible resumption of an investigation or future investigation". We are not happy about that. As I understand it, that was not in the original Bill but was moved as an amendment in the upper House. That is where the import of what I wanted to say will lead. I ask members to bear with me while I develop that.

Insofar as the Bill seeks to amend clause (5)(1)(b) of schedule 1 by substituting the word "prejudice" for the word "reveal", it is entirely consistent with the amendment of the clause approved by Cabinet in 2003, which is currently subject to drafting instructions with parliamentary counsel. This aspect of the amendment proposed in the Bill is also entirely consistent with the position taken by members of the present Government when we were in opposition. In May 1998 the Minister for Consumer and Employment Protection, when he was in opposition, introduced his own private member's Bill in which he sought to substitute the words "prejudice an investigation" for the words "reveal the investigation" in clause (5)(1)(b) of schedule 1 to the Act. We are very happy with that element of this amendment. It is consistent with what we propose to do in the Bill. It is something that, when we were in opposition, we thought was a good idea. It is something that is broadly consistent with the freedom of information legislation in the other States.

Where this Bill departs from what was anticipated is the inclusion in clause (5)(1)(b) of a reference to prejudice to "a possible resumption of an investigation or a future investigation". These words were included in the Bill by an amendment made to the Bill when it was before the Legislative Council on 11 September 2003. When did this Bill pass the Legislative Council?

Dr E. Constable: Earlier this year, I think.

Mr J.A. McGINTY: According to my note it is 11 September 2003. Would that be right?

Dr E. Constable: Yes.

Mrs C.L. Edwardes: So you are doing this on the basis that the release of that information could prejudice a future investigation?

Mr J.A. McGINTY: No. We are saying that by adding those words it might restrict the availability of information. That is why I am not happy with it.

Dr E. Constable: I agree.

Mr J.A. McGINTY: I will develop this a bit further, because we support it subject to that one amendment, which we can send back to the Legislative Council. If the Council agrees with that, the substantive amendment, which is the prejudice and reveal issue, will be fixed, because that is the issue that really needed to be dealt with.

The amendment was advocated by Hon Peter Foss, MLC. During the debate in the Legislative Council, Mr Foss quoted from *Hansard* of 11 November 1998 when the private member's Bill was debated. In the course of that debate reference was made to the judgment of Justice Anderson in Police Force of Western Australia v Kelly and Smith (1997) 17 WAR 9, one of the leading decisions in relation to the exemption in subclause (5)(1)(b). As stated in that debate by Hon Peter Foss, in that case Justice Anderson observed -

> It is not difficult to imagine cases in which it would be highly detrimental to good government and inimical to the administration of law enforcement to disclose that a particular criminal investigation is contemplated, has been started or has been completed.
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> . . .
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> Even after an investigation has been completed, there may be very good operational reasons why there should be no disclosure of it. For example, it may be part of a wider and perhaps incomplete investigation . . .

They were the comments of Justice Anderson.

During the debate in the Legislative Council, Hon Peter Foss said -

> One could possibly interpret that this -

That is, the amendment in the terms initially proposed in the Bill -

> should be read in such a way that it would deal with future investigations or, if one had been finished and another started, it should be read as similarly protected. I think perhaps the way to deal with it is for an amendment to be made in Committee in which we deal with a possible resumption in a future investigation.

When the matter came on for debate in the Legislative Council in the committee stage, Mr Foss suggested an amendment to the Bill to add the words that are the subject of our present debate. Mr Foss explained -

> The reason for moving this amendment is the concern that, for instance, if an investigation against somebody were stopped because it had reach a dead end, people should not reach the conclusion that there was no case but that there was no evidence at that time. If that were to be revealed, it would be dangerous, because it would certainly prejudice any resumption of the investigation. The case given by the Honourable Justice Anderson was of when an investigation might finish and the same information might be used on a future investigation . . . It could be argued that the prejudicing of an investigation includes a resumed or future investigation and not just the current investigation. That is arguable. This amendment puts it beyond doubt.

Therefore, I have no argument with the intent of the amendment.

I will now share with the House the legal advice that we have received on this Bill and the import of the proposed amendment. Justice Anderson's discussion in Kelly and Smith of the impact of the disclosure of an investigation, whether that investigation was current, had concluded, was temporarily in abeyance or was related to other ongoing investigations, was by way of explanation of his conclusion that the phrase "reveal the investigation" should be broadly interpreted - I believe that is a very proper conclusion to reach - so that the secrecy of any investigation could be preserved when this was required. For the same reason, His Honour concluded that the phrase "reveal the investigation" did not import any element of novelty or exclusivity as to what a particular document disclosed about an investigation. As a result, Justice Anderson concluded that a document would reveal the investigation if it revealed the fact of a particular investigation of a particular incident involving certain people. Because the phrase "reveal the investigation" has been broadly interpreted, the advice that I have received is that there has not been any case about clause 5(1)(b) in which it has been argued, much less successfully argued, that the exemption is applicable only to documents relating to current investigations.

Further, it would be difficult to argue that clause 5(1)(b) is directed only to the protection from disclosure of documents relating to current or ongoing investigations, because the remaining words in clause 5(1)(b) make clear that the exemption applies "whether or not any prosecution or disciplinary proceedings have resulted" from the investigation. Those words necessarily carry the implication that the exemption is directed to protecting the secrecy of investigations, irrespective of whether they are ongoing or have concluded.

Although the requirement for prejudice clearly is more stringent than the requirement that a document simply reveal an investigation, the legal advice that I have received is that the words in clause 5(1)(b) support the conclusion that the exemption clause, once amended, will be capable, at least in theory, of precluding the disclosure of documents containing information about investigations that have been concluded, or are in abeyance, provided the agency in question can demonstrate that there would be a prejudice to that investigation. For this reason, a reference to prejudice to a possible resumption of an investigation or a future investigation is not, strictly speaking, necessary.

The advice I have received then goes on to state that insofar as the proposed amendment in the Bill refers to prejudice to a future investigation, it is difficult to see how an agency would be able to establish that the release of a document, or matter in a document, could reasonably be expected to prejudice a future investigation if that investigation has not even commenced at the time the claim to exemption is made. A claim of that kind would appear to be speculative in nature and therefore unlikely to meet the "could reasonably be expected" test.

In addition, if an investigation has been completed and there is no present intention to resume that investigation in the future, it will be very difficult for an agency to establish that that investigation will be prejudiced by the disclosure of documents containing information about that investigation. Even in some cases in which an investigation is temporarily in abeyance, it may be difficult for the agency in question to satisfy the prejudice test because of the speculation inherent in a claim that the disclosure of documents will prejudice the investigation if it is recommenced in the future. That, however, is a consequence of the application of the more stringent requirement of prejudice, together with the existing requirement that the outcome "could reasonably be expected".

A final merit-based consideration is the fact that the amendment proposed in the Bill, insofar as it refers to a possible resumption of an investigation or future investigation, does not reflect the terms of any comparable exemption clause in other Australian freedom of information legislation. Part of the rationale for the proposed change from the term "reveal" to the term " prejudice", which is what I believe everyone in this Parliament supports, is to bring the exemption provision into line with comparable provisions in the legislation of other jurisdictions. The Commonwealth, Victorian, New South Wales, Queensland and Australian Capital Territory legislation each contains an exemption for documents, the disclosure of which could reasonably be expected to prejudice the conduct of an investigation of a breach, or possible breach, of the law, or words to that effect, without any reference to prejudice to the resumption of investigations or future investigations. The amendment proposed in the Bill would therefore involve a further departure, albeit perhaps not a substantial one, from the terminology used in comparable provisions in other jurisdictions. For those reasons, I wish to move the amendment that I have foreshadowed to delete those words.

In summary, the argument is twofold. First, the broad interpretation of the meaning of an investigation for the purposes of FOI adopted by Justice Anderson would be capable of including a future investigation. Secondly, the inclusion of those express words might well limit the availability of documents that should otherwise be made available. For those reasons, based on the advice we have, I foreshadow that when we go into consideration in detail I will move the amendment that I have indicated.

DR E. CONSTABLE (Churchlands) [4.17 pm]: I will take a few minutes to thank the member for Kingsley and the Attorney General for their comments this afternoon. I thought I would be able to say that we have unanimous support for the legislation, but I am not sure what the Opposition will do with the Attorney General's amendment. However, there is general support across the House, I believe, for an amendment to clause 5(1)(b) of schedule 1. I think we all recognise the problems, and we support the comments of the former Information Commissioner that this was a screen that departments and agencies could hide behind and deny people access to information to which they should have had access. As the Attorney General just pointed out, to amend this would bring our legislation in line with legislation in other jurisdictions in Australia.

I will leap ahead for a moment to the comments of the Attorney General. Of course, I am very comfortable - I do not suppose the Attorney General will be surprised that I am very comfortable - with the amendment that he has foreshadowed, because that amendment will bring the amendment to the Bill back into line with that proposed by Hon Jim Scott in the Legislative Council last year. That was his intention. I believe that the amendment that was passed in the upper House, to which the Attorney General referred - that of Hon Peter Foss - leaves a partial loophole that could be used by departments, and that is not what we want in the end. We want a fair result for those individuals who have sought information. For instance, in the past when the Office of State Revenue has looked into matters such as payroll tax payments and come up with a new assessment, people have often been refused access to information that would allow them to appeal. Under our system, they should be able to appeal such a review by the Office of State Revenue. That is just one example. There are many others in which people's hands have been tied behind their backs. They have had limited time to appeal a decision by a department and have not had access to material that they needed in order to mount that appeal. The Attorney

General's amendment to the Bill will go a long way to solving that issue for many individuals in our community, and I thank him for that.

Mr J.A. McGinty: It is your Bill that will do that, not my amendment.

Dr E. CONSTABLE: The Attorney General is amending the Bill. I think it is everyone's Bill, given the history of this small part of the Freedom of Information Act. The member for Nollamara proposed a Bill in 1998 and Jim Scott introduced this Bill last year, which will now pass through this House. With the Attorney General's amendment, we can all be pleased with it and hopefully in the next week or so it will be enacted, and those people can rest assured that they will have access to their material. I thank both the member for Kingsley and the Attorney General for their support for the Bill.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clauses 1 to 3 put and passed.

Clause 4: Schedule 1 amended -

Mr J.A. McGINTY: I move -

Page 2, lines 13 to 15 - To delete the lines.

I addressed this issue fairly comprehensively during the second reading debate and I do not think it is necessary to go through it further. I had hoped to be able to bring into the Parliament this year a comprehensive rewrite of freedom of information laws. The question of revealing versus prejudicing an investigation is probably the most clear-cut example, but a number of other amendments to FOI legislation were recommended by the former Information Commissioner. There were a number of other amendments to this legislation that I thought desirable and they would also have incorporated privacy legislation, which we do not have in Western Australia at the moment.

Mrs C.L. Edwardes: That is not coming in.

Mr J.A. McGINTY: No.

Mrs C.L. Edwardes: What are you going to do with your Acting Information Commissioner? Her time expires on Tuesday next week and she cannot be reappointed.

Mr J.A. McGINTY: The member for Kingsley has been watching this matter closely. I know that we have made some arrangements, but I did not refresh my memory on exactly what they were before I came into this place today. I can certainly find out if the member has an interest.

We had hoped to bring in quite comprehensive legislation incorporating privacy issues, which is now a feature of the laws of many other States, and to amalgamate the work of the proposed privacy commissioner and the Information Commissioner, because, to my mind, they are very much part of the one issue in respect of public sector records and privacy issues relating to those records. The extent to which this needed to be included in legislation would have been fairly minor, but we then proposed that those functions be undertaken by the Ombudsman, as is the case in some other States. It would have been a major overhaul and reform of this area.

To cut a long story short, the developmental work, which consists of putting out a discussion paper and getting feedback from people, did not proceed at a pace that enabled us to bring the legislation before the Parliament this year. Subject to the will of the electors, it is intended that that be brought forward next year, because the work on it is significantly advanced. The reason that we are happy to support this Bill is that it will fix a problem that was adequately described by the member for Churchlands as a significant loophole in the current legislation, and it should not await next year. It should be fixed now. We do not, however, want to go that step further into uncharted territory for the reasons that I outlined during the second reading debate. I think it is appropriate that we have comprehensive legislation to reform this area of freedom of information and privacy. It has received Cabinet approval. The work is significantly advanced. With this amendment, the Bill will address the practical problem that exists today. I do not see any detriment arising from the amendment that I have moved to the Bill originally introduced by Jim Scott.

Dr E. CONSTABLE: I thank the Attorney General for his amendment. As I said a moment ago, I appreciate it very much and I appreciate the fact that he is involved in a comprehensive rewrite of the FOI Act and that he has agreed to the passage of this Bill. Too often over the past 13 years I have seen very sensible private members' Bills come forward and ministers say that they agree with them but they will do it themselves, and that does not happen. This is quite urgent for some people. It will put their minds at rest. It is a practical solution for many people to have this stand-alone amendment to the FOI Act. As the Attorney General has said, it will not

interfere with any comprehensive rewrite of the FOI Act. Therefore, the amendment to the original Bill proposed by Hon Jim Scott is a very sound solution for us all.

Amendment put and passed.

Clause, as amended, put and passed.

Title put and passed.

Third Reading

Bill read a third time, on motion by Dr E. Constable, and returned to the Council with an amendment.