

PUBLIC INTEREST DISCLOSURE BILL 2002

Council's Amendments

Amendments made by the Council now considered.

Consideration in Detail

The amendments made by the Council were as follows -

No 1

Clause 5, page 8, after line 23 - To insert -

- (4) Where a public interest disclosure falls within 2 or more paragraphs of subsection (3), then it is made to a proper authority if made to any or all of the authorities contemplated by the applicable paragraphs.

No 2

Clause 8, page 9, line 26 - To delete "or frivolous".

No 3

Clause 8, page 9, line 27 - To delete "made vexatiously" and insert instead -
vexatious or frivolous

No 4

Clause 10, page 10, line 29 - To delete "person referred to in section 5(3), that person" and insert instead -

proper authority, that proper authority

No 5

Clause 10, page 11, lines 4, 9, 14 and 18 - To delete "person" and insert instead -
proper authority

No 6

Clause 11, page 11, line 23 - To delete "person" and insert instead -
proper authority

No 7

Clause 11, page 11, line 24 - To delete "person's" and insert instead -
proper authority's

No 8

Clause 17, page 17, after line 32 - To insert -

- (2) Where a Court is considering whether a person has pursuant to subsection (1) forfeited the protection of section 13 and forms the view that the failure or disclosure —

(a) has not materially prejudiced the public interest served by the appropriate disclosure; and

(b) is of a minor nature,

it may make an order relieving the person in whole or part from the forfeiture and may also make such consequential orders necessary to give effect to the order for relief.

No 9

New clause 11, page 11, after line 21 - To insert the following new clause -

11. Alternative investigation where proper authority under no obligation

- (1) This section applies where a public interest disclosure is made to a proper authority who is either the Chief Justice or the Presiding Officer of a House of Parliament (“**an exempt proper authority**”).
- (2) Unless the exempt proper authority forms the view that had section 8 applied to the exempt proper authority the exempt proper authority would be entitled to refuse to investigate or to discontinue an investigation pursuant to subsection 8(2), if the exempt proper authority decides not to investigate the information disclosed to it, he or she shall refer the investigation in accordance with the next subsection.
- (3) The referral shall be to —
 - (a) in the case of the Chief Justice, to the President of the Legislative Council;
 - (b) in the case of the Presiding Officer of a House of Parliament, to a body within the House which would within the usual processes of the House deal with improper conduct on the part of a member.

No 10

Schedule 1, page 24, line 12 to page 25, line 11 - To delete “*Whistleblowers Protection*” where it appears and insert instead -

Public Interest Disclosure

Mr J.A. McGINTY: I move -

That amendment No 1 made by the Council be agreed to.

This amendment was moved by Hon Peter Foss in the Legislative Council. It basically means that a public interest disclosure is made to a proper authority if it is made to any one of the proper authorities referred to in clause 5(3). Although I am not entirely sure that the amendment is necessary, the view of the Legislative Council was that proposed clause 5(4) would not alter the intention or operation of the legislation, and it therefore agreed to it. We will also agree with it.

Mrs C.L. EDWARDES: Council amendment No 1 was made primarily to ensure that a complainant making an appropriate disclosure of public interest information to a proper authority is not excluded from going to more than one or all of the proper authorities. This amendment ensures that it will be considered a proper disclosure and that the complainant will not lose his protection by going to more than one proper authority. Although it may not appear to be a necessary amendment, it will aid the court in future actions by putting beyond doubt any questions about the complainant keeping his protection if he goes to more than one proper authority.

Question put and passed; the Council’s amendment agreed to.

Mr J.A. McGINTY: I move -

That amendments Nos 2 and 3 made by the Council be agreed to.

Amendments Nos 2 and 3 relate to the words “frivolous” and “vexatious”. Hon Jim Scott expressed concern about the wording of clause 8(2)(b); namely, that the word “vexatiously” had two meanings. On the one hand, vexatiously can mean to cause annoyance or worry; on the other hand, it can mean that a matter is brought without sufficient grounds for winning, purely to cause annoyance. Hon Derrick Tomlinson stated that he thought the intention of the legislation was to cover disclosures that were vexatious rather than those made vexatiously. This is really a matter of semantics. Nonetheless, the Government is happy to agree to the amendments which were proposed by the upper House and which would make these clauses consistent with the relevant provisions of the Anti-Corruption Commission Act. The Government does not consider the amendments to be overly significant in terms of the intention and operation of the legislation. Nonetheless, they will improve its operation.

Mrs C.L. EDWARDES: The Opposition supports the amendments. This matter involved determining whether the disclosure was frivolous.

Question put and passed; the Council’s amendments agreed to.

Mr J.A. McGINTY: I move -

That amendments Nos 4 to 7 made by the Council be agreed to.

These amendments relate to the definition of “proper authority”. Clause 7 defines proper authority for the purposes of clauses 8, 9 and 10. The definition does not include the Chief Justice or the Presiding Officer of a House of Parliament. In the Legislative Council, the Minister for Racing and Gaming proposed amendments to clauses 10 and 11 to make it clear that the obligation for the informant to be notified of the action taken does not apply to the Chief Justice or the Presiding Officers. Clause 10 and 11 referred to “person” rather than “proper authority”. The drafting amendments to clause 11 were suggested by parliamentary counsel to make it explicit that this clause does not apply to the Chief Justice or the Presiding Officers in view of the change to clause 10. Clause 11 deals with limitations on notifying informants pursuant to clause 10.

Question put and passed; the Council’s amendments agreed to.

Mr J.A. McGINTY: I move -

That amendment No 8 made by the Council be agreed to.

This amendment seeks to insert a new clause 17(2), which was proposed by Hon Peter Foss. Clause 17 provides that persons who fail without excuse to assist with an investigation or disclose information otherwise than under the legislation forfeit the protection given by clause 13, which is immunity against civil, criminal and disciplinary action. In return for providing protection to whistleblowers, the Bill requires them to assist with investigations. This clause also prevents a person from using the legislation for improper purposes, such as defaming a person the subject of a disclosure in the media. When this matter was debated in the Legislative Assembly, I agreed, I think in response to a proposition put by the member for Kingsley, that clause 17 could in practice be harsh and that its operation could be examined as part of the review of the legislation after three years. The Legislative Council seemed to agree with the first of those propositions; that the legislation could be harsh in its operation. However, Legislative Council members were of the view that the matter could best be addressed now rather than being left for review in three years time. The amendment proposed by Hon Peter Foss seeks to address this potential concern by giving courts discretion on the forfeiture of the protection provided by clause 13 in cases in which the failure or disclosure has not materially prejudiced the public interest served by the appropriate disclosure, and is of a minor nature. The amendment is sensible. It does no violence at all to the notion that if someone materially or substantially prejudices a disclosure that he has made, he should forfeit the protection of the legislation. Accordingly, I am happy to indicate support for this amendment, because it is a sensible improvement to the legislation.

Mrs C.L. EDWARDES: I thank the Attorney General for his consideration and acceptance of this amendment. The matter was raised previously in debate in this House.

Question put and passed; the Council’s amendment agreed to.

Mr J.A. McGINTY: I move -

That amendment No 9 made by the Council be not agreed to.

This amendment is problematic. We should advise the Council that, for a range of reasons, it is not an amendment that we can agree to. There are four reasons for not agreeing to proposed new clause 11. Firstly, this amendment interferes with judicial independence and the separation of powers. For example, it could result in the President of the Legislative Council or a committee of the Council investigating complaints against a judicial officer. There are two appropriate ways to proceed against judges. The first is pursuant to section 55 of the Constitution Act 1889, which specifically refers to an address to both Houses of Parliament to consider whether a judge should be removed, and the second is under section 5 of the Stipendiary Magistrates Act 1957, which also provides for such an address, as well as specifically establishing a procedure involving the Chief Justice in allegations against magistrates. Secondly, the Chief Justice has already established internal procedures to deal with complaints of misconduct. Thirdly, from a drafting perspective, the proposed amendment is unclear. It is not clear what the President should do with a disclosure once a matter has been referred to him or her, or what is the purpose of referring the matter to the President. The President would probably not have an obligation to investigate or take action, because under clause 7, the definition of proper authority does not include Presiding Officers. It is also not clear whether a matter involving a judicial officer would be referred to a body in the House under proposed clause 11(3)(b) if the Chief Justice and Presiding Officers decided not to investigate the matter. Fourthly, this amendment is contrary to what was endorsed by Cabinet; namely, that the Chief Justice would be exempt from the statutory obligation to investigate judicial officers. For those reasons, the Government believes this amendment should be opposed.

Mrs C.L. EDWARDES: The concern behind this amendment was that if someone made a complaint on a matter that was a proper disclosure under the legislation to either the Chief Justice or the Presiding Officers, and those authorities exercised their discretion not to investigate the matter further, the matter could simply be dropped.

As we all know and have experienced in the past, there is a high level of dissatisfaction among complainants who feel that their matters have not been properly investigated. Many of us can understand some of the serious consequences that have flowed over the years from the fact that people have felt that their matters were not properly investigated. I understood what the Attorney General said on the separation of powers and the potential for interference with judicial independence. I also note the Attorney General's comments that the Chief Justice has already established internal procedures to deal with complaints of misconduct. It is well recognised by this House that judges are not immune from the acts that are contemplated under this legislation. I am sure that the Chief Justice will take note of the views of this House that complainants should not be left dissatisfied because their complaints would appear to have simply been dropped with no further action being taken. If this Chamber agrees with the sentiment behind the amendment put forward in the Legislative Council - that complainants could be totally dissatisfied in the event that one of the proper authorities, as is within its discretion, dropped the matter and the complainant was not informed - perhaps in the review of this legislation we might be able to document complaints and look at another process in the event that internal procedures that the Chief Justice has already established appear not to be working in the way that Parliament would like, particularly to ensure that complainants are at least informed of what has happened or given reasons for their complaints not being investigated further.

Question put and passed; the Council's amendment not agreed to.

Mr J.A. McGINTY: I move -

That amendment No 10 made by the Council be agreed to.

This amendment arose from the change of name of the Bill from the Whistleblowers Protection Bill 2002 to the Public Interest Disclosure Bill 2002. The Government supports this amendment to the schedule.

Debate interrupted, pursuant to standing orders.

[Continued on page 5585.]