PUBLIC INTEREST DISCLOSURE BILL 2002

Second Reading

Resumed from an earlier stage of the sitting.

HON DERRICK TOMLINSON (East Metropolitan) [5.39 pm]: The term whistleblower has been frequently used in this debate. In fact, I have heard this Bill referred to in the corridors of the Parliament as the whistleblower Bill. I find the term whistleblower an interesting one. It reminds me of a rhyme that we used to chant when I was in standard 1 of primary school -

> Fat got in the teapot,
> Skinny got in the spout,
> Fat blew his whistle
> and blew Skinny out.

I always wanted to know about the nature of the whistle that Fat blew that caused Skinny's hasty ejection. I always assumed that it had a certain stench about it. Likewise, the term whistleblower has a certain stench about it. The term is used pejoratively. The treatment of whistleblowers is interesting in that context. The previous speaker referred to Mr Tony Lewandowski and said that the effect of his ethical or appropriate disclosure of information of public interest in the Mickelberg case was quite startling. Of course, that matter is now before the Court of Criminal Appeal, so I will not canvass it. The original whistleblower of the Mickelberg case was in fact a journalist - Avon Lovell.

Hon Kim Chance: That is a stretch.

Hon DERRICK TOMLINSON: The Leader of the House might want to say that is a stretch of the term whistleblower, but if he -

Hon Kim Chance: It is a stretch of the term journalist.

Hon DERRICK TOMLINSON: At the time of the publication of *The Mickelberg Stitch,* Avon Lovell was a journalist. Most recently he has been an industrial advocate for a union. That might be a stretch of the term "industrial advocate" too.

Hon Kim Chance: Mr Lovell is a very versatile man.

Hon DERRICK TOMLINSON: He is very versatile. However, I am not interested in the quality of his journalism or his performance as an industrial advocate; I am interested in the effect of his act of whistleblowing. The first thing that was done was that an injunction was taken out against the publication of the book *The Mickelberg Stitch*. The second thing was that threats were made to any retailers that held copies of that book. The third thing was that the publisher of the book was threatened. The fourth thing was that Mr Lovell was involved in a long civil litigation after about 14 police officers took action against him. That litigation was eventually resolved in Mr Lovell's favour. However, for the whole time that that action was occurring, whatever could be done to discredit Mr Lovell was done. For example, to say that it is a stretch of the term to refer to Mr Lovell as a journalist is the sort of accusation that was made at that time.

I first heard of the possibility of Mr Lewandowski doing what he did some seven or eight years ago. It was rumoured that he was saying indiscreet things when he was, shall we say, inebriated.

Hon Peter Foss: In his cups.

Hon DERRICK TOMLINSON: Advanced in his cups might be the term. After Mr Lovell published *The Mickelberg Stitch,* he published *Split Image: International Mystery of the Mickelberg Affair*. A third book was in the offing in the mid-1990s. I think its title was to be something like *The Spider's Web*. When Mr Lovell and I sat down and talked about it, we said that it perhaps should be called *The Red-back Spider's Web*, because of the intricate nature of the web of deception that was associated with the matter on which Mr Lovell never did publish. However, from what we are told in the Press, Mr Lovell obviously pursued this question of Mr Lewandowski for some time. As I recall, we were told that Mr Lovell was the one who finally persuaded Mr Lewandowski to say what he said and arranged for Mr Lewandowski to leave the State and find protection in Thailand. What was the effect upon both of them? Well, first it was to discredit Avon Lovell - to demonstrate that Avon Lovell had a contract with Channel Seven and therefore was doing it for money - tut, tut - and that Lewandowski could not be believed, because, after all, he was just a fat, drunk cop who was in the pay of Avon Lovell. So instead of listening to what they had to say, the immediate response was to publicly discredit them both in the most despicable ways. After they were publicly discredited, the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers directed Channel Seven to hand over the full tape file of its interview with Mr Lewandowski. That tape is rather damning to a lot

of people. The royal commission then released parts of that tape. Mr Lovell was also called before the royal commission. I will not comment on Mr Lovell's conduct at the royal commission, but the royal commission learned that Mr Lovell had a private video interview of Mr Lewandowski. He was forced to hand that over. Both the Channel Seven tape and Mr Lovell's private tape now form the basis of the charge against Mr Lewandowski - not the evidence that he gave to the Court of Criminal Appeal, but the matters that the royal commission compelled Avon Lovell and Channel Seven to hand over.

It is interesting to think of the way in which Avon Lovell was publicly discredited for something like 15 years when he was the original whistleblower.

Hon Peter Foss: And it sent him broke.

Hon DERRICK TOMLINSON: I know it sent him broke. I know why the third book was never published, and I know why he had to find work as an industrial advocate. It is interesting to see how he was treated. I compare his experience with that of Estelle Blackburn and her book *Broken Lives* on the Button case. Estelle Blackburn is feted as an investigative journalist. I think the book won the Premier's Prize. She may have received a Walkley award and so on. The case against Mr Button was heard in the Court of Criminal Appeal, largely on the basis of Estelle Blackburn's book. There is an interesting contrast between these two investigative journalists who publish: one is lauded for her publication; the other is reviled for his publication.

We then come to the question of protection of whistleblowers, but what will we protect them against? Under clause 13 of the Bill, a person who makes an appropriate disclosure in the public interest will incur no criminal liability, cannot be dismissed, cannot be subject to any disciplinary action, cannot have his or her services dispensed with for any breach of duty of secrecy, etc. What will be done to protect the police officer who is suspected by his mates of disclosing information to the police internal affairs department and who constantly finds, for example, when he enters his office that all his files are scattered over the floor and when he complains to his superior, he is told, "You sort it out." What will we do for the ethical informant - I use that term rather than whistleblower - who gave evidence against her police colleagues and was transferred from her station to a station a couple of thousand kilometres north? She was sent to Coventry! Her colleagues did not speak to her; they pretended she did not exist. How will she be protected?

Another informant who provided appropriate disclosure in the public interest and became a protected witness was given a secret identity, taken out of the State and put into the protection of another police jurisdiction - the witness protection program of that State - and mysteriously died of a drug overdose. Somebody had access to his file at police records and disclosed information - unethical disclosure. In the meantime, the ethical informant, if I can use that term - and that may be stretching it - is dead. What will we do about Chris Read, whose disclosure led to the downfall of the Ombudsman? The Ombudsman was left with nowhere to go but to resign. Where is Chris Read? He cannot get his job back because the job that he had was a temporary appointment at a level beyond his substantive status. It was not possible to restore him to his position in the office of the Ombudsman because he was on secondment, with a special duties allowance at another level - from level 6 to level 7. That ethical informant has been discredited. How will we protect these people?

Hon Kim Chance: You asked the question - it might have been rhetorical - but in all of the examples you have provided there are reasons for this legislation being required.

Hon DERRICK TOMLINSON: Sure. These people will incur no civil liability, they cannot be dismissed and they cannot be disciplined. What can we genuinely do to protect those people in the work force? The constable who was sent to Coventry eventually took stress leave and then resigned from the Police Service - very, very effective protection! In fact, the Commissioner of Police gave her a commendation. Her colleagues showed her the way out. Her colleagues disclosed her medical file - contrary to the law - and nobody was prosecuted.

What do we do with the informant who disclosed information which was very valuable but is not prosecuted? He persisted until it became an obsession. So obsessed was he that his employer suggested that he might have a psychiatric examination. He underwent that examination and his employer then put around that he was insane. He then went on stress leave and eventually resigned. His employer then said he resigned because he was not competent to do the job because of his mental state - he was nuts! How will we protect him?

It is all very well to propose legislation like this to protect the ethical informant -

Hon Kim Chance: Surely in that case it is a matter that should be dealt with under the Public Sector Management Act rather than this legislation.

Hon DERRICK TOMLINSON: I will come to that, but I emphasise the value of the appropriate disclosure of public interest information. What has been startling in the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers over the past few weeks has been the

appropriate disclosure of public interest information by a witness who is referred to as L5? Nobody knows the great L5, except every police officer in Western Australia! A person said to me recently, "You know, I served with L5 at such and such police station. God, it must have been 25 years ago. I don't know what he is getting at. We didn't do that in those days." Every police officer in Western Australia knows L5. He is a marked man. He is about as marked as Tony Lewandowski, but without his disclosure, where would the royal commission be? Without Tony Lewandowski's disclosure, where would the Mickelberg case be? Without Tony Lewandowski's disclosure, where would Bob Kucera be? They are most important people, but we discredit them instead of truly protecting them. We go through the motions of saying -

Hon Kim Chance: What did you mean by bringing Bob Kucera into it?

The PRESIDENT: Order! This is not question time.

Hon DERRICK TOMLINSON: What I mean is that Mr Kucera's evidence before the Court of Criminal Appeal should be very closely scrutinised, and I am sure it will be.

That dimension of protection of whistleblowers is not addressed in this legislation.

I will now respond to the interjection by the Leader of the House who said that this was a matter for the Commissioner for Public Sector Standards. The function of the commissioner is to work with public and government agencies to establish codes of conduct and codes of ethics and to see that they are honoured. The commissioner is to work with public and government agencies on the promotion of that ethical behaviour.

Sitting suspended from 6.00 to 7.30 pm

Hon DERRICK TOMLINSON: Before the dinner adjournment I was responding to an interjection from the Leader of the House when he asked - I will paraphrase - whether there was a role for the Commissioner for Public Sector Standards in addressing the protection of ethical informants on the dimensions that I had raised. I pointed out that the role of the Commissioner for Public Sector Standards is to assist government agencies, to establish codes of conduct and codes of ethics and so on. Part 4 of the Bill, headed "Role of Commissioner for Public Sector Standards", replicates the provisions contained in the Public Sector Management Act. In some respects, part 4 of this Bill is redundant because it restates what is in that Act; that is, it is the function of the commissioner to promote compliance with the Act, to establish codes of conduct, to provide guidelines and so on.

I was the only member of Parliament who attended the recent release by the Commissioner of Police of a new code of conduct for police. Perhaps I was the only member of Parliament who was invited, but I was certainly the only member of Parliament who attended. The statements contained in the code of conduct for the Western Australia Police Service make it a laudable document. It states in bright red -

> OUR CREDIBILITY
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> demands:
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> HONESTY
>
> RESPECT
>
> FAIRNESS
>
> EMPATHY
>
> OPENNESS
>
> ACCOUNTABILITY
>
> STATEMENT OF COMMON VALUES
>
> The conduct of all personnel must be exemplary in the commitment to:
>
> - Highest professional and ethical standards
> - Satisfying client needs and expectations
> - Respect and development of our people

Under the heading "Conflicts of Interest", the code states -

> **Your private interests cannot conflict, or be perceived to conflict, with your public duty.**

That is highly commendable. Under the heading "Discrimination" it states -

> **To ensure you remain impartial you must avoid unlawful discrimination or harassment of colleagues and the public.**

Under the heading, "Drugs and Alcohol" it states -

> **If you are affected by alcohol or drugs, including prescription drugs, you must not remain at work or undertake any work-related duties or attend any Service workplace unless a medical practitioner determines that you are competent.**

It is a highly commendable code of conduct for the police officers to pursue. Every member of the Police Service will receive and sign a copy of this document in the presence of his or her supervisor. The police are required to sign the statement -

> **I acknowledge my requirement to comply with this Code, (being a Code of Conduct under Section 9 of the Public Sector Management Act and a lawful direction under Police Regulations), its constituent documents, and all lawful directions.**
>
> **I understand that, should I fail to comply with this Code, I may face disciplinary or other sanctions.**
>
> **In the event that this Code conflicts with other Service instructions, I will comply with the requirements of this Code, unless otherwise directed by the Commissioner of Police.**

That is highly desirable, not just for the Police Service, but even for this place as well. Were we to comply with such a code, we would lift ourselves in the public esteem.

This is not the first code of conduct that has been released by a Commissioner of Police; Commissioner Falconer released an earlier code of conduct. I remember Commissioner Falconer proudly saying to us that this code of conduct - it was a small document - could be folded. He said that every member of the Police Service would have one in his top pocket. Whacko! The question is whether they ever took it out of their top pocket.

When the latest code of conduct was launched, the Commissioner for Public Sector Standards addressed the assembled group and said that a code of conduct is only a collection of nice, meaningless words if it simply sits on the shelf and gathers dust. Although I commend the Police Service on this code of conduct, if it is not enacted, it is nothing more than a collation of words that have no meaning whatsoever. If the intention of the Bill, which is merely a redundant restatement of the principles of the Public Sector Management Act, is not pursued, it will be meaningless.

Allow me to be cynical for a moment, Mr Deputy President (Hon Jon Ford). I recall the commencement of the Delta program in the Western Australia Police Service. I recall the Commissioner of Police telling us that the Delta program had two dimensions: firstly, organisational change; and, secondly, organic change. The organisational change was to restructure the Police Service with a flatter command structure and to disperse some of the troublesome sectors of the Police Service across the divisions. They were to be closely supervised by the divisional commanders and there was not meant to be the opportunity for the collusion and improper conduct that had occurred under the previous command structure. That organisational change was carried out in the Delta program.

Organic change is another name for cultural change. The Commissioner of Police said that the culture of our Police Service must be changed. He said that it must move away from the kick-in-a-few-doors and knock-a-few-heads-together mentality of policing and establish a different ethos for the Police Service. It was to be not merely a culture change; it was to be a transmogrification and an organic change of the Police Service. However, the royal commission is demonstrating that nothing has changed. Until there is a change in the culture of the whole public sector, the attacks on ethical informants, to which I alluded and described earlier in my address, will not change and ethical informants will not be protected against discrimination. We can say as often as we like and until we are blue in the face that they will not suffer a civil suit, will not be subject to a criminal suit, will not be discriminated against in their employment and will not be dismissed from their employment, but those statements will be meaningless until there is a cultural change. That cultural change, which has not occurred in the Police Service, can be mirrored in many other government departments.

In this place last week, I referred to the Department for Planning and Infrastructure's thumbing its nose at an instruction from the Ombudsman. If the Department for Planning and Infrastructure cannot respond in an ethical way to complaints from its clientele - that is, the public of Western Australia - what hope does an ethical informant in that organisation have of not being discriminated against by his or her peers or superiors? None whatsoever.

It is interesting that although the Bill contains sanctions against discrimination, legal protections against dismissal and provisions for codes of conduct etc, there is no structure whatsoever for their enforcement; and I

do not believe there is any structure for promotion. The Bill states that the Commissioner for Public Sector Standards and the heads of department will promote these provisions. These provisions have been in the Public Sector Management Act since 1995 and there has been no change, as demonstrated in the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers and in the Royal Commission into the Finance Broking Industry. Exactly the same culture is manifest in the Police Service, in the Department of Consumer and Employment Protection and in many government departments. That is the core of protection to whistleblowers that is not even addressed in this Bill, other than in flyblown words. Where is the structure?

It is interesting that in its interim report the police royal commission recommended the establishment of a corruption and crimes commission modelled upon the Crime and Misconduct Commission in Queensland; that is something I applaud. The Crime and Misconduct Commission in Queensland is a commendable model to work on. It has a charter to educate the public sector on ethical standards of conduct and is truly about working with government departments to promote these things and to do them and it does it well; the charter is not just words. Likewise, the Independent Commission Against Corruption in New South Wales has a responsibility for educating the public sector on ethical standards, and does it well. Regrettably there has been little demonstrated change in ethical conduct in some parts of the public sector, as has been demonstrated in the investigations of the CMC and ICAC. Changes to the organisation and culture are the most difficult parts to change. The Bill does not tackle those changes. Much as I commend what the Government is trying to do with this Bill to protect ethical informants, and although I believe ethical informants are as absolutely essential to public sector integrity as they are to private integrity, I can see nothing in the Bill that will bring about the cultural change that is absolutely essential to encourage ethical informants to expose misconduct wherever it might occur.

The Bill must be supported. I stand in this place as a cynic and say that if it is nothing more than words on paper, it is straw and hollow legislation that will have no meaning, no force and no impact and will bring about no change whatsoever.

HON RAY HALLIGAN (North Metropolitan) [7.46 pm]: As Hon Derrick Tomlinson has said, the Bill before us purports to provide protection to public servants and people in other areas, for which I have no doubt public servants have been looking for many years. I too am cynical about whether the Bill will provide that protection that these people are after. Certainly in the second reading speech, the honourable minister said words, which are repeated a number of times, that to some members would have provided enormous comfort, not the least of which were -

> This Government stands for openness and accountability of the public sector.

That is, not necessarily openness and accountability of the Government. The minister went on to say -

> To achieve and maintain open and accountable government, there must be a free flow of information.

Again, those are words with which the majority of people would agree. As to exactly what those words mean and whether they cause this Government to be open and accountable is another matter entirely. The minister went on to say that the Bill creates an open and accountable Government for Western Australia. Again, I have difficulty in understanding exactly how this Bill creates an open and accountable Government. The Bill refers mainly to openness and accountability in the public service. I note that the Bill purports to disclose information about ministers of the Crown and other parliamentarians. However, if we in this House have been unable to obtain answers to questions for some considerable period, I cannot see that this legislation will provide the answers that we have been unable to obtain. I like the part in the second reading speech that states -

> The Government is committed to ensuring the highest standards of ethical behaviour in state and local government.

I am very pleased to hear of that commitment. I would dearly love to find out at some stage exactly how that will be achieved; or is it just rhetoric? Again, they are words that the Government is aware that people want to hear. However, at the end of the day someone will say that the Government is committed to it, but unfortunately it is a little too difficult; it cannot achieve those high standards about which it spoke in the second reading speech.

The second reading speech states in part -

> A second important feature of the Bill relates to what can be disclosed under the Bill. For this purpose, public interest information involves information that tends to show that in relation to the performance of a public function, a public authority, a public officer or a public sector contractor is, has been or proposes to be involved in any of the following activities:

It goes on to state the obvious. However, one of the activities is -

> an act done or omitted that involves a substantial and specific risk of injury to public health, of prejudice to public safety or of harm to the environment;

Over the past few months a certain number of issues have been brought to the public's attention, and also, for that matter, to the Government's attention. I wonder whether the Government intends to do something about some of those issues under this legislation or whether it will leave it to public servants to bring them forward.

I note that the whistleblower must make a public interest disclosure to a proper authority with responsibility for that matter. I share Hon Derrick Tomlinson's cynicism about the difficulties associated with a whistleblower going to the chief executive officer of the department for which he works, or in fact the person appointed by that CEO, and providing that person with information that may be somewhat unique, so that even though the whistleblower's name may not be made public at that stage, the information provided would certainly identify exactly where it came from. I am not sure that the Bill is likely to protect the whistleblower in that instance.

A number of matters concern me. The second reading speech states -

> The Bill also contains a number of important provisions that place obligations on departments and agencies.

That all sounds very reasonable. It continues -

> For example, a proper authority must carry out an investigation when the allegation is of substance.

I know the difficulties associated with determining what is of substance. It goes on -

> If the agency declines to investigate a disclosure, it must give the whistleblower the reasons for its refusal to investigate.

That is fine, because there is concern about trivial and vexatious disclosures. All that is totally understandable. As I said, I am fully aware of the difficulties associated with many of these matters. One would hope, though, that if for whatever reason the agency declined to investigate, the whistleblower would be able to go to another agency or organisation. I am led to believe that that may well be the case. The second reading speech further states -

> . . . in addition to the agency concerned, disclosures may also be made to a number of authorities. Disclosures regarding the actions of public officers could be made to the officer's department;

I thought that is where they had to go in the first place; that is, to the agency in which the perceived problem originated. Admittedly, the second reading speech does state that disclosures relating to the use of public resources, which can be very broad, can be made to the Auditor General. What I am getting at is if the agency, for whatever reason, believes that the disclosure is trivial, what will happen to the whistleblower? Must the whistleblower accept that judgment, or can he take it further? It appears that he may well be able to take it further. I wonder whether there is an obligation on, first, the whistleblower as to the number of agencies to which he can take the disclosure, or whether there is a requirement that all those agencies that receive the disclosure must be aware of where else that disclosure has gone.

I also note that, except in certain circumstances - I am not sure that they have been spelled out - information concerning a public interest disclosure will remain confidential, and agencies will be required to determine the likelihood of reprisal action being taken against the whistleblower before the whistleblower's identity is revealed. Is it assumed that if there is the likelihood of a reprisal, the whistleblower's identity will not be revealed? Considering the Government is committed to ensuring certain things, such as the highest standards of ethical behaviour, if an agency has identified the likelihood of reprisal action, should it not do something about it? One would expect the person placed in the position to receive these disclosures to be somewhat independent. Again, I am unsure. If that person were an employee of the agency, under the direction of the CEO, I expect that would make it somewhat difficult for that person to show complete independence. Of course, if that person has identified that there are likely to be some reprisals, what will happen? Will some action be taken by that person or persons that will make life difficult for the whistleblower? What will happen under those circumstances?

I note that the second reading speech also states -

> . . . the Bill provides that the Commissioner for Public Sector Standards must develop a code specifying minimum standards for persons who may receive a public interest disclosure, and guidelines on internal procedures relating to the obligations of proper authorities.

It all sounds absolutely marvellous and fantastic in theory, but I wonder how it will operate in practice. It states also -

> In addition, the Commissioner for Public Sector Standards will be responsible for ensuring that agencies comply with the legislation.

In what manner will the commissioner ensure that agencies comply? It goes on to say -

> Chief executive officers of public authorities will be required to appoint a person to receive disclosures, provide protection to employees who make a disclosure, ensure that their agencies comply with the legislation and code, and prepare procedures relating to agency obligations under the legislation.

That sounds absolutely marvellous too.

I am a little concerned about the following statement -

> Agencies that receive disclosures must annually provide information to the commissioner on the number of disclosures and the result of any investigations, including any action taken as a result of each investigation.

What form will that take? An agency may say, "We have received 10 disclosures; no action was taken." What will the commissioner do to ensure that agencies comply with the legislation? Will the commissioner receive copies of the disclosures? Who will make the judgment? If the judgment is to be made by the agency in which the disclosure was made, then I hope there will be some transparency in the process. I hope also that the person who is appointed by the CEO seeks to not only protect the agency but also do the right thing by the whistleblower, the Government and the people of Western Australia. I am fully aware that, in the main, the name of the whistleblower will remain confidential. However, that does not mean that the issue will have to remain confidential. In order for the commissioner to ensure that the agency is doing the right thing, he will need to be provided with certain information. It appears from the second reading speech that the commissioner may not receive a great deal of information.

Between 1985 and 1992 when I was in the public service, certain things were done - organised might be a better word - that concerned not just me but a number of other people. It was often difficult to find the evidence, because a lot of it was kept secret, but not just one or two but a number of people who had been working in the public service on an hourly basis suddenly found themselves named in the *Government Gazette* as having been parachuted into permanent positions. In those days there was a definite need for this legislation. Of course it was not a matter of looking out for these things. I would be the first to admit that it is entirely up to the Government of the day to determine its policy and to defend and be accountable for whatever project, program or expenditure may be involved. I might not have agreed with a lot of what the Government of the day was doing, but I accepted that it had the right to go down that path, provided it was open and accountable; and in the main it was. Papers were written on what need or demand had to be met, what resources the agency could provide, what alternative projects and programs were available, and what outcomes were expected, and that was readily available for everyone to see so that at the end of the day, the work that had been completed could be compared with what had been proposed.

In another instance in 1989, if I recall correctly, someone was brought into the department to kick a few heads, as the saying goes, or get rid of a few people. As the minister would know, it is difficult to remove permanent public servants unless they have done something drastically wrong. The people to whom I am referring had done nothing wrong. However, again it was a matter of trying to put someone else into those positions of authority, and the only way to do that was by creating vacancies. This person came into the department and happened to speak with me and one other person about a certain project or service that was to be provided in Bunbury but that had not been budgeted for and had just come out of the blue, quite amazingly just before an election was due. That person said to me and this other person, after explaining very little of what was being proposed, "It is best that you do not know, because this is political."

It is fortunate that the Government is now bringing forward this legislation to make it more open and accountable and to try to ensure that circumstances such as the one to which I have just referred do not occur in the future. I am sure this Government will try to be open and accountable - "try" being the operative word. It is very important that this legislation can work as the second reading speech suggests it will. Many difficulties will be associated with this legislation. Hon Derrick Tomlinson has already alluded to the fact that there is an ethos in the public service that suggests it looks after its own. If a person is rocking the boat, he is told about it very quickly. If the disclosure may in any way, shape or form identify the area and/or the person who has made it, then I suggest the whistleblower will keep that information to himself. That is most unfortunate. I am sure the Government has the best of intentions in wanting to go down this path and show the people of Western Australia, as well as members on this side of the House, just how open and accountable it can be. However, with all the rhetoric, at some time in the immediate future it will come down to a situation whereby we can identify what has been done in this area and whether it has any meaning. I do have those concerns. How will the Parliament find out just how well this legislation has been operating? We know that the Commissioner for Public Sector Standards will receive reports from agencies. We still do not know in exactly what form, whether the commissioner will be able to go back and view the information received by the agencies, or whether the

commissioner will be able to make a judgment on whether the agency was right in suggesting that the disclosure was trivial or vexatious. Again, this is a particularly important matter if this Government wants to be seen as open and accountable. If that is the case, I suggest that there should be a report from the Commissioner for Public Sector Standards to this Parliament in a form that will be meaningful, and not just numbers of disclosures received and a yes or no as to whether any further action has been taken. Again, we have a Government that wants to be open and accountable and I will leave it to that Government to decide in what form that information should be provided to this Parliament.

There is no doubt that the two aspects - being open and accountable and the fact that whistleblowers should be given the opportunity to bring forward any concerns they might have - are important. I just hope that this legislation provides not only what this Government is looking for, but also what we on this side of the House and probably more so the people of Western Australia are looking for.

HON NICK GRIFFITHS (East Metropolitan - Minister for Racing and Gaming) [8.12 pm]: I do not do this very often, but I wish to quote Hon Peter Foss, who, on speaking to the Bill on 17 September 2002, debate on which was resumed from 14 May, said -

> I am somewhat surprised that we reached debate on this Bill so quickly.

I am very pleased that we are now dealing with this Bill.

Hon Peter Foss: We got that far, but it hasn't gone very well since then.

Hon NICK GRIFFITHS: I think we will progress now.

First, I thank the honourable members who have spoken - Hon Peter Foss, Hon Jim Scott, Hon John Fischer, Hon Derrick Tomlinson and Hon Ray Halligan. They have made a number of observations and I propose to spend a little time dealing with them so far as I am able.

The first speaker was Hon Peter Foss and, after those memorable comments on that memorable day, he went on to make a number of observations. He had a concern about clause 5(2), which provides that a person makes an appropriate disclosure of public interest information if, and only if, the person who makes the disclosure believes on reasonable grounds that the information is true or mainly true. There was a suggestion that this provision could operate to exclude the courts from dealing with matters outside the statutory definition. The courts will be able to deal with matters involved in the Bill within the ambit of the legislation and its definitions. If the disclosure is outside clause 5(2), the person will not receive the protection provided by the Bill. The "if, and only if" requirement in clause 5(2) is necessary to limit the protection provided by the Bill to disclosures for which the person believes the information is true or may be true, otherwise people would be afforded protection for disclosures which they believe may not be true, so we are concerned with ethical behaviour.

Hon Peter Foss suggested that whistleblowers who want to make a disclosure about a police officer will not make it to a police officer. That may well be so in a number of instances and they would rather make the disclosure to the Anti-Corruption Commission, and I am making the presumption for the moment that the current bodies of government will remain. The Bill provides two alternative proper authorities to which a whistleblower can make a public interest disclosure about an offence - the police and the ACC. Currently, the Police Service has a system for dealing with complaints about officers. The police will be required to comply with the legislation, which has a number of safeguards to protect those whom members involved in the debate have referred to as whistleblowers.

Concern was expressed about disclosures involving a Chief Justice; that is, the office holder who holds the position of Chief Justice as distinct from any particular Chief Justice. Clause 5(3) provides -

> A disclosure of public interest information is made to a proper authority if -
>
> . . .
>
> (e) where the information relates to a judicial officer - it is made to the Chief Justice;

If the disclosure relates to the Chief Justice, it could be made to the police, the ACC if it involved an offence, or the Auditor General if it involved the substantial, unauthorised, irregular use or substantial mismanagement of public resources. The Chief Justice and other independent statutory authorities can always be investigated by Parliament. In the end, Parliament is the appropriate body to investigate those authorities, albeit, one may argue, a body of last resort, given the various matters that Parliament must deal with. Of course, if a matter is raised in Parliament, there is the protection of parliamentary privilege.

Hon Peter Foss expressed concern that there were constraints in clause 5(3), which prescribe to whom a public interest disclosure can be made. The object is to ensure that a disclosure which is to receive protection can be

made only to an authority that can investigate the subject of the disclosure. With some limited exceptions, a person will have a choice about to whom the disclosure is to be made.

Hon Peter Foss expressed concern that the Bill does not assist people who are unable to get an agency to act on their complaint. I think that concern was echoed a few moments ago by Hon Ray Halligan, if I interpret his observations correctly, and the member nods at that proposition. If an agency does not investigate a public interest disclosure, the complainant - the so-called whistleblower - can make a disclosure to an independent agency; for example, the Parliamentary Commissioner for Administrative Investigations or the Commissioner for Public Sector Standards. These independent agencies can investigate most complaints, and there are exceptions, which are listed in the Bill. The person may also make a disclosure to the police or the Anti-Corruption Commission if the disclosure involves an offence, or to the Auditor General in the circumstances referred to earlier.

Hon Peter Foss expressed concern that if a person stepped outside the legislation, that person might forfeit everything. Clause 17 provides that a person who fails to assist the investigation or who discloses information otherwise than as set out under the Act forfeits the protection provided by clause 13. Clause 13 sets out what protection there is. Clause 17 is aimed at ensuring that whistleblowers provide the necessary information to enable the disclosure to be investigated and that they comply with the legislation.

I refer in passing to clause 14, dealing with the offence of a reprisal, and to clause 15, dealing with remedies for acts of victimisation still applying in certain circumstances. If the disclosure contained defamatory statements, a subsequent statement to the media would, because of the operations of clause 17(b), result in the forfeiting of the protection provided by clause 13, and as a result that person would be open to defamation proceedings in relation to any defamatory statement made in the disclosure.

Hon Peter Foss: He not only loses in respect of the disclosure outside, but he also loses in respect of the disclosures inside.

Hon NICK GRIFFITHS: Yes. Hon Jim Scott raised a number of issues. He spent some time dealing with a number of Commission on Government recommendations and made reference to recommendations that have not been included in the legislation. The Bill implements a number of Commission on Government recommendations but does not implement every recommendation dealing with the particular issues to do with whistleblowers. The Bill does not purport to deal with each and every conceivable aspect of the issue of whistleblowing. The second reading speech makes that clear, as do the contributions of honourable members. The following Commission on Government recommendations are not implemented by the Bill: recommendations Nos 67, 73, 74, 75, 76, 77, 78, 80 and 82. A central part of most of those recommendations, but not in every case, concerned the creation of a new body. This Bill is not concerned to create a new body but to use existing agencies to provide protection for people making disclosures and to encourage as a result a culture of disclosure and more ethical behaviour within the public sector. It does not go all the way, or it does not tick off on each and every particular of the recommendations of the Commission on Government, but within its terms it seeks to advance the cause of encouraging greater ethical behaviour and disclosure in the public sector. So-called whistleblowers can still make disclosures to the media, but the protections afforded by the Bill are set out in the Bill. They do not remove any protections, such as they are, that currently exist. It is a matter for people to choose whether they will remain within the confines of the Bill or otherwise.

Hon Jim Scott asked whether the Bill repealed section 361 of the Criminal Code, a section that deals with defamation of members of Parliament, and pointed out that repeal of this section was recommended by the Commission on Government. I have known Hon Jim Scott for about a decade, and I know he reads his legislation very carefully. I suppose that question is rhetorical, because he, having read the Bill, would know that this Bill does not repeal that section of the Criminal Code. The purpose of this Bill is to establish a regime to protect and encourage whistleblowers who make public interest disclosures under the regime set out in the Bill. Repealing section 361 of the Criminal Code is a separate matter from a regime to protect and encourage whistleblowers.

Hon Jim Scott also raised the issue of recompense for whistleblowers who suffer financially. Recompense is an interesting word, but basically the Bill contains a number of measures seeking to prevent reprisal action; namely, the provision of immunity from civil, criminal and disciplinary action. It makes reprisal an offence and provides remedies for acts of victimisation. I refer the honourable member to clause 15, which requires the Commissioner for Public Sector Standards to monitor compliance with the Act and the code and to report to Parliament on compliance. It makes provision for a code to set out minimum standards of integrity and it places obligations and duties on chief executive officers to protect employees who make disclosures. Under clause 15, a person who suffers financially may take civil action against the person who took the reprisal action. An act of

victimisation may also be dealt with under the Equal Opportunity Act. The legislation does not provide for the State as such to pay compensation.

Hon Jim Scott sought clarification of the situation involving retaliation against the family of a whistleblower. Pursuant to clauses 14 and 15, the reprisal does not have to be taken against the person who made the public interest disclosure for the action to be an offence or an act of victimisation. He made the observation that the legislation must provide clear pathways for people to use. The Government contends that the Bill does that; it certainly seeks to do it. For example, clause 5(3) identifies proper authorities to whom to make a disclosure. The Bill gives people a choice of to whom disclosure can be made, such as the agency with responsibility for the subject of the disclosure, and all those other bodies such as the Parliamentary Commissioner, the Commissioner for Public Sector Standards, the Commissioner of Police, the Anti-Corruption Commission or the Auditor General, depending on the nature of the complaint or the subject matter of the public interest disclosure. This goes to matters raised by Hon Ray Halligan and Hon Derrick Tomlinson: if a person is not satisfied that the agency with responsibility for the matter has adequately investigated it, he or she can make disclosure to one of those independent bodies subject to the category that is set out in the Bill.

Reference was made to the need to change culture. The purpose of this Bill is to move towards changing culture. If the Bill is passed, at the very least it is not a matter that goes into the top pocket; it is a declaration by the Parliament that it considers these issues to be serious and that it is the Parliament making law to reassure people that it is concerned to set up a regime under which there is protection. As is the case with all these matters, if they need improvement, it is a matter that can be improved upon. I do not want to pre-empt the passage of the Bill, but from what members have indicated, it is likely that the Bill will pass in one form or another. I anticipate that as the Commissioner for Public Sector Standards makes his reports over time, matters may give rise to the requirement to amend. That is something we as a Parliament will deal with in the light of experience. This is a building block exercise, and I suggest to members that this Bill is a good foundation.

I believe that I have dealt with most of the matters raised by Hon Jim Scott, but he will no doubt correct me if I am wrong. Earlier today Hon Jim Scott made reference to something in the Bill being draconian. I was not quite sure what he meant by that. I do not believe that there is anything particularly draconian about the Bill.

Hon Peter Foss: Clause 17 is reasonably draconian.

Hon NICK GRIFFITHS: I do not accept that clause 17 is draconian; it provides that loss of protection can occur. At the end of the day loss of protection -

Hon Peter Foss: The Bill does not give protection.

Hon NICK GRIFFITHS: If a person loses the protection of the Bill, that person is certainly no worse off than if the Bill had not been passed. The Bill provides appropriate safeguards. I would have thought that clause 17 is a matter of providing safeguards rather than being draconian. I believe that the word "draconian" is a little harsh, but Hon Peter Foss has reminded me by his interjection that Hon Jim Scott was referring to a description given by Hon Peter Foss.

Hon Peter Foss: Exactly.

Hon NICK GRIFFITHS: It is interesting if a member is quoted twice on the same day. I will leave it at that and not quote him again.

Hon John Fischer made a number of observations on his perceptions of recent events. It is perfectly proper that members contribute to the debate, and I thank him for his contribution.

Hon Derrick Tomlinson has an in-depth knowledge of many issues of controversy which have arisen in relatively recent times. He gave the House the benefit of his perception of those matters. I thank him for his support of the Bill. I note he used words of cynicism. I trust his cynicism will be found to be misplaced.

Hon Derrick Tomlinson: I hope so.

Hon NICK GRIFFITHS: I note he shares my hope. Even though we may disagree on our perception of issues from time to time, if members of Parliament raise issues and give their perceptions, it will assist in providing a culture which will lead to the expressions of cynicism being misplaced. I think the observations about culture are very important. The Bill is part of addressing a need to change culture. It does not purport to be the absolute answer. Nothing any Parliament can do will do that. In the end we are dealing with human nature, but I suggest that the Bill will assist in improving the culture.

Hon Ray Halligan made a number of points. In particular, he analysed the second reading speech. I attempt to summarise his concerns this way: this is a matter of perception, but the impression I got from Hon Ray Halligan's observations was that he was concerned about the practical implementation of the Bill. I acknowledge that there are practical difficulties in any measure of this kind. In the end we are dealing with

human beings. Human nature is a very interesting thing indeed. He made observations on the role of the Commissioner for Public Sector Standards. I think he was concerned in particular about the form of the report and whether it would be a worthless one or one of substance. In the first instance, that would be a matter for the Commissioner for Public Sector Standards, but if a report from the Commissioner for Public Sector Standards were not up to scratch in pointing out to the Parliament that an agency has not delivered the goods, or the commissioner in the eyes of the Parliament has not delivered the goods, the Parliament would be in a position to act. I thank Hon Ray Halligan for his support of the Bill. In conclusion, I note that he raised matters of confidentiality, which are dealt with under clause 16. I commend the Bill to the House.

Question put and passed.

Bill read a second time.

Committee

The Chairman of Committees (Hon George Cash) in the Chair; Hon Nick Griffiths (Minister for Racing and Gaming) in charge of the Bill.

Clause 1: Short title -

Hon PETER FOSS: Although we believe that this Bill has some inadequacies, as the minister has said, one is better off with it than without it. Some small things can be done to improve the Bill. However, we will never address the point raised by Hon Derrick Tomlinson that this legislation is merely a collation of words unless a change of attitude occurs with regard to silver-service police, etc. We will try to move this legislation through. We have a number of amendments that we believe would improve it. I will ask a number of questions that are important to have answered.

A problem with this legislation is that it is not clear exactly how it works. If people who disclose public information lose their protection by not complying with the future Act, this Bill must be made even clearer than most Bills. People might unwittingly not follow the Bill's processes if they cannot tell what it means after reading it. As the Bill currently stands, people would lose all protection given them under clause 13. Under our proposal, they would still lose their protection but would have an opportunity to be relieved from that loss of protection. At this stage, I cannot predict how members of the House will view our proposed amendments. Even if the amendments are accepted, in view of the drastic consequences of getting things wrong, it will be important for the minister to clarify any areas where the language is ambiguous.

Hon NICK GRIFFITHS: The member has raised an issue concerning the operation of clause 17 and he has foreshadowed an amendment on the Notice Paper to it. The Government will accept that amendment.

Hon JIM SCOTT: One of the interesting issues to come out of the second reading debate was the cultural change that is required in the Police Service in conjunction with this legislation. In his reply, Hon Nick Griffiths pointed out that the Bill would be part of changing that culture. I also raised some issues regarding the culture of the Police Service and Hon Derrick Tomlinson further elaborated on my concerns. I would hope there is some way in which this culture can be enhanced. I know that the Bill cannot cover that. However, perhaps one way to help improve the culture would be to conduct performance audits to examine public interest disclosure, for example. Police could get more performance ticks if they have done well in that regard, but if they covered something up, they would lose some kudos in their performance reviews.

Clause put and passed.

Clause 2: Commencement -

Hon PETER FOSS: I am curious to know why this is a split proclamation Bill. It does not seem to me to be an appropriate Bill to split. The only part that might be able to be split is part 4, Role of Commissioner for Public Sector Standards. However, if that were done, it would have to be specifically stated. I cannot see how one part of the Bill can be proclaimed without dealing, for instance, with disclosure, the obligation to deal with disclosure and the protection and immunity that is given.

Hon NICK GRIFFITHS: I agree with the honourable member's observation. My understanding is that it may be necessary to split the role of the Commissioner for Public Sector Standards; however, I would be surprised if that eventuated. I anticipate that the whole Bill may come into operation on the same day.

Hon PETER FOSS: Although I do not intend to move an amendment, I ask that it be conveyed back to the draftsperson or the person who gave instructions for the Bill, that this Chamber is not all that keen on split proclamations; however, we will go along with it when there is a clear reason for doing so. There does not seem to be a clear reason in this case. Even if there were an area that could not be proclaimed, it should be dealt with specifically.

Clause put and passed.

Clause 3: Interpretation -

Hon PETER FOSS: I refer the minister to paragraph (e) under the definition of "public authority". Does that include universities?

Hon NICK GRIFFITHS: Yes.

Hon PETER FOSS: I ask the minister to look at the definition of "public interest information". I understand the definition, which means -

> . . . information that tends to show that, in relation to its performance of a public function (either before or after the commencement of this Act), a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in -

For many of the definitions that follow, the relevance of a private function may not be appropriate. I will give members an example of when it would be appropriate. For instance, if an allegation is made against a judicial officer that he committed a criminal offence - not the offence of taking a bribe or corruption in the course of his duties as judicial officer - that would appear to be a very relevant matter. I would have thought that the paragraph related either to the performance of a public function or the capacity to perform a public function. The Bill appears to omit matters of a private nature, although those matters might relate to the capacity or fitness of an officer to carry out a public function. For instance, the case of a judicial officer who committed a criminal offence would be a matter that this Parliament would need to know about and would have to deal with by way of an address to both Houses of Parliament. I have not drafted an amendment to this clause. However, the definition in the clause states that information that tends to show that, in relation to its performance of a public function, a public authority, a public officer or a public sector contractor has been involved in improper conduct in the performance of that public function. That is the problem I see with that clause.

Hon RAY HALLIGAN: The definition of "public sector contractor" refers to a person who, other than as an employee, contracts with a public authority etc. I am unsure how the wording in that definition would encompass a corporation.

Hon NICK GRIFFITHS: "Public sector contractor" is defined in the clause. It could well include a corporation, as it is a legal person.

Hon RAY HALLIGAN: Is "person" defined elsewhere in other legislation to include a corporation, which would encompass this legislation?

Hon NICK GRIFFITHS: Yes; however, "public sector contractor" means a person; a corporation is a legal person.

Hon Peter Foss: Will the minister deal with my concern about behaviour that does not relate to a public function?

Hon NICK GRIFFITHS: Yes. I am dealing with Hon Ray Halligan's question.

Hon Peter Foss: I could not understand how his question had anything to do with my question.

Hon NICK GRIFFITHS: That is fair enough. The answer to Hon Ray Halligan's question has nothing to do with the issue raised by Hon Peter Foss. Hon Peter Foss's question raised some interesting points.

Hon Peter Foss: I would have thought it related only to public officers.

Hon NICK GRIFFITHS: I would have thought so. Hon Peter Foss raised an interesting point that we may need to examine in further consideration of these issues. There is no easy answer; I cannot think of one off the top of my head.

Hon PETER FOSS: I am concerned a little about that, as it is a significant and glaring omission. I propose that we continue with the rest of the clause but I hope we can postpone voting on the clause until the minister has had a better opportunity to think about it and to consider whether anything should be done about "public officers".

Hon Nick Griffiths: Could you put the argument again?

Hon PETER FOSS: I do not believe the definition of "public officer" applies to public contractors or public authorities, but it does apply to public officers.

Hon Nick Griffiths: Yes.

Hon PETER FOSS: For example, most public officers, but not all, have the capacity to commit a criminal act. Although the criminal act might not relate to the performance of a public function by an officer, it would relate to the officer's capacity to hold that public office.

Hon Nick Griffiths: It would go to the public officer's suitability and the officer would cease to be a fit and proper person to hold that public office.

Hon PETER FOSS: That is exactly the point. Most people defined as public officers in paragraphs (a) to (e) in the clause would lose their office if they were convicted of a certain type of offence. There are other more remote definitions, such as those in paragraphs (f) and (g); however offences committed by officers defined in paragraphs (a) to (e) which were not committed in the performance of a public function but which related to the capacity of an officer to hold public office should come within the ambit of public interest information.

Hon NICK GRIFFITHS: I understand the point, but the Bill does not deal with it.

Hon Peter Foss: That is because it has put all three entities together.

Hon NICK GRIFFITHS: Yes. I do not have the Anti-Corruption Commission Act in front of me but I am trying to recall its terms and whether it deals with that point.

Hon Peter Foss: It could; that is a good point.

Hon NICK GRIFFITHS: It will not be necessary to deal with that point in this Bill if current legislation deals with it.

Hon Peter Foss: I do not think the ACC Act does.

Hon NICK GRIFFITHS: I do not have the Act in front of me. However, the commission of an offence by a member of either House of Parliament or a judicial officer would be dealt with in other legislation.

Hon Peter Foss: I do not think it would because they would not be regarded as a corporation. We are dealing with two different issues. One problem is that there is nobody to approach to have the matter investigated. I am happy to move on through the clause until the minister has had a better chance to consider it.

Hon NICK GRIFFITHS: Does Hon Peter Foss propose that we postpone clause 3 and come back to it?

Hon Peter Foss: Yes.

Further consideration of the clause postponed until after the consideration of clause 28, on motion by Hon Nick Griffiths (Minister for Racing and Gaming).

Clause 4 put and passed.

Clause 5: Public interest disclosure -

Hon PETER FOSS: Again, I am concerned about subclause (2), which reads -

> A person makes an appropriate disclosure of public interest information if, and only if, the person who makes the disclosure -

The phrase "if, and only if," is a circumscribed definition. The subclause continues -

> (a) believes on reasonable grounds that the information is true; or
>
> (b) has no reasonable grounds on which to form a belief about the truth of the information but believes on reasonable grounds that the information may be true.

I agree with the minister that both provisions are reasonably liberal. However, what would happen if a person did not have reasonable grounds for believing that the information was true, but actually it was true? Should truth not be an absolute reason in this case?

Hon NICK GRIFFITHS: We are keen to encourage a culture in which people behave ethically. It is not the intention of the Bill to reward somebody who jags the truth, albeit through acting on bad reason, but who behaves unethically in those circumstances.

Hon Peter Foss: That person might have been reckless but happens to know the truth.

Hon NICK GRIFFITHS: That is always possible. Even the worst fisherman can catch a fish, but perhaps he did not deserve to.

Hon PETER FOSS: Am I correct in assuming that even though it is actuated by malice, it is still protected?

Hon NICK GRIFFITHS: A person can be malicious. However, provided he falls within clause 5(2)(a) or (b), that is it.

Hon Peter Foss: I agree with you. I just wanted to make sure that we had it clearly stated.

Hon NICK GRIFFITHS: Yes.

Hon PETER FOSS: I will now deal with subclause (3). It is because of subclause (3) that I will move my proposed subclause (4). Subclause (3) states -

> A disclosure of public interest information is made to a proper authority if -
>
> (a) where the information relates to an act or omission that constitutes an offence under a written law - it is made to a police officer or to the Anti-Corruption Commission;

Further on, paragraph (f) states -

> where the information relates to a member of either House of Parliament - it is made to the Presiding Officer of the House of Parliament to which the member belongs;

It could be that it is an offence committed by a member of Parliament. My concern is the way in which this operates. For instance, it is quite clear in paragraph (a) that a person has a choice between a police officer and the Anti-Corruption Commission, and either of them would be appropriate. Paragraph (d) refers to the Commissioner of Police or the parliamentary commissioner; either of them is okay. The situation is similar when it is a public officer, other than a minister of the Crown. Bearing in mind clause 17, my concern is that if a person gets anything wrong in this whole process, he will forfeit his protection. There is an ambiguity about this. If a paragraph is more specific, must a person report under that paragraph? I do not think there is an answer to this, because the problem is that it could be argued either way. A person could argue that a number of options are given; or he could say that if it is more specific, it must be dealt with more specifically. I have a problem with that. I believe that it must be clear to people that they have the option to pick any one of those authorities so that it is acceptable. I now move -

> Page 8, after line 23 - To insert -
>
> (4) Where a public interest disclosure falls within 2 or more paragraphs of subclause (3), then it is made to a proper authority if made to any or all of the authorities contemplated by the applicable paragraphs.

The other thing that is not clear is whether a person can go along to one authority and not get a result, and then go along to a second one. At this stage it appears that a person has one option or another. If he goes to the Commissioner of Police, he cannot then go to the parliamentary commissioner. If he goes to the Commissioner of Police, he cannot go to the Presiding Officer of the House. That is a matter of interpretation that I do not want to be left to the courts to decide, particularly when it is being argued that somebody has lost the protection of the clause. Therefore, I have moved the motion to insert a new subclause (4), which will make it clear that wherever a person qualifies, if he makes the disclosure, it is an appropriate disclosure.

Hon NICK GRIFFITHS: As I read it, if a public interest disclosure is made to one of those bodies, it is made to a proper authority. A person could conceivably make a public interest disclosure that may involve a substantial unauthorised or irregular use or substantial mismanagement of public resources, which, consistent with clause 5(2)(a) or (b), is, perhaps in the mind of the person making the disclosure, of a criminal nature. That disclosure could be made not to the Auditor General but to a police officer or the Anti-Corruption Commission; or under paragraph (h); or to any one or a number of those people. I do not think that would impact on the operation of clause 17. It would be a public interest disclosure, but that public interest disclosure could be made to any one of a number of people. In each case it would be a different public interest disclosure, albeit dealing with the same matter. The disclosure could be made to one authority, another authority, or yet some other authority.

Hon PETER FOSS: That is an interesting concept. I agree with the minister that that is what it should be. However, I do not agree with him that that is what it must be. The problem I have is that I believe, first of all, that a disclosure is a disclosure rather than a series of disclosures. Secondly, I believe that so far as, say, paragraph (a) applies, it can be said that the word "or" means that it is made to that person, or that it is made to that person but it cannot be made to both. The other problem I have is that I also believe that paragraphs (a) to (i) can be read so that the disclosure must be made to the more appropriate authority in those paragraphs. Paragraph (g) states that if the information relates to a public officer, the disclosure is made to the commissioner or the parliamentary commissioner. Therefore, one would ask whether the person concerned is a public officer. If he is, the disclosure will be made under paragraph (g). Alternatively, one would ask whether the person is a member of either House of Parliament. If he is, the disclosure will be made to the Presiding Officer. All I am saying to the minister is that I agree with what he is seeking to interpret; I just do not know that it is clear from the wording of the clause. All I am suggesting to the minister is that if we put my proposed subclause (4) into the clause, it puts it beyond doubt, because it states - the minister is saying that this is what can be done -

> Where a public interest disclosure falls within 2 or more paragraphs of subclause (3), -

That should be subsection (3), because once it is put into an Act it becomes a subsection -

> then it is made to a proper authority if made to any or all of the authorities contemplated by the applicable paragraphs.

That means that if a person is alleging, for example, that a minister criminally dealt with a substantial number of public resources, that person could make his complaint to a police officer, the Anti-Corruption Commission, the Auditor General and the Presiding Officer of the House of Parliament to which the minister belongs. A person could go to any and all of them. At the end, that person would still have made a proper disclosure. That is all I am aiming at. I do not think it is a contentious matter. I believe it is what we all want. I just want to put it beyond any doubt.

Hon NICK GRIFFITHS: I have given my understanding of it. I note what the member says. It is his amendment. However, I suggest that he make a couple of minor changes; namely, the word "subclause" in the second line should be "subsection", and the words "applicable paragraphs" should be "paragraphs of the subsection".

Hon Peter Foss: We need to have the words "applicable paragraphs", because otherwise it may be made under paragraphs that are not applicable.

Hon NICK GRIFFITHS: I do not want to hold things up, but it should certainly be the word "subsection" rather than "subclause". That will probably be a Clerk's amendment anyway.

The CHAIRMAN: It will be.

Hon PETER FOSS: I seek leave to make that change.

The CHAIRMAN: Hon Peter Foss seeks leave of the Chamber to delete the word "subclause" in line 2 and substitute the word "subsection".

Amendment, by leave, altered.

Amendment, as altered, put and passed.

Hon PETER FOSS: If a public interest disclosure about a minister does not involve an offence under a written law or an irregular use or substantial mismanagement of public resources, then the only person to whom that public interest disclosure can be made is the Presiding Officer of the House of Parliament to which the member belongs. I think the minister will find that such a public interest disclosure falls only within paragraphs (a) and (b) of subclause (3), because it is not a matter that can be investigated by the Parliamentary Commissioner. A minister is not a police officer or a judicial officer, nor is a minister a public officer, other than as a minister of the Crown. It may fall within the sphere of responsibility of a public authority; however, that is a remote possibility. The only person to whom a complaint can be made is the Presiding Officer. I am sorry to harp on this, but the minister will see why this is important when we get to clause 7, because that clause states that the obligation to do something does not apply to the Presiding Officer of a House of Parliament.

Hon NICK GRIFFITHS: It clearly falls within paragraph (f). It may also fall within paragraphs (h) and (i).

Clause, as amended, put and passed.

Clause 6 put and passed.

Clause 7: Interpretation -

Hon PETER FOSS: Generally speaking, unless the public interest disclosure involves an offence or a substantial misappropriation of funds, the only person to whom the complaint can be made is the Presiding Officer of the House of Parliament to which the member belongs. I can understand that, and that is how it should be. However, the problem is that clauses 8, 9 and 10, which deal with the obligations and actions by the proper authority once it has received the disclosure, do not include the Chief Justice or the Presiding Officer of a House of Parliament. Clause 7 provides that a complaint can be made to the Chief Justice or the Presiding Officer of a House of Parliament; however, that person can decide to do absolutely nothing about it. We need to keep in mind that it is usual for the Speaker of the Legislative Assembly, and it is usual, but is not always the case, for the President of the Legislative Council, to be in the same political party as the Government. Therefore, it seems a bit wrong that a complaint has to be made to someone who may have an interest in not going into the matter too deeply. Regardless of whether that is the case, surely that must be the perception of a person who wants to make an ethical disclosure. Can members imagine making a complaint about a member of the Government to a person who owes his position as Presiding Officer of the House to the members of the Government who put him in that position? I do not think the Presiding Officer is the best person to whom to go to make that sort of

disclosure. I also have a concern about the Chief Justice. I will not touch on why I think the Chief Justice has been left out. I am sure I could work it out, but -

Hon Nick Griffiths: We are talking about the holder of the office of Chief Justice, whoever that may be from time to time.

Hon PETER FOSS: I know. I am not talking about this Chief Justice. The point I am making is that what really makes people upset is the fact that the judiciary appears to be unaccountable. I will anticipate my amendment, because it is relevant to this clause. The one body to which the judiciary is accountable is this Parliament; and I think the minister said that in his second reading speech.

Hon Nick Griffiths: That is patently obvious, because the Parliament can remove a judicial officer from office.

Hon PETER FOSS: It seems to me that the Chief Justice has two choices. If a complaint has been made to him, he would decide whether to investigate it or not to investigate it. Obviously, if he were subject to clause 8, which he is not, he could refuse to investigate the complaint under clause 8(2). If he could not refuse to investigate it under clause 8(2), something should happen. If the Government does not want to write an Act that says that the Chief Justice will investigate complaints against judicial officers that are not merely trivial, it should write an Act that provides that the Chief Justice report it to somebody. In my amendment - when we get to it - I have suggested that he should report it to the Presiding Officer of this House. The reason I have suggested the Presiding Officer of this House is that it is to this House that the judges come at the opening of Parliament. The judges do not go into the other House. That is an old constitutional reason, because this is the House in which all parts of the Parliament meet; that is, the sovereign, the Legislative Council and the Legislative Assembly. This is the one place in which all three gather together from time to time, whereas traditionally those people have not been in the Legislative Assembly Chamber. That is why I have said that the complaint must be reported to somebody. It would be better for it to be reported to one person, so my amendment provides for that person to be the Presiding Officer.

Secondly, the amendment provides that if a complaint is made to the Presiding Officer as the proper authority and he decides not to do anything with it, he should send it to the appropriate committee of the House that deals with privileges. One way along the line, the buck stops with somebody, and I thought the privileges committee of this House so far as the judiciary is concerned or the privileges committees of either House so far as a member of Parliament or a member of the Executive is concerned is where it should stop. I am not wildly keen on clause 7 and any support I give to it is very much dependent on a successful amendment to insert a new clause 11, because I think I would vote against this clause if new clause 11 were not accepted.

Further consideration of the clause postponed until after consideration of new clause 11, on motion by Hon Peter Foss.

Clause 8: Obligation to carry out investigation -

Hon JIM SCOTT: I would like some clarification of clause 8(2)(b), which states -

> A proper authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the disclosure if it considers that -
>
> . . .
>
> (b) the disclosure is made vexatiously;

I am a little concerned about that subclause. I would like the meaning of the word "vexatious" clarified, because when I looked it up it had a couple of meanings, one of which was "causing annoyance or worry". It would cause me annoyance or worry if that is the meaning that is used, because a vexatious disclosure might actually be correct but the person might be disclosing it because he is angry with somebody and wants to get revenge. The other meaning, with which I would be happy - I want to clarify that this is the meaning that is used in the subclause - is "brought without sufficient grounds for winning, purely to cause annoyance". If that is the meaning, it adds a lack of substance to the vexatiousness and that would be a safe subclause to include. However, if that is not the meaning that is used, the subclause worries me because I can think of examples whereby people may not start out being vexatious when the disclosure is first made, but things happen to it and it becomes vexatious. For instance, I have noted that one of the measures that is used to stifle dissent in the ranks is to have a minor shuffle in the department and get rid of a person's position, which tends to make a person fairly vexatious after he has started making complaints within the department. I would like the assurance that in this case the word "vexatious" means a lack of substance.

Hon DERRICK TOMLINSON: I suggest that the problem that Hon Jim Scott has identified arises from the syntax of this provision. Subclause (2)(b) states "the disclosure is made vexatiously". Vexatiously in that phrase

is used as an adverb relating to the verb "is made". It describes how the disclosure is made; whereas I think the intention is that it is the disclosure that is vexatious. In fact, the Bill says that the disclosure is made vexatiously. It does not relate to the disclosure; it relates to the manner in which the disclosure is made. I suggest that that could be very simply clarified by deleting "is made" and changing the adverb to a noun. It would then state "the disclosure is vexatious".

Hon NICK GRIFFITHS: I have two observations, neither of which is vexatious, I hope, although they may cause annoyance.

Hon Derrick Tomlinson: However, you are not making them vexatiously.

Hon NICK GRIFFITHS: I hope not. Certainly the intent is that it be a matter of substance, but I suppose that is dealt with in terms of trivial or frivolous.

Hon Peter Foss: However, vexatious could be to make it only to cause that person a problem.

Hon NICK GRIFFITHS: That is right. Hon Derrick Tomlinson has made an interesting observation; that is, he is concerned about the nature of the disclosure being vexatious rather than the manner in which the disclosure is made.

Hon Peter Foss: What if you keep going back and doing it even though somebody has already knocked it back?

Hon NICK GRIFFITHS: I am not sure whether it matters one way or the other. However, if Hon Derrick Tomlinson would care to elaborate, I will listen to what he has to say.

Hon PETER FOSS: I will give some examples that I think might apply. Let us say that a person alleges that a judge of the Supreme Court has a tendency to lock jurors up in the jury room and murder them all. It is not trivial or frivolous; the person might seriously believe it. However, it could be that the person says it just to cause problems for the judge. That is a vexatious allegation. I think this is the point to which Hon Jim Scott was referring. What happens if a person makes an allegation and it is investigated and knocked back, then that person makes the same allegation to somebody else who investigates it and knocks it back, so then that person goes to a final person and says that he has complained to two other people? The mere fact that the person is persistent does not make it vexatious, but it could be that the person forms the view that the allegation continues to be made in order to cause vexation to the person being complained about.

I will provide an example which should be fresh in all our minds: a person called Mr Easton made allegations on a number of occasions about his wife which were thoroughly investigated and which he was told had been rejected, but he nonetheless made those allegations again. One of the things he wished to do was to cause grief to his wife. That was done vexatiously. Members should keep in mind that this does not deprive him of the right to make the disclosure; it simply removes the obligation to investigate. All we are looking for here is an out for the person who says that this person is making a real living out of this allegation, the person has made it before and it has been rejected on a number of occasions and in this instance he is being vexatious in his application. It is a judgment call. People must have something to protect themselves with in those circumstances. I am not sure whether the word is "vexatious" or "vexatiously", but either way it will probably be a matter that will not be judiciously considered. To that extent it probably does not matter.

Hon JIM SCOTT: What happens when, for instance, two police officers turn a blind eye to prostitution or something that is supposed to be regulated, and they are offered a payment in kind, but one of the officers does not get the favoured -

Hon Derrick Tomlinson: Does not get the regular regulation.

Hon JIM SCOTT: That is right. Even if it is money, one may get only 10 per cent and the other one may get 90 per cent. That person may make a claim because he is vexatious about it, but the claim is correct and something has occurred.

Hon Peter Foss: The claim is made purely to pay somebody back.

Hon JIM SCOTT: Yes. An offence has occurred, but does the fact that it is vexatious stop it from being investigated?

Hon DERRICK TOMLINSON: I did not make those observations trivially, frivolously or vexatiously. The clause we are looking at is almost identical with a section of the Parliamentary Commissioner Act and also the Anti-Corruption Commission Act. The commissioner may decide not to investigate. Section 18 in the Ombudsman's Act is in these terms -

(1) The Commissioner may refuse to entertain a complaint, or, having commenced to investigate a matter raised in a complaint, may refuse to continue the investigation if he is of the opinion that -

(a) the matter raised in the complaint is trivial;

Compared with whether the matter is trivial or frivolous -

(b) the complaint is frivolous or vexatious or is not made in good faith;

That is a much clearer delineation: frivolous, vexatious or not made in good faith. It answers the very point raised by Hon Jim Scott. Is it made vexatiously - that is, not made in good faith - or is it a matter or a disclosure that is a vexatious disclosure? A vexatious disclosure is one that is not made in good faith.

Hon Peter Foss: No.

Hon DERRICK TOMLINSON: Perhaps not. I will leave my learned friend to discuss that. There is ambiguity in the way it is phrased. The ambiguity needs to be clarified. It is much clearer in the Ombudsman's Act and, if nothing else, we could simply transpose subsections (a) and (b) of the Ombudsman's Act. All we need to do is say that the disclosure is vexatious, full stop.

Hon NICK GRIFFITHS: The honourable member is pointing to wording in the Ombudsman's Act and the Parliamentary Commissioner's Act. In another context I was looking at the Anti-Corruption Commission Act and turned to section 17 of that Act. Reference is made there to allegations being frivolous or vexatious or being made in good faith. The language there refers to vexatious. It would seem appropriate that we have, at the very least, consistency in the legislation.

Hon PETER FOSS: Hon Derrick Tomlinson has put his finger on the point. It is difficult to see how the matter can be frivolous, because the matter, if it is to be a public interest disclosure, has to be a disclosure relating to improper conduct, an offence, an unauthorised or irregular use or substantial mismanagement of public resources or an act that involves a substantial and specific risk to public health, safety or the environment. It can hardly be frivolous, but I think the honourable member is right. The disclosure can be frivolous. I would suggest taking out the words "or frivolous" after "trivial" and putting them where Hon Derrick Tomlinson suggested: the disclosure is vexatious or frivolous. I do not think it should be in bad faith, because we have already agreed that malice should not defeat one of these disclosures. I know the example Hon Jim Scott gave was a malicious disclosure, but nonetheless a truthful one. It would not be frivolous, nor would it be trivial, but it would certainly be in bad faith or malicious. I suggest we adopt Hon Derrick Tomlinson's wording and move "frivolous" into subclause (b) but not add the words "in bad faith".

Hon NICK GRIFFITHS: I propose an amendment in these terms. I move -

Page 9, line 26 - To delete "or frivolous".

Page 9, line 27 - To delete "made vexatiously" and substitute "vexatious or frivolous".

The CHAIRMAN: I think members understand what is proposed.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 9: Action by proper authority -

Hon PETER FOSS: I made a note against clause 9(1)(a) to (c) to ask what it means. Paragraph (b) I understand, but paragraph (a) is hard to understand. It seems to be drafted for a public contract or public authority rather than a public officer. How does the minister see this clause being applied?

Hon NICK GRIFFITHS: The words "necessary, reasonable, and within its functions and powers" should not cause any difficulty. I am trying to think of an example. I hate thinking of examples off the top of my head in case I get it wrong, but the clause seems to be reasonable. It invites a public authority that has formed an opinion as to some activity that would fall within the operations of the public interest disclosure, which is something one would not like to have occur, to take steps which are necessary, reasonable and within its powers. Prevention is better than cure.

Hon PETER FOSS: I now remember the reason for my note. It seemed to me that this clause might apply to some people and not to others. It says "within its functions and powers", but obviously people like the parliamentary commissioner and bodies like the Anti-Corruption Commission have no capacity to prevent it from continuing to occur in the future. In many cases they have no capacity to refer it to anybody else, although

the ACC might, or to take disciplinary action or commence or enable disciplinary proceedings to be commenced. Generally speaking, it seems to apply only to public authorities and public contracts. Quite a few bodies will not be able to do any of those things.

Hon Nick Griffiths: That is true.

Clause put and passed.

Clause 10: Informant to be notified of action taken -

Hon NICK GRIFFITHS: The amendments in my name under this clause and the following clause flow from the wording of clause 7. Consideration of clause 7 has been postponed. Therefore I move postponement of clauses 10 and 11 until after consideration of new clause 11 and clause 7. If new clause 11 is defeated, we move on to clause 7.

Further consideration of the clause and clause 11 postponed until after consideration of clause 7, on motion by Hon Nick Griffiths (Minister for Racing and Gaming).

Clauses 12 to 16 put and passed.

Clause 17: Loss of protection of the Act -

Hon PETER FOSS: I move -

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.

I understand the Government is minded to accept this amendment. The reason I put the amendment in is that it is a concept well understood in law that there should be relief against the forfeiture of a legal right if it would be unjust to forfeit it. I did contemplate looking at this to try to modify the circumstances under which the forfeiture took place, but that leads to problems. It seems to me that we must have the requirement that people comply with the Act. The consequence of that is obviously the forfeiture of that right, but then it only really arises if somebody says that he will sue because the right was forfeited. At that time the court, while looking at it, can look at the circumstances and say that maybe the letter of the law was not followed exactly, but it must look at the Act and what is intended to be served by it. It may not have materially prejudiced the public interest - we are really talking about public interest served by public disclosure - and may be of a minor nature. I realise it is a cumulative test. Some people might think there is a significant limit on the ability of the court to grant relief against forfeiture. It is probably a reasonable criticism of what I have done. I have not fallen overboard in my attempt to make it too easy to get out of it, but if the public interest is not affected in any way and it is a minor departure, the court can make an order relieving the person from that forfeiture.

The type of case in which courts first started doing this was the case of forfeiture of leases. A lease is a legal document. If someone breaches the terms of a lease, it can be formally forfeited, but the courts for a long time, even before Parliament formalised relief against forfeiture, used to grant relief against forfeiture in certain circumstances. The nature of a relief against forfeiture is very limited, but it is necessary to give somebody who might happen to get something slightly wrong the opportunity to have that relief against forfeiture.

Hon NICK GRIFFITHS: The Government supports the amendment.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 18 to 28 put and passed.

Postponed clause 3: Interpretation -

Hon PETER FOSS: I am concerned that the definition of "public interest information" is appropriate for a public authority and a public sector contractor, but is not appropriate for a public officer when conduct, even

though he is not in the performance of a public function, impinges on his fitness - and even on his qualification in some instances - to hold that public office. If a person were to allege that a judicial officer had committed a criminal offence, even though that criminal offence had nothing to do with the conduct of the judge, the matter may very well lead the Parliament to move an address to remove that person from office. Even more importantly, it is a matter that the Chief Justice ought to be told about so that he - I say he in this instance because there happens to be a male Chief Justice at the moment - can find out whether the allegation is true. We do not want all sorts of allegations of impropriety made against public servants and their private lives; we have not the faintest interest in that. A "public officer" might be found guilty of one of the provisions outlined in the definition of "public interest information". If the offence did not relate to the course of the performance of the person's public function but to the person's fitness to hold that position, I would accept that that qualification has to be there. It has to relate to the person's fitness to hold that position; that is relevant. I have not tried to reconstruct the clause; however, it is an important point. The Bill says "in relation to its performance of a public function"; maybe it should read "its fitness to perform a public function", because that is what we are really talking about. The definition of "Public interest information" would then read -

> . . . information that tends to show that, in relation to its performance of a public function, or its fitness to perform a public function . . . a public authority, public officer or public sector contractor has been or proposes to be involved in . . .

I have only just suggested that amendment and am therefore reluctant to ask the minister to consider it. However, I hope that by suggesting that late amendment, the minister understands the point I am trying to make.

Hon NICK GRIFFITHS: I thank the honourable member for his suggestion. I note the passage of time. I propose to move a pro forma motion shortly that will, without wasting the time of the Committee or the House, enable consideration to be given to the point raised and perhaps the matter can be dealt with tomorrow. I do not know whether there is a ready answer. If I can come up with something after the matter has been duly considered, that could be done.

The CHAIRMAN: Order members! Having regard to the time, I am required to leave to the Chair and report progress. However, before I do, I want to clarify the remaining clauses and the manner in which they will be dealt with. We are dealing with clause 3, and we will then deal with new clause 11, then clauses 7, 10 and 11. That will be the order of dealing with those clauses.

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