WHISTLEBLOWERS PROTECTION BILL 2002

Second Reading

Resumed from 16 April.

MR PENDAL (South Perth) [4.41 pm]: I support the Bill. In fact, I do more than that. I welcome the fact that it is before the House after a long period from the time when it became apparent that it was necessary. At the outset, I express my thanks to the Leader of the House and the Attorney General for holding over the debate. A few weeks ago I was absent because I had the onerous task of representing the Parliament in South Africa. I wanted to take part in this debate for a special reason.

The legislation has come into the House at a time of special significance to my electorate because of the recent tabling in the Parliament of the "Report of the Inquiry into the City of South Perth". I will come back to that later as a means of explaining to the House what might be some of the deficiencies in a Bill that in any event I intend to support. I remind members, perhaps with a little more detail than the minister gave in his second reading speech, of where we have come from on this topic and why we have arrived at this point in the debate today. The Bill has its genesis in what colloquially became known as the WA Inc saga of the late 1980s and early 1990s. In the course of the subsequent appointment of the Commission on Government, whose report should be required reading for all of us, and constantly thereafter, one of the points that was raised was the need in Western Australia for some form of whistleblower legislation. Those times demonstrated the real need for a procedure and a protocol for people to go to those empowered to receive complaints and to make public disclosures that were effectively in the public interest.

The Commission on Government, at chapter 5 on page 6 of its No 2 report, made a recommendation, but stated as follows -

> Currently in Western Australia only persons providing information to the Official Corruption Commission -

I imagine I can interpolate here to say the present Anti-Corruption Commission -

> covered by the Official Corruption Commission's jurisdiction can be protected against reprisal. This means that for the majority of persons wishing to raise issues of improper conduct, no protection exists. This situation must be rectified.

To that I can only say amen, because that period demonstrated an urgent need for a facility for members of the public and of the public service, or even a wider group of people, to have access to someone to whom to make an official and a public disclosure.

Although the legislation is welcome, I place on record my opinion that it is deficient in at least two areas, one of which I intend to make the subject of an amendment. I have circulated an amendment by which I will seek to alter the title of the Bill so that any reference to whistleblowers in the title is deleted and, instead, the words "Public Interests Disclosure" are inserted. I do not want to spend a lot of time on this issue. I would rather spend more time on the next issue regarding the South Perth City Council.

However, I draw the Attorney General's attention to the fact that there is good reason, as a result of anecdotal evidence and also documentary evidence, to suggest that we must not use the term "whistleblowers" in the context of this statute. When the Bill was introduced some weeks ago, I was surprised that a colloquialism was effectively being used and that that was being entrenched into the law. Interestingly, the Bill that was introduced by the Attorney General contains a number of definitions, as one would expect any Bill to do, but there is no definition of a whistleblower. I guess that solidifies my view that we should be wary of the notion of incorporating or entrenching into law words that are basically colloquialisms. When I looked just a few minutes ago at *The Australian Pocket Oxford Dictionary*, I found no reference to what is meant by the term "whistleblower".

Apart from that, the term "whistleblower" has a somewhat derogatory tone attached to it, whereas I happen to think that what the Government is doing in this legislation is of the highest order. In other words, that term diminishes the value of the Bill. I believe that it is still the case that if I am going to blow the whistle on someone, it has the connotation that I will dob in a mate. This Bill has far more going for it than that notion that a person will simply be dobbing in a mate or blowing the whistle on someone. I add that the Commission on Government - I was surprised to be reminded of this today - at the same page to which I referred earlier, under recommendation 72, said quite specifically -

> The term whistleblower or any derivative of that term should not be defined or used in the Public Interest Disclosures Act proposed in . . .

The section was referred to later. Therefore, even as far back as the report of the Commission on Government, the point was being made that the legislation should be steered away from the connotation of the derogatory term and, instead, called the Public Interest Disclosures Act. I will say more on that later, because I have now circulated my amendment and I intend to move it at the appropriate moment.

The Bill is deficient for a second reason. I regret that since I was briefed by several people in my electorate on Friday, I have not been in a position to advance this to the point at which I might have come in with a substantive amendment. I will explain to the House and particularly to the Attorney General the nature of what we see as the deficiency that might be properly addressed in the months ahead. As has happened with the City of South Perth, the Bill offers no protection in the immediate and intermediate stages of the act of making a public disclosure. That came home to me very strongly when I was briefed by the two people who were effectively responsible for the previous Government calling the inquiry into the City of South Perth. They were Mr Stuart Downing and Ms Anthea Britter, both of whom were respected officers of the City of South Perth. Ms Britter continues to work at the City of South Perth but Mr Downing no longer has a job, and therein hangs the tale. Mr Downing was one of those people most instrumental in raising this issue. Mr Downing acted out of the best of motives when he brought the issue to the attention of Mr John Lynch, the then permanent head of the Department of Local Government. Although Mr Downing did all of the right things and helped to bring about a public inquiry into the City of South Perth, he no longer has a job. I intend to make a case to the City of South Perth that it has a serious moral obligation to address and should invite Mr Downing back when a suitable vacancy arises.

In order to make my point about whistleblowing, I will quote from three sections of the report to which I referred and which was tabled in Parliament in April. On page 18, Mr Downing is quoted in a letter sent from the inquirer, Mr McIntyre, which states -

> "Given that I was the officer of the City of South Perth who made the initial complaint to the Department of Local Government and lost my employment as a result of the complaint, it would appear to be another cost that I have to bear as a result of the imposition of state legislation, the Local Government Act and the Anti-Corruption Commission Act, requiring me to report such problems with the running of the council as being investigated by this inquiry.

At that point, Mr Downing is referring to an argument that he was advancing as to why he should get some legal assistance for the inquiry. It is sufficient for my purposes to say that he went on the public record and was one of the people whose complaints to the Department of Local Government led to the inquiry. I suppose that it was open to Mr Downing and Ms Britter to have gone to the Press. It might also have been open to them to use the information they had in a party political sense or to cause mischief by disclosing what was going on to people who had no direct interest in it. However, they did none of those things. They acted with the utmost integrity as the officers I know them to be. They put their complaints to the Department of Local Government and it has meant that Mr Downing is no longer employed.

On behalf of Mr Downing and Ms Britter, I tell the House that there is a deficiency in the Bill before us. It does not give people the protection in that initial interval between the time they make a complaint - such as they did to Mr Lynch - and the time the complaint either is concluded or is substantially investigated. I will not mention names, but I have it on good authority that those individuals then came under the most intense pressure from people within the South Perth City Council and certain other individuals to not cooperate with the inquiry. In effect, they were asked to break the law. However, they took the courageous decision and refused to do that. They both paid a great penalty for doing that, particularly Mr Downing, who is now not employed.

Mr Trenorden: How employable is he by another local government?

Mr PENDAL: I would say that he is highly employable.

Mr Trenorden interjected.

Mr PENDAL: That is a good point. Indeed, he is finding resistance even though he did the right thing.

On page 81 of the report is a description of the settlement of the action for unfair dismissal Mr Downing took in the Australian Industrial Relations Commission. I do not have time to read all of it into the record. I ask members to bear in mind that we have a situation in which a formal inquirer is saying these things about the person who made these public disclosures in the right way. At the bottom of page 81 are the following words of the inquirer -

> The City lost a senior and experienced employee -

He is referring to Mr Downing -

> by virtue of a majority of councillors having accepted by their conduct a structure that had not been properly scrutinised and which was ultimately abandoned by the Council on 22 November 2000. It should be noted that those councillors who voted against the proposal to terminate Mr Downing's employment (Councillors Eisenmann Cala and Macpherson) are not included within this criticism.

That is a reference by the inquirer himself about the loss to the city of a senior and experienced employee because of the poor way in which this matter was handled by those who have since been suspended. Finally, on page 101 in chapter 8.5, the inquirer gives reasons why he found that conduct occurred that warranted the dismissal of the council. I hasten to add that the council has not been dismissed. The minister has tabled the report in Parliament and there is a 35-day circulation period. On or about 21 May, the Minister for Local Government and Regional Development is free to act according to the report, which may or may not lead to the dismissal of the councillors.

[Leave granted for the member's time to be extended.]

Mr PENDAL: The inquirer then lists a raft of proposals that run for several pages that describes conduct warranting dismissal. On page 101, chapter 9 states -

> The Council failed to engage in a sufficient degree of inquiry or analysis to provide a rational basis for the decision they made to deem Stuart Downing to have resigned from his employment with the City.

Therein is the nub of the issue. The council took a certain letter of his that it deemed to have been a resignation and that has been commented on at some length in the report, to which members have heard me refer.

What does that all mean in relation to this Bill? I place on record that yesterday I rang Mr John Lynch, the retired head of the department, because I did not want to make an unnecessary link between Mr Downing's position and the way he conducted himself and his current predicament if there were not grounds to do that. Knowing that Mr Downing and Anthea Britter had made contact with John Lynch, the head of the department, I thought it sensible to seek some guidance from him. I made Mr Lynch aware that I planned to refer to that conversation, and he was comfortable with that. He at all stages found the two officers to be honourable, decent people of integrity. He had no doubt that once they made public disclosures to them, they were left out on a limb. They had no protection, as is evident from the excerpt of the Commission on Government's report that I read to the House. Mr Downing and Ms Britter support this Bill, and they speak highly of the Government's sponsorship of it. Sadly, it is their belief that even if this Bill had been in place earlier, they would not have been given any protection in the interregnum between the complaint being made and it being substantially investigated. I understand that once Mr Lynch received the complaints, he wrote to the acting chief executive officer of the City of South Perth, warning him not to take any adverse action against these two people for doing what they believed was their public duty. The acting chief executive did not see matters in that way and applied all sorts of unprofessional pressure to the two people to whom I have referred. In summary, there must be some sort of intermediate action to guard against the victimisation that is properly referred to in its own place in the Bill before us. All sorts of things happened, and those people were threatened. Ultimately, a whistleblower - to use a term that I do think we should use - must at all stages be given protection by the law, especially when it is displayed, as it was in this case, that that person is acting with the best of motives. No evidence has been put forward that suggests that these people acted for any reason other than that they believed that certain practices of the South Perth City Council were not professional or honest. The appropriate people, possibly the Director of Public Prosecutions, will decide what, if any, charges are laid.

We are confronted with a Bill that is about 85 per cent complete. It is a shame that, after such a long period, we are only 85 per cent of the way there. It is now eight or nine years since the Commission on Government presented its report. I had hoped that the previous Government would pick up this particular matter. Apparently there were reasons for it not doing that. The present Government deserves the credit for moving forward. However, some form of guarantee or undertaking must be given. I use this occasion to ask the Attorney General to consider this matter and to make reference to it in his response to the second reading debate. If the response from the Attorney General is in the negative, it may be worthwhile including some form of review or sunset clause towards the end of the Bill. I do not necessarily want to do that. The Attorney General might circumvent the need for that by saying that he will give the House the undertaking that within two years, he will direct the personnel charged with administering the Act to carry out a review of the issue to which I have made reference, and make a subsequent ministerial statement to the House. Based on the experience of Mr Downing and Ms Britter, I do not think that a huge amendment to the Bill would be necessary if the matter were to come before the House in two years. I repeat that I would prefer some form of reassurance from the Attorney General that a review on that point will be undertaken. I would rather not have to resort to moving that a review or sunset clause be included at the end of the Bill. I signal to the Attorney General that we have the capacity to include a simple amendment towards the end of the Bill, in the usual place for sunset or review clauses.

Finally, I return to my starting point. I commend to the Attorney General and other members of the House the notion that we should not refer to a colloquialism in an Act of Parliament, especially one that does not have a definition in either colloquial terms or within the Bill itself. We should certainly not countenance an expression that is frowned upon and seen in negative terms by many people who would not align "whistleblower" with the noble intention of someone wanting to make a public disclosure because they believe something within the system is wrong.

Apart from that, the Government's legislation deserves the support of the House. I will commend my own amendment to the House when we reach that point. I ask that the Attorney General give me an assurance that the interim period to which I have referred will be the subject of a review in the next 12 months, or even two years. In the absence of such an assurance, I will keep open my option to move that a review or sunset clause be inserted. I support the Bill.

MR TRENORDEN (Avon - Leader of the National Party) [5.07 pm]: The National Party will also support the Bill, although not with a great deal of gusto.

Mr McGinty: That is a pity.

Mr TRENORDEN: I will tell the Attorney General why. We are all products of our experiences. I spent 12 years as a member of the Public Accounts Committee of this Parliament, and on many occasions saw people who would be described - although a description is not provided in the Bill - as whistleblowers. One particular case taught me much about the service of the Public Accounts Committee and made me a better committee member. An employee of the Port Hedland Port Authority made complaints to a range of people, including the Auditor General and the then Minister for Transport, about the actions of the port authority. The Auditor General investigated those complaints. Following that, the minister still had concerns about the issue and, as he had a right to do, requested that the Public Accounts Committee investigate that person's allegations. We listened to the individual's allegations before we decided to conduct an inquiry, and what he suggested was very feasible. His allegations were reasonably compelling. It was decided that the Public Accounts Committee would travel to Port Hedland and put the Port Hedland Port Authority under the considerable pressure that the Public Accounts Committee can exert, especially when dealing with government agencies. However, although the employee's argument was feasible within the parameters of the information he had, once all the information became available it was evident that he was unquestionably way off course. That is always the problem with the question of so-called whistleblowing. Many people genuinely think that they have uncovered a great desperate act, when in fact they are in control of only a portion of the information. I saw that with the Public Accounts Committee on numerous occasions. On the other hand, that is why we have parliamentary privilege and why we have the Anti-Corruption Commission. We all know that, from time to time, in the history of any State or nation there will be people in possession of information of such a critical nature that it needs to be exposed, and exposed with some protection afforded to those people. The question that always comes about with such issues is one of balance. In reality, we have a Clayton's Bill, although it does cover the issues raised by the member for South Perth. He said that it covered 85 per cent of them, but I am not prepared to put a figure on it. It does cover the issues of people making statements. The Bill discusses disclosure in the public interest, and that is what such disclosures will be called. The Bill is more concerned with the protection afforded to a whistleblower and the obligations of the investigating agencies than anything else. The Anti-Corruption Commission has been established in this State for some time. If anyone in this State goes to the ACC and makes a complaint, the complaint must be kept secret. That is a requirement under the Act. A similar process exists with the Ombudsman. I know the Attorney General is listening. Does he believe there will be too many cases or a number of cases that will occur outside those agencies when normally a complaint would not be made public?

Mr McGinty: I really cannot answer that.

Mr TRENORDEN: That is why we support this Bill. I do not want to say anything that indicates the National Party does not support people who make public disclosures; it does. I am trying to make the point that if a person goes to the ACC and makes a complaint, it must be kept secret. That is compulsory. I do not believe that the Government will change that.

Mrs Edwardes: Secrecy is a requirement under the Anti-Corruption Commission Act.

Mr TRENORDEN: That is right. If I really thought, like Mr Smith in the street, that I knew something highly important and went to the ACC but also spoke to *The West Australian*, I would be acting outside the law, before and after this Bill. That is the point I am making. I am not sure whether this Bill will make a huge impact on the public of Western Australia. On the other hand, we will not do the public of Western Australia any harm by passing this Bill.

The attitude of the State to whistleblowers concerns me. King Edward Memorial Hospital for Women recently had a couple of cases in which whistleblowers - by whatever definition - have been affected. The person who was the chief executive officer of the hospital at the time has now been demoted and moved elsewhere. One would think that if the Government were really red-hot about protecting whistleblowers, the chief executive officer would be back in his job. That reflects the need for balance. That was also the point I made to the member for South Perth about the person he spoke to. We cannot change the nature of the beast. I am absolutely certain that if the past chief executive officer of King Edward Memorial Hospital were reinstated, he would be greeted with enthusiasm by the employees of the hospital and a range of other people who have found themselves in similar circumstances. The reality of dealing with whistleblowers is not that easy. It is cute to say that the Government will look after such people when, in fact, most people will not be looked after. This Government has not looked after the two people who blew the whistle at KEMH. That is a substantial point.

Mr Kucera: Did the member say that they had not been looked after?

Mr TRENORDEN: Of course they have not been looked after by the Government. One was demoted and sent off -

Mr Kucera: The member should be careful about whom he talks. I understand that one of them is considering an action against the member. The other has been well taken care of in obtaining a new position.

Mr TRENORDEN: The minister should get his facts straight, because that is not true.

Mr Kucera: That is my understanding.

Mr TRENORDEN: As usual, the minister's understanding is very poor.

Mr Kucera: I am just advising the member because I would hate to see him mislead the House. I would also hate to see him again besmirch someone's character in this House when there is no necessity.

Mr TRENORDEN: Whose character have I besmirched in this House?

Mr Kucera: I am suggesting -

Mr TRENORDEN: Whistle, come on, whistle! Tell me. The minister is absolutely pathetic. Come out and say it; cough it up! If the minister is going to say something, he should cough it up.

Mr Kucera: The member has made statements in other places about Dr Beresford and about other people at King Edward Memorial Hospital that are blatantly untrue and ignorant. In all fairness to those people, the member is doing exactly now what this Bill is designed to protect people from.

Mr TRENORDEN: As the minister has raised the subject, we will have a good discussion about it. The Minister for Health has decided to raise the name of Dr Beresford. I was very critical of the role of the minister, and I am still very critical of his role. The report into the events at King Edward Memorial Hospital shows that there were 500 incidents over 10 years. It is very serious. What has been done about that? The same people who administered that hospital for much of that period have been put back on the administration committee to look after the hospital.

Points of Order

Mr KUCERA: This issue is not relevant to this Bill. The issues raised by the member for Avon have already been raised in other places. They go to the heart of the reputations of the people he is talking about. The issues have been well reported on; the records have been tabled in this House. This issue has no relevance to the debate before the House.

Mr JOHNSON: The comments made by the Leader of the National Party were, to a great extent, in reply to comments made by the Minister for Health. The House is dealing with the whistleblower legislation. The Leader of the National Party passionately believes that his comments relate to this Bill. By way of interjection, the Minister for Health made comments to the Leader of the National Party that generated further comments. The Minister for Health has no point of order.

Mr McRAE: Mr Acting Speaker -

Mr Birney interjected.

Mr McRAE: The member for Kalgoorlie should fix his boat and get a life! The yuppie from Kalgoorlie cannot tell whether his backside is down or his head is up. He continues to make inane and not very useful suggestions and comments in this House.

I listened to the exchange between the Minister for Health and the Leader of the National Party and it is true to say, as was said by the manager of opposition business, that the detail of another matter not directly related to this Bill came from an interjection that was welcomed by the Leader of the National Party. The minister's point is well made; it is okay to use that as an example of the application of this Bill to those circumstances, but it does not mean that we should go to the substance of that discussion and mention the detail of what is still a very contentious and sensitive matter for people who have great responsibilities in other areas in this State. I support the minister's request that the House return to the subject matter of this Bill and that the Leader of the National Party stick to that.

The ACTING SPEAKER (Mr Edwards): I do not believe there is a point of order. I ask the Leader of the National Party, in pursuing what I believe to be a relevant point, to be careful in the choice of his words.

Debate Resumed

Mr TRENORDEN: The day when members do not answer interjections will never come. The minister decided to throw in a cute interjection and thought I would not respond. If the minister does not want responses he should not make interjections. The minister is on very dangerous ground. He put into King Edward Memorial Hospital for Women a process that we will all regret - he put the old team that sank the ship back in charge of the *Bismark* or the *Titanic*.

Mr Kucera: In all fairness I must make an interjection. The gentleman the member referred to earlier was not at the hospital at the time.

Mr TRENORDEN: The minister is pathetic. The gentleman I referred to was Michael Moodie, not Bill Beresford. The minister is as thick as two bricks! Mr Acting Speaker, I had no intention of mentioning any names. His name is Michael Moodie and he was chief executive officer of KEMH -

Mr Kucera: The matter is finished as far as I am concerned. Mr Moodie was not demoted. Mr Moodie has made public statements that he is more than comfortable with the position he now occupies within the Department of Health. I suggest the member has made his point and, rather than try to besmirch people's reputations further, he should move on.

Mr TRENORDEN: Where am I besmirching people's reputations? The minister raised this matter. I have no idea whether Mr Michael Moodie -

Mr Kucera: He has made public statements to that effect.

Mr TRENORDEN: That is fine. From where I sit, he was once the CEO of KEMH, he performed certain actions, and I now understand he has a job somewhere in the south west of the State. They are the points I am making. If he is happy with his position, that is his province, not mine. If he is content doing whatever his new job is, good luck to him. However, many of the things that occurred at KEMH under the previous Government did so because he took certain courses of action and presented them to the board, and the board did not like that action. He paid the penalty for it. That was the only point I was trying to make, until the minister got cute.

Mr Day: It was certainly Michael Moodie who came forward. A number of people within the hospital had concerns as well, and they should be given due credit.

Mr TRENORDEN: That is the point I am making. Even though the minister is doing it in an obscure way, he obviously wants a KEMH that is operating properly. It is the State's only women's hospital, and we want it to be a good hospital. If people are prepared to come forward from within the hospital or the Department of Education or anywhere else, we want to encourage them to do that, but they must have some protection in the process. Will those people be given opportunities different from those that have been available through the Anti-Corruption Commission and the office of the Ombudsman? Under the current legislation, if people decide to make public interest disclosures, they are not protected. I am not saying they should be; this is just my point. I cannot see the provisions in this Bill being used in too many instances.

When the police arrest or charge an individual, it is typical to believe in the truth of the allegation. This is an area where the minister could make some comment. The legislation mentions that the information "may be true". In the past we have found whistleblowing to be a double-edged sword. In a couple of cases it has been a very good thing. However, if people are not in possession of all the information, they may find they are not in a position to comment with such passion. In the future, if a whistleblower goes public, he will not have that protection. I think that is a good thing. We support the Bill, but we have some doubts that the Bill will be very operative, because the legislation covering the ACC and the Ombudsman make it difficult for this legislation to do anything different from what happens now.

MR McGINTY (Fremantle - Attorney General) [5.25 pm]: I thank members opposite for their indications of support for this legislation, although it was less than full-bodied support from the National Party.

Mr Trenorden: Will provisions under this Bill be enacted differently from the area of the Ombudsman and the ACC?

Mr McGINTY: Yes. The thing that will make a difference for whistleblowers is that for the first time they will not be exposed to possible defamation actions. That is a very real consideration.

Mr Trenorden: If someone made a complaint to the ACC, he would still not be exposed to that action.

Mr McGINTY: People can still go to the ACC; the provisions of this legislation will not affect those people. At the moment, when talking about corruption, a limited range of options are available. People can go to the ACC with impunity, and immunity for that matter, but secrecy surrounds the issue and they are then stymied in what else they can do with the complaint. For instance, if the person is an employee in the public sector, the issue that will be important in this legislation is that, firstly, if he is in any sense victimised, he will have redress other than through the general industrial channels, such as going to the Industrial Relations Commission or lodging a complaint with the Equal Opportunity Commission or something like that. Such people will have statutory protection. More importantly, a statutory right to damages and statutory duties is also placed upon public sector staff. These are all very important changes. People who want to raise an issue of impropriety or corruption in the public sector do not currently enjoy these protections. No system is perfect and foolproof. The problem at the moment is that a whistleblower more often than not is discriminated against in his employment and has had action taken against him to his detriment. He has paid a price for whistleblowing. We are trying to set up, to the extent that we can within the law, a system that protects that person and puts him in a position of some advantage as a result of his whistleblowing, rather than absolute disadvantage.

Mr Trenorden: We see genuine individuals, who have a half or a third of the information, with the genuine belief that what they have is terrible information. In fact it is wrong, because they have only a portion of the whole picture. I think the Attorney General has seen that himself.

Mr McGINTY: Yes, regularly.

Mr Trenorden: What about the damage they cause within their own agencies and so forth when they go back?

Mr McGINTY: I take a robust view of the role of agencies in these matters. For instance, in the Department of Justice, my view is that if there is information and somebody wants that information, it ought be out in the public arena. Government departments should be far more open and robust in handling criticisms that are made of them. Information can be brought forward that might be half true or might appear to indicate a particular point of view. The job of the department is to deal with that and put forward all the relevant information. I would rather someone came forward with something he believed was true, even if it was only half the story or wrong, so that the matter could be investigated and the position set straight, rather than have the situation that has operated in some departments in which there is an element of secrecy and the department says it will not answer the question or decides it will cover the matter up a bit. This will have a very good effect on the openness and accountability of departments and the way in which they address issues.

Mr Trenorden: I hope you are right, minister. I trust that you are, and therefore the National Party will support the legislation.

Mr McGINTY: I am delighted about that. There may be people who are still victimised after the legislation comes into force, because they have blown the whistle and they believe they should be protected. As members of Parliament we will be able to tell them they have a statutory right to damages, a right not to be discriminated against in their employment, and access to courts and tribunals to deal with those matters. The member for Kingsley spoke to me a few weeks ago about a recent whistleblower, who was with her at the time. She said this person had suffered a wrong. I could not offer much joy to this person in the way of advice about which body to approach or what action to take. All members will be able to give that advice once this legislation comes into force, but at the time I found myself stymied in discussions with that individual. He did blow the whistle, and then suffered actions to his detriment as a public servant. There was not a great deal I could hold out to him as a remedy. Some people will still feel aggrieved and some will still get it wrong, but I hope a new culture comes into the public service so that when someone blows the whistle with the best of intentions, the record will at least be set straight. That will be a step forward.

I acknowledge the point raised by the member for South Perth about the title of the Bill, which will be considered immediately in consideration in detail. If he can secure support from a majority of members, the title can be changed.

Mr Pendal: Are you in any position to give any assurance over the issue I raised about the alleged deficiency in the Bill regarding the period between the complaint being made and it being substantially under investigation?

Mr McGINTY: It is the intention that, when this Bill becomes law, anyone who makes a public interest disclosure will be protected once they make such a disclosure. I am unaware of the argument that this Bill has a window of time during which no protection will be afforded to the whistleblower. I cannot see how that argument can be mounted. I would appreciate it if the member for South Perth could demonstrate where this window exists, because I would certainly wish to close it. I do not think it is there, but I would appreciate being told how such an argument could be advanced. In its broad scheme, the Bill states that anyone making a public interest disclosure is protected. It does not prescribe a particular period of time during which that protection is available.

Mr Pendal: I am certainly reassured on that matter. I would be interested in moving a review clause, under which the people who have charge of the administration of the legislation are obliged, say after a period of two years, to report to the Attorney General on how the legislation is working.

Mr McGINTY: I would be quite relaxed about that, if the member for South Perth can convince a majority of members to support the amendment. If the member can have the amendment drafted, it would be well within the spirit of the legislation. The Government wants the legislation to work. With one exception, which relates particularly to the media, the Government has cast the Bill as widely as it could. It has tried not to cast the Bill in such a way that options for obtaining redress are cut off. The Government saw more evil being created by providing protection for people who go to the media, and who subsequently find themselves without protection as a result of the damage they have caused. With that one exception, the Government has tried to pick up the recommendations of the Commission on Government and the royal commission, and has looked to legislation enacted elsewhere to make this Bill as broad and all-encompassing as possible.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clause 1: Short title -

Mr PENDAL: I move -

> Page 2, line 3 - To delete the words "*Whistleblowers Protection*" and substitute "*Public Interests Disclosure*".

I mentioned in my contribution to the second reading debate that many people would be uneasy with the connotations of the word "whistleblower". In the Australian culture, a whistleblower may be seen as someone who dobs in his or her mates, and whistleblowing may not be a particularly good or noble thing to do. However, from what the House has heard in the course of this debate, all the indications are that public interest disclosures of this kind are good and noble things because they will ultimately help public administration. That argument is a strong one. The second reason goes beyond the use of colloquialisms. The Commission on Government, a bipartisan body that reported several years ago in a rather mammoth way, made recommendations for whistleblower legislation but was insistent that the term should not be used. I suppose it could be argued that it is good to have titles of Acts that provide people with some notion of what the legislation means. However, the public interests disclosure legislation would probably be colloquially known as the whistleblowers legislation in any event. We nonetheless have an obligation to not only reflect the views of the Commission on Government but also avoid incorporating in our law colloquialisms that have no special meaning beyond that. I commend the amendment to the House.

Mrs EDWARDES: The Opposition supports the amendment. During the second reading debate the Opposition indicated that it was concerned about the title of the Bill. Although I acknowledge the points made by the member for South Perth, the Opposition believes the title is incorrect for different reasons. As I and the members for South Perth and Avon said, very little protection is provided in the Bill.

I refer again to the case I mentioned earlier and to which the Attorney General also referred. As I said during the second reading debate, I have met Mr Chris Read. All the words in this legislation will be hollow and hypocritical if the case of Chris Read is not used as an example to indicate to all members of the public service who wish to make public interest disclosures, as Mr Read did according to all the correct criteria that the Attorney General outlined, that they will not be discriminated against. If the Government is serious about giving the public service a message that a new culture will be developed and discrimination will not occur against employees who blow the whistle, an example must be set now.

This legislation will not protect Mr Read from victimisation. We will explore the relevant clause later. As I read the Bill he will have no recourse other than to say that he has been victimised as a result of blowing the whistle, unless he can prove that the victimisation occurred later. I have indicated that he must be restored to the position at the Ombudsman's office that he occupied when he blew the whistle. Mr Read was on a contract, which was renewed. However, it was not renewed after he had blown the whistle, although he had been at the Ombudsman's office for a number of years. If the Government does not ensure that that person is protected, this legislation will contain very hollow words.

The Government's commitment to whistleblower protection will be judged, I suggest, by that bottom line, although I hate to refer to a public servant who has fulfilled his duty to this State as a bottom line. Essentially, Mr Read is a recent whistleblower who is still within the system and to whom it has been suggested that he might like to consider taking the new redundancy package. Why should he? He acted in accordance with the proper processes as he knew them and as have been prescribed within this legislation.

The Attorney General will hear from the Commissioner for Public Sector Standards that nothing can be done about Mr Read and that everything that can be done is being done for him: he has been given a position within another agency and his salary is being maintained at the level he received at the Ombudsman's office. That means that the recent three per cent increase will not apply to him because his salary will be maintained until the substantive level increases to the amount he received when he was at the Ombudsman's office. If that does not disadvantage him and is not clear discrimination against him, I am not sure what the Attorney General means by "victimisation". The Commissioner for Public Sector Standards will also tell the Attorney General that, under the legislation, neither the Attorney General nor the Minister for Public Sector Management can do anything about it. However, the Attorney General can set policy.

Mr BIRNEY: I am intrigued by the comments of the member for Kingsley and I want to hear some more.

Mrs EDWARDES: A clear demonstration must be made to the public sector that individuals who disclose information will not be stigmatised. The member for South Perth referred to stigmatisation in connection with officers at the City of South Perth. A stigma attaches to people in that position unless a proper process is in place to protect them. The Government is seeking to implement that process through the code to be developed by the Commissioner for Public Sector Standards and through regulations. In the meantime the Attorney General has a strong moral obligation to ensure that Mr Read is looked after. Some resistance might be shown if the public sector is advised that within the new culture to be developed for whistleblowers in this State, whistleblowers will not be discriminated against or disadvantaged in their employment. Resistance has occurred in Mr Read's case. He is being discriminated against and a stigma is attached to him. Nobody wants him. That is not right. Anyone who suffered what that gentleman suffered would be experiencing a great deal of stress now. It beats me how he can still go to work every day for this State Government. He is not being looked after. For the Attorney General's information, Mr Read is in the public gallery. It is all right to say that a code will be developed for the future. The Attorney General indicated in response to the second reading debate that he felt that there was nothing he could offer. However, he can demonstrate to the public service that discrimination will not occur.

A way around these matters can always be found. There is now an opportunity because a new Parliamentary Commissioner has been appointed. An opportunity exists to restore this gentleman to the position he occupied before he blew the whistle and to ensure that his case is seen as an example. What other public servant would put his foot forward in the light of what has happened to Mr Read?

I strongly suggest that if the Government is serious about this whistleblowing legislation, public interest disclosure and protection of whistleblowers, the Attorney General should use Mr Read as an example to the public sector that government agencies cannot discriminate against people who do the right thing. This legislation will pave the way for the future, but we should demonstrate now that a new Government is in town and a new culture to ensure that whistleblowers will not be discriminated against.

Mr McGINTY: I will start with the amendment moved by the member for South Perth. This issue is a bit of a mixed bag in the other States and jurisdictions. The term "public interest disclosure", which is essentially what the member for South Perth has advocated be the short title of the Bill, has been used throughout the text of the Bill to describe a whistleblower. The term "whistleblower" appears in the short title and nowhere else. The reason is that we believe the term "public interest disclosure" is unlikely to assist members of the public to understand the subject of the Bill, whereas the term "whistleblower" is readily understood. I concede that the term "whistleblower" has various meanings. For some people it has a negative meaning, such as a dobber, or even a troublemaker. We certainly want to avoid that. However, for other people it has a positive connotation as a person who is prepared to fight to expose the truth. I appreciate that there is a downside to the term "whistleblower". The member for Kingsley has indicated the support of the Liberal Party for the amendment.

The relevant legislation in South Australia, Queensland and Victoria is the Whistleblowers Protection Act; in New South Wales, the Protected Disclosures Act; in the Australian Capital Territory, the Public Interest Disclosure Act; and in Tasmania, the Public Interest Disclosures Act.

Mr Pendal: You would expect that from Queensland, but not from the other States to the south.

Mr McGINTY: In the United Kingdom the relevant legislation has been incorporated into the Employment Rights Act 1996 and is the Public Interest Disclosure Act, which is close to the title that the member is proposing. In New Zealand, which the member might also use as a precedent for his argument, it is also the Public Interest Disclosure Act. The problem with the member's amendment is that he is proposing public interests disclosure, plural. In each of the other jurisdictions in which that word is used, and in the text of the Bill, it is public interest, singular.

Mr Pendal: It was typographical. It certainly was not the intention.

Mr McGINTY: If the letter "s" can be deleted, in light of the overwhelming support for the proposition that the member has advanced, I will have to succumb to his greater wisdom and agree to the amendment.

Mr PENDAL: I agree with the comment that when we talk about the public interest, we talk about an entity, and that was certainly my intention. Mr Acting Speaker, is it necessary for me to move an amendment to delete the letter "s", or is that understood to be a typographical mistake?

The ACTING SPEAKER (Mr Edwards): The member can seek leave of the House to alter his amendment by deleting the letter "s".

Mr PENDAL: I seek leave to alter the amendment by deleting the letter "s" from the word "interests".

Amendment, by leave, altered.

Mr TRENORDEN: I am in absolute shock that the Attorney General has agreed to an amendment in this House without consulting with the Greens (WA).

Mr McGinty: Perhaps we should have an adjournment!

Mr TRENORDEN: I was about to stand to make the position easier for the Attorney General, because he is so enamoured with being in dispute that I would happily oppose this amendment so that he could agree with it, but even that has not worked! I hope my sore foot is just an illusion. I am in shock.

Amendment, as altered, put and passed.

Mr McGINTY: I will reply to the member for Kingsley, and it will not be as comprehensive an answer as she would like, but I will comment on the situation that would have applied to Chris Read had this Bill been in operation at the time that he made his disclosure. Under this Bill, Mr Read would receive protection if he made a public interest disclosure to the Office of the Parliamentary Commissioner for Administrative Investigations. Under this Bill, the Commissioner for Public Sector Standards could not investigate the public interest disclosure if the public interest disclosure related to an office referred to in schedule 1 to the Parliamentary Commissioner Act 1971. I refer the member to clause 5(3)(g) of the Bill.

Mrs Edwardes: It says the commissioner or the parliamentary commissioner can investigate. If the complaint was against the parliamentary commissioner, as it was in that instance, could it be taken to the Commissioner for Public Sector Standards?

Mr McGINTY: No. Approximately 17 agencies are listed in schedule 1 to the Parliamentary Commissioner Act. Clause 5(3)(g) states that a disclosure of public interest information is made to a proper authority if, where the information relates to a public officer, it is made to the commissioner or the parliamentary commissioner, other than where it relates to one of the agencies referred to in schedule 1 of the Parliamentary Commissioner Act. In other words, the Commissioner for Public Sector Standards cannot investigate an allegation about the Ombudsman.

Mrs Edwardes: If the allegation is against the Ombudsman and only the Ombudsman can investigate the complaint, is that not a flaw?

Mr McGINTY: I am told that because of the statutory independence that is bestowed on officers such as the Ombudsman, a limit is placed on the persons to whom a public interest disclosure about a public officer can be made. If it was information about a public officer, it would need to be made to the Ombudsman. However, that would not exclude someone from going to the Anti-Corruption Commission or the police.

Sitting suspended from 6.00 to 7.00 pm

Mr McGINTY: Before the suspension, I was in the process of addressing the situation of Mr Chris Read, who was formerly employed in the Ombudsman's office. The issue was raised by the member for Kingsley. I indicated that although I would not be able to give her the comprehensive answer she wanted, I could certainly deal with a component of the issue she raised; that is, how this legislation would have impacted upon Mr Read had it been in place at the time he blew the whistle or made his public interest disclosure. I made the point that under this Bill Mr Read would receive protection if he made a public interest disclosure to the parliamentary commissioner's office. I also pointed out that the Commissioner for Public Sector Standards, being a separate office, could not investigate that public interest disclosure under this Bill because it related to the office of parliamentary commissioner, which is an office referred to in schedule 1 to the Parliamentary Commissioner Act. That is because of the operation of clause 5(3)(g) of this Bill.

I was then going to make the point that under the Bill the Auditor General could investigate a public interest disclosure against the parliamentary commissioner regarding a substantial, unauthorised or irregular use of public resources, or, indeed, the Anti-Corruption Commission, or the police could investigate if there were an allegation of an offence having been committed. Therefore, there are these other avenues, as set out in clause 5 of the Bill, that could have been pursued. In addition to that, if what happened to Mr Read was a reprisal in the terms used in this Bill, he could take that matter to the police or to the Anti-Corruption Commission because it is an offence under this legislation.

Mr Read's allegations about the human resource management issues were investigated by the Commissioner for Public Sector Standards under section 21 of the Public Sector Management Act. The ability of the Commissioner for Public Sector Standards to investigate these matters is unaffected by this Bill. The financial issues were examined by the Auditor General, and the ability of the Auditor General to investigate these matters is also unaffected by the Bill.

I know that the broader issue the member is raising is one of holding up Mr Read as an example. I am not in a position to respond positively on that issue tonight. I can say only that this is the position in which Mr Read would have found himself had this legislation been in place. The reason that I am not able to deal with the example issue is that it is not within my portfolio, and I have not been involved with the issue beyond the occasion on which the member introduced Mr Read to me. I am broadly aware from the media of the nature of the allegations and the nature of the circumstances that arose. However, I really cannot take it any further. That would be somewhat different once this Act was in operation; but of course it is not.

Mrs EDWARDES: I thank the Attorney General for that explanation. Of course, when we deal with clause 5(3), I will explore the independent agencies a little further, because one of the critical issues which will arise and which this legislation does not overcome is the age-old problem of sending people who have concerns, complaints or issues from agency to agency. The Attorney may recall that in my second reading contribution I said that in some places individuals had suggested that maybe there is a need for an overseeing body for that. I am not always in favour of creating further bodies. However, one of the bodies that comes to mind is the standing committee on which I serve at the moment; that is, the Joint Standing Committee on the Anti-Corruption Commission. Of course, it can be broader than that. Perhaps the Parliament could look at that matter in the future. One of the concerns that members of that committee have is that we often get referrals, and because there are too many agencies and organisations, those matters fall outside the lines. When people keep falling outside the lines, they can become increasingly frustrated and do not believe that the system is there for them. I will deal later with a couple of issues regarding independent agencies.

I return to the issue that there is a new culture in public sector management, for example. I acknowledge the point that the Attorney General made; that is, that he has not been involved in the rest of the matter, that it is not within his portfolio, and that until the legislation comes into force he will not have an ability to become involved. However, the Attorney General has a commitment to protect whistleblowers. As such, he could have a level of influence on the issue of policy, particularly with the Premier, who is obviously in charge of public sector management. Therefore, would the Attorney General give an undertaking to at least consider the simple issue? He does not need the whole history. The history can be summarised quickly in the context of meeting the criteria that would have been applied had this legislation been in place at the time. However, the issue is simple. Mr Read made the complaint, and it was proved correct. He did all the right things, and he has been disadvantaged in his employment. As such, the clear message back to the public sector agencies is that that is not on; that will not be the way we will do business in dealing with whistleblowers in the future. I am fearful that the wrong message will be given. With a recent whistleblower, there is the opportunity to demonstrate clearly to the public sector that these people will not be discriminated against in the future. Therefore, the Attorney General will make sure that Mr Read is looked after and that the disadvantage he currently faces will be rectified. The Public Sector Management Office will tell the Attorney General that the issue is that Mr Read is getting paid the same amount that he would have been paid if he were still in the Ombudsman's office. Two

issues are associated with that: firstly, maintenance does not allow him to receive any increases until his level increases to the level under which he was employed at the Ombudsman's office; that is a disadvantage. Secondly, he is still being discriminated against. If he did nothing wrong in his position with the Ombudsman's office, from which the allegations were made, why has he been removed? Why has he not been reinstated in his former position? That is a critical issue for any whistleblower.

Mr Pendal: That is a similar position to my constituent in South Perth.

Mrs EDWARDES: Absolutely. The City of South Perth should re-employ that gentleman at the first opportunity.

Mr PENDAL: I am very interested to hear the member for Kingsley continue.

Mrs EDWARDES: As I have pointed out previously, the Police Service has put a very good system in place to deal with whistleblowers. One of the key criteria of its system is that the officer must stay in the station in which the allegations were made. One would think that in that culture it would be far worse for a whistleblower to work in that environment and he would want to be removed. The Police Service has made that a clear principle. However, if the individual is put at risk that is not the case. Whistleblowers should be kept in the position in the agency in which they are employed. They will always be discriminated against if they are physically removed from their environment. Are whistleblowers removed from their workplaces for their good health, because the agency does not want them, or because there is a stigma attached to being a whistleblower? The other agencies would not want those people either. If the Ombudsman's office does not want Mr Read, who else will have him? Why would people put their hand up and disclose matters in the public interest if they are going to be discriminated against? It is a matter of fairness.

The Government has introduced this legislation. In its media releases, the Attorney General's second reading speech and throughout this legislation it has indicated that the legislation is there to protect whistleblowers. However, that will not happen. The Attorney General has an opportunity to demonstrate to the public service, which is a very close-knit organisation, that he will protect whistleblowers. The public service is colloquially known as a boys' club, which includes the girls. The peers with whom they have come through the system work very closely together. If a whistleblower breaks that bond, telephone calls are quickly made from one person to another. Who wants a whistleblower in their agency? We do. As the Attorney General has said in a media release, it is about accountable government. If the Government is clear about demonstrating that the culture in the public service has changed, it now has the opportunity to do so.

Mr McGINTY: I will respond to the two issues raised by the member for Kingsley. Firstly, I will refer to new agencies. When we were preparing this legislation, I was keen to not create yet another public sector management body to deal with public interest disclosure matters. Enough agencies around the place perform related functions, whether it is the Public Sector Standards Commissioner, the Anti-Corruption Commission, the Ombudsman and the like. The Government examined existing agencies that could have the functions in this Act added to them. At first, we agreed that the Commissioner for Public Sector Standards was the best body to monitor compliance and also to assist public authorities and officers to comply with the Act. We then thought that it would be better to give people a range of options for the lodgment of complaints or disclosures. Partly for cost reasons and partly for duplication reasons we did not want to set up an office of whistleblowing or public interest disclosure. Other bodies can fulfil those functions. That is the approach we adopted.

Secondly, I do not feel that I am sufficiently across the detail in the case involving Chris Read, beyond what I have read in the media and seen generally, to be able to usefully comment on the message that surrounds his treatment. The message the Government wants to send out to the public sector is that whistleblowing or making public interest disclosures is to be encouraged in the public interest. Even if, as has been mentioned earlier, people who make those disclosures are not aware of all the facts or are wrong, we should encourage a greater attitude of disclosure and openness in the public sector. If an incident were to occur in the future like that to which the member referred, I would seek to invoke all the powers, provisions and protection of this legislation. That would demonstrate that a new approach is now in place in the public sector in Western Australia, and the old boys' club approach, as the member for Kingsley described it, is no longer acceptable.

Mrs Edwardes: Would you undertake to investigate what is possible in Mr Read's case, particularly given the Government's commitment to protect whistleblowers?

Mr McGINTY: I can make those inquiries to find out whether it is appropriate to reopen the matter. I undertake to look at whether it is appropriate and possible to do that. However, his case would need to be raised in the context of the existing legislative framework. I think that the member understands that it cannot be raised in the context of the future legislation, otherwise that would make this Bill retrospective.

Mrs Edwardes: I do understand that. This is a simple issue. If the Attorney General is serious about non-discrimination and not affecting somebody's employment opportunities, Mr Read ought to be reinstated in his old position. The boys' club says that that is not possible. That issue ought to be tested.

Mr McGINTY: The member for Kingsley put a range of matters on record this evening. I will take those on board and investigate them further to find out what appropriate action can be taken regarding this matter.

Clause, as amended, put and passed.

Clause 2: Commencement -

Mrs EDWARDES: Does the Attorney General anticipate why some clauses should come into operation later than others?

Mr McGINTY: We have nothing in mind. It is not an uncommon provision. I cannot think of any reason why the whole Act would not come into effect on the same day.

Clause put and passed.

Clause 3: Interpretation -

Mrs EDWARDES: In passing, I mention the definition of "detrimental action", which includes adverse treatment in relation to a person's career. My question relates to the definition of "public authority".

Mr McGinty: Was that made as a reference to Chris Read?

Mrs EDWARDES: Yes. This entire legislation is intended to protect someone in that situation. Paragraph (c) of "public authority" refers to "a non-SES organisation within the meaning of that term in section 3(1) of the *Public Sector Management Act 1994*." Section 3(1) of the Public Sector Management Act does not specifically detail the entities that are included within the definition of an SES organisation. It states -

> **"non-SES organisation"** means entity which consists of -
>
> (a) a body, whether corporate or unincorporate, or the holder of an office, post or position, being a body or office, post or position that is established or continued for a public purpose under a written law; and
>
> (b) persons employed by or for the purposes of that body or holder under that written law or another written law,
>
> and which neither is nor includes -
>
> (c) an SES organisation; or
>
> (d) an entity specified in column 2 of Schedule 1;

Column 2 of schedule 1 states -

> A department of the staff of Parliament referred to in the *Parliamentary and Electorate Staff (Employment) Act 1992*

That is very important, because the Government's clause notes state that a public authority is defined by reference to specific entities, including public sector departments; that is, senior executive service organisations and non-SES organisations, such as electorate offices. This legislation refers to the Parliament and provides that a complaint against a member of Parliament must be made to the presiding officer. As the presiding officer is independent, he is treated like the Chief Justice, and is not required to investigate or report on the complaint or advise the complainant. There are specific exclusions relating to the way in which complaints against members of Parliament shall be dealt with. An electorate office is referred to as a non-SES organisation. How does that fit in with the rest of the requirements, particularly when a department of Parliament, referred to in the Parliamentary and Electorate Staff (Employment) Act, is specifically included in the Public Sector Management Act as an entity that is not an SES organisation? Does that exclude electorate staff? Who in an electorate office will be required to report to the Commissioner for Public Sector Standards on the number of public interest disclosures that have been made, about which he must report to the Parliament?

Mr McGINTY: I am not sure whether this information will answer the member's very technical question, the ramifications of which I did not fully understand. The clause notes were provided to the House on 10 April. I subsequently wrote to the Speaker, drawing his attention to an error in those clause notes, and requesting, in accordance with Legislative Assembly Standing Order No 156, that two alterations be made to the those notes. The first change was in relation to the title of the Bill, and was to delete "2001" and replace it with "2002", which is of no consequence whatsoever. The second change was to the notes on clause 3. I asked that the clause

notes relating to the definition of a public authority be amended by deleting the words "electorate offices, the Police Force, courts, tribunals universities and local government authorities" and substituting "the Building and Construction Industry Training Board". Does that help the member?

Mrs Edwardes: That certainly halves the time needed for the consideration in detail debate! Is the Attorney General saying that in the part of the clause notes which spells out what is a non-SES organisation, the words "electorate offices, the Police Force, courts, tribunals, universities and local government authorities" have been deleted and replaced by the words "the Building and Construction Industry Training Board"?

Mr McGINTY: That is in the clause notes.

Mrs Edwardes: Yes.

Mr McGINTY: That was an amendment to the part of the clause notes that states -

> Clause 3 defines the terms used in the Bill. Of particular note are the following terms:
>
> **"public authority**" - The definition of public authorities is defined by reference to specific entities including: public sector departments; SES organisations (such as TAFE Colleges, the Disability Services Commission, Government Employees Superannuation Board, and the Fire and Emergency Services Board); non SES organizations . . .

It then referred to organisations such as electorate offices, the Police Force, courts, tribunals, universities and local government authorities. That was the original definition of a non-SES organisation.

Mrs Edwardes: It did not help to clarify what was a non-SES organisation.

Mr McGINTY: That is right. I refer briefly to a note that was provided to me about this issue. I am happy to provide it to the member if she thinks it would be of assistance. After the Bill was drafted, my office asked the Department of Justice whether electorate offices, the Police Force, courts, tribunals, universities and local government authorities would be caught by the Whistleblowers Protection Bill 2002. The letter in reply states -

> For the reasons set out below, the answer is yes in respect of the Police Force, courts, tribunals, universities and local government authorities. Electorate offices probably do not come within the definition of "public authorities", and if so, those offices cannot investigate public interest disclosures. However, electorate officers come within the definition of "public officer", therefore, can be the subject of a public interest disclosure which can be investigated by, for example, the Commissioner for Public Sector Standards or the Parliamentary Commissioner.
>
> Under clause 5(1) "any person may make an appropriate disclosure of public interest information to a proper authority".
>
> There are two aspects:
>
> (1) A Proper authority for a public authority is the occupant of a specified position within that authority. That is, where a PID relates to a matter falling within responsibility of a public authority, then the PID can be made to a person whom the Chief Executive Officer of the public authority has designated to receive public interest disclosures - clause 5(3)(h).

The word "whom" should read "who"; however, that is a grammatical matter. I continue -

> Public authority is defined in clause 3.
>
> - not within paragraph (c) of that definition are: electoral offices, the Police force, courts, tribunals, universities and local government authorities. However, as noted below, other than electorate offices, all of these bodies fall within the definition of public authority.
> - within paragraph (d) of that definition are local government authorities.

Mrs EDWARDES: I would like to hear the rest of the Attorney General's comments.

Mr McGINTY: The letter continues -

> - within paragraph (e) of that definition (a body that is established or continued for a public purpose under a written law) are courts, police, universities and tribunals.

The letter then sets out the definitions of a public authority, public officer and public sector contractor. I will give the member a copy of this letter. It is very technical in its nature, and it might throw some light on the matter.

Mrs Edwardes: Who employs electorate officers? If I remember rightly, members' staff are split between different bodies. Research officers come under public sector management and the Department of the Premier and Cabinet, but electorate office staff come through Parliament House.

Mr McGINTY: I am not sure.

Mrs Edwardes: If the Commissioner for Public Sector Standards were to investigate electorate officers employed by the Parliament, it could raise an issue about the Executive and the Parliament. That should be investigated in the future. Research officers are dealt with differently. I never worked out if there was a reason for that.

Mr McGINTY: If anything, this Bill errs on the side of ensuring that they are accountable.

Mrs Edwardes: Yes; there is a place to go.

Mr McGINTY: Yes. Technically, I am not sure. We have tried to include people rather than to exclude them on the basis of some technicality, particularly in relation to electorate officers. An allegation of improper behaviour should be the subject of whistleblowing. I was going to say that perhaps a greater standard should apply the closer we get to political operations. However, I should not say that. We should be very rigorous.

Mrs EDWARDES: I refer the Attorney General to the definition of "public interest information". Paragraph (e) states -

> a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act* . . .

Why has the Attorney General singled out that section of the Parliamentary Commissioner Act in that instance when he has not singled out some of the other independent agencies? In particular, I am thinking about the Anti-Corruption Commission and/or some of the other independent agencies. Section 14 deals with the matters subject to investigation. However, those powers are protected all the way through the Bill. If they are covered by a law other than this proposed Act, whatever occurs under that other written law overrides what is contained within the whistleblowers legislation. Does that make a difference to this proposition?

Mr McGINTY: No. The inclusion of paragraph (e) in the definition of "public interest information" is to ensure that matters covered by section 14 of the Parliamentary Commissioner Act come within the ambit of public interest information about which a disclosure can be made rather than to exclude it.

Mrs Edwardes: If the Ombudsman is investigating it by virtue of section 14 - that is, another written law - does the whistleblowers legislation not apply?

Mr McGINTY: We are keen to avoid duplication. Section 14 of the Parliamentary Commissioner Act states -

> . . . the Commissioner shall investigate any decision or recommendation made, or any Act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any department or authority . . .

Obviously, the jurisdiction of the parliamentary commissioner is very broad. This was to ensure that all those matters that could be investigated by the Ombudsman also are brought within the ambit of this Bill. It is intended that there not be a duty on the Ombudsman to investigate those matters that he is already under a duty to investigate, so that no confusion arises out of that duplication of function.

Mrs Edwardes: That is the point of my question. Why have you included section 14 and not some of the other sections or powers of some of the other bodies to investigate matters within the definition of "public interest information"? A clear example is the ACC, which deals with matters of corruption. That broadly rounds it off. There are other matters that are within his power.

Mr McGINTY: It is thought that that is already covered by the preceding paragraphs. There is no intention to exclude anything that fits within the jurisdiction of those bodies. Paragraphs (a), (b) and (c) of the definition of "public interest information" are pretty much a summary of the jurisdiction of the Anti-Corruption Commission. The belief is that that is already adequately covered. However, the jurisdiction of the Ombudsman is considerably broader than that and is along the lines of section 14(1) of the Parliamentary Commissioner Act, which I have just read. We wanted to ensure that the Bill is more inclusive and allowed the commissioner to investigate the widest possible range of matters about which there could be a public interest disclosure.

Mrs Edwardes: For example, it does not need to be something that the Ombudsman needs to investigate by virtue of section 14. However, if it is an administrative matter - that is, when they have or have not done

something in another agency - that also can be the subject of public interest information to be investigated by the other agency in the first place without having to go back to the Ombudsman.

Mr McGINTY: I refer the member also to clause 12 of the Bill, under the heading "Obligations under this Act of certain persons limited", which provides -

> (1) The Anti-Corruption Commission and the Parliamentary Commissioner are not required to comply with sections 8(1), 9 and 10 if the disclosure relates to a matter that it is a function of the Anti-Corruption Commission or the Parliamentary Commissioner to investigate . . .

Again, that is for the purpose that I indicated earlier.

Mrs EDWARDES: I refer to the definition of "public sector contractor", which includes persons who contract with the agency to supply goods and/or services or to perform a public function. It would include any subcontractor of the main contractor or any employee of the main contractor and/or the subcontractor. Paragraph (k) of the previous definition of "public officer" is a catch-all and states "any other person holding office under the State of Western Australia". Last year, the Auditor General, in investigating the Department of Commerce and Trade, was quite critical of the way it had employed contractors to perform a public function. Essentially, they were being treated as public servants when in fact they were not. I am ensuring that between this section and/or paragraph (k), those people will be totally caught within this legislation.

Mr McGINTY: The intention very clearly was to cast the net as wide as possible, not only for what can be the subject of a public interest disclosure and to whom a public interest disclosure might be made, but also in the definition of "public sector contractor". The intention was to pick up those elements. The legislation has been deliberately drafted in the broader sense rather than in the narrower sense.

Mrs EDWARDES: I refer the Attorney General to subclause (2), which deals with regulations. It states -

> The regulations made for the purpose of paragraph (g) of the definition of "public authority" in subsection (1) can only declare a body . . . to be a public authority if -
>
> (b) . . .
>
> (iii) a body or the holder of an office declared by the regulations to be a public authority.

Who are we anticipating that to be?

Mr McGINTY: It is intended as a catch-all. There is nothing specifically in mind.

Clause put and passed.

Clause 4 put and passed.

Clause 5: Public interest disclosure -

Mrs EDWARDES: I wish to go through clause 5(3) in some detail to demonstrate that there will be either gaps or no gaps in the legislation. All members of Parliament have been the subject of some level of frustration for people with complaints because the members may know to which particular agency the complaint should be directed. The administration of public interest issues can vary and the problems may relate to inappropriate use of resources etc, which would fall within the Auditor General's responsibility. Human resource issues would be covered by the Public Sector Management Act. To which independent agency does a complainant go with regard to the administration and human resource issues relating to, say, the Anti-Corruption Commission? Does that person go to the ACC-authorised officer first and foremost, or straight to the Commissioner for Public Sector Standards?

With regard to the issue involving the Ombudsman's office, inappropriate use of contractors is clearly an audit matter. If the complaint were against the Ombudsman, the appropriate person to approach would be the Auditor General. If it is a human resource matter, given the Attorney General's previous comments, does that limit any complainant to the Ombudsman's office because it is an independent office, or can that person go to the Commissioner for Public Sector Standards? If it is a criminal offence matter they can obviously go to the ACC or the police, but these are grey areas.

Some very unhappy people will fall outside the guidelines in clause 5(3). It is not within the ACC's power, they will be restricted from going to the Commissioner for Public Sector Standards, and the matter certainly falls outside the Auditor General's jurisdiction. What will happen if it is a complaint against the Auditor General himself? To whom will that person complain if it is a matter of inappropriate use of funds or resources at the agency? Normally that would be an Auditor General's function. To whom will they go if the Government is

trying to retain the independent status of that agency? If it is a human resource matter and a complaint directly against the Auditor General, people are restricted from going to the Commissioner for Public Sector Standards. To whom will those people go? There appear to be some gaps in the attempt to protect the independent nature of some of those agencies, which will potentially result in some very unhappy people.

Mr McGINTY: I do not think there are gaps. I am interested to know where the member thinks they might be. It is certainly not the intention to create gaps through which some whistleblowers or people making public interest disclosures might fall. The general proposition is that they would need to categorise the nature of the public interest disclosure or the subject matter. Under subclause (3)(a), if it is an offence under written law, they can go to the police or to the Anti-Corruption Commission, in addition to the agency in question. From the point of view of drafting we should have started with paragraph (h), which states that where the information relates to a public authority, it should be taken to that public authority first and the others should be alternatives. That is an oddity of the drafting.

Perhaps we could start with the proposition that it should be taken to the agency about which the complaint is made as the first step, and the remainder are alternatives to that, depending upon the way in which the public interest disclosure is categorised. If it is an offence under written law, it should go to the police or to the ACC, and if it relates to matters such as substantial unauthorised or irregular use or substantial mismanagement of public resources it should go to the Auditor General.

Mrs Edwardes: What if it is a complaint by a public officer or any person about the Auditor General's misuse of public resources? To whom do they go?

Mr McGINTY: An option is the Auditor General.

Mrs Edwardes: It is a complaint about the Auditor General. If they get no satisfaction, where do they go?

Mr McGINTY: It depends. If it is not an offence under a written law, that would count out going to the police or the ACC. Paragraph (c) provides that if it is a matter that can be investigated under section 14 of the Parliamentary Commissioner Act, they can go to the Parliamentary Commissioner. Section 14 of the Parliamentary Commissioner Act is cast in very broad terms. It relates to most issues about which people would want to make a public interest disclosure. Section 14 "relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any department or authority", which is extremely broad.

Mrs Edwardes: If it covers the sorts of issues that would go ordinarily to the Auditor General, what about those that would ordinarily go to the Commissioner for Public Sector Standards; that is, human resource issues? Does section 14(1) cover independent agencies as well?

Mr McGINTY: Will the member please rephrase that?

Mrs Edwardes: A complaint is made against the Auditor General for the misuse of public resources, which could under section 14 be referred to the Ombudsman. What if it is a human resource issue dealing with members of staff in an inappropriate way or not following proper processes? The Attorney General is saying people should go to the Auditor General, but if the complaint is against the Auditor General himself to whom do they go? I understand they cannot go to the Commissioner for Public Sector Standards. Is section 14 broad enough to allow the Ombudsman to investigate that type of behaviour?

Mr McGINTY: A matter involving human resources practices in the Auditor General's department can be raised only with the Auditor General. There is no other broad class of persons involved other than for which paragraph (g) provides, which is of no immediate use. It provides that, in a general sense, if the information relates to a public officer, disclosure can be made to the Commissioner for Public Sector Standards or the Parliamentary Commissioner. Of course that would be subject to exclusion of the independent agencies that are referred to in schedule 1 of the Parliamentary Commissioner Act, of which there are 17. They are essentially the bodies that have statutory independence. Their independence is enshrined in this legislation under the provision that does not allow other agencies to investigate them in the same way as a complaint made about a judicial officer can be made to the Chief Justice, and I suspect no-one else, because of the independence attached to that officer. It is a balancing exercise to respect the status of those bodies so as not to impinge on their independence, but to provide at least an avenue in which a grievance can be raised or a public interest disclosure can be made without compromising their independence.

Mrs EDWARDES: Those are the gaps to which I referred. Although it is in connection with the independent agencies, we cannot be so naive as to think that complaints of some nature would not be made against them. Chris Read's complaint against the Ombudsman is a current example. The Auditor General's office is not the only office in which a complaint could be made; the same circumstances applied in the office of the

Parliamentary Commissioner. In the case of mismanagement or misuse of public resources a complaint could be made to the Auditor General. With a human resource issue there is nowhere to go.

Mr McGinty: It is not a matter of having nowhere to go; there is no independent alternative.

Mrs EDWARDES: Yes. If a direct complaint is made against an individual, what sort of independence or arbitrary approach can be made? This highlights gaps in the legislation, particularly for independent agencies, and why I suggested that somewhere along the line a separate body should have oversight, without the need to create a new body. The independent agencies are generally those that report to the Parliament. The Parliament could therefore be that body, although the Parliament does not have the expertise or resources to investigate human resource matters. It could be an overseeing body, but not an investigative body. It could be difficult for Parliament to assume that role. That may be one of the issues dealt with in a review if one were conducted in a couple of years. I do not know how often that oversight would be required. Let us hope its requirement would be very rare. However, potential exists for those gaps.

Does paragraph (i) refer to the previous clause as a catch-all phrase?

Mr McGinty: Yes.

Mrs EDWARDES: I refer to subclause 4. I gather that if the event occurred before this legislation was enacted there could be public interest disclosure and all the provisions of the Act would apply. I take it that the legislation is not retrospective when public interest disclosure occurs prior to the implementation of the Act; in other words, the event itself is covered, but not the actual public interest disclosure.

Mr McGINTY: The member for Kingsley is correct in relation to subclause (4). We have sought to make the public interest disclosure the crucial element. If that occurred prior to the operation of the Act, the Act could not be used in those circumstances. However, for more recent maladministration or matters about which the whistle should be blown, we wanted to provide an incentive for people to come forward, even though the subject of the whistleblowing occurred before the Act came into operation, in the knowledge that their public interest disclosure would attract the protection of the Act. That is sound from a public policy perspective. I do not think there will be too many revelations about what happened 20 or 30 years ago. However, there might be a few revelations about what happened in the past 12 months or the eight years preceding that.

Clause put and passed.

Clause 6: Liability of person disclosing unaffected -

Mrs EDWARDES: The clause notes clarify that if the whistleblower is involved in improper conduct that is the subject of the disclosure, the making of the disclosure will not affect the whistleblower's liability. However, the word liability could confuse the issue. It does not mean that this clause necessarily refers to an obligation – that is, a liability - to carry out an action, completion of a contract or whatever, which is the subject of the disclosure. It could be read in isolation from the clause notes and interpreted along those lines, although a later clause provides for an obligation to stop any action that is the subject of a particular public interest disclosure. Will the Attorney General clarify what is intended with this clause?

Mr McGINTY: Clause 6 is not worded in the way in which I would have worded it; nonetheless, its intention is perfectly clear. If, for instance, a public servant stole money and blew the whistle on himself, that would not relieve him of criminal liability for theft. People will not be able to use this Act to gain criminal or civil immunity on the subject matter that they are disclosing. Their disclosure will have immunity associated with it, but not the subject matter. That is the crucial distinction. When I first read the subclause I thought that we were trying to relieve whistleblowers of liability attached to their disclosure. However, this will not remove liability from the subject matter of the disclosure if they are involved in it themselves. If they were to make a defamatory statement, steal money or behave corruptly, a disclosure will not assist them to avoid liability for that.

Clause 6 is not intended to remove liability for the act itself. However, later provisions of the legislation remove liability that might otherwise attach to the act of disclosure.

Clause put and passed.

Clause 7: Interpretation -

Mrs EDWARDES: We are now dealing with division 2 of the Bill, which is headed "Obligations of a person to whom a disclosure is made". Clause 7 states that -

> **"proper authority"** means a person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3), except that it does not include the Chief Justice or the Presiding Officer of a House of Parliament.

Why has the Attorney General decided that those two officers shall be excluded from the obligation to investigate, notify and report? Some people will be very unhappy if they have made such a disclosure but they have not heard back from the office holder and there has been no follow up or notification. We are likely to receive complaints ourselves from persons who believe their complaints have not been listened to. Obviously we are not talking about people who are unhappy with a particular decision by the Chief Justice. That is not a matter of public interest information. However, there may be other matters that fall within the definition of public interest information that it is in the public interest to investigate.

Mr McGINTY: The answer lies in a matter that we have already debated to a certain degree. One of the balances that is sought to be achieved in this legislation is the retention of the statutory independence and integrity of particular bodies. We do not want this legislation to give power to the Executive to intrude into the independence and conduct of certain of our institutions. The head of the legislature and the head of the judiciary are at the top of the hierarchy of those institutions. To give an example, a number of years ago in a former life I was very concerned that because of the independence of the Parliament, employees of the Parliament could not be the subject of an award of the Industrial Relations Commission. It seemed to me quite unfair that employees of the Parliament could not receive the same benefits of industrial regulation as other employees. It is the same concept, but it is taking the matter somewhat further, to place an obligation on the Presiding Officer of a House of Parliament to submit to certain requirements of the law with regard to public interest disclosure. On the one hand it is a matter of the rights of whistleblowers, and on the other hand it is a matter of the independence of those positions. It has been a difficult balancing exercise. However, we believe that the head of the judiciary and the head of the legislature should be exempt from the provisions of this legislation in order to honour their statutory and constitutional independence from the Executive. That is the basis for that decision. Other agencies that have been set up under statute have been given a measure of independence, but not as profoundly as those two bodies. It is a question of where do we draw the line. It may be that with the passage of time, in the same way that the employees of Parliament have become subject to industrial regulation and the Parliament has given up its independence in that matter, the Presiding Officer of a House of Parliament may also become subject to these provisions for the disclosure of public interest information.

Mrs Edwardes: If the obligation to investigate, notify and report was not carried out and a complaint was made to you, what would you do?

Mr McGINTY: There are often ways in which informal processes can come into play to ensure a just and equitable result. I cannot take it much further than that at this stage. The member would be aware that matters in respect of the head of the judiciary and the head of the legislature can sometimes be dealt with on an informal basis. However, it would be improper to deal with them on a statutory basis.

Clause put and passed.

Clause 8: Obligation to carry out investigation -

Mrs EDWARDES: Subsection (3) states -

> A proper authority that refuses to investigate, or discontinues the investigation of, a matter raised by a disclosure must give the person who made the disclosure the reason for its refusal.

If a person has made a proper disclosure to the proper authority under the legislation and the authority has either refused to investigate or has discontinued the investigation, where can that person then go? That person may have the opportunity to go to one of the other independent agencies, or to the Commissioner for Public Sector Standards. However, there may be nowhere else for that person to go. That is a potential flaw in the legislation and is likely to cause some frustration for people who believe they have raised a proper matter to be investigated.

Mr McGINTY: It is important to bear in mind the total context of clause 8. Subclause (1) places on the public authority an obligation to investigate or cause to be investigated the information disclosed to it. Subclause (2) provides limited circumstances in which a public authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the disclosure; namely, if it considers that the matter is trivial or frivolous; the disclosure is made vexatiously; there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter; or the matter is being or has been adequately or properly investigated by another person to whom an appropriate disclosure of public interest information has been made. A department cannot refuse to investigate, or discontinue the investigation of, a matter raised by the disclosure. It has a statutory imperative to investigate it, unless one of those four reasons applies. Therefore, if one of those four reasons is given to a complainant or to a public interest disclosure person, I guess that person, if he wanted to, could take the matter outside the ambit of this legislation in terms of that disclosure. However, we have provided only limited grounds on which that person can be advised that the matter will not be investigated or that the investigation will be discontinued.

Clause put and passed.

Clause 9 put and passed.

Clause 10: Informant to be notified of action taken -

Mrs EDWARDES: I refer the Attorney General to clause 10(2), which states -

> A person who has made an appropriate disclosure of public interest information under this Act may request the person to whom the disclosure was made to provide a report on progress on dealing with the matter in relation to which the disclosure was made.

No time frame is mentioned. Under subclause (1), the person who is the recipient of the public interest information must, not more than three months after the disclosure is made, notify the person who made the disclosure of the action taken or proposed to be taken in relation to the disclosure. Under subclause (2), does the Attorney anticipate that that will be at any time between the time when the disclosure is made and the three months? I am at a loss to know why that subclause has been inserted, when there is a tight time frame of three months in any event. What happens if the three month time frame is not met? The person can request a progress report, but there is no identification in subclause (2) of what the time frame is likely to be. Is it before or after three months?

Mr McGINTY: Subclause (1) provides that the person who made the public interest disclosure must be notified within three months of the course of action taken or proposed to be taken in relation to that disclosure. As the member rightly indicated, subclause (2) goes on to say that the whistleblower, if the member for South Perth does not mind my continuing to use the phrase in a shorthand sense, can at any time before or after the three months - because it is not limited as to time - make a request to be provided with a report on progress.

I will give a recent example of a matter that featured fairly prominently in the media. It affected a number of prison officers who were working in the hospital at either Casuarina Prison or Hakea Prison. Allegations of improper behaviour were referred to an unnamed investigatory body. I took the action of ensuring that they were referred to that body, and I was keen to know what was happening. It is now many months since those allegations were referred to that body. Although I was not the whistleblower, I passed on the information to that body, and I certainly would have appreciated being kept informed of what had happened. In recent days, I have been informed that of the 30 specific allegations that were raised, 20 have been dismissed for lack of evidence and 10 are subject to ongoing investigations.

In that same sense, it is intended that at any time someone can request an up-to-date report on where things are up to. We have left it that way so that it is obvious that the intent of the legislation is that a request can be made. We have not included an obligation to accede to it. However, it is clear that the purpose and the intent is to keep someone informed, particularly a person who wants to be informed and who has blown the whistle. That is the intent. It is really an enabling provision or something to draw people's attention to the fact that there is a duty to keep informed those people who have been whistleblowers. Again, it is part of the support for whistleblowers, which has not been a feature of our system of government in the past.

Clause put and passed.

Clause 11: Limitation on notification of informant -

Mrs EDWARDES: Clause 11(2) uses the term "To avoid doubt". That term obviously relates to subclause (1) whereby, in any notification or report, there will not be anything that will adversely affect any person's safety, the investigation of an offence, or any other matter that requires confidentiality. Subclause (2) states -

> To avoid doubt, it is declared that information that section 54 of the *Anti-Corruption Commission Act 1988* prevents a person from publishing is not to be given or disclosed under section 10.

It is the use of the words "To avoid doubt" that concerns me. I thought that section 54 of the Anti-Corruption Commission Act stood alone in the context of what is referred to in subclause (1).

Mr McGINTY: Clause 11(2) is an unusual declaratory clause - one does not see terribly many of them - so that there will not be any argument in the future about the interaction of the Anti-Corruption Commission Act and the proposed Public Interest Disclosure Act. When there is a duty to provide to the whistleblower a report on action taken or proposed to be taken in relation to the disclosure, clause 11(2) simply makes it clear that information that is prevented from being published under section 54 of the Anti-Corruption Commission Act is not to be given or disclosed under section 10.

Mrs Edwardes: I do not have section 54 with me.

Mr McGINTY: Section 54 of the Anti-Corruption Commission Act is headed "Restriction on publication of certain information or allegations". This section gives rise to the use of the euphemism "an unnamed investigatory body" because it provides -

> . . . a person shall not publish or cause to be published in any newspaper or other written publication or by radio or television -
>
> (a) the fact that the Commission -

That is the Anti-Corruption Commission -

> has received or initiated; or
>
> (b) any details of,
>
> any information or allegation . . . unless that fact or those details -
>
> (c) is or are so published; or
>
> (d) has or have already been publicly disclosed,
>
> under, or in connection with the execution of, this Act.

Essentially, the fact that a complaint has been made, and any details of that complaint, cannot be published in the media.

Mrs Edwardes: Are we extending what has been referred to in section 54 to any complaint to an independent agency or authority, or are we still limiting clause 11 to just the ACC?

Mr McGINTY: To just the ACC is the way in which it is worded. I will read out the opening part of section 54 in its entirety. It states -

> Subject to subsection (2), a person shall not publish or cause to publish in any newspaper or other written publication or by radio or television -
>
> (a) the fact that the commission has received or initiated; or
>
> (b) any details of,
>
> any information or allegation referred to in section 13(1) . . .

Information that has been received by the commission is the controlling criteria. That means that no obligation on the Anti-Corruption Commission will arise out of its duty to notify a complainant or an informant of the progress that is being made. To the extent that the Anti-Corruption Commission is currently protected by section 54 of the Act, that protection will remain in place.

Clause put and passed.

Clauses 12 and 13 put and passed.

Clause 14: Reprisal an offence -

Mrs EDWARDES: Under this clause, a person must not take or threaten to take detrimental action against another because anyone has made, or intends to make, a disclosure of public interest information under the Act. The Government has provided a penalty of $20 000 or imprisonment for two years for that offence. Given some of the penalties that have been imposed in previous legislation, the Attorney General must regard this as a serious financial penalty.

The Attorney General might think that I am being repetitive. Again, I refer to the issue of Chris Read. The Attorney General regards that as a serious matter. An element of detrimental action is involved in that case; therefore, it must be taken seriously and must be dealt with in that light. To draw a line in the sand while there is an existing case that could be considered conflicts with where the legislation will go in the future.

Clause put and passed.

Clause 15: Remedies for acts of victimisation -

Mrs EDWARDES: This legislation provides that a whistleblower can take a tort action against a perpetrator of an act of victimisation or an action could be taken for an act that might be unlawful under section 67 of the Equal Opportunity Act, which is also an act of victimisation. However, a victim can do only one or the other. A civil action of tort cannot be taken as well as an action under the Equal Opportunity Act. If a person misses out under the Equal Opportunity Act, he cannot claim a tort action in the civil courts. Therefore, the action taken by individuals who find themselves the victims of reprisals would depend upon the likely outcome. Although it is nice to potentially have an opportunity to take a tort action, the option of going to the Equal Opportunity

Commission is and has always been there. All the whistleblowers that I have spoken to over the years have told me that their actions have cost them money. However, they do not want their money back; they want to be reinstated to the positions they were in before they blew the whistle. The Attorney General raised this matter in the second reading debate. Whistleblowers do not want to take tort actions or to have to go to another tribunal to seek compensation for the acts of victimisation. Generally, they want to be reinstated to the same positions they were in before they blew the whistle, and they have a right to that.

Mr McGINTY: If successful, the option of suing in tort will result in an award of damages. The alternative is to use the mediation facilities under the Equal Opportunity Act with a view to redressing the loss of employment, career and things of that nature. For people who want a damages payment and to then move on, taking the matter to a court and suing under a tort of victimisation -

Mrs Edwardes: You will go down in the history books!

Mr McGINTY: Does the member think so? For creating a new one?

Mrs Edwardes: Yes.

Mr McGINTY: Not many people, other than common law judges, have done that. It is not often done by statute.

I urge people who are interested in securing their employment and redressing the wrongs that have been done in their employment so that they can return to work to use the equal opportunity remedy rather than a civil remedy. That avenue is more likely to result in an order that takes everything into account.

Mrs EDWARDES: Under subclause (6), it is not possible to commence a tort action for an act of victimisation that occurred before the commencement of the Act, although the Equal Opportunity Commission is still open to people who have suffered victimisation prior to the commencement of this Act.

Mr McGinty: Only if it were one of the specifications in the Equal Opportunity Act.

Clause put and passed.

Clause 16: Confidentiality -

Mrs EDWARDES: Members on both sides of this House have raised concerns about this clause, and it was again referred to today by the Leader of the National Party. Will the Attorney General outline what is meant by clause 16?

Mr McGINTY: I will endeavour to do that. Again, as in so much of this Bill, there is a need to balance the rights of the whistleblower and the rights of the person against whom the whistle is blown. Also, the independence of certain institutions of government, including the judiciary, the Legislature and the like, must be balanced against the rights of people who want to make public interest disclosures. A similar balancing act occurs in respect of confidentiality because it is often destructive of the interests of the whistleblower to have his identity made known. Clause 16 tries to protect the identity of the whistleblower and it provides that -

> A person must not make a disclosure . . . of information that might identify or tend to identify anyone as a person who has made an appropriate disclosure of public interest information under this Act unless -
>
> (a) the person who made the disclosure of public interest information consents . . .

An exception is made to the general rule of confidentiality if whistleblowers indicate that they are happy to have their names published or revealed to the persons against whom the allegations are made. The Bill further states -

> (b) it is necessary to do so having regard to the rules of natural justice;
>
> (c) it is necessary to do so to enable the matter to be investigated effectively;
>
> (d) the identifying disclosure is made under section 12 or 22 of the *Anti-Corruption Commission Act 1988*, or Part II Division 6 of that Act; or
>
> (e) to do so is required under section 14 or 15 of the *Anti-Corruption Commission Act 1988*.

The last two measures relate to peculiar provisions of the Anti-Corruption Commission Act. Before that, the measures facilitate the investigation, to comply with the requirements of natural justice, or with the consent of the whistleblowers themselves.

The Bill also provides certain safeguards in the way in which that is to be addressed. It does not and cannot provide complete anonymity to a whistleblower. That would depend on the nature of the allegation that is made. If a particular person played a role in a matter, it might be necessary to reveal the identity of that person so that

the matter could be properly investigated. We also want to ensure that the rules of natural justice are complied with. However, we would not want to disclose the identity of the complainant without his being aware that that is the basis upon which the complaint is received. It is not perfect in my view; it cannot be.

Clause put and passed.

Clause 17: Loss of protection of the Act -

Mrs EDWARDES: A person who has made an appropriate disclosure of public interest information, but who fails, without reasonable excuse, to assist in the investigation of that information, or discloses the information for a purpose other than that provided under the legislation, will forfeit the protection given by clause 13. I imagine that if the whistleblower were to go to the media, the protection afforded by clause 13 would be forfeited. We did not go through clause 13 in detail earlier. It states -

> A person who makes an appropriate disclosure of public interest information . . .
>
> (a) incurs no civil or criminal liability for doing so; and
>
> (b) is not, for doing so, liable -
>
> (i) to any disciplinary action under a written law;
>
> (ii) to be dismissed;
>
> (iii) to have his or her services dispensed with or otherwise terminated; or
>
> (iv) for any breach of a duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by a written law) applicable to the person.

I want to focus on the term "disciplinary action", and a case in which a whistleblower goes to the media. He might have gone through a number of the public disclosure steps but is not happy with the way the investigation is or is not going. At some point - it might be months or years later - the whistleblower goes to the media about the particular public interest information. Under clause 13, a whistleblower will not be subject to any disciplinary action under a written law. Clause 17 says that that protection is forfeited if the person discloses the information that was contained in the disclosure of public interest information for any purpose other than under this legislation. This Bill does not refer to the media. The Attorney General referred to that earlier. Could that whistleblower be subject to disciplinary action for going to the media? Is that the consequence of clauses 13 and 17 read together?

Mr McGINTY: The member has raised a reasonable point. The intention of clause 17 is that although somebody who has made a public interest disclosure to the appropriate public authority is protected from defamation proceedings, he would lose that protection if he went to the media. That is what we tried to achieve through that clause. It was not intended that it would then expose someone to disciplinary action. The thinking behind the clause was that a person should not be able, effectively, to set up a scam whereby he goes through the right channels to make a public interest disclosure, and then goes public, saying that he is protected from defamation proceedings or other action because he has first made the complaint through the correct authorities.

Disciplinary procedures of both a statutory and common law nature can be invoked against an employee if he discloses confidential matters relating to his employer. Provisions in the Criminal Code relate to disclosure of official secrets and other things of that nature that an employee might become aware of as a result of his employment. Terms in his contract of employment might require duties of fidelity to his employer or non-disclosure of information gained during the course of his employment. They are the sorts of things a whistleblower would be protected against. If an employee were under a duty of confidentiality and became a whistleblower in accordance with the Act, he would, to that extent, be protected. I take the member for South Perth's earlier point that there should be a review of the provisions of this Act within a reasonable time. In the light of the issue the member for Kingsley has raised, I foreshadow that this might be one of the areas included in that review. In my view, the purpose of clause 17 is to prevent people using this legislation for improper means, such as defaming someone; that is, it should prevent someone who has complied with the legislation to make a public interest disclosure from using the protection of the legislation for things that are not in accordance with the legislation. It was certainly not my view that this should extend to things such as disciplinary actions against a person who, for instance, made a proper disclosure and was interviewed by Paul Murray on 6PR a week later when the matter became a public issue. Of course, that person might well be sued for defamation for what he or she said on the radio station.

Mrs Edwardes: That is a different issue.

Mr McGINTY: That is a different issue. The intricacies of that will need to be worked through. It places on the whistleblower a burden greater than that which we intended. In addition, further down the track we will need to consider exactly how it operates and what is its potential for operation in light of the discussion we are now having. It does not take away any rights that are enjoyed currently by a whistleblower or anyone else. It certainly is conservatively worded. We should have a look at it to see what the practice is and whether there are any practical problems. However, I can foresee that there might be practical problems with that clause.

Clause put and passed.

Clause 18 put and passed.

Clause 19: Promoting compliance with this Act -

Mrs EDWARDES: Clauses 19 and 20 deal with the code, which will be established by the Commissioner for Public Sector Standards. He will be responsible for the monitoring of compliance with not only this Bill but also the code to be established. Does the Attorney General have any time frame of when the code is likely to come into play, or has work already started on the development of the code?

Mr McGINTY: At this stage, all that has taken place is preliminary discussions, information gathering and looking at provisions from other jurisdictions. The work is not very far progressed at this stage. Obviously, once this Bill comes into operation, it will become a duty of the Commissioner for Public Sector Standards to expeditiously establish that code.

Mrs Edwardes: Once it has passed through both Houses of this Parliament, how long do you expect it to be before you can proclaim it?

Mr McGINTY: I do not know that proclamation would depend upon the code already being established. It would be a duty on the Commissioner for Public Sector Standards to do that once the Bill is proclaimed. Again, I think that that would be months rather than years, but beyond that I cannot be more specific.

Clause put and passed.

Clause 20: Code -

Mrs EDWARDES: Clause 20(7) states -

> Section 42 of the *Interpretation Act* . . . applies to and in relation to the code as if the code were regulations within the meaning of that section.

That is a wonderful clause and one that we should bring in for a number of wide-ranging issues that I can foresee. I have not seen a clause drafted along these lines before. The clause is great, particularly for ensuring enforceability of such things as the code and the like. I just wanted to bring to the attention of the Parliament that in this subclause, a code will be treated as a regulation and will be subject to disallowance and the like. However, it is given enforceability; it is good to see.

Mr McGINTY: In the light of that wholehearted endorsement by the member for Kingsley, I wondered what I had done wrong! Having had a quick look at section 42 of the Interpretation Act 1984, I believe it is very positive to involve Parliament in that process.

Clause put and passed.

Clauses 21 to 26 put and passed.

New clause 27 -

Mr PENDAL: I move -

> Page 22, after line 23 - To insert the following new clause -
>
> **27. Review of this Act**
>
> (1) The Minister shall carry out a review of the operation of this Act two years after the Act and all of its provisions have been fully proclaimed, and in the course of such review the Minister shall consider and have regard to -
>
> (a) the attainment of the purposes of this Act;
>
> (b) the administration of this Act; and
>
> (c) such other matters as appear to him to be relevant.

(2) The Minister shall prepare a report based on the review made under subsection (1) and shall as soon as practicable after its preparation, cause the report to be laid before each House of Parliament.

I hasten to assure the Attorney General and members of the Government that there is no hidden agenda in the construction of these words. I have been advised by the Deputy Clerk, and I think I am correct in saying, that it is a review clause that comes from some racing and gaming legislation in Western Australia. Therefore, one might call it standard fare with no hidden agenda.

Secondly, I am aware that the Attorney General was somewhat doubtful during the second reading debate about whether we needed it. I made out the case to him that the advice of one of my constituents, Mr Downing, formerly of the city of South Perth, who has read the Bill that we are dealing with, is that it leaves a gap between the point of a complaint being lodged and the time that is then taken to the point at which a complaint is investigated at a substantial level. Even if my constituent is wrong and the Attorney General is right, in any event, there cannot be any difficulty whatsoever in our inserting a review clause. It is not a sunset clause, which is another option that I could have chosen. In that case, the Bill would need to be renegotiated through the House for it not to be the subject of a sunset clause. I think I am right in remembering that the Commissioner for Public Sector Standards will have charge of administering the Bill. It will be his obligation to prepare such a report. Given this debate and what is being said about my concerns and the concerns of Mr Downing and others, one assumes that in preparing a two-year review of this Act, the commissioner and then the Attorney General would take into account our fear that the Bill is deficient in the way that I have outlined. Whether there is or is not a deficiency, there can be no argument that says a review is not an adequate response. It does not suggest, for example, that we set in place a mechanism that will be costly. It means that the person who is administering the Act on behalf of the minister is required to prepare that report, which must come to this Parliament.

My final point is this: if there is any substance to the fears being expressed to me, they will emerge in that first two-year period. I suspect this will be one of those statutes that will be activated quickly and frequently. If there are any deficiencies, we will see those deficiencies come forward in the first couple of years. It gives the Commissioner for Public Sector Standards and, in turn, the Attorney General or the minister in charge, the opportunity to table a report and say, "The fears of the member for South Perth two years ago have been found to be unfounded and therefore the Act continues", or to say, "The fears that were expressed during the debate have been seen to have some substance and this is the way we are suggesting that they be tackled." I commend the amendment to the House.

Mrs EDWARDES: We also support the amendment. It would seem appropriate, given the newness of the legislation, that a review clause be included. Some issues have been highlighted during the debate and, as with any new legislation, the proof of the pudding will be in the eating following its implementation. Given the importance that the Government and the House place on this legislation, such a review clause is important.

Mr McGINTY: I indicate general support for the proposition advanced by the member for South Perth, but in doing so raise two issues. Firstly, because of the concerns raised not only by the member for South Perth but also others, particularly the member for Kingsley, during the course of the debate, a possible set of problems have been drawn to my attention about clause 17 of the Bill, in particular the loss of those protections that are contained in clause 13. The concerns relate to somebody having properly made a public interest disclosure and is then interviewed by Paul Murray and discloses some of the information that was part of the public interest disclosure. That person might then be subject to disciplinary proceedings which he might not otherwise have been subject to. I have some concern as to how that might operate as well. Rather than seek to amend the legislation now, given that it does not take away existing rights, that is something that should be the subject of a review.

Having indicated my in principle support for the proposition, the major concern I have is the timing of that review. There are two elements to my concern. The code which is to be drawn up by the Commissioner for Public Sector Standards, and which is referred to in clause 20, is fairly crucial to the operation of this Act. I was asked a few minutes ago how long it would take and what work has been done to establish that code already. It is my view that the review of the Act should also be dependent upon the establishment of that code and the guidelines attaching to it. I indicate to the member for Kingsley that that should take months rather than years to establish, but we really want to have the review two years after everything is up and running, which is implicit in the way the member has drafted the amendment, but in this case it should be after the code and the guidelines have been in operation. If I am wrong and it takes more than a couple of months to do that, two years could be a little premature. There are two ways of handling it. The first would be to extend the time to three years. By any educated guess the code and guidelines would be in operation for at least two years if we were to have a prescription of that nature. The second option would be to insert after the word "proclaimed" in the third line the words "and the code provided for in section 20 has been established". We want to make sure that the review is

undertaken after the Act has been in operation in all of its glory for at least two years. That might well be three years from the date of proclamation.

Mr Pendal: What are the words suggested?

Mr McGINTY: The member's amendment would then read -

> The minister shall carry out a review of the operation of this Act two years after the Act and all of its provisions have been fully proclaimed, and the code provided for in section 20 has been established.

That is one way of doing it; the other is to change two years to three. Without having thought about it, the second of those options would place the review early in the term of the next Parliament rather than in the dying days of this Parliament. There might be an advantage in that as well. I cannot think of what the advantage might be offhand but, generally speaking, I am in favour of doing things other than in an election environment to ensure that they are done properly.

Mr Pendal: If it were three years, it would be post-election, which would be a good thing.

Mr McGINTY: That is right. We also need to factor in the point that our friends in the Legislative Council, since the member for South Perth has left there, have been dragging the chain and a considerable backlog of legislation is building up. It might well be that two years places us well into the term of the next Government in any event. We are not too sure how that might work out. I raise those matters for the member's consideration.

Mr PENDAL: I am happy that the amendment should reflect the minister's concern to see that the code is given a chance, firstly, to be completed and, secondly, to be in operation. The better way of doing it would be to change the two-year review to a three-year review. Are we able to do this in the way that we eliminated a simple "s" earlier tonight? I seek leave to replace the word "two" in the first line with the word "three".

The DEPUTY SPEAKER: Is leave given to insert the word "three" instead of "two"?

Mr McGINTY: Yes.

Amendment, by leave, altered.

Mrs EDWARDES: I do not have any issue with extending two years to three other than any unintended injustices that may occur, in particular in the connection between clauses 17 and 13. Given the fact that that has been highlighted, and if there is to be a review in three years instead of two, the Attorney General might take the opportunity to see whether the Government could bring forward an appropriate amendment in the other place.

Mr McGINTY: I am happy to do that. Members may take the view, given that the legislation does not take away any existing rights, that we should see how it works, or there might be amendments that are thought to be appropriate. I am happy to ask that question as this legislation makes it way to the upper House.

New clause, as altered, put and passed.

Clause 27 put and passed.

Schedule put and passed.

Title put and passed.