CORRUPTION AND CRIME COMMISSION BILL 2003

Standing Orders Suspension

On motion by Mr J.A. McGinty (Attorney General), resolved -

> That so much of the standing orders be suspended as is necessary to allow the motion that the Bill be now read a third time to be moved immediately after the completion of the consideration in detail stage of the Corruption and Crime Commission Bill 2003.

Consideration in Detail

Clause 1 put and passed.

Clause 2: Commencement -

Mrs C.L. EDWARDES: Will the Attorney General explain the amendment that has been incorporated into subclause (3)? How will that subclause deal with the transition between the Anti-Corruption Commission and the Corruption and Crime Commission? Essentially, will the ACC continue for long after the CCC has been carrying out some of its functions, in particular telecommunications interceptions?

Mr J.A. McGINTY: The answer to that is probably not. The effect of the amendment to clause 2(3) is to ensure a smooth transition. The new Corruption and Crime Commission will be required to certify that the functions of the ACC are substantially exhausted before that part comes into operation. In other words, the ACC will not be finally wound up until the new body is comfortable that the functions of the former body are exhausted.

Mrs C.L. Edwardes: The approval to conduct telecommunications interceptions has been given to the ACC. Is it the case that the process of approval of the transfer may take some time; therefore, the ACC will have to continue carrying out that work?

Mr J.A. McGINTY: Generally speaking, it is to ensure an orderly handover between the two bodies. The most pronounced area is probably the area to which the member referred; that is, telecommunications interception. I am told that changes are needed to federal legislation to enable the Corruption and Crime Commission to undertake the function that was previously undertaken by the ACC. This is the mechanism by which that capacity will be retained by the former Anti-Corruption Commission until such time as the federal legislation is enacted to enable the function to be transferred to the Corruption and Crime Commission. That is the most significant area.

Mrs C.L. EDWARDES: It is never easy to get that type of legislation through Parliament, although it seems to be a minor change, but once the commission is in place, will any of the work carried out by the ACC come under the auspices of the commission? Will it have an overseeing role? What interaction will take place if that continues for some time?

Mr J.A. McGINTY: The arrangement is set out in proposed new section 48A, which is on page 147 of the Bill. It gives the new body, the Corruption and Crime Commission, the power, by notice in writing, to direct the commission to refer an allegation to the CCC. In other words, it can assume responsibility for matters from the ACC. If we consider the balance of these matters, in particular proposed subsection (5), the commission must not take any further action in an allegation that is referred to the CCC. The legislation provides the mechanism for the changeover.

Mrs C.L. Edwardes: If it is doing the intercepts at the time, it is not just a referral of an allegation. The ACC will stay in existence, because it has the power to do the intercepts; however, the commission will carry out the work under the auspices and direction of the ACC.

Mr J.A. McGINTY: That is not quite right. The ACC will continue to exercise that function. In a practical sense what the member has said is right, but in a legal sense the ACC will continue to exercise that function.

Clause put and passed.

Clause 3: Terms used in this Act -

Mrs C.L. EDWARDES: I refer the Attorney General to paragraph (b) under the definition of "allegation", which states that -

> a proposition initiated by the Commission under section 26;

Proposition is a new term; where has it come from and what is its meaning?

Mr J.A. McGINTY: Under the Anti-Corruption Commission Act an allegation has to be made to the ACC, because it does not have the power to be proactive. I am told that, during the drafting of this Bill, much thought

was given to how best describe something that is not an allegation received by the commission, but a situation in which the commission is proactive and investigates misconduct or corruption -

Mrs C.L. Edwardes: It is not a determination; it is the commencement of it and it is different from an allegation -

Mr J.A. McGINTY: It is the same as an allegation, but it will be initiated by the CCC of its own initiative. It is designed to pick up the proactive nature of the commission and would otherwise be an allegation if it were made by someone else.

Mrs C.L. EDWARDES: The Bill states that disciplinary action -

> . . . means disciplinary action under any law or contract and includes -
>
> (a) action under section 8 of the *Police Act 1892*; and
>
> (b) the taking of action against a person, with a view to dismissing, dispensing with the services of or otherwise terminating the services of that person;

This deals with matters of misconduct that come to the commission. Is it limiting? What would happen if the allegation could be dealt with by way of demotion or a fine, but it still fits within the definition of misconduct as outlined in clause 4?

Mr J.A. McGINTY: The definition of disciplinary action under section 8 of the Police Act is well understood. It then goes on to deal with the taking of action against a person with a view to dismissing, dispensing of the services of or otherwise terminating the services of that person. The intention is to limit the definition of misconduct in clause 4(d) so that it relates only to more serious levels of misconduct, not minor matters that could not conceivably result in the dismissal or termination of the services of a public officer. That is its effect.

Mrs C.L. Edwardes: I use the example of a police officer and a random breath test. That situation could still be of a serious nature but the resultant outcome may be less than a termination. We could have similar examples in the public sector. It would appear to limit what may be a set of behaviour within a department or agency for which the CCC may want to undertake a proactive role.

Mr J.A. McGINTY: I think I have figured it out. I refer to clause 4, headed "Misconduct". Misconduct is defined under paragraph (d) as conduct engaged in by a public officer as set out in subparagraphs (i) to (iv) which constitutes or could constitute, under subparagraph (vi), a disciplinary offence. I now turn to the definitions of disciplinary action and disciplinary offence. A disciplinary offence -

> includes any conduct or other matter that constitutes or may constitute grounds for disciplinary action;

Disciplinary action involves matters that could result in a person being sacked. I do not know whether that answers the member's question, but that is the structure.

Mrs C.L. EDWARDES: It does not fully answer the question. What if an offence fell within clause 4(d)(i) to (iv) and was of such a nature that disciplinary action could be taken but might not result in termination? After an investigation, a fine or another form of disciplinary action might be imposed. What if an offence would never have resulted in termination? If it could never have resulted in termination, it would not fall within the definition of disciplinary action. It would not matter what the outcome was.

Mr J.A. McGinty: The actual outcome does not matter. It is a question of whether it could lead to it.

Mrs C.L. EDWARDES: I suppose the powers for those public sector matters are being limited. I cannot come up with an example of serious conduct. One issue I want to raise when we deal with clause 4 is the example of a government department or agency dealing with a lease. For example, a public servant may have been around for a number of years and may know the ins and outs of the public service and of a specific lease and the property it relates to. The giving of the lease to that property to a set person would not result in any benefit to the public servant, but would benefit the lessee. The government agency would grant the lease for the public property to the lessee. That would result in a benefit to the government agency, because it could earn an income from that lease. It would not result in any benefit to the public servant. However, there may be a detrimental impact on the tenant, because the lease may not be enforced, the money may not be followed through, or the expenditure required under the lease may not be made etc. That offence would not warrant termination. A public servant may have done this on a number of occasions. He might not get any benefit from it other than a few lunches, a couple of good bottles of wine at Christmas, and may generally be made to feel good and to be looked after. However, some form of disciplinary action should be taken. An element of corruption is involved in such an example, which quite rightly should be investigated. My view is that that would not be encompassed within the definition of disciplinary action.

Mr J.A. McGINTY: I will make a couple of observations on the point raised by the member for Kingsley. Although it is somewhat differently expressed, this provision is substantially the same as section 13 of the Anti-Corruption Commission Act, which among other things limits the nature of allegations to allegations of conduct very similar to those detailed under clause 4. Section 13 of the Anti-Corruption Commission Act goes on to state that the conduct-

> . . . constitutes or could constitute -
>
> (vi) a disciplinary breach providing reasonable grounds for the termination of a person's office or employment as a public service officer -

The concept is almost a direct take from the Anti-Corruption Commission Act. That is the first point.

The second point is that although the conduct the member has just described would not fit within paragraph (d) of the definition of misconduct in clause 4, it would fit within other areas of clause 4. For instance, paragraphs (a) or (b) would certainly be sufficient to generate the intervention of the Corruption and Crime Commission. Each of those paragraphs, as I read them, can in their own way give rise to a matter being brought within the jurisdiction of the Corruption and Crime Commission.

Mrs C.L. EDWARDES: I bring the Attorney General's attention to the definition of public authority on page 6 and the definition of notifying authority on page 4. The term public authority is used consistently throughout the Bill in terms of investigation. Am I correct in saying that there are two limitations on that? The first is that the definition of public authority does not incorporate notifying authority. If it does not incorporate notifying authority, that term is then excluded from that definition. It is not incorporated under paragraph (b), but it may be covered under paragraph (a), which refers to the Constitution Acts Amendment Act.

The second point is that when we get to the other clauses that incorporate public authority, the Bill does not provide for investigations of public authorities per se unless a public officer is involved. Unlike the situation with the Police Department, it does not provide for investigations, for example, of the Department of Consumer and Employment Protection unless an allegation has been made against an officer of that department. There are two limitations on the way in which public authority is defined and used. I would like the definition clarified to determine whether it incorporates all the bodies listed under notifying authority. Was it intended that the commission would be given the power to broadly investigate a department or agency rather than just when a public officer is subject to an allegation? For example, could the commission investigate a local council, as opposed to an allegation against a chief executive officer? Could it investigate the Department of Consumer and Employment Protection only if there were an allegation against one of the inspectors?

Mr J.A. McGINTY: Every notifying authority is a public authority, but not every public authority is a notifying authority.

Mrs C.L. Edwardes: We do not want that to be the case. We want the commission to have the opportunity to investigate bodies. Under clause 17, the commission will perform a preventive and educative function by taking action to raise standards of integrity and conduct in public officers and public authorities. That does not incorporate notifying authorities.

Mr J.A. McGINTY: It does. Every notifying authority is a public authority.

Mrs C.L. Edwardes: The clause refers to a public authority. However, that is excluded from the definition of public authority.

Mr J.A. McGINTY: I do not follow the member.

Mrs C.L. Edwardes: The Attorney General said that every notifying authority is a public authority.

Mr J.A. McGINTY: Yes.

Mrs C.L. Edwardes: Where is that stated? It is not included in the definition.

Mr J.A. McGINTY: The definition of a public authority, in particular paragraph (b) -

Mrs C.L. Edwardes: That paragraph does not incorporate government departments, agencies or bodies under the Public Sector Management Act.

Mr J.A. McGINTY: They would be picked up under paragraph (a).

Mrs C.L. Edwardes: They are not. The Constitution Acts Amendment Act picks up only the boards, committees, authorities and trusts.

Mr J.A. McGINTY: I use the example the member gave of clause 17, which relates to the commission's preventive and educative function. Under that clause the commission is to take action to raise standards of integrity and conduct in public officers and public authorities. The two are mentioned together. The term public

officer includes everyone. Therefore, even if there were a shortcoming in the definition of a public authority, the member's concern would be resolved because of the simultaneous reference to a public officer. However, I would not mind looking at this further.

Mrs C.L. EDWARDES: I would like the Attorney General to continue his remarks.

Mr J.A. McGINTY: We want the definition of a public authority to include all notifying authorities to ensure that the scope of the legislation is sufficiently broad. I am not able to say off the top of my head whether there would be any consequential ramifications to the legislation if a change were made. I seek the member's indulgence in letting us look at this during the course of the day to determine whether it is appropriate to move an amendment to include a notifying authority in the definition of a public authority. I think that is her point. Would it be acceptable to the member if we came back to this at a later stage?

Mrs C.L. Edwardes: I would be happy with that, depending on what the Clerk and the Acting Speaker have to say about how we would go about it.

Mr J.A. McGINTY: We are happy to recommit the clause if necessary. We are happy to discuss that with the member to make sure that all the issues are covered. The other concern she raised -

Mrs C.L. Edwardes: If the definition of a public authority is amended to include a notifying authority, that concern will be covered. Clause 94(1) states -

> For the purposes of an investigation, the Commission may, by written notice served on a public authority or public officer,

My argument is that the definition of a public authority does not include a notifying authority. Although a notifying authority is incorporated every time there is reference to a public officer, the commission's functions relating to notifying authorities would be limited if a public officer always had to be referred to.

Mr J.A. McGINTY: I understand that argument perfectly.

Mrs C.L. Edwardes: If the Attorney General incorporated a notifying authority within the definition of a public authority, my other point would be covered.

Mr J.A. McGINTY: I understand and agree with that. It is a matter of looking at the associated drafting issues. I make the point that misconduct is always misconduct by a public officer, not by a department. The behaviour of an officer is essentially what needs to be inquired into. I think it has been put in that context. However, as the member rightly pointed out, the commission's preventive and educative function applies to organisations as well as individuals. I hope the member is happy to allow the Government some time to look at that issue, as we want to make sure we have it covered.

Mrs C.L. EDWARDES: I support that, and while he is looking at it, the Attorney General should also look, for instance, at clause 100, which deals with power to enter and search public premises. Clause 100(3) requires a public officer or public authority to make certain things available. Throughout the Bill, where misconduct is not mentioned, a body is mentioned which may be a notifying authority, and no functions and powers are listed. It does not necessarily always involve an allegation. The other clauses which might be examined in the light of that position are 34, 102, 105 and 144.

I refer the Attorney General to the definition of reviewable police action. Paragraph (b) refers to unreasonable, unjust, oppressive and improperly discriminatory actions. Could an action that is lawful be regarded as unreasonable? For instance, what if a police officer were to regularly give cautions instead of fines, perhaps because he does not believe in giving money to the consolidated revenue fund? He does not get much, and he will give out cautions no matter how many Multanovas are placed along the freeway. Although I am being flippant, I make the point that this seems a very subjective use of the terms unreasonable, unjust, oppressive and improperly discriminatory. What criteria would the Commissioner of Police be able to use in determining the terms used in paragraphs (b) and (c)?

Mr J.A. McGINTY: The definition of reviewable police action was taken from section 25(1) of the Parliamentary Commissioner Act. When we looked at the recommendation from the police royal commission that the CCC take over the function of the Ombudsman in dealing with certain complaints against police, we found that the definition in section 25(1) of the Act was too broad. Consequently, we have deleted from the definition those paragraphs that gave it greater breadth. Those paragraphs referred to minor offending, which we did not think could in any sense constitute misconduct or corruption.

Mrs C.L. Edwardes: If it was a complaint to the Ombudsman, it would have been about a police officer hiding behind trees, which might have been regarded as unreasonable.

Mr J.A. McGINTY: To answer the member's first question very directly, conduct that is lawful can be unreasonable. That much is clear. Running through the hierarchy of provisions set out in section 25(1) of the

Parliamentary Commissioner Act, about what constitutes what we have defined in this Bill to be reviewable police actions, paragraph (a) deals with matters contrary to law, paragraph (b) with unreasonable, unjust oppressive or improperly discriminatory actions. Then the provisions move down through the hierarchy. Section 25(1)(f) of the Parliamentary Commissioner Act refers to any action that was based wholly or in part on an error of law or fact, and section 25(1)(g) simply refers to an action that was wrong. We all make mistakes, but they should not be caught up within the definition of misconduct. The matters in paragraphs (a) to (e), however, could and should be caught up in that definition. We have cut off the lower level of behaviour in defining a reviewable police action and left in those matters that constitute the more serious levels, in an attempt to transfer responsibility from the Ombudsman for those matters over which the Ombudsman had jurisdiction.

Mrs C.L. Edwardes: Has a set of criteria or precedents been established to give the Commissioner of Police the ability to fit matters into paragraphs (b) or (c), so that it is not so subjective?

Mr J.A. McGINTY: I am told that there are various legal cases about the meaning of words such as unreasonable, unjust, oppressive and improperly discriminatory. Assessing these matters would nonetheless still come down to the discretion of the commissioner and of the CCC. No doubt the commissioner would be guided by the case law on this matter, but it is difficult to confine the definition any further than is done here.

Mrs C.L. EDWARDES: I would think it highly unreasonable if an action is regarded as unreasonable when it is lawful. Picking up the definitions from section 25(1) of the Parliamentary Commissioner Act results in an extremely broad definition. It will be interesting to see how it plays out in the future.

Mr J.A. McGINTY: The policy recommended by the royal commission was that the CCC take over the responsibility of the Ombudsman in these functions. These were the functions of the Ombudsman in regard to police. We have not sought to change the test, other than at a very low level, but in a practical sense I doubt that the CCC would spend its time on minor matters. It would allow those matters to be dealt with internally by the Police Service. The CCC would only take on more serious matters, so a policeman hiding behind a tree, to use the example of the member for Kingsley, would probably be referred back to the police, rather than occupying the time of the Corruption and Crime Commission. I do not know exactly where the cut-off point would be, but it would be one of those areas where discretion can be retained by picking up the wording contained in the existing Ombudsman legislation.

Clause put and passed.

Clause 4: Misconduct -

Mrs C.L. EDWARDES: This is probably the most important clause in this Bill, because it deals with the definition of misconduct. It is new in the way it has been drafted in that it brings everything together under the one term, instead of talking about serious misconduct, corruption and the like. Paragraphs (a) and (b) refer to acting corruptly, corruptly failing to act and corruptly taking advantage. I made the point earlier that although an action may or may not obtain a benefit for the perpetrator or another person, there can also be a detriment. Although the example I gave earlier of the lease would have provided a benefit to the lessee, it might not always be interpreted that way. The action taken could be to the detriment of a person. I am not sure whether that is incorporated in the definitions. Reference to corruptly taking advantage would apply a higher test. Therefore, on their own, low level acts, which may form a part of a pattern of behaviour, may not be regarded as corrupt actions or failing to act or corruptly taking advantage. However, I am not sure whether that will be incorporated within this definition. It would be far better for something to be incorporated that added the words "disadvantage or detriment to any person" in not only clause 4(b) but also 4(d)(iv). Clause 4(d)(iv) states -

> involves the misuse use of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or another person,

The misconduct could also be to the detriment or disadvantage on an individual. For example, a Department of Justice employee might give the address of a prison officer to a bikie gang. Although that would involve other extreme connotations of breaches of confidentiality and codes of conduct, if the matter were taken to court, I am not sure whether the benefit of that misconduct could be demonstrated. However, the disadvantage or detriment to the person by having his or her address disclosed could certainly be demonstrated. That is another example off the top of my head. I am sure many other examples could be used that would be regarded as serious and would not necessarily be picked up by this definition. Misconduct comes within the whole of this Bill. An act may or may not lead to the termination of a person's position; however, that is secondary to the act of misconduct. The disclosing of public information or material may very well be a serious issue, but it may not be regarded as misconduct under this definition.

Mr J.A. McGINTY: The member for Kingsley is correct. Firstly, I will talk about the reviewable police action. We are applying a different standard to police than is applied to other public sector workers. Several provisions in this legislation apply to police officers but not public sector workers.

Mrs C.L. Edwardes: I will come to those. I do not necessarily agree with the Attorney General.

Mr J.A. McGINTY: Yes. The integrity tests and controlled operations are examples of those differences. A different test is applied to police than that applied to other public sector workers. Similarly, the reviewable police action will include a raft of things that would be at the lower end of the scale. The same behaviour by a public sector officer would not come under the jurisdiction of the Corruption and Crime Commission. The reason for that is based on the recommendations of the royal commission that the Ombudsman's jurisdiction over police officers be taken over by the CCC. We have done that but have not included some lower level behaviour by police officers that we do not think should occupy the time of the CCC.

The member gave an example of the definition of misconduct. If a public sector officer persisted in a course of action in relation to a lease, over time a case would build up to satisfy the definition of misconduct under paragraph 4(d). It could constitute grounds for dismissal if a number of instances of the same calibre occurred. However, a one-off error of judgment or even partial behaviour at a minor level most probably would not constitute grounds for dismissal. Therefore, lower levels of improper behaviour by public officers are not caught by this Bill. The definition of misconduct is taken from section 13 of the Anti-Corruption Commission Act. Cases of misconduct must be sufficiently serious before the corruption body becomes involved. The definition of corrupt behaviour - or misconduct as it is now - from the old ACC Act has not changed significantly under this Bill. We did not focus on this matter in particular. We tended to accept that the relevant current jurisdictions with regard to misconduct or corruption were adequate and those definitions were transported into the new legislation from their existing legislation, whether it be the Ombudsman's Act or the Anti-Corruption Commission Act, which has given rise to some of these matters. I would not necessarily want the State's primary corruption-fighting body occupying itself with matters that are appropriately dealt with by the Ombudsman or internally under the Public Sector Management Act or by any other disciplinary procedures available, unless the matter became more serious. The cut-off point at which a matter becomes more serious is when the misconduct could lead to someone being dismissed. The member would be familiar with a recent example involving the Department of Justice. A superintendent at Casuarina Prison engaged in improper behaviour with a female prisoner at Bandyup Women's Prison. The penalty imposed on him was the loss of his job as the superintendent of Casuarina. He was transferred to head office and demoted by one level in the public sector. That type of behaviour would have been caught under the definition of misconduct in this Bill because it could have led to his dismissal. In some respects, the practices in operation under the Public Sector Management Act are too beneficial to the employees. Certain behaviour should lead to dismissal. That misbehaviour could have, but it did not. The CCC could have dealt with that matter. I understand the ACC dealt with it.

Mrs C.L. EDWARDES: I refer to clause 4(d)(i). This definition was taken from the ACC Act. The term public body is used but it is not defined. I think that is an error. From a drafting point of view, I would have thought the Bill would need to be consistent and use the term public authority rather than public body. Although the term public body is used in the ACC Act, from a drafting point of view I think the Bill should be consistent.

Mr J.A. McGINTY: I am not able to give the member a satisfactory explanation for that, but I will explain how it came about. The issue of consistency with terminology was specifically raised. Crown counsel was adamant that the words public body remain. We are at a loss to understand why. Nonetheless, we accepted his advice. As I said, I am not able to provide an adequate explanation. However, that is how it came about. I cannot advance that any further. We suspect that the meaning of public body - if it has a meaning - is possibly broader. Therefore, in that instance it is not in any way seen as a limitation. Otherwise, I accept the point the member made.

Mrs C.L. EDWARDES: Far be it from me to contradict crown counsel. However, if that is the case, it may assist the Attorney General with notifying the authority and public authority. Let us use the term public body if it has a broader definition and will be all encompassing.

While I am dealing with the misconduct provision, does paragraph (d)(i) cover a public officer if, at the time of misconduct, he is acting in a private capacity?

Mr J.A. McGINTY: Yes, provided it meets the other tests laid down in the definition in paragraph (d).

I will make a minor correction to something I said a minute ago. I said that the definition of misconduct was taken from section 13 of the Anti-Corruption Commission Act. We have made one change to it in paragraph (c) that states -

> a public officer whilst acting or purporting to act in his or her official capacity, commits an offence punishable by 2 or more years' imprisonment;

That is a shorthand version and not necessarily a directly comparable translation of the current provisions in the Anti-Corruption Commission Act in section 13(1)(a)(iv) through to (vi), which refer to the scheduled offences under the Criminal Code. I will not say that in every sense it will be the same offences, but this is now -

Mrs C.L. Edwardes: I think it is better drafting.

Mr J.A. McGINTY: Fine. I just thought I should draw the member's attention to that because it is different and arguably broader.

Clause put and passed.

Clauses 5 to 8 put and passed.

Clause 9: Corruption and Crime Commissioner -

Mrs C.L. EDWARDES: Clause 9 establishes the commissioner for the Corruption and Crime Commission. This is one of the most important differences between the Anti-Corruption Commission and the CCC; that is, the commission will consist of one person and not three, as currently applies to the ACC. That can run into problems. Although I accept that it will make the job easier and the process will flow better than the current system, there may be problems as a result of the transference of powers from the Criminal Investigation (Exceptional Powers) and Fortification Removal Act across to the commissioner. An independent judge-like person must then respond to the Commissioner of Police's requests to grant exceptional powers, yet, who will be the commissioner? He is a "super cop". There will no longer be an independent judge looking after the rights of the individual. The safeguard for this Parliament passing the exceptional powers legislation was that the Commissioner of Police had to convince and satisfy a judge about his decisions. We can make the commissioner a judge-like person and he can be given those powers, but by doing so, we shall give the "super cop" the power to hand over to the "top cop" those exceptional powers. Therefore, he will lose his independence. There is a huge conflict in the commissioner acting out his powers under the CCC legislation and then acting as a commissioner and handing over exceptional powers to the Commissioner of Police. This has been done as a matter of convenience in terms of who would do this job instead of a judge. It also picks up the organised crime recommendation by the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers, which I understand, but this will create a huge conflict and take away some of the safeguards that this Parliament accepted would be in the exceptional powers legislation when it was passed.

Mr J.A. McGINTY: The requirement under the Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002 is that the special commissioner be a former judge. Section 7(2) of that Act requires that it be -

> . . . a person who has held office as a Judge of the Supreme Court or the District Court or has held another equivalent judicial office prescribed by regulations.

That provision was put in to apply mainly to interstate people. Therefore, someone with judicial status can occupy the position of a special commissioner under the exceptional powers legislation. As I understand it, the member is proposing to move amendments that require that the commissioner be a person of judicial status. That should go significantly towards meeting the problems to which the member has just referred.

Mrs C.L. Edwardes: It adds to them because the investigator or "super cop" gives powers to the "top cop". When it referred to a judge of a District Court or Supreme Court, that person was independent, as against an investigator, and sat in judgment. The Attorney General is essentially giving the investigator the powers to hand over further investigative powers to the police, which creates a conflict and undermines the sense of security and checks and balances that this Parliament was very insistent upon when the exceptional powers legislation was passed.

Mr J.A. McGINTY: The function of the special commissioner is one of overseeing the exercise of police powers. Under this legislation that is what the commissioner will do with regard to exceptional powers or organised crime gangs, if I can put it that way. Given that that is the nature of the proposal, I do not see a problem with one person exercising those powers. Should a conflict arise, in the sense that that is popularly understood, this legislation has the capacity to appoint an acting commissioner who could meet the requirement to overcome that conflict. That is one way in which we have sought to tackle that issue.

Mrs C.L. EDWARDES: I understand that further proposals will be able to deal with an actual or real conflict. However, the Attorney General is handing over exceptional powers to meet the recommendations of the police royal commission with regard to organised crime. He is doing it as a matter of convenience, which undermines the confidence that this Parliament had in the exceptional powers legislation. If I read *Hansard* correctly, according to the members of the Legislative Council - including government members - this will cause problems.

Mr J.A. McGINTY: Perhaps the difference is that our people still stay and fight as a team! Sorry about that, it was a cheap shot.

The recommendation of the royal commission is that the new body, chaired by a single commissioner, take over the policing functions of investigating serious crime. That was the single most significant recommendation from the police royal commission that the Government did not accede to. It was because the Parliament had quite recently dealt with the issue of organised crime and had passed legislation only one year earlier. The legislation created the office of a special commissioner to oversee and facilitate police investigations using exceptional powers in dealing with organised crime. The interim report of the police royal commission recommended that the new body have the power to take over from the Police Service the investigation of serious crime. That was not proceeded with. However, it gave rise in a quite profound way to the issues that the member is talking about. Given that the Parliament had decided that the exceptional powers were to be exercised in an organised crime context, that was thought to be sufficient at this stage rather than giving the CCC the power to take over the investigation of murders, rapes, armed robberies and other serious crime. That has avoided some of the problems to which the member is referring.

Dr E. CONSTABLE: Will the Attorney General take me step by step through the appointment process of the commissioner? Clause 9(4) states that the Premier will consult with the parliamentary leader of each party in the Parliament. What is meant by the term consult? What will happen in the interchanges? Will it be just a courtesy that the leaders are informed by the Premier? Do the leaders have some say in the appointment? How will the appointment occur? It is a different procedure from normal appointments in the public service because the commissioner will not hold office in the public service. I find it interesting that the Premier will have a major role in the appointment of the commissioner because clause 12 refers to the direct involvement of the Parliament in the removal or suspension of the commissioner. It is an interesting aspect of the commissioner's appointment. Will the Attorney General explain why the appointment is in this form, the steps the Premier will presumably go through in order to make the appointment, and why the Government is taking this route? Who will the commissioner be responsible to once he or she is appointed? Who is the commissioner's master; is it the Parliament or the Premier? To whom is the commissioner ultimately responsible?

Mr J.A. McGINTY: The commissioner will be appointed following a procedure drawn from the Electoral Act. It will require consultation with the leaders of political parties. For practical purposes that will mean discussions with the Leader of the Opposition - in other words, the Leader of the Liberal Party - and the Leader of the National Party.

Dr E. Constable: Take me through step by step. There will obviously be an advertisement and people will apply.

Mr J.A. McGINTY: I do not know whether the Government will advertise. There is no requirement in the legislation to do so. It is intended that it will be a judicial position. At present, the Government advertises for magistrates but not for Supreme Court or District Court judges. Those judges are subject to a consultative process, not in a political sense, but in a professional sense.

Dr E. Constable: Is a list of some sort drawn up?

Mr J.A. McGINTY: Yes. If the member were to read a recent edition of *The West Australian* or *The Australian* last month she would see a list of names. They were not in any sense official. I imagine that a range of people will be suggested for the position. Input will be sought from those that the legislation refers to. Although it is not required by the legislation, it is my belief that will be before the matter is taken formally to the Cabinet so that in considering the matter the Cabinet can give consideration to the input from the leaders of the two political parties represented in the Parliament. Before a person is recommended formally to the Governor, the process I would adopt would be to confer with the leaders of the political parties and advise them of the recommendation having taken into account their views and the views of others.

Dr E. Constable: Are they informed at that point?

Mr J.A. McGINTY: Yes, having received their input earlier and assuming their input on a range of names was given consideration in the process. It will not be unlike what occurs in the legal profession with the appointment of judges. Key interest groups such as the Law Society of WA, the Western Australian Bar Association, women lawyers groups and - depending upon the appointment - the Family Law Practitioners Association - if it were in respect of a family law appointment - would be consulted. They would be asked if they had any names to put forward and would be asked for their opinion of suggested candidates. The final decision would be made following the input. That is the sort of process that would be followed given that it will be a judicial-type position, notwithstanding any amendments that may be made to the legislation. I imagine it will happen on this occasion. Once Cabinet has made a decision, perhaps even after it has been to the Executive Council, I would not want just a courtesy notification given to the leaders of the two political parties. It would not be an appropriate way to give effect to the spirit of legislation. The federal Attorney General came under some

criticism, perhaps justified, for the extent to which he personally intervened in High Court appointments. He met with potential candidates and the like. I do not know whether it would be appropriate to go down that path. In terms of consultation, what I have just outlined to the member is what I envisage will occur.

Dr E. Constable: If an appointment is made that way to whom is the commissioner responsible? The Parliament will be involved in the suspension or removal of the commissioner.

Mr J.A. McGINTY: The appointment will be made by the Governor upon the recommendation of the Government of the day. That is the standard way in which these appointments are dealt with. After that, the commissioner will be truly independent. Once appointed, he will be able to be removed only by an address to both Houses of Parliament. If an issue arose that is how it would be dealt with. The commissioner will not have a master or mistress in the conventional sense.

Clause put and passed.

Clause 10: Qualifications for appointment -

Mrs C.L. EDWARDES: This clause deals with the qualifications required for the appointment of the commissioner. Many people are of the opinion that the first appointment should be a person who is either a serving judge or a former judge. We all want the CCC to have the best opportunity to establish confidence in the community and all those who might be the subject of allegations of misconduct as they are defined. Later I will move amendments to the Bill that will give this person the status of a judge. Although I recognise the need for the qualifications to be as broad as possible to open up the opportunities for a person to be eligible for appointment, I hope that the first commissioner will be a former or currently serving judge. I support subclause (3), which states -

> A person who is or has been a police officer is not eligible to be appointed as Commissioner.

I understand that there is a lot of debate about this. There will be a review in five years. That will provide an opportunity for the debate to be held again. The debate is along these lines: what if a person who was a police officer has legal qualifications? There are a number of such people today. That person is being excluded from such an opportunity. Again, I am interested in the integrity of the body. If a police officer who has legal qualifications is brought in, it is likely to undermine public confidence in coming forward. One of the concerns with the Anti-Corruption Commission is that police officers have not been willing to come forward. Although this is a limiting provision, I support it at this time. There will be an opportunity to review it in five years, so that if there is a need for a broader range of people from whom to make an appointment, police officers who have a legal qualification or former police officers who are currently practising law will not be excluded.

The amendment I will move later is to provide for the person to have the status of a judge, although there is a limit on the tenure of the commissioner of four years, subject to reappointment. As I understand it, that does not mean - I will ask the Attorney General - that the person will be a judge for life.

Mr J.A. McGINTY: I will comment first on the last matter raised by the member for Kingsley. Although we agree with the amendment that the member is proposing regarding the judicial status of this person, it is for the duration of his or her appointment. It could not then lead to an argument that that person has been appointed a judge for life. We will need to make sure that that is very clear in the form of the amendment that is to be considered.

I will deal with the issue of who is to be appointed commissioner. We have laid down in the legislation two requirements. One is that that person be eligible for appointment as a judge; in other words, an experienced lawyer. The second requirement is set out in clause 10(3), which states -

> A person who is or has been a police officer is not eligible to be appointed as Commissioner.

That has the effect of our saying that somebody who has been appointed Governor General of Australia and who happened to be a former police officer - I am thinking of Bill Hayden - would not be eligible to be appointed as the commissioner of the Corruption and Crime Commission.

It is important from the point of view of public appreciation of this office, given that a significant part of the commission's work will be to deal with complaints against police, that there is seen to be no collusion or no compromising of the independence that will be brought to the office. For that reason, even though there might be the odd exceptional former policeman who, because of his eminence in the community, could be considered for appointment to this position, I believe the Parliament should be very clear cut on this; and I appreciate the member's support for that point of view.

I refer to a matter that was raised in the interim report of the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers. Paragraph 9.37 on pages 80 and 81 states -

> Section 5(4) of the *Anti-Corruption Commission Act* currently prohibits a person who is a judicial officer from appointment to the ACC. The exclusion of the judiciary limits the range of suitable applicants for the appointment of Commissioner, particularly if the agency is to have the capacity to conduct public hearings, where the skills of judicial office would be appropriate. The inaugural Commissioner of the PIC -

That is, the Police Integrity Commission -

> was a Judge of the District Court of New South Wales, and it is recommended that the opportunity be provided for the selection of a suitable Commissioner who currently occupies judicial office. That would be particularly valuable for the first term of the office, when the agency will need to establish public credibility and acceptance. It is likely that the community will feel a greater sense of comfort, particularly when public hearings and other powers will be new, if the organisation is headed by a person who has public confidence as a member of the judiciary.

I do not disagree with those sentiments at all. That will obviously very much guide the consideration of the sort of person who should be appointed. Those sentiments from the police royal commission pick up the essence of what the member was suggesting as well.

Clause put and passed.

Clause 11 put and passed.

Clause 12: Removal or suspension of Commissioner -

Dr E. CONSTABLE: I would like to be sure that I understand this and that it is recorded. From the Attorney General's comments about the removal or suspension of the commissioner, it seems to me that two paths can be taken for the removal or suspension of the commissioner. The first is that the Parliament itself could initiate a motion that would be passed in both Houses. Following that, if it was the wish of the Parliament, the Governor would be given a signal that the commissioner should be removed or suspended; or the Governor, presumably on the advice of the Premier or the Attorney General or through the Executive Council, would initiate this procedure. It would then be debated in the Parliament. I just want to be sure that that is correct. I understand that both Houses of Parliament would have to agree to this happening by way of a vote. For the record, I would like the Attorney General's explanation of that procedure to make sure that I have understood it correctly.

Mr J.A. McGINTY: I can add nothing to the member's very adequate description of the process involved. There are two processes. The first is when the Governor would act on the advice of the Executive Council in respect of the suspension of the commissioner when one of three criteria is met - they are laid down in clause 12(2)(a), (b) and (c). That could result in suspension. The matter would then need to be referred to the Parliament under clause 12(3) for consideration, or the Parliament could, whether at the instigation of the Government or otherwise, initiate an address to the Governor. Both Houses of Parliament would need to resolve to recommend the removal of the commissioner. Therefore, the member's understanding is perfectly correct.

Clause put and passed.

Clause 13: Declaration of inability to act -

Mrs C.L. EDWARDES: This clause deals with a declaration when the commissioner has an actual or potential conflict of interest or has to perform other functions under the Act. I want to deal with the potential conflict of interest. Although I do not have a problem with this clause, it is the only place in the Bill where I can raise this issue. It does not appear that there is a clause similar to that in the Anti-Corruption Commission Act under which officers of the commission report to the commission that they have a personal interest or potential conflict of interest. Section 50(3) of the Anti-Corruption Commission Act provides such a requirement of disclosure of interest, and there is a penalty if that is not done.

Mr J.A. McGINTY: The matter is covered by clause 215(1), which reads -

> A person who is an officer of the Commission and who has a material personal interest in a matter in respect of which the Commission is performing its function must, as soon as possible after the relevant facts have come to the knowledge of the person, disclose the nature of the interest to the Commission.
>
> Penalty: Imprisonment for 3 years and a fine of $60 000.

Mrs C.L. Edwardes: Lovely. Thank you.

Clause put and passed.

Clause 14: Acting appointment -

Dr E. CONSTABLE: Does the appointment of an acting commissioner follow the same procedure as does the appointment of the commissioner? Clause 14(4) states that it will be possible for the commissioner and the

acting commissioner to perform duties at the same time. I can see why that may occur, especially if there is a matter in which the commissioner has a conflict of interest. Will it be possible for the acting commissioner to perform duties at the same time as the commissioner if, for example, there is a heavy workload? This is an area in which we want matters to be dealt with as speedily as possible; they should not be delayed. If the commissioner had an extremely heavy workload it would be of great benefit if he or she could inform the Government that an acting commissioner was needed to assist. Is that possible?

Mr J.A. McGINTY: The answer to the first question about whether the same appointment process is involved is no, because we are talking about a person in an acting role.

Dr E. Constable: How will an acting commissioner be appointed?

Mr J.A. McGINTY: The acting commissioner will be appointed by the Governor on the recommendation of the Executive Council.

Dr E. Constable: Will the qualifications required of an acting commissioner be similar to those of the commissioner?

Mr J.A. McGINTY: Yes. A person must be eligible for the appointment of acting commissioner.

Dr E. Constable: But the procedure will be different?

Mr J.A. McGINTY: Yes. As it is stated in the Bill, it will simply be an appointment by the Governor. When someone performs an acting role he generally does so for a short period. A person may be appointed in substitution for the commissioner or to act concurrently with the commissioner. As is indicated in clause 13, the commissioner may declare himself or herself unable to act in a particular matter by reason of -

(b) having to perform other functions under this Act.

In other words, it is workload related. If two people are required to get through the volume of work, an acting person will be appointed to cover the workload. That may result if the commissioner is absent. A range of circumstances could give rise to that, and, given that the appointment is of an acting nature, the same consultative procedures involved in the appointment of the commissioner are not necessary.

Clause put and passed.

Clauses 15 and 16 put and passed.

Clause 17: Commission's prevention and education function -

Dr E. CONSTABLE: The commission's prevention and education function is an important addition to the role of the anti-corruption agency in this State. I am pleased that it has been included. Will the Attorney General assure me that the commission will have wide scope in its prevention and education function? It is important that the commission be involved in the initial training of police officers and other public servants. It is important that it be involved in the training and induction programs right through to the area of professional development. As a member of a joint standing committee I spent quite a lot of time, particularly in Los Angeles, looking at the pre-service training of police officers and the work that has been done in training, ethics and other related areas. It is very important that an outside agent such as the commissioner be involved in and made aware of that training. It is important that the commissioner have a role in advising for continuing professional development. This is an exciting addition to the role of the anti-corruption agency. I hope sufficient resources will be available so that these roles can be performed well.

Mr J.A. McGINTY: I echo the words of the member for Churchlands by saying that this is an important function and one that has not been prominent in the past. It is derived substantially from the interstate areas to which we looked, predominantly Queensland and New South Wales, to ensure that the commission not only deals with corruption when it occurs, but also plays a significant preventive role. In that way, we will have a multi-faceted approach to dealing with and minimising the occurrence of corruption, and we will not just deal with it when it occurs in a heavy fashion. The precise form of this role will depend on the commissioner. The Bill contains the power and instructions to enable the commission to have a significant educative and preventive function. I suspect also that there will be a significant role for the parliamentary committee to push this function along. In round figures, the budget of this body has been doubled to accommodate the increased functions, including the educative and preventive functions. Resourcing issues should not arise because the budget has been increased from $10 million or $11 million to $21 million. That is a massive injection of funds. We are serious about this issue and it is an important part of the function.

Clause put and passed.

Clauses 18 to 24 put and passed.

Clause 25: Any person may report misconduct -

Mrs C.L. EDWARDES: That a person can report misconduct has been the subject of controversy during the life of the ACC. Under section 54 of the Anti-Corruption Commission Act, a person cannot say that he has reported matters to the ACC. Therefore, it has often been the case that the ACC was the body that could not be named and that brought reporting an allegation into disrepute. Section 54(1) of the Anti-Corruption Commission Act states -

> 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 has received or initiated; or
>
> (b) any details of,
>
> any information or allegation -

The reporting of such allegations fell into disrepute because everybody referred to the Anti-Corruption Commission as the body that could not be named. When that was said, everybody knew or assumed that an allegation had gone to the ACC. The removal of that prohibition will enable a person to defame others by saying that he has made a complaint to the Corruption and Crime Commission. Under clause 25 of the Bill -

> A public officer or any other person may report to the Commission any matter which that person suspects on reasonable grounds concerns or may concern misconduct -

This is of concern to a considerable number of people. If someone were to say that he had made a complaint or believed that a complaint had been made to the CCC, it would be a statement of fact if that had indeed occurred. Therefore, it would defeat the defamation laws as they apply in Western Australia. The statement of truth would be that the matter had been reported, and would not necessarily involve the subject matter. It has been suggested that a further clause should be inserted in the Bill to provide that publication that a complaint had been made would carry the defamatory implication that there was a basis for the complaint, and would then be open to the normal rules of defamation. If that provision were inserted in the Bill, people would be free to say that a complaint had been made but would need some sound factual basis for their complaint. Thus, they could not use it to defame without providing details. That has occurred more than enough, particularly around local council election times. Therefore, we do not want to limit the CCC, the requirements of the Public Interest Disclosure Act, the chairman of the parliamentary committee, or the parliamentary inspector in supervising the operations of the CCC if authorised to do so. However, the making of such statements should carry a defamatory implication to prevent people from defaming others.

Dr E. CONSTABLE: I echo the concerns of the member for Kingsley. I drew this matter to the Attorney General's attention yesterday by way of interjection. I would go a step further than what the member for Kingsley has suggested. A clause should be included in the Bill to provide a penalty for vexatious or malicious comments. I understand such a provision is provided in the whistleblower legislation. I urge the Attorney General to seriously consider this idea. This is a very serious matter. Any person could make a malicious statement or allegation against someone and it would become public at that time. We should be very cautious and put in some checks and balances. I am not saying that it should not become public; however, there should be some checks and balances to protect people from malicious and vexatious allegations.

Mr J.A. McGINTY: As the member for Kingsley rightly said, the current arrangements have been brought into disrepute by reference being made to a complaint being referred to the body that cannot be named and the like. That is the common ground between us. My second proposition is that in the twenty-first century, for the public to have confidence in a body such as this, it needs to be open and transparent; it needs to hold public hearings. Those things are an important part of public acceptance and the integrity of such a body. We agonised over this issue of being able to publicly state that a matter has been referred to the CCC. The best example I can give is that on several occasions I have been in a position in which I have not been able to account to the public for the discharge of my functions or the activities within my department because of the confidentiality requirement when a disciplinary or corruption matter has been referred to the Anti-Corruption Commission. The public might say that it is a good and appropriate thing to do, but neither I nor the chief executive officer of the department has been able to say that because of the existing provisions of the Anti-Corruption Commission Act. It was our view that people should be able to say that a matter was being properly dealt with and had been referred to the Corruption and Crime Commission. I do not think there is a problem so far. The problem arises with malicious and false allegations or those made for improper purposes. An example would be an allegation being lodged a week before a local government election together with a headline in a local community newspaper stating that a certain individual, who was a candidate in the election, was being investigated by the Corruption and Crime Commission. That is where the problem exists.

Most people would be happy with otherwise opening up the ability to describe these matters and to say publicly that something is being investigated in the proper way. The scheme of the Bill currently before the House is to give an individual the right to say that he has referred a matter to the Corruption and Crime Commission. However, that still leaves individuals other than the minister responsible for the particular area and the chief executive officer or director general of the relevant department able to say that they have referred a matter to the CCC and receive full protection against any civil or criminal action that might be taken. We are talking here about defamation action. By and large, an allegation that someone has behaved corruptly is inherently defamatory. There is the practical situation of who will sue in defamation and the like. Individuals, and particularly vexatious complainants, if I can loosely describe them in that way, will not receive protection from the civil laws of the country. Criminal laws might even be involved. That might be cold comfort to someone whose political and personal careers are destroyed as a result of someone vexatiously saying that a matter had been referred to the commission when it was not true and was done maliciously. Provision is made in this legislation to deal with that. I refer particularly to clauses 151 and 166. Any person who, having made a complaint, makes false testimony will be punished severely under clause 166. If that person gave evidence that he knew to be false or misleading in a material particular, he would be guilty of a crime and face imprisonment for five years and a fine of $100 000. That is the second step in the process. Someone may make an allegation and may not follow it up by giving evidence. However, the public damage may already have been done. The stage at which someone gives false evidence is adequately covered by clause 166. Clause 151 provides limited coverage to matters about which disclosure cannot be made. In particular, clause 151(1)(d) and (e) concerns evidence that a person is about to be examined by the commission, or the fact that a person has been or is about to be examined by the commission. They are restricted matters that cannot be published.

Dr E. CONSTABLE: I do not think we have heard everything that the Attorney General wanted to tell us. I ask him to continue his explanation.

Mr J.A. McGINTY: I thank the member for Churchlands. That still does not deal with the issue of someone making a complaint to the Corruption and Crime Commission and then going public about it when it is not in the public interest. Protection is provided to senior government officers to be able to say that they have done that; they will be fully protected by the law. At this stage, vexatious complainants run the risk of defamation action being taken against them. As I said, that would be cold comfort and not an adequate remedy. I looked at comparable matters. The Public Interest Disclosure Act will be proclaimed to come into effect on 1 July. Section 24 of that Act, offence to make false or misleading disclosure, reads in part -

> (1) A person who makes a statement purporting to be a disclosure of public interest information -
>
> (a) knowing it to be false in a material particular or being reckless about whether it is false in a material particular;
>
> or
>
> (b) knowing it to be misleading in a material particular or being reckless about whether it is misleading in a material particular,
>
> commits an offence.
>
> Penalty: $12 000 or imprisonment for one year.

That provision could be adapted and narrowed and included in this legislation to give a person complete protection in the making of a complaint to the CCC. There should be no inhibitions on anyone making a complaint, even if it is malicious. I would hate for a penalty to be imposed on someone who made a complaint. The real issue arises when people make those complaints public. I am reasonably disposed to the inclusion in this legislation of a provision similar to that in the public interest disclosure - whistleblowers - legislation that will apply to situations in which an allegation is malicious or false or in which someone is reckless with the truth. I would be sympathetic to a proposition to cover a situation in which somebody takes a complaint that has been made and is therefore protected into the public arena for ulterior purposes; in other words, to personally damage someone. That way the right of someone to go public about the fact that a matter has been referred would not be limited. I have been the subject of an investigation by the Anti-Corruption Commission. I would have liked to have been able to talk publicly about that. I was completely cleared and the reference was made for malicious purposes. I have been on the receiving end of this, and I can completely understand the situation.

Dr E. Constable: It would have been a terrible experience for you if the complaint had been made public.

Mr J.A. McGINTY: It was made by Hon Peter Foss, and was as good as made public at the time. It was done for no reason other than to inflict political damage. There was no substance to it whatsoever. I can say that in this place, notwithstanding the provisions of the Anti-Corruption Commission Act, as this legislation will effect its demise.

Mrs C.L. Edwardes: We have not done so yet.

Mr J.A. McGINTY: In that case I might need to rely on parliamentary privilege for the appropriate protection! It illustrates the point that there needs to be a constraint against that sort of damage. It is up to the member for Churchlands how we progress this matter. If she wishes to pursue it, I am more than happy to make available parliamentary counsel to assist in drafting something along those lines.

Dr E. Constable: I would support that.

Mrs C.L. Edwardes: I would support that.

Mr J.A. McGINTY: We could recommit this clause after we have some discussions. Perhaps during the lunchbreak the member for Churchlands and the member for Kingsley, if she has an interest in it, could check the wording of what is prepared by parliamentary counsel. I think that would cover that situation to provide a degree of protection. I would not want the clause to limit the rights of people unless the complaint breached the fairly serious standard of being malicious or untrue or involved a person being reckless about its truth. We do not want to discourage people from making complaints.

Mrs C.L. EDWARDES: I thank the Attorney General for that. The insertion of such a provision is absolutely vital, and we would support it. What does subclause (4) add to clause 25?

Mr J.A. McGINTY: I am told that subclause (4) provides those public officers who owe a duty under another piece of legislation, such as a duty of confidentiality, with a defence or an excuse for making a complaint. It deprives them of any criminal liability for exercising that function.

Mrs C.L. Edwardes: Should subclause (4) not be connected to subclause (3)? Subclause (4) refers to someone not committing an offence, and is very broad when read in conjunction with subclause (1).

Mr J.A. McGINTY: Subclause (1) provides that a public officer or any person may report any matter involving misconduct. Subclause (3) states that they can do that despite the provisions of any other legislation. Subclause (4) needs to be read jointly with (3). Subclause (4) provides that there is no offence committed by making a complaint, and flows naturally from the provisions of subclause (3).

Mrs C.L. Edwardes: If we moved an amendment about vexatious or malicious behaviour, we would need to ensure that subclause (4) did not contradict it.

Mr J.A. McGINTY: We can take that up.

Clause put and passed.

Clause 26: Proposition by Commission -

Mrs C.L. EDWARDES: We earlier discussed the commission making a proposition. Why does the clause not incorporate the requirement that the commission must have reasonable grounds for believing that misconduct has or may have occurred? Why is it so broad? The clause refers to a proposition that misconduct has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur. That is different from someone having reasonable grounds for believing those things. It is rather broad and may be limiting.

Mr J.A. McGINTY: The Anti-Corruption Commission suffered from not being able to be proactive by initiating complaints. This is the key clause that will enable the Corruption and Crime Commission to undertake an investigation of its own motion. This is the originating process. It has been deliberately drafted broadly to ensure that, if the commissioner is of the view that a matter needs to be investigated, it is less susceptible to challenge. Setting the threshold too high would make it difficult to show reasonable suspicion. The commission needs to be able to initiate, and this is the precursor to an investigation. The investigation will then take place, to determine whether there are reasonable grounds for proceeding further. We wanted to cast this clause as broadly as possible so that the CCC could vest itself with jurisdiction to deal with a matter.

Mrs C.L. EDWARDES: When I first read the clause, I also considered it broad. However, going back and reading it again reveals that it is about fact; "has or may have occurred", "is or may be occurring" and "is or may be about to occur" all deal with fact, while "is likely to occur" may or may not be fact. Reasonable grounds for believing, on the other hand, does not require fact. While the Government wants this section to be broad, even with clause 26(2), it may actually be limiting what it is trying to achieve.

Mr J.A. McGINTY: The definition of an allegation includes a proposition initiated by the commission under clause 26. That is on page 2 of the Bill. The member for Kingsley is to a degree correct in her assertion that this could have a limiting effect, because there needs to be a proposition about matters of fact. The view here is that it is an attempt to give the commission the broadest possible way to initiate an investigation of its own. This was simply the technique used to do that. It is the view of the advisers that this is broad enough to enable the commission to effectively do that. At the same time we agree with the proposition put forward by the member.

If it were necessary, we could make it broader, but the thinking is that this is adequate to enable the commission to initiate matters.

Mrs C.L. Edwardes: The review will take place in five years.

Mr J.A. McGINTY: That is when I would be inclined to look at matters like that, if that is acceptable.

Ms M.M. QUIRK: I will make some comments that may assist the member for Kingsley in understanding this clause. This phrasing in this clause is similar to that used in the commonwealth Telecommunications (Interception) Act, for those who wish to obtain an intercept warrant. It is terminology and concepts that law enforcement officers are familiar with. It is very good to have a set of phrases that is consistent among the broad range of applications that law enforcement bodies can make. It means we will have concepts that are well used and familiar to those making applications, and there is a body of law about what these phrases mean. It is not desirable to have separate tests for distinct applications on different matters. I support the terms currently used in clause 26. They are well known to operational staff, who can work effectively with them because they know what is meant by them. This clause will not curtail or limit the capacity of enforcement to operate effectively.

Clause put and passed.

Clause 27: Allegation about Commissioner, Parliamentary Inspector or judicial officer not to be received or initiated -

Mrs C.L. EDWARDES: This clause contradicts the underlying principle of the Public Interest Disclosure Act, that the proper authority to whom a disclosure of public interest information must be made is the chief executive officer in the first instance, before it goes anywhere else. The clause reads, in part -

(1) An allegation about the Commissioner must not be received by the Commission.

(2) An allegation about a person in his or her capacity as an officer of the Commission must not be received or initiated by the Commission.

(3) An allegation about a person in his or her capacity as the Parliamentary Inspector, or an officer of the Parliamentary Inspector, must not be received or initiated by the Commission.

Subclause (1) is consistent, subclause (2) is inconsistent, and subclause (3) is partly consistent and partly inconsistent. To whom does somebody go with these allegations? What if it is a matter of human relations within the organisation more than anything else? There have been such concerns with the Anti-Corruption Commission. Those allegations should properly be investigated by the Anti-Corruption Commission or by the body itself first and foremost before they go elsewhere. There are other authorities. We saw the instances with the Ombudsman's office, in which the allegation was against the Ombudsman himself. The Ombudsman did not take the proper step, and that eventually led to the debacle surrounding Chris Read. That is fine if it deals with the commissioner or the Ombudsman. However, in the case of the other officers, should not the agency or the organisation itself in the first instance sort that matter out before it goes elsewhere? The clause does not say to whom such a matter should go.

Mr J.A. McGINTY: Clause 27(1) and (2) should be read in conjunction with clause 192. Any allegation about the commissioner or an officer of the commission should go to the parliamentary inspector. That is the function of the inspector under clause 192 of the Bill.

Mrs C.L. Edwardes: What about the parliamentary inspector himself or his staff, as mentioned in clause 27(3)? Does that go to the standing committee?

Mr J.A. McGINTY: That would be the only place to which such a matter could effectively be referred, if it is misbehaviour by the parliamentary inspector.

Mrs C.L. Edwardes: What about a complaint about the parliamentary inspector, if he or she has not yet misbehaved?

Mr J.A. McGINTY: With a body like this, there is a limit to how far there can be someone sitting over the top of another person who is sitting over the top of another person. If a matter refers to the staff of the parliamentary inspector, it is picked up in clause 192(1)(b), which refers to complaints about officers of the commission or of the parliamentary inspector. I suspect the only person for whom there is no-one to report to apart from the parliamentary committee to which the inspector reports, would be the parliamentary inspector himself. That would be the appropriate way to deal with that. The commissioner, staff of the commissioner and staff of the inspector are all covered by appropriate bodies in this Bill to which a complaint can be made.

Clause put and passed.

Clause 28: Notification of misconduct -

Mrs C.L. EDWARDES: Clause 28 deals with the duty to notify. Clause 28(2) reads -

> Subject to subsections (4), (5) and (6), a person to whom this section applies must notify the Commission in writing of any matter -
>
> (a) which that person suspects on reasonable grounds concerns or may concern misconduct; and
>
> (b) which, in the case of a person referred to in subsection (1)(d) or (e), is of concern to that person in his or her official capacity.

I am concerned about the objective relevance of paragraph (a) and the subjectivity of "concern" in paragraph (b). What does (b) add to (a)?

Mr J.A. McGINTY: This provision was taken directly from section 14 of the Anti-Corruption Commission Act.

Mrs C.L. Edwardes: But the ACC Act did not always work.

Mr J.A. McGINTY: That is true. Those officers listed in clause 28(1) have a duty to notify the commission of any matter. I will use the example of a director general of a department. The director general must be concerned that the matter does or could concern misconduct with regard to the official capacity of that person. It must be a matter that -

Mrs C.L. Edwardes: Concerns and is of concern.

Mr J.A. McGINTY: Yes. I do not believe there is a problem with this. I am unaware of this matter having been raised under the ACC Act.

Mrs C.L. Edwardes: Will this provision allow a principal officer, or an officer that constitutes a notifying authority, to get out of reporting a matter by saying that although it was of concern to the agency, it was not a concern to the principal officer? The subjective nature of concern -

Mr J.A. McGINTY: I am told that it is not a subjective assessment.

Mrs C.L. Edwardes: Of concern?

Mr J.A. McGINTY: Yes. The concern relates to that person's official capacity.

Mrs C.L. Edwardes: That is objective in clause 28(2)(a), but in 28(2)(b) "of concern" appears to be subjective to that person in his or her official capacity.

Mr J.A. McGINTY: I am told that it should not be construed subjectively. The concern must relate to the official capacity, not whether an officer is worried on one day about a particular matter. The concern must involve the person's official capacity. If someone were told privately of something in another department or the behaviour did not relate to the official capacity -

Mrs C.L. Edwardes: The officer is under no obligation to report that.

Mr J.A. McGINTY: That is right.

Clause put and passed.

Clauses 29 to 33 put and passed.

Clause 34: Matters to be considered in deciding who should take action -

Mrs C.L. EDWARDES: When the commission decides whether to refer an allegation to another appropriate agency or independent authority, it is to have regard to the seniority of the public officer, the seriousness of the conduct to which the allegation relates and the need for an independent investigation rather than an investigation by a public authority - that issue will run into problems because of the previous definition that I raised earlier - with which any public officer to whom the allegation relates is connected by membership, employment or any other respect. It is suggested that public interest should also be included in this provision. Although the matters I have just mentioned are taken into account, another element must be included, which might not be covered under this clause; for example, an aspect of public interest, which would link it all together.

Mr J.A. McGINTY: I do not disagree with the member that the public interest is the basis upon which the matter is to be regarded. The way in which this clause was drafted does not make it an exclusive list of matters to be taken into account. Rather, regard is to be given to factors, including paragraphs 34(a), (b) and (c). They are generally indicative of the types of matters that would constitute the public interest.

Mrs C.L. Edwardes: The provision of only those subclauses could have a limiting effect by not providing a catch-all clause that refers to any other matter of public interest, evidence, conduct etc.

Mr J.A. McGINTY: This provision was taken from section 18 of the Anti-Corruption Commission Act 1998. The Bill could include having regard to the public interest. Frankly, I do not know whether that would add a great deal to it. By providing that the commissioner must have regard to matters including those listed certainly enables the commissioner, as it properly should, to have regard for the broad public interest. The matters included in this clause are indicative of those.

Clause put and passed.

Clause 35: Informant to be notified of decision not to take action -

Mrs C.L. EDWARDES: If a person makes an allegation under clauses 25 or 28(2), and the commission decides to take no action, the commission must notify that person. In the transitional provisions, what would happen to a matter that has been referred to the commission by the police royal commission and/or a matter that is taken over by the CCC? Do the notification provisions cover a person who has made an allegation in any other authority?

Mr J.A. McGINTY: The point the member raised appears to be valid. That can become the third matter we will consider at the recommittal stage.

Dr E. CONSTABLE: Someone might have made an allegation to the commission, which it considered, and determined not to take any action. Can the person who made the allegation make that information public? Could that person make public statements disagreeing with the commission and express concern that the commission did not take action? Could a person air his concerns so that judgments can be made in the media about it? That could cause grief to the person against whom the allegation has been made. This relates to our discussions on clause 25.

Mr J.A. McGINTY: Yes, if a person has referred a matter that the commission has determined is not worth investigating and takes no further action on, that person would be at liberty to disclose that they had made a reference to the Corruption and Crime Commission, provided that it did not involve any evidence. If the commission decided to take no action in the matter I presume that no evidence would have been taken. The restricted matters are listed under clause 151. Someone might say that he referred the matter to the commission and it was rejected, and I do not see that doing any damage to people. Once the matter has been considered by the commission and rejected, I do not see any problem with that information being made public.

Dr E. Constable: It was just a point of interest as to whether that could become a public matter.

Mr J.A. McGINTY: Yes, it could, but the restricted matters are found in clause 151. It is not allowed if the person then says, "I gave this evidence to the commission and it still does not believe it." However, the mere reference to a matter would be allowed.

Clause put and passed.

Clauses 36 to 47 put and passed.

Clause 48: Summoning witnesses to attend and produce things on application of Commissioner of Police -

Mrs C.L. EDWARDES: Moving provisions from the Criminal Investigation (Exceptional Powers) and Fortification Removal Act across to this Bill has resulted in major drafting improvements. When there is an opportunity to rewrite legislation, it can be seen more clearly. A couple of additions, as well as deletions have been made to clauses in the Bill.

Clause 48 deals with the summoning of witnesses to attend and produce things on application of the Commissioner of Police. The fortification Act requires that a summons be personally served and that it identify the time, the place and the day on which the person must give or produce evidence or do any or all of those things. When using exceptional powers, why has the Attorney General removed the need for the summons to be personally served? The summons could be left, for instance, at the person's workplace or home, and that would be regarded as an acceptable service. Also, the summons does not need to identify all the relevant information that was previously required. Why have these changes been made?

Mr J.A. McGINTY: I am advised that there has been no relevant change from the existing provisions of the organised crime legislation. Clause 48 states -

> The Commission may, on the application of the Commissioner of Police for an organised crime summons, issue a signed summons under section 96 . . .

Clause 96(2) states -

> Personal service of the summons is required.

That probably deals with the issue raised by the member.

Clause put and passed.

Clause 49 put and passed.

Clause 50: Offences for which a person stands charged -

Mrs C.L. EDWARDES: This provision picks up on section 13 of the fortification Act and specifies when a person stands charged with an offence. Why has that been included? Was there any doubt as to when a person stands charged? Has there been a recent case that has brought this matter to light and required that it be incorporated in the legislation?

Mr J.A. McGINTY: This change was requested by the Police Service. It was taken out of the DNA legislation because the police thought it would give greater clarity. This provision is similar to that in section 3 of the Criminal Investigation (Identifying People) Act. The notion of consistency is worthwhile.

Clause put and passed.

Clause 51: Commission may limit exercise of power -

Mrs C.L. EDWARDES: This clause incorporates a new subclause (5) that refers to a power under this division. Although the power relates to entry search and related matters, it applies only through the power given by the commission. Subclause (5) states -

> A power under this Division cannot be exercised contrary to a direction under this section.

However, it does not seem to add anything to the legislation. There is no penalty if the provision is not complied with. The power is given only as a result of a direction under this clause, or as varied or revoked etc. A person cannot exercise a power contrary to a direction under this section because he does not have that power.

Mr J.A. McGINTY: The provision has been taken from the Criminal Investigation (Exceptional Powers) and Fortification Removal Act. That Act gives police the right to exercise a broad range of powers. The commissioner could order that the powers be limited in particular circumstances. The provision is inserted for abundant caution so someone can have his statutory powers curtailed by an order issued by the commissioner.

Mrs C.L. Edwardes: But it is a power under this division. It cannot be dealt with other than under the division. It is the only power available.

Mr J.A. McGINTY: I cannot argue with the member on that. It certainly does not detract; it could be said to add greater clarity.

Clause put and passed.

Clauses 52 and 53 put and passed.

Clause 54: Provisions about searching a person -

Mrs C.L. EDWARDES: This clause is different from the drafting of a similar provision in the Criminal Investigation (Exceptional Powers) and Fortification Removal Act. Will the Attorney General identify whether there are any significant differences in what is proposed from the fortification legislation?

Mr J.A. McGINTY: The intention is to make this provision consistent with the DNA legislation, which is used to identify people. As best as I can ascertain, the significant change from the Criminal Investigation (Exceptional Powers) and Fortification Removal Act relates to searches by persons of the same sex. This provision contains greater protection. The old provision allows the search of a person by an officer who is not of the same sex. Clause 54(2) is quite explicit: it is not permissible.

Clause put and passed.

Clauses 55 to 57 put and passed.

Clause 58: Report on use of powers -

Mrs C.L. EDWARDES: Under this clause, if a police officer exercises an exceptional power he must submit a report to the Commissioner of Police. The report is then to be forwarded to the commission. The report by the police officer to the Commissioner of Police must be submitted within five days. It previously had to be submitted within three days. I take it there is concern about officers in regional areas. The concern was raised during debate on the fortification removal Bill. The Commissioner of Police is to forward a copy of the report to the commission as soon as is reasonably practicable. Why is a time frame not inserted for the forwarding of the report? Five days would be acceptable as a check and balance to ensure the commission received a copy in a timely manner.

As an aside, I note that clause 57 has increased penalties of imprisonment from two years to three years. The fine has been increased from $40 000 to $60 000. I knew the Attorney General would come around a little bit to our way of thinking!

Mr J.A. McGINTY: We were getting on so well until the member accused me of being a redneck!

The major change is that under the Criminal Investigation (Exceptional Powers) and Fortification Removal Act a police officer exercising exceptional powers is required to report only to the Commissioner of Police. The additional obligation is that the report must also go to the commissioner of the Corruption and Crime Commission in order to complete the accountability circuit. That is a significant enhancement.

Mrs C.L. Edwardes: In doing so, why was a time frame not included?

Mr J.A. McGINTY: As best I can ascertain, given that there will be a permanent commissioner overseeing these powers rather than someone appointed for a particular job, such as a part-time commissioner under the Criminal Investigation (Exceptional Powers) and Fortification Removal Act, there is enough emphasis that a report be forwarded as soon as practicable. Depending upon the circumstances, it might be hard to define.

Clause put and passed.

Clauses 59 to 62 put and passed.

Clause 63: Terms used in this Division -

Mrs C.L. EDWARDES: The Criminal Investigation (Exceptional Powers) and Fortification Removal Act concentrates on organised crime. Organised crime means the activities of two or more persons associated solely or partly for the commission of an offence. The definition of criminal activity in clause 63 refers to a section 5 offence by one or more persons. I have not checked whether the number of offences under that section has been increased or decreased. Will the Attorney General elaborate on that?

Mr J.A. McGINTY: The definition of organised crime on page 5 of the Bill carries forward the former definition of two or more persons. That definition is the same; there is no change. The term criminal activity means any activity that involves the commission of a section 5 offence by one or more persons. Therefore, that carries forward that definition into clause 63 of this Bill by making it a section 5 offence.

Debate interrupted, pursuant to standing orders.

[Continued on page 8316.]