PUBLIC INTEREST DISCLOSURE BILL 2002

Third Reading

MR McGINTY (Fremantle - Attorney General) [2.45 pm]: I move -

That the Bill be now read a third time.

Mr Barnett interjected.

The SPEAKER: I call the Leader of the Opposition to order for the first time.

MRS EDWARDES (Kingsley) [2.45 pm]: In responding to the third reading debate on the Whistleblowers Protection Bill, which has now been renamed the Public Interest Disclosure Bill, I will summarise exactly what it is that we have been debating.

Who is a whistleblower? I will use the colloquial term because that will be the case in any event, whatever title we give to the legislation. Most people will revert to using the term "whistleblower". A whistleblower does not necessarily need to be a public servant, although in our debate we have been talking about public servants. A whistleblower is any person who, by virtue of clause 5(2) of the Bill -

(a) believes on reasonable grounds that the information is true; or

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

The person has some information, but what is that information about? This is outlined in the definition of "public interest information" in clause 3. It states that public interest information deals with -

(a) improper conduct;

(b) an act or omission that constitutes an offence under a written law;

(c) a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources;

(d) an act done or omission that involves a substantial and specific risk of -

(i) injury to public health;

(ii) prejudice to public safety; or

(iii) harm to the environment;

or

(e) a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971*;

To whom can that public interest information be disclosed? It can be disclosed to a public officer, a public authority, a public service contractor, any of those contractors with whom that contractor himself may make arrangements with and/or any of their employees. The person can disclose that information to a range of proper authorities by virtue of clause 5(3). Those proper authorities would essentially report to the authority; that is, the agency or the department about whom the complaint is being made, or where the individual public officer is working. There is then a range of other independent agencies who similarly have powers of investigation. That can range from the presiding officers of Parliament, if the complaint is about a member of Parliament, who is termed a public officer, to the Chief Justice if there is a complaint about any judges, to the Police Service, the Ombudsman, the Auditor General, the Anti-Corruption Commission, and the list goes on. There are some concerns about the potential restrictions on those powers, particularly in respect to the independent agencies. If a complaint is made to a public authority, a department or an agency other than one of the independent agencies, there is always the opportunity to take that matter further to one of the independent agencies. As such, a review process is essentially being put in place. When there is a complaint regarding an independent agency, unless the matter falls within the powers of one of the other independent agencies, as we were discussing yesterday, very little review process is put in place. As discussed yesterday, often that review process is bought to us as members of Parliament because people have not had any satisfaction in dealing with the matter.

Once the public interest has been disclosed to the proper authority, there is an obligation on that authority - excluding the presiding officers of the Parliament and the Chief Justice by virtue of their special status of independence - to investigate, notify and report to the whistleblower. If the whistleblower follows the processes within the Act, there is protection for those individuals. A new tort of victimisation has been created, and the

opportunity for protection also exists under the Equal Opportunity Act. The protection that is given is outlined in clause 13, which states -

> A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 -
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> (a) incurs no civil or criminal liability for doing so;
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> (b) is not, for doing so, liable -
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> (i) to any disciplinary action under any written law;
>
> (ii) to be dismissed;
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> (iii) to have his or her services dispensed with or otherwise terminated; or
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> (iv) for any breach of a duty of secrecy or confidentiality or any other restriction on disclosure

That recognises the real potential for whistleblowers to be victimised and to be subjected to reprisal; this is well known and well documented. As outlined in my second reading speech, this issue goes back hundreds of years. Reprisal is not something that is new today in the year 2002; reprisal against whistleblowers has essentially been part of our culture and way of life for in excess of 100 years, not just in Australia but around the world. How do we overcome this? This legislation will essentially change the culture; but it will not work like that. The Commissioner for Public Sector Standards is being given a responsibility to develop a code that will become a regulation by virtue of its status under the Interpretation Act and the relevant clause in the Bill. Therefore, that responsibility will be enforceable. The Commissioner for Public Sector Standards has been given a valuable tool. It also has a role in monitoring the implementation of this Act and the performance of those proper authorities according to their responsibilities under this Act. However, it will not happen unless there are cultural changes within the public service.

A whistleblower could be any person, and the person who will most likely be disadvantaged in blowing the whistle is a public servant. Members from both sides of the House have provided examples of agencies that have disadvantaged employees because they have blown the whistle. On its own, this legislation will not change that culture; it will not change what has been a part of the public service psyche for in excess of 100 years. It will not change the network of the public servants who have worked and grown together in the public service, or their peers. Public servants provide references and support for each other on matters such as budgetary issues and upcoming job interviews. Therefore, there is a strong camaraderie among public servants. That can be very good - I am not saying that that is a negative. However, when dealing with whistleblowing legislation that attempts to change the culture, we must take into account the fact that if an employee blows the whistle in a certain agency, the agency usually dismisses that person from his position and removes him from the agency. Who will want to employ a person who has been removed from his position for whistleblowing? That is the critical issue, because until a strong policy position is adopted about what happens to an individual who blows the whistle, we will not overcome or change the culture. The person who blows the whistle is regarded as a pariah and will continue to be thought of in that way throughout the agency. Nobody looks kindly upon a person who has blown the whistle, and the fact that he is not looked upon kindly does not necessarily have anything to do with the content of the matter that has been exposed. Also, it may have nothing do the with the fact that the information that was disclosed was proved to be true. The fact is that a public servant who publicly discloses information which the agency has had to address will have to look for new employment. No matter what code or legislation is introduced, until such time as this fundamental problem is addressed, the culture of dealing with whistleblowers in the public sector will not change. Strong penalties exist for offences of reprisal, and there are remedies for acts of victimisation. However, victimisation can be subtle. The major criterion that should be contained in the code is that the person who makes the disclosure should be kept in his or her position of employment. People who blow the whistle must be protected from discrimination by being able to remain in their position. The person who makes a disclosure should not be removed from his position of employment; rather, the person about whom the disclosure has been made should be moved. However, people who make public interest disclosure becomes victims, and they will always be victims until whistleblowers are allowed to remain in their position. This is fundamental to any decision to make changes.

I commend the Western Australia Police Service on this issue. It has put in place a strong process to deal with whistleblowers. The fundamental point must be - it is critical that a number of fundamental points be inserted into the code - that the person who makes the disclosure must stay in his position of employment; he should not become a victim for doing the right thing. The Police Service provides a mentor for whistleblowers, because it is important that a person who makes a disclosure is not put to any expense and that proper counselling processes are put in place.

As we have been told in the House, the first message that the peers and comrades of people who are about to blow the whistle will give to them is that they should not do it. They will be told that they are being silly by disclosing information, especially because they do not know what will be the consequences of their actions. From the outset, there is no support for the person who wants to do the right thing. The first reaction will always be "Mate, you are bloody stupid". That culture must be changed.

I have referred previously to the case of Chris Read. I firmly believe that his case is the benchmark. The Government's commitment to protect whistleblowers will be tested by Chris Read's victimisation. That is a critical point. If the Government intends to draw a line in the sand by applying this legislation only to whistleblower cases that occur after this legislation has been proclaimed, it will reflect its hypocrisy and hollow words. Chris Read is still being victimised today. Because he blew the whistle on the Ombudsman, he does not have a position in the public service. His contract was not renewed with the Ombudsman's office and he is now floating between jobs. His salary has been maintained, but he will not receive any salary increases until his substantive level has caught up to the level of pay he was earning at the Ombudsman's office. Chris Read's time at the Ombudsman's office was not short term; he worked there for about seven years. He is being retained at the level at which he was working for those years; however, that is all that is happening. He has no job, nor will his employment be reinstated. That is a fundamental point of the culture that presently exists in the public service. If the victimisation of Chris Read is not examined and he continues to be the victim - his allegations were investigated and found to be correct - where is the Government's real commitment to the protection of whistleblowers?

Mr Pendal: That will send the same message to prospective whistleblowers, because the legislation, as good as it is, will fail if your constituents and Mr Downing continue to be the victims.

Mrs EDWARDES: That is correct, because the Government's words will prove to be hollow. I supported the change of terminology because there is no protection for whistleblowers in this legislation. It provides for remedies, and it makes reprisal an offence. However, the culture that exists presently is the critical element in the protection of whistleblowers, whether they be constituents of members opposite - such incidences have been raised - whether they be those who have received publicity for their actions, or whether they be future whistleblowers. What confidence can our constituents have? If the Government is seriously committed to the protection of whistleblowers, it must not draw a line in the sand and protect only whistleblowers who disclose information after this legislation has been proclaimed. Chris Read is one whistleblower who has been victimised and who needs protection. It is not good enough for the Government to say that its hands are tied because his case occurred prior to the implementation of the legislation. Why are they tied? They are tied because of the public sector network. This is an ideal opportunity to send a message to the public sector network that whistleblowers will be protected. What is lacking in this debate is the realisation that a radical cultural change is needed to ensure that the agencies respond in a positive way to whistleblowers' needs.

We support the legislation to ensure that this matter will move forward. However, it is not the end. The end is still to come with the massive cultural change that is needed within the public sector to ensure that this legislation will work. That will not happen overnight. We need look only at equal opportunity. I have the highest regard for the former Commissioner for Equal Opportunity, June Williams, who has just retired. I always found June Williams a highly professional person who took to her job a strength of conviction and passion. She dealt with equal opportunity in such a professional way that she pulled everyone on board, so much so that people who 17 years ago were sceptical about equal opportunity today support her and the role that she played. She did a tremendous job in talking to many organisations in the public and private sectors, and running workshops and the like. The work she did was enormous. The cultural change that was needed for equal opportunity is understated in the case of whistleblowers. If there is to be any effective and adequate change to this area, the Government will need to put a lot of work, money and resources into promoting the ethos of protection of whistleblowers. There is no better way of doing that than by starting with a person who is being victimised.

We support the legislation. We have highlighted some of the issues and concerns. A review is in place, but the Attorney General has a huge job ahead of him, particularly with the Commissioner for Public Sector Standards, in the development and implementation of the code. However, the umbrella over all that is the massive cultural change that will be needed within the public sector to ensure that this legislation is workable. I liken this legislation to the equal opportunity legislation. The Attorney General knows the tremendous amount of work that has been done since the 1980s to achieve equal opportunity. The Attorney General remembers as well as I the concerns that were raised at that time and for a number of years afterwards. June Williams, to her credit, did a tremendous job in overcoming all those fears. The Commissioner for Public Sector Standards will also have a huge task in again overcoming all the fears that are emanating from within the public sector. The Attorney General has a wonderful opportunity to start that massive cultural change and stop the current victimisation of a whistleblower.

MR PENDAL (South Perth) [3.03 pm]: I will echo many of the remarks that have been made by the member for Kingsley. There is no doubt that a number of people who have been mentioned by name in this debate have gone from being whistleblowers to being victims. The member for Kingsley has outlined in detail how the officer at the Ombudsman's office was made to pay for the culture that did exist and still exists within that office, in the same way that the constituent whom I mentioned, Mr Downing, has been made to pay for the culture that still exists within local government. I find it ironic that there was even some debate about the change to the short title of the legislation. Much of that debate centred around whether it is noble to make a public interest disclosure or whether it is the act of a dobber, to use the word used by the Attorney General. We had a helpful debate about that matter, which led the House to agree unanimously to change the word "whistleblower" in the short title of the Bill to the words "public interest disclosure". Yet, despite that, and because of the culture to which the member for Kingsley referred, people continue to suffer for doing what is in the public interest. That baffles me. What baffles me also is that we tend to discount or put to one side any notion that we will seek to get some redress for these two people. These two people are only the tip of the iceberg, one with respect to local government, and the other with respect to state government. The case of the Ombudsman's officer is even more serious in some respects than the member for Kingsley makes out. The Office of the Ombudsman is not part of the Public Service. It is, like the Office of the Auditor General, an extension of this Parliament. In colloquial terms, those officers are officers of the Parliament, not in the sense that the Clerk of the House and his officers are officers of the Parliament, but nonetheless in the sense that they are creatures of the Parliament. Their first point of report is to this House via the Speaker and to the other place via the President. When the Parliament is incapable of looking after its own, one must wonder how long that cultural change will take before it sinks through into the more remote areas of the public service of this State and then into the area to which I referred; namely, the public service of local authorities.

I am not altogether convinced that we got it right last night for my constituent. I was certainly buoyed by the assurance from the Attorney General that it is his belief and the belief of the officer advising him at the Table that there is, to use his words or analogy, no closure of the window of opportunity between the time a disclosure is made and when it is investigated in a substantial way. That gave me some reassurance. I was reassured further when the Attorney General agreed to put in a review clause and to make that for three years rather than two, for the reasons that he advanced over and above my arguments. I know that the Attorney General was acting in good faith, because he agreed to a couple of reasonably important amendments. However, although I go away from this debate with his assurance ringing in my ears, I have a nagging doubt about whether we will properly and adequately protect those people who so far have suffered not in ancient history but in the past 18 months.

The member for Kingsley is right. We probably will need a change in the culture over a long period so that people will begin to acknowledge that people who make disclosures in the public interest are people who should be commended. They may even be people who should be promoted and given some recognition for what they have done. I am not sure that we have arrived at that point. I am the first to agree that Parliament cannot educate for attitudes. The best Parliament can do is write a law, and it is then essentially up to the administrators and the public service of the day to find ways to educate the public and public servants to understand that a public interest disclosure is not a bad thing but is a good thing. Although we have come a long way, we have probably taken 10 years too long to get to this point. I am pleased that we have dealt with the Bill, given it our support and made a couple of reasonably important amendments. However, I echo the fears of the member for Kingsley that we may yet overlook administering justice to those people to whom we should feel a great deal of gratitude.

Question put and passed.

Bill read a third time and transmitted to the Council.