EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Receipt and First Reading

Bill received from the Council; and, on motion by **Mr J.H.D. Day (Minister for Planning)**, read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR J.H.D. DAY (Kalamunda — Minister for Planning) [7.01 pm] — by leave: I move —

That the bill be now read a second time.

The Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 significantly reforms the law of evidence in Western Australia. The bill fulfils the government's election commitment to introduce responsible and accountable protections for professional persons and journalists which, in appropriate circumstances, preclude them from being compelled to give evidence. The bill introduces three key reforms to amend the Evidence Act 1906 and the Public Interest Disclosure Act 2003. The first area of reform expands on some of the existing protections in the Evidence Act 1906. Sections 19A to 19M, for example, currently protect the confidentiality of communications made to counsellors in the context of sexual harassment claims. Sections 19A to 19M recognise that there is a public interest in protecting the confidentiality of certain types of communications. The bill furthers this public interest by providing protection for communications made to persons acting in a professional capacity, including journalists. This protection is encapsulated in the bill in the professional confidential relationships protection provisions—PCRP provisions.

This bill serves the public interest of preserving appropriate confidentiality while recognising that journalists play a vital role in ensuring the free flow of facts and information to the public. It follows that the public interest in the free flow of information is served by supporting journalists in their professional capacity. In many instances, the role that journalists play is assisted by the provision of information by sources. Such sources may often wish to remain anonymous and indeed, in some cases, a source may provide information only on the condition that their identity remains confidential.

Although it is generally recognised that journalists should identify the source of their information, it is necessary to ensure that protection is provided to cover the circumstances in which a source wishes to remain anonymous. The bill achieves this balance by providing a protection for the identity of journalists' sources. The protection prevents a journalist from being compelled to give evidence disclosing the identity of their source unless it is determined that the protection should not apply in the circumstances of the proceedings in question.

The third area of reform that the bill introduces also furthers the public interest in the free flow of information. Journalists are not the only people capable of disseminating information of public interest. As early as 1863, whistleblowing legislation was introduced in the United States with the enactment of the False Claims Act. In 2003, Western Australia followed suit by enacting the Public Interest Disclosure Act 2003. The purpose of the Public Interest Disclosure Act 2003 was to ensure the openness and accountability of government. This purpose was achieved by enabling persons who witnessed illegal conduct or the mismanagement of public resources to disclose such wrongdoing without fear of reprisal. This bill furthers this purpose by expanding the capacity of public service employees to make public interest disclosures and by increasing the protection available to whistleblowers.

Having outlined the general effect of the bill, I would now like to address the three key reforms in more detail to assist members. The first protection that the bill introduces is a protection for communications made to persons acting in a professional capacity. The PCRP provisions are modelled on part 3.10, division 1A of the Evidence Act 1995 of New South Wales. The decision to introduce PCRP provisions has arisen from recommendations made by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their inquiry into the operation of the uniform Evidence Acts. The report, titled "Uniform Evidence Law", recommended that division 1A of part 3.10 of the Evidence Act 1995 of New South Wales be incorporated into the commonwealth Evidence Act 1995 to provide a general professional confidential relationship privilege.

Since the report, Tasmania has also adopted PCRP provisions in line with New South Wales. Unlike Tasmania and New South Wales, Western Australia has not adopted the uniform Evidence Act in order to preserve the integrity of the Evidence Act 1906, which is uniquely suited to WA, as well as to preserve and protect WA sovereignty. This government is, however, committed to working within the parameters of the evidence working group as part of the Standing Committee of Attorneys-General to further develop model uniform evidence laws in Australia. Consistent with this commitment, Western Australia has chosen to adopt the PCRP provisions.

The new protection that the bill introduces is not absolute. The PCRP provisions are intended to assist professionals in reconciling their ethical obligations to preserve their client's confidentiality and their legal obligations to give evidence when required to do so by a court. The bill reconciles these conflicting obligations by vesting a guided discretion in the court to exclude evidence of a confidential communication. The discretion vested in the court consists of two components. The first component is a threshold component, providing that the protection can apply only when the communication was made in the course of a professional relationship in which the confidant was under an express or implied obligation not to disclose its contents. The protected information can be information about the content of the communication, documents that would reveal that content or information that would make it possible to discover the identity of the maker of the communication.

The bill does not give extensive guidance on who constitutes a person acting in a professional capacity. Consistent with the reforms adopted in New South Wales and Tasmania, however, it is intended that the professional confidential relationships protection provisions will apply to persons such as financial advisers or accountants. The bill also confirms that the PCRP provisions apply to journalists acting in a professional capacity when information was disclosed to them in circumstances of express or implied confidentiality.

Under the second component, the bill requires the responsible court to determine whether or not the nature and extent of the harm that may be caused to the confidant, either directly or indirectly, outweighs the desirability of the evidence being given. If the harm outweighs the desirability of the evidence being given, a court must give a direction that evidence not be adduced. As part of this essential balancing exercise, the bill contains a series of factors that a court must take into account, including the nature of the proceedings, the importance of the evidence, and the means available to the court to limit the harm that is likely to be caused by disclosing the evidence. For the purposes of the PCRP provisions, it was also determined that two further factors should be included in the bill in addition to those in the New South Wales Evidence Act 1995. They include the public interest in preserving the confidentiality of protected confidences and protected identity information. It should be noted that the list of factors provided in the bill is non-exhaustive; however, if a court fails to consider one of the matters listed in the bill, it may fall into error by failing to take into account a mandatory relevant consideration.

Members should also note that there are two exceptions to the requirement on a court to give a direction that evidence not be adduced. The first is when the person who made the communication consents to evidence of that communication being adduced. The second is when the protected confider engages in misconduct that furthers the making of the communication. Unlike the New South Wales Evidence Act 1995, the PCRP provisions do not define "misconduct" to include fraud. The term "fraud" can be ambiguous, and to the extent that it means fraud in the sense of an offence, it adds little to the definition of "misconduct". Instead, the definition of "misconduct" in the bill is modelled in part on the definition of "misconduct" in the Corruption and Crime Commission Act 2003. For example, "misconduct" is defined in the bill to include committing an offence, committing an act that renders the confider liable to a civil penalty, acting corruptly or corruptly failing to act, misusing information or material acquired by the confider, and performing conduct that provides reasonable grounds for terminating the confider's employment.

When a court determines that misconduct has occurred, it may order that evidence be adduced, notwithstanding that it may disclose a protected confidence or protected identity information. To assist courts in making determinations as to misconduct, the bill enables a court to make a finding of fact about the existence of misconduct if there are reasonable grounds for believing that the misconduct occurred and a communication was made or document was prepared in furtherance of the misconduct. The bill also, importantly, preserves the inherent discretion of a court to allow evidence to be adduced in two key ways. First, the bill expressly reaffirms the continuing relevance of the common law rules of evidence and the inherent discretion of the court to take such action as the interests of justice require. The bill also provides for a court to exercise its ancillary powers in certain circumstances. For example, the court may order that evidence be heard in camera or it may make a suppression order in relation to the publication of evidence. The bill does not, however, in any way limit the existing powers of a court to make ancillary orders.

The second protection that the bill introduces is exclusively for journalists. Although the PCRP provisions can apply to journalists, the bill also introduces a unique protection for journalists' sources that recognises the fact that a source may often wish to remain anonymous in return for providing information to a journalist. The nature of the protection incorporated for journalists' sources has its origins in amendments made to the New Zealand Evidence Act 2006. The decision to extend an additional protection to journalists' sources was, however, inspired by recent amendments to the commonwealth Evidence Act 1995, and particularly by the recently passed New South Wales Evidence Amendment (Journalist Privilege) Bill 2011, which inserted sections 126J to 126L into the New South Wales Evidence Act. The new journalist protection provisions strengthen the capacity for journalists to maintain the anonymity of their sources by introducing a presumption that a journalist is not compellable to give identifying evidence when they have promised not to disclose the identity of their source. As with the PCRP provisions, however, the protection afforded to journalists is a qualified protection. The public

interest in the free flow of information and news must always be balanced against the public interest in courts and tribunals being properly informed of all matters that could legitimately affect their decisions. The bill achieves this balance by outlining the circumstances in which a person acting judicially may direct that identifying evidence be given, notwithstanding the general presumption of non-compellability on the part of a journalist. The bill relevantly provides that a person acting judicially may give a direction when the public interest in the disclosure of the identity of the informant outweighs, first, any likely adverse effect on the informant or any other person; and, secondly, the public interest in the communication of facts and opinion to the public by the news media and the public interest in the ability of the news media to access sources of fact. In determining whether the relevant standard has been met, a person acting judicially must have regard to a series of factors set out in the bill, including the probative value of the evidence, the importance of the evidence, the availability of other evidence and the risk to national security.

In addition to the general limitations on the application of the protection for journalists' sources, members should note that the scope of the protection is also affected by the definitions adopted in the bill. The scope of the protection is primarily determined by the definitions of "journalist" and "informant" adopted in the bill. "Journalist" is defined to mean a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium. "Informant" is defined to mean a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium. The terms otherwise used in these definitions, such as "occupation" and "profession", are intended to have their plain, ordinary meaning. "Journalist" has been defined in this manner to ensure that the protection applies only to persons generally involved in the reporting and disseminating of information on matters of public interest. The definition adopted is not intended to excessively restrict the application of the protection so as to differentiate between, for example, journalists employed by a news medium and freelance journalists. The protection is, however, drafted in such a way as to ensure that it applies only to persons reasonably engaged in working as a journalist, as well as the person who employed them at the time the promise not to disclose the source's identity was made. The protection does not extend to, for example, bloggers or persons commenting on, or publishing information concerning, matters of public interest via social networking media such as Facebook or Twitter. The definition of "informant" likewise restricts the protection to apply only to situations in which a journalist received information in the normal course of their work and with the expectation that it would be published. A journalist could not claim the protection if they received information outside their professional capacity as a journalist or with a view that the information would remain confidential. In the latter case, the protection afforded under the PCRP provisions may instead apply.

I would like to draw two further matters to the attention of members before moving to address the reforms that the bill introduces to the Public Interest Disclosure Act 2003. As members will now be aware, under the journalist protection provisions, the relevant person who may direct that evidence be given is a person acting judicially, and not simply a court as provided under the PCRP provisions. The phrase "person acting judicially" is not defined in the bill, but is defined in section 3 of the Evidence Act 1906 to mean any person having, in Western Australia, by law or by consent of parties, authority to hear, receive and examine evidence. The purpose of permitting a person acting judicially to give a direction under the protection provisions is to ensure that the protection afforded to journalists applies to courts and tribunals as well as to inquiries. The protection will apply in this manner regardless of whether the empowering statute of the relevant tribunal or inquiry excludes the application of the Evidence Act 1906, which is the act that the bill amends. The protection will not apply to hearings before the Legislative Assembly, the Legislative Council or committee hearings of both houses of Parliament. An amendment to the bill has been introduced following a report of the Standing Committee on Procedure and Privileges. This amendment states —

> ***person acting judicially*** does not include a member of a House of Parliament or a Committee of a House, or both Houses, of Parliament who, by law, has authority to hear, receive and examine evidence;
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> ***proceeding*** does not include a proceeding before either House of Parliament or a Committee of either House, or both Houses, of Parliament, in which evidence is or may be given;

The purpose of this amendment is to ensure unequivocally that the protections do not apply before Parliament. This amendment resolves the concerns that arose in the report of the Standing Committee on Procedure and Privileges by ensuring compatibility with the Parliamentary Privileges Act 1891 and avoiding any constitutional issues that might arise from scrutiny of parliamentary proceedings.

The second matter of note is the expansive misconduct provisions adopted in the bill. Under the journalist protection provisions, misconduct is a matter that a person acting judicially must consider when determining whether or not to give a direction. As with the PCRP provisions, the definition of "misconduct" does not include fraud. "Misconduct" is instead defined to include, among other things, a journalist or informant committing an offence, a journalist or informant committing an act that renders the confider liable to a civil penalty, and a journalist or informant acting corruptly or corruptly failing to act. There are two key differences between the

PCRP provisions and the journalist protection provisions regarding misconduct. First, under the journalist protection provisions, both the conduct of the journalist and informant is capable of constituting misconduct. The purpose of this restriction is to ensure that persons seeking to rely on the protection have acted in such a way that does not violate the public interest in the free flow of information and news. Second, under the journalist protection provisions, a finding of misconduct does not automatically preclude the journalist protection provisions from applying. A person acting judicially instead retains the discretion to direct that identifying evidence be given. To assist with the exercise of this discretion, the bill outlines a series of principles that, if satisfied, generally require a person acting judicially to direct that evidence be given. In the event that misconduct is a fact in issue, a person acting judicially may make a finding as to misconduct when there are reasonable grounds for believing that there was misconduct by an informant or a journalist in relation to the obtaining, using, giving or receiving of information.

This final feature is a further example of the delicate balance that the bill attempts to preserve—that is, the balance between the public interest in assisting journalists to disseminate information about matters of public interest and the public interest in ensuring that justice is done and that courts, tribunals and inquiries are properly informed of matters that could legitimately affect their decisions. This balance is ultimately weighted in favour of the need to ensure that decision-makers have access to all relevant evidence, as the bill preserves the inherent discretion of a decision-maker to take action if it is in the interests of justice to do so.

The final reform that the bill introduces concerns the Public Interest Disclosure Act 2003. This aspect of the bill expands the capacity of persons to make public interest disclosures under the act in a manner consistent with the new protections introduced by the bill. These reforms have been principally modelled on existing provisions in other Australian jurisdictions, and particularly the Victorian Whistleblowers Protection Act 2001, the New South Wales Public Interest Disclosures Act 1994 and the Queensland Public Interest Disclosure Act 2010. There are three key features of the reforms made to the Public Interest Disclosure Act 2003. The first is the expansion the bill makes to the protections already available to whistleblowers under the act. The increased protection is twofold. In order to maximise accountability and integrity in government decision making, the bill introduces enhanced protections for persons who disclose public interest information. Under the bill, a person who believes that they have or will be subject to detrimental action in reprisal for disclosing public interest information may apply to the Supreme Court for an order remedying the detrimental action or for an injunction. In the event that the whistleblower still fears reprisal, the bill also permits a whistleblower to apply to their employer to be relocated. An employing authority will be required to relocate the employee when relocation is the only practical means of substantially reducing the danger of reprisal, provided, of course, that the employee consents to the proposed relocation. The bill also enhances accountability and openness in government decision making by diversifying the manner in which disclosures can be made. As with the legislation in Queensland and other states, the bill enables a person to anonymously disclose public interest information. This amendment ensures that persons can make disclosures without fear of reprisal as their identity will remain unknown. In the event that a person makes an anonymous disclosure, the bill relieves the relevant authorities of their obligation to notify the person who made the disclosure of the status of any investigation or inquiry that was initiated as a result of the disclosure.

Members will also be interested to know that the final feature of the bill introduces a role for journalists under the Public Interest Disclosure Act 2003. Under the proposed reforms, public interest information can now be disclosed to journalists as an avenue of last resort. The information that can be disclosed must be substantially the same information as was disclosed as public interest information and the entity that received the disclosure must have refused to investigate or discontinued investigating a matter raised by the disclosure; not completed the investigation within six months of the disclosure being made; completed the investigation but not recommended any action be taken in respect of the matter; or failed to comply with its notification obligations in section 10(1) or (4). Should such a disclosure be made, the bill deems that disclosure to be a disclosure of public interest information. As a result, the person making the disclosure can rely on the existing protections provided in the Public Interest Disclosure Act 2003.

In summary, legislation of the kind delivered by the bill has been slow to come to Western Australia. PCRP provisions have existed in New South Wales since 1997. Regardless, such legislation is now here. Until now, courts and tribunals have engaged in an unassisted balancing exercise between two competing philosophies when deciding whether or not to permit evidence to be adduced: the utilitarian philosophy that a court should be able to make the most judicious decision based on all the available information and the libertarian philosophy that the law should not unduly interfere with the rights and interests of individuals. This bill delivers a solution to this complex balancing exercise. By introducing a qualified protection for professionals and journalists, as well as for journalists' sources, in addition to improving the capacity of persons to disclose public interest information, this legislation will issue in a new era of openness and accountability in public and private sector decision making.

On behalf of the government, I commend the bill to the house.

Debate adjourned, on motion by **Mr J.R. Quigley**.

House adjourned at 7.24 pm