

PUBLIC INTEREST DISCLOSURE BILL 2002

Committee

Resumed from 11 March. The Deputy Chairman of Committees (Hon Simon O'Brien) in the Chair; Hon Nick Griffiths (Minister for Racing and Gaming) in charge of the Bill.

Postponed clause 3: Interpretation -

Progress was reported after the clause had been partly considered.

Hon PETER FOSS: Last night I indicated my concerns that the ethical disclosure provisions would be somewhat lacking if there were no provision to make a disclosure relating to a person's fitness or even qualification to hold a public office. This relates especially to a public officer covered by a statute prescribing that he may be deprived of that office if certain things are proved against him. That is of as much importance as impropriety in the course of the public duty. I provided a draft of my amendment to the minister, and I have been informed by him that it is not acceptable to the Government. I am sure he will speak about that. I move -

Page 4, lines 5 and 6 - To delete -

, in relation to its performance of a public function

Page 4, after line 22 - To insert -

in relation to its performance of a public function, or, in the case of a public officer, to an extent that affects their fitness or qualification to hold that public office.

Points of Order

Hon NICK GRIFFITHS: I considered the amendment last night. Hon Peter Foss has raised an interesting issue; however, when I considered the matter, I formed the view that it was outside the policy of the Bill and, therefore, out of order. The policy of the Bill relates to a public interest disclosure about the performance of a public function or duty, not about the other mischief Hon Peter Foss seeks to deal with in his amendment. I invite him to seek leave to withdraw it.

The DEPUTY CHAIRMAN (Hon Simon O'Brien): I advise the committee that I take the point of order the minister raised. It is my intention to shortly leave the Chair to seek advice.

Hon PETER FOSS: If this amendment goes forward, I will vote for it but not divide on it. Although I believe the amendment is important, it was drawn up at the last minute. I therefore was a bit reluctant to move the amendment, because although it expresses what I want to express, I am not convinced that it is the best drafting that could have been done. One of the reasons that I submitted the amendment to the minister was so that if he wished to adopt it, he would have the opportunity of getting it drafted properly.

It is important that I explain the amendment. The policy of the Bill is set out mainly in the long title, which states -

A Bill for an Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.

The long title does not say anything about the performance of a public function. It is only when we get to the definition of "public interest information" in clause 3 that we deal with the question of what is public interest information. The first part of my amendment is to delete the words " , in relation to its performance of a public function". If we were to delete those words, the definition would be considerably wider than what I am proposing by the insertion of further words. I do not think it would be outside the policy of the Bill merely to delete some of the words in a definition. However, I respect the minister's position. I insist on the amendment and do not intend to withdraw it, and I await your ruling, Mr Deputy Chairman.

The DEPUTY CHAIRMAN: Hon Peter Foss has moved at page 4, lines 5 and 6, to delete the words " , in relation to its performance of a public function". However, a point of order has been raised by the minister, so before I put the question that the words proposed to be deleted be deleted, I will leave the Chair briefly to seek some advice on that point of order.

Sitting suspended from 7.41 to 7.49 pm

Deputy Chairman's Ruling

The DEPUTY CHAIRMAN (Hon Simon O'Brien): I have had the opportunity to consider the amendment moved by Hon Peter Foss, and to seek advice. The proposed amendment raises an issue of relevance to the scope and purpose of the Bill. The point of order is in relation to an amendment that links, in this case, fitness to

hold office with the right to make public interest disclosure otherwise protected under this Bill. Hon Peter Foss may wish to make some further comment, and indicate whether he wishes to proceed with this amendment or withdraw it. I indicate now, that if the Committee were to proceed with this amendment I would have to rule it out of order. The member may not wish to proceed down that path.

Debate Resumed

Hon PETER FOSS: I certainly did not intend that the Committee divide on this matter, so I seek leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Postponed clause 3 put and passed.

New clause 11 -

Hon PETER FOSS: I move -

Page 11, after line 21 - To insert -

11. Alternative investigation where proper authority under no obligation

- (1) This section applies where a public interest disclosure is made to a proper authority who is either the Chief Justice or the Presiding Officer of a House of Parliament (“**an exempt proper authority**”).
- (2) Unless the exempt proper authority forms the view that had section 8 applied to the exempt proper authority the exempt proper authority would be entitled to refuse to investigate or to discontinue an investigation pursuant to subclause 8(2), if the exempt proper authority decides not to investigate the information disclosed to it, he or she shall refer the investigation in accordance with the next subclause.
- (3) The referral shall be to -
 - (a) in the case of the Chief Justice, to the President of the Legislative Council;
 - (b) in the case of the Presiding Officer of a House of Parliament, to a body within the House which would within the usual processes of the House deal with improper conduct on the part of a member.

I hope that everybody can remember what I said about this new clause yesterday because I will not speak at length on it. The Bill contains the capacity for a person who receives a disclosure to refuse to investigate if it is trivial, vexatious or frivolous, there is no reasonable prospect of obtaining sufficient evidence or the matter has been adequately and properly investigated by another person. That means that if the Chief Justice or a Presiding Officer had to act in accordance with clause 8, he could refuse under those circumstances. We know that the obligation to the extent that clause 8 applied to them would be only in respect of matters that were not trivial, did not involve disclosure that was vexatious or frivolous, had a reasonable prospect of obtaining evidence and had not been properly or adequately investigated. Yet there is a possibility of their not being investigated. It is unlikely that would happen, certainly in the case of a judicial officer. I hope he would investigate a matter. We have taken away the statutory requirement provided for in clause 9 to refer a matter to the Commissioner of Police or some other power, although it can be referred as a matter of ordinary right. I think there is a problem with letting a matter drop. It is not just a matter of the reality but the perception. I understand that we might not want to impose on the Chief Justice an obligation to research. I agree with that. He is a judicial authority; he should not be an investigative authority. If he were to tell the Presiding Officer of this House about the matter, I am sure the Presiding Officer would arrange for it to be investigated. It would be a bipartisan matter that would concern all of us and would not be in any way political. A minister is more likely to be the person involved than a member of Parliament because ministers have the capacity to do the things that are subject to public disclosure. Therefore the Presiding Officer may find it very difficult to investigate, even if it is not because he wants to but from political necessity. It is not very pleasant for a Presiding Officer to investigate one of his own ministers. Just as a matter of realpolitik, the Presiding Officer might be obliged to do it by law but his colleague might not find it endearing. A lawyer fighting the case for a client might verbally beat up someone on the other side and consequently that person will think very badly of the lawyer for the rest of his life. One might say that one is only doing one's job and that there is no personal animus. The person who has been beaten up in the witness box does not see it that way; he views it as a nasty personal experience. Whilst the theory is clear that a lawyer is merely doing his duty and has no personal animosity against the person he beats up in the witness box, that is not the way it is seen by the other party. I can see the same situation with someone who is a Presiding Officer.

Hon Jim Scott interjected.

Hon PETER FOSS: Hon Jim Scott has made a very good point. If it was a situation in which the Presiding Officer was from a different party, it might be seen that he was doing so through animus and that it was not a action that had any semblance of fairness, but was clearly to pursue a political point. That is a very good point. If they were Greens, it could be just that people were tired of them and wanted to get rid of them!

What I propose is outlined in the new clause. If they decide not to do it themselves, they must, in the case of the Chief Justice, pass on the matter to the Presiding Officer of a House. If the initial complaint is to the Presiding Officer of a House and he decides not to investigate - which I suspect he would normally not - he must pass it on to a body that normally deals with misconduct. Both Houses of this Parliament have privileges committees.

I have not gone to the detail of saying what happens if a Presiding Officer receives a matter from the Chief Justice and he does not want to deal with it. One can put on too many belts and braces. The conclusion is that he can pass it on to the committee. I really do not mind. As far as I concerned, if a matter goes from the Chief Justice to a Presiding Officer, I see no reason why the Presiding Officer would have any difficulty in dealing with it as he thinks fit. I have not bothered to prescribe what a Presiding Officer does if he receives a matter and does not want to deal with it. In the case of a Presiding Officer who receives a matter in the first instance because it comes under the category of matters referred to him, he hands it across to the appropriate committee of the House.

Hon NICK GRIFFITHS: The Government opposes the new clause. With respect to matters referred to the Chief Justice - actions against judicial officers - Parliament has a particular role in the disciplining of judges. It is through the very drastic step of an address in both Houses to remove a judicial officer from office. Parliament has that role as a matter of last resort because Parliament traditionally protects the independence of the judiciary. The power of address gives the Parliament the capacity to deal with someone who has behaved in an unsuitable way. To go further than that would interfere with the time-honoured principle of independence. Established procedures are in place to deal with complaints against judicial officers. The Chief Justice has power under the Stipendiary Magistrates Act to deal with stipendiary magistrates. The Attorney General also has a role to play if an opinion is formed that a magistrate is physically or mentally unfit for office, as magistrates are judicial officers.

Hon Peter Foss has referred to belts and braces in the context of what will happen. Frankly, what would happen if the matter were referred to, say, the President of the Legislative Council as is proposed, is problematic. What is the President supposed to do? It is not a matter of going into that detail. The principle of judicial independence is well grounded in our system and we should tamper with it only with great care. To proceed down the path the honourable member suggests in respect of judicial officers is something that we should not do.

Reference has been made to the Presiding Officers supposedly operating in a partisan way. That is not the tradition of this Parliament and it is not the tradition of this House. It is not the perception that we have of Presiding Officers, irrespective of party. We should not lend currency to that perception by voting for an amendment that the role of a Presiding Officer is a role that lends itself to partisanship. That is against all of the traditions of this House that members opposite and members on the government side have sought to uphold for a long time. The positions of Presiding Officers and the Chief Justice are obviously unique. They are positions of paramountcy in our system and they are held by people who have been selected because of very special qualities. In the end it is appropriate for communities such as ours to put trust in institutions and in people who have been chosen, in the case of Presiding Officers, by their peers to hold a very high office, and the office of Chief Justice of Western Australia is at the peak of the Western Australian judicial system. If we were to proceed down the path of amending the Bill by adopting this new clause we would arguably run the risk of doing damage to each of those institutions.

Hon PETER FOSS: I differ from the minister, because judges do not have judicial independence to engage in the sort of activity that is contemplated by this Bill. If the minister thinks judges are so pure that they never do anything wrong, they do not need to be included in the Bill at all. They could be taken out of the definition of "public officer", but this Bill commences on the assumption that there is something that a judge or a member of Parliament has done that could be the subject of public interest information; that is, that they have been the subject of improper conduct, an offence, irregular use or substantial mismanagement of public resources, an act done or omission involving substantial and specific risks to public health, public safety or the environment, or a matter that can be investigated under the Parliamentary Commissioner Act. We could remove the last two issues immediately, because they do not fit in. I suppose paragraph (d) could remain. That being the case, and they having been specifically excluded from clause 8, it is hard to see why there should not be some way in which a non-trivial, non-frivolous, non-vexatious complaint should not be required to be dealt with. There is no such thing as judicial immunity from prosecution. We have parliamentary privilege and that has been limited. There is no judicial privilege at all. If judges engage in any of those actions, they are not acting as judges. They do not

enjoy judicial independence to do those things; their judicial independence is to decide fairly on cases between people. If the allegation is about improper behaviour, it is not unreasonable to say to the person against whom the allegation has been made that somebody will listen to him. That person may not get the result he likes, but at least somebody has listened to his complaint. A judge who is guilty of improper behaviour is excused by someone saying, "Oh well, trust the Chief Justice; he has not done anything, even though it is not trivial, because judges are above that." How can it be said that we should proceed on the basis that we can trust them when the whole basis of this Bill is that they cannot be trusted? One cannot get to first base in this Bill unless there is at least an allegation of impropriety on behalf of somebody. I can see why, possibly, there may be difficulties in imposing the obligation. However, I see no reason for not saying that the matter must be passed onto somebody else if the person to whom the complaint is made does not deal with it. It does not mean that the Presiding Officer cannot investigate the matter; it just means that if he decides not to, he should hand the matter to somebody else. We are not saying that he will not do the job impartially. However, I bet that if we authorise it under this Bill and a Presiding Officer gets a hot potato like this, the first thing he will do is hand it to one of the committees. He will be authorised to do so. It will be in accordance with the Act and I think he would be very pleased to do so. He can then be impartial by not having anything to do with the matter. This provision is of quite some benefit to those people because it does not require them to investigate a matter, and to that degree I accept it. However, it lets the person who has made the complaint know that somewhere along the line somebody will deal with it. I do not think that is unreasonable, especially when a person making an ethical disclosure might not start out feeling paranoid but will probably end up feeling paranoid - I think Hon Jim Scott picked up on that. If somebody made a complaint about a judge and is told that the matter will not be investigated because the person is a judge, can members imagine what that would do to the complainant or how someone would react if he makes a complaint to a Presiding Officer about a minister and is told that the matter will not be investigated because it involves a minister! Those people would go bonkers. They would say, "What is this all about? You are all in it together. You are all looking after each other." What sort of Public Interest Disclosure Bill is this when we can all pat each other on the back and say, "It does not apply to us." People will think this extraordinary.

From the point of view of constitutional appearances, we cannot make the Chief Justice investigate and we cannot make the Presiding Officer investigate. However, there are all sorts of people who could do the job. The most likely option is a committee of this Parliament. If an allegation of crime is made, the matter could be referred to the Anti-Corruption Commission. If the allegation deals with the wasting of money, it could go to the Auditor General. They are the alternatives. However, as the Bill stands, we are providing people with the capacity to go to the Presiding Officers or the Chief Justice with a complaint and then we say that they do not have to do anything about it. That would be irritating to put it mildly.

Hon JIM SCOTT: I agree with Hon Peter Foss. This provision does not take anything away from the respectable position held by the Presiding Officers or the Chief Justice in this case. It is offering them an alternative. In the words of the cliché truism - sometimes there is some truth behind them - justice must not only be done but it must be seen to be done. As Hon Peter Foss has pointed out, whistleblowers quite often feel that the whole system is against them because they are unable to progress their claim of corruption or wrongdoing. They may run into a dead end because somebody is in a respectable position. I believe it magnifies the problem.

As I said at the beginning of this debate, I do not believe that this detracts from the position of the Chief Justice; in fact, it gives him the extra tool of being at arm's length when there could be seen to be some vested interest. If the Chief Justice wishes to make a decision, he has the ability to do so. However, if he does not want to make a decision and he believes there may be the possibility of some conflict, he can hand the matter over to another body that is at arm's length. I believe that this is a good amendment. I have heard nothing yet to the contrary. By way of an aside, because I am in the wrong position in this Chamber, I have not heard the minister's argument very well. I believe that this amendment will enhance the Bill.

New clause put and passed.

Postponed clause 7: Interpretation -

Hon NICK GRIFFITHS: I remind the Committee that this clause was postponed until after consideration of new clause 11, because Hon Peter Foss foreshadowed that he would have a different view of clause 7 in the event that he was not successful in getting up new clause 11. I mention in passing that the amendments to clauses 10 and 11 tidy up the language in those clauses in the event that clause 7 in its present form is passed by the Committee.

Postponed clause put and passed.

Postponed clause 10: Informant to be notified of action taken -

Hon NICK GRIFFITHS: I refer the Committee to the wording of clause 7 and what I have just said. I have been invited by Hon Peter Foss to move the amendments en bloc if it is acceptable to the Committee. I move -

Page 10, line 29 - To delete “person referred to in section 5(3), that person” and insert instead “proper authority, that proper authority”.

Page 11, lines 4, 9, 14 and 18 - To delete “person” and insert instead “proper authority”.

Amendments put and passed.

Postponed clause, as amended, put and passed.

Postponed clause 11: Limitation on notification of informant -

Hon NICK GRIFFITHS: The same argument that applied to the previous clause applies to this clause. I move -

Page 11, line 23 - To delete “person” and insert instead “proper authority”.

Page 11, line 24 - To delete “person’s” and insert instead “proper authority’s”.

Amendments put and passed.

Postponed clause, as amended, put and passed.

Schedule 1 -

Hon NICK GRIFFITHS: I move -

Page 24, line 12 to page 25, line 11 - To delete “*Whistleblowers Protection*” where it appears and insert instead “*Public Interest Disclosure*”.

The Act that this Bill will become is incorrectly referred to in the schedule as the Whistleblowers Protection Act when it should be referred to as the Public Interest Disclosure Act. I will not comment on the processes of the other place.

Amendment put and passed.

Schedule, as amended, put and passed.

Title -

Hon PETER FOSS: A Clerk’s amendment may be required because the heading “Defined Terms” appears at the top of the pages of the schedule, whereas the defined terms are actually on the back of the Bill and are not included as part of the Bill. That is clearly a typographical error.

The DEPUTY CHAIRMAN (Hon Simon O’Brien): That concern has been noted. If a Clerk’s amendment is necessary, it will be done. It is a marginal note.

Title put and passed.

Bill reported with amendments.

Leave granted to proceed forthwith through remaining stages.

Report

Report of the Committee adopted.

Third Reading

HON NICK GRIFFITHS (East Metropolitan - Minister for Racing and Gaming) [8.21 pm]: I move -

That the Bill be read a third time.

HON PETER FOSS (East Metropolitan) [8.22 pm]: Some of the objections that I raised to the Bill in the second reading debate have been addressed. The Bill is by no means perfect, but it would not be easy to come across a perfect Bill in such a vexed area. The Bill as amended in the committee stage is a far more satisfactory arrangement than that which entered the Committee. It should be supported.

Question put and passed.

Bill read a third time and returned to the Assembly with amendments.