

PUBLIC INTEREST DISCLOSURE BILL 2002

Second Reading

Resumed from 17 September.

HON JIM SCOTT (South Metropolitan) [4.42 pm]: When last I spoke on this Bill, I noted that this legislation is largely a result of the recommendations of the Commission on Government. I have read those recommendations and compared them with the legislation. In many cases, there is quite a good match - not a precise one - with the recommendations of the commission, for which I am very pleased. However, I will raise a few matters.

I will inform members of some of the interesting comments made by the commission about its investigation into whistleblowing and the protection of whistleblowers. Section 5.2.1.3 at page 137 of report No 2, part 1 states -

Most of the submissions agreed that whistleblower protection laws should override secrecy laws. There was also general agreement that the Western Australian defamation laws operate to protect the interests of the rich, often to the detriment of others.

In the analysis on the following page it states -

We believe that in order to achieve open and accountable government, it is essential for the general secrecy provisions in this State's statutes to be overridden to protect people who in the public interest disclose information concerning improper conduct in or concerning the public sector and public sector funds, which we shall refer to as public interest disclosure.

The commission also raised a concern about section 361 of the Criminal Code, as it relates directly to members of Parliament, which states -

Any person who, not being a member of either House of Parliament, unlawfully publishes any false or scandalous defamatory matter touching the conduct of any member or members of either House of Parliament as such member or members, is guilty of a misdemeanour, and is liable to imprisonment for 2 years, and to a fine of \$1 000.

It goes on to recommend that section 361 of the Criminal Code, which deals with the criminal defamation of parliamentarians, be repealed. I have read the legislation, but I could not find that provision in the Bill. I ask the Government the reasons that that section of the Criminal Code has not been addressed.

Another matter raised in the Commission on Government report quotes the De Maria and Jan report on the financial effects to which whistleblowers are subjected. It is stated at page 139 of the report -

The interesting statistic is the 49% of whistleblowers who reported a decrease in income . . . The most powerful reason was unemployment, including suspension without pay . . . Other punitive measures used by employers which directly affected income were demotion, withdrawal of penalty or overtime rates, non-renewal of contracts, and denial of annual increments.

It points out that people who speak out in the public interest have to pay not only in an emotional way, but also with good hard cash. It makes it more difficult for those people to defend themselves because quite often they are threatened with lawsuits as well. With a diminished income, it is difficult for those people to establish a proper defence. The report further states -

It is essential to ensure that protections are in place to encourage people, acting in the public interest, to come forward with information about wrongdoing. The exposure of wrongdoing allows the disclosure to be investigated and the necessary action to be taken to bring the wrongdoers to account.

In any legislation that we consider, we must ensure the whistleblower is protected from some of the types of retaliation that may occur. The commission also noted that 49 per cent of whistleblowers suffer financially from speaking out, and that there should be some recompense for those people. I am not sure whether provision has been made for that in regulations in the future. When the minister responds to the second reading debate, I would like to know whether anything is likely to happen in that regard.

I am pleased that the legislation also reflects the commission's comment -

We also do not intend that a whistleblowing scheme should protect a person from liability for their own acts.

In other words, when a person guilty of wrongdoing, realising he will be caught, comes forward and says that something is wrong, the legislation does not get him off the hook. Another thing that was not quite clear to me in the legislation is that sometimes the retaliatory action does not take place against the whistleblower but against another family member. I am not sure whether the Bill adequately picks up that aspect.

The other area that is very important - this reflects what I was saying before afternoon tea when I was talking about the cultural change that is sometimes required to go along with legislation - is that it is quite often very difficult to pick up everything in legislation. The former Deputy Premier, Hon Hendy Cowan, MLA, gave evidence to the Commission on Government, as reported at page 146 of its report No 2. He said -

... there is no such thing as a total legislative protection for whistleblowers. Any employee can be subjected to various informal actions that could make their lives uncomfortable or that could affect their future employment prospects, and that would not be able to be proved as being in breach of any law. No matter what whistleblower protection is in place, whether it be special whistleblower legislation or protection provided under various other Acts, there will always be an element of risk for anybody who blows the whistle on a major act of corruption or impropriety.

Hon Derrick Tomlinson: At least the law can establish the limits of acceptable behaviour.

Hon JIM SCOTT: Yes, it can. The report also quotes the then Director of Public Prosecutions, Mr John McKechnie, QC, who argued that any public disclosure legislation must go hand in hand with a cultural change if it is to be effective, and that is what I was talking about. He told a Perth public hearing on 11 October 1995 that -

You can legislate the same way that there's legislation that says it's unlawful to kill anybody but there were 43 homicides last year in Western Australia. Legislation doesn't prevent crime and legislation won't prevent reprisals to whistleblowers. That is a much more intractable problem which needs to be dealt with by raising ethical standards throughout the public service by developing a culture of openness and communication ... I think that with whistleblowing it's at an early stage and we really need to work very hard on creating the culture and climate to allow people to speak out freely without fear of reprisal. Legislation isn't going to help. I have seen enough cases where whistleblowers have been very, very badly treated through speaking out.

Earlier, a Mr Winzer was in attendance in the House to listen to this debate. He is still trying to get a matter dealt with that would appear to me, on evidence, to be a genuine issue. However, there has been an ability on the part of the bureaucracy to bury the true details of what is going on. There was an inadequate inquiry to begin with, and each subsequent inquiry has referred to that first inquiry and said that the matter had been looked into and everything is okay. As well as passing this legislation, we must also make sure that very clear pathways exist for people to use and there must be a change in the culture. Mr McKechnie said that in the first years of this legislation, some very hard work would have to be done by the responsible ministers to ensure that the culture does change, and that this legislation is given a good hard push at the top of the slope to make sure that it gets over the ski jump; otherwise it will be slowed down by cotton wool all the way and gradually come to a grinding halt. We will be back in here again, trying to make further changes. It is very important that we exercise vigilance to make sure, not that the legislation is perfect, but that its spirit is being properly adhered to.

Hon Derrick Tomlinson: It will require intensive and extensive integrity education for the public sector at all levels.

Hon JIM SCOTT: I agree with the comments of Hon Derrick Tomlinson. He was talking earlier about the culture of secrecy or mateship - the brotherhood mentality - in the Police Service, which is drummed into people. I do not see that as something peculiar to the Police Service; it goes right through the public service. Part of the reason for that is that people do not want to admit mistakes. It is very important to bring about a culture in which it is seen to be good to admit mistakes, and put in place processes to prevent them from happening again. I remember reading out a document from a Radio National program on the health system in which an expert from the United States was talking about the problem with litigation in hospitals, and the cost to hospitals of people hiding the truth. A hospital with which he was involved had set up a system that ensured that, whenever there was a mistake, it was immediately notified, and systems were put in place to ensure that that mistake did not happen again.

Hon Derrick Tomlinson: The inquiry into King Edward Memorial Hospital exposed that sort of problem here in Western Australia.

Hon JIM SCOTT: That is right, and there is a reason for it. People are worried that they will, at the very least, be castigated for the mistake and that they are letting down the side. There also is a real competitive nature within the departments as well, rather than a service culture. It is very important that, not so much whistleblowing, but admission of error be encouraged. Error is the beginning of a lot of this. From my experience so far in this place, whenever I have come up against a problem with corruption, that corruption has not been the initial act, but the subsequent building up and layering of the cover-up. If people had come out in the beginning and said that they had made an error that needed to be remedied, two things would have happened. First, the enmity of the person who suffered from that error would have been taken away by the mistake being

acknowledged and, secondly, systems to prevent a recurrence could have been put in place. There should be some way of encouraging people to come forward and commending them for coming forward and admitting errors, so that the situation does not arise. That process can be very costly. I cannot remember how much it cost when a whistleblower complained about the safety of roads. A report on road building had concluded that the roads were not safe. A huge effort was undertaken to find out who had made that determination; even private detectives were hired. That operation cost hundreds of thousands of dollars. That person spoke up on an issue that affected many people's lives, and he was to be punished. That is exactly what we do not want. Departments must honestly appraise their own mistakes. This legislation goes further than legislating for people's mistakes; it goes into deliberate acts of corruption; for example, in order to get money.

Debate interrupted, pursuant to standing orders.