EVIDENCE AND PUBLIC INTEREST DISCLOSURE BILL 2011

EXPLANATORY MEMORANDUM

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1. Overview

The Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 (**Bill**) introduces several significant reforms to the laws of evidence and public interest disclosure in Western Australia. The purpose of the Bill is two-fold. The Bill seeks to preserve the necessary confidentiality of certain types of relationships whilst simultaneously ensuring the free flow of information and facts to the public. The Bill achieves this purpose in three ways.

The first manner in which the Bill achieves this purpose is by inserting a new protection for confidential communications made in the context of professional confidential relationships (**PCR**). The new professional confidential relationship protection provisions (**PCRP provisions**) will enable the claims of professional persons, such as accountants, to refuse to answer questions about their clients to be tested in court. The protection afforded under the PCRP provisions is not, however, limited to accountants. The protection also applies to other classes of professionals, and particularly journalists where they have received information in circumstances of express or implied confidentiality.

The protection provided to persons acting in a professional capacity is not absolute. The PCRP provisions set out a guided discretion of the court to exclude certain evidence which would disclose confidential communications made to a person acting in a professional capacity. The court is required to exercise this discretion in circumstances where the harm to the confider outweighs the public interest in the information being adduced. By formulating the protection in this way, the bill recognises that there may be a range of competing public interest factors which affect a decision to disclose confidential information.

The professional confidential relationship provisions are modelled on Part 3.10, Division 1A of the *Evidence Act 1995* (NSW). The decision to introduce PCRP provisions into the *Evidence Act 1906* has arisen from the 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, entitled *Uniform Evidence Law*, recommended that Division 1A of Part 3.10 of the *Evidence Act 1995* (NSW) be incorporated into the *Evidence Act 1995* (Cth) to provide a general professional confidential relationship privilege.

In addition to the PCRP provisions, the Bill also introduces a further level of protection for journalists which precludes a journalist from being compellable to give evidence disclosing the identity of their source. The nature of the protection for journalists' sources introduced in this aspect of the Bill has a precedent in a similar provision enacted by section 68 of the New Zealand Evidence Act 2006. The inclusion of the protection for journalists' sources is, however, a direct response to the *Evidence Amendment (Journalists' Privilege) Act 2010* (Cth)[1] as well as the recently passed *Evidence Amendment (Journalist Privilege) Act 2011* (NSW). Although the Commonwealth introduced a protection for journalists in 2010 in consultation with the States, it was envisaged that WA would undertake its own amendments to ensure that the issues identified with the Commonwealth legislation were not replicated in WA, and also to preserve the sovereignty and integrity of the *Evidence Act 1906*.

Introducing a protection for journalists' sources represents an important reform to evidence law. The new protection takes the form of a presumption that when a journalist has promised not to disclose an informant's identity, the journalist cannot be compelled to give evidence that would disclose the identity of the informant. It was determined that only affording journalists protection under the PCRP provisions would be insufficient as information is often disclosed to journalists with the expectation or reasonable possibility that it may be published. Where information is disclosed with an expectation of publication, it cannot have been disclosed in circumstances of express or implied confidentiality. Accordingly, the PCRP provisions would not apply.

In order for the protection to apply, information must be disclosed by an informant with the expectation that the information may be published. Moreover, if a journalist seeks to protect the content of a confidential communication from a source rather than, or in addition to, the identity of the source the protection will not apply. In these

[1] See also the Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) (Cth).

circumstances, a journalist could instead seek protection under the general PCRP provisions.

In addition to these preconditions, the protection afforded to journalists' sources is subject to certain qualifications. Although starting with the presumption that a journalist is not compellable to give evidence identifying their source, a person acting judicially retains a guided discretion to direct that evidence be given. This discretion is exercisable in circumstances where the public interest in 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. As with the PCRP provisions, the protection has been formulated to enable a person acting judicially to balance the public interest in the free flow of information against the need for a decision-maker to make a decision based on all available evidence.

The final way in which the Bill fulfils its intended purpose is by enhancing the capacity of persons to disclose public interest information under the *Public Interest Disclosure Act 2003* (WA). The Bill makes a series of amendments to the *Public Interest Disclosure Act 2003* which further ensures the openness and accountability of Government decision making through the free flow of information.

The reforms which the Bill introduces are divided up amongst the three Parts of the Bill.

Part 1 of the Bill outlines the preliminary matters that are necessary to address.

Part 2 of the Bill proposes the introduction of sections 20A-20M into the *Evidence Act 1906*. The protection for confidential communications and journalists' sources are divided into two discrete sections within Part 2 of the Bill. The first part of Part 2, being sections 20A-20F, contains the PCRP provisions. The amendments made in the first part only apply to courts. The second part of Part 2, being sections 20G-20M, is concerned with protecting the identity of journalists' sources. The protection afforded in this part applies to courts, tribunals and

inquiries[2] where the decision-maker is a "person acting judicially" as defined in section 3 of the *Evidence Act 1906*.

Part 3 of the Bill proposes a series of amendments to the *Public Interest Disclosure Act 2003* (WA). The purpose of the amendments is to further expand the capacity of persons to disclose public interest information. Such an expansion is achieved by permitting persons to anonymously disclose public interest information or disclose public interest information to journalists as an avenue of last resort. The Bill also enhances the protections available for whistleblowers.

2. Part 1 – Preliminary

Clause 1 – Short Title

Clause 1 cites the short title of the Bill as the Evidence and Public Interest Disclosure Amendment Legislation Bill 2011.

Clause 2 – Commencement

Clause 2(a) provides for the commencement of Part 1 of the Bill on the day of Royal Assent. Clause 2(b) provides for the commencement of the remainder of the Bill on a day or days to be appointed by proclamation.

3. Part 2 - Amendments to the *Evidence Act 1906* about protection of confidential communications given in professional confidential relationships or to journalists

Part 2 addresses the protection that attaches to information conveyed in the context of PCR and that which precludes the identity of a journalist's source being disclosed.

In the *Evidence Act 1995* (NSW), the *Evidence Act 1995* (Cth) and the *Evidence Act 2001* (Tas) the protection afforded to persons acting in a professional capacity is referred to as a privilege. Properly understood, however, the PCRP provisions introduce a protection not a privilege. As Brereton J said in *Director-General of Department of Community Services v D* [2006] NSWSC 827 (at [23]):

[2] By parliamentary inquiries, it is intended that the protection afforded will apply to journalists being examined by the Legislative Assembly, Legislative Council or a Committee of either House of Parliament: see generally the *Parliamentary Privileges Act 1891* (WA).

> "Section 126B does not create a “privilege”, properly so called, but confers on the Court a discretion by which it may direct that evidence of a confidential communication not be adduced, which is to be exercised having regard to the various relevant factors, including those listed in section 126B(4). The mere fact of confidentiality gives rise to the discretion, but it is clear from the factors listed in section 126B that the mere fact of confidentiality does not create an entitlement to a favourable exercise of that discretion."

The title to Part 2 therefore refers to the protection of confidential communications and not the privilege for confidential communications.

Clause 3 – Act amended

Clause 3 provides that Part 2 amends the *Evidence Act 1906* (WA).

Clause 4 – Heading replaced

Clause 4 deletes the heading before Section 19A which read "Sexual assault communications privilege" and replaces it with the new heading, "Protection of confidential communications given in counselling concerning sexual assault". The heading was changed in light of the decision in *Director-General of Department of Community Services v D* [2006] NSWSC 827 (see above).

Clause 5 – Sections 20A to 20M inserted

Clause 5 provides for sections 20A to 20M to be inserted into the *Evidence Act 1906* after section 19M. The provisions relevant to PCR are sections 20A to 20F of the Bill. The provisions relevant to journalists' sources are contained in sections 20G to 20M of the Bill.

Sections 20A to 20F are modelled on, and largely identical to, sections 126A-126D of the *Evidence Act 1995* (NSW).

(a) <u>Section 20A</u>

Section 20A(1)

Section 20A(1) is modelled on section 126A(1) of the *Evidence Act 1995* (NSW). Section 20A(1) defines certain words and expressions used in the Bill.

'Confidant' is defined to mean "a person to whom a communication is made in confidence and includes a journalist as defined in section 20G". The definition of confidant clarifies the scope of the intended protection. The definition ensures that the PCRP provisions apply to all persons acting in a professional capacity, including journalists.

'Harm' is defined broadly in subsection (1) to include "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm, such as shame, humiliation and fear". This definition clarifies what types of harm the confider must suffer in order for the court to give a direction that evidence not be adduced.

'Protected confider' is defined to mean "a person who has made a protected confidence or, in other words, the person who uttered the communication to the person acting in a professional capacity".

'Protected identity information' is defined to mean "information about, or enabling a person to ascertain, the identity of the person who made a protected confidence".

The definition of 'protection provisions (PCR)' clarifies that the PCRP provisions are those contained in proposed sections 20C to 20F of the *Evidence Act 1906*.

The most complex term defined in section 20A is 'protected confidence'. In order to establish the existence of a protected confidence, two preconditions must first be satisfied. There must be a communication made:

(1) to a person acting in a professional capacity; and

(2) when the person to whom the communication was made was under an express or implied obligation not to disclose its contents.

The Bill does not define who constitutes a person acting in a professional capacity. In the Explanatory Memoranda of the Evidence Amendment Bill 2010 (Tas) the PCRP provisions were said to apply, but were not limited, to persons such as accountants or financial

advisers. The protection afforded in Western Australia applies to the similar types of persons as well as others, such as doctors. By virtue of the definition of 'confidant', the PCRP provisions also apply to journalists.

Section 20A(2)

Section 20A(2) is identical to section 126A(2) of the *Evidence Act 1995* (NSW). Section 20A(2) clarifies when a communication can be considered to have been made in confidence for the purposes a protected confidence. Section 20A(2) provides that the presence of a third party does not prevent a communication from being made in confidence. The third party's presence must, however, be necessary in order to facilitate the communication. If the third party's presence was unnecessary to facilitate the communication, the communication will not be made in confidence.

(b) Section 20B

Section 20B is modelled on section 126F of the *Evidence Act 1995* (NSW). The purpose of section 20B is to clarify the application of the Bill.

Section 20B(1) and Section 20B(2)

Sections 20B(1) and (2) clarify the retrospective and prospective operation of the Bill. Subsection (1) provides that if a court hearing has commenced before the Bill comes into force the parties to that hearing cannot rely on the PCRP provisions. Conversely, under subsection (2), the fact that a protected confidence was made prior to the Bill coming into force does not prevent a party relying on the PCRP provisions at a subsequent hearing. In other words, if:

(1) a protected confidence was formed before the Bill came into force; and

(2) a court hearing occurs after the Bill came into force which concerns a communication made before the Bill came into force but which formed a protected confidence as defined under the Bill,

then the PCRP provisions apply to that communication.

Section 20B(3)

Subsection (3) clarifies the interaction between the PCRP provisions and the other protection provisions in the *Evidence Act 1906*. Subsection (3) provides that the PCRP provisions do not apply in relation to the matters that are the subject of protection in section 19A(1) of the *Evidence Act*. Section 19A is principally concerned with counselling communications made in respect of the commission, or alleged commission, of sexual assault. Accordingly, the protection afforded under the PCRP provisions does not in any way impact on the protection afforded to sexual assault victims under section 19A of the *Evidence Act 1906*.

Section 20B(4)

Subsection (4) provides that the Bill does not affect the law of legal professional privilege (**LPP**). The policy of the Bill is not directly concerned with LPP. Unlike the protections afforded under the Bill, LPP is a substantive general principle of the common law which plays an important role in the effective and efficient administration of justice.[3] LPP attaches to all documents which are made for the dominant purpose of obtaining legal advice and prevents the inspection and tendering of that document as evidence.[4] While the Bill affords other professionals a protection somewhat akin to LPP, the Bill is not intended to alter substantive, existing doctrines of evidence such as LPP. The purpose of subsection (4) is to clarify this fact and outline the way in which the new protection is intended to interact with privileges which already exist at common law or under the *Evidence Act 1906*.

Section 20B(5)

Subsection (5) also clarifies the interaction between the Bill and the law relating to evidence given in a confession to a member of the clergy. Subsection (5) provides that the PCRP provisions do not affect the law relating to evidence given to a member of the clergy acting in a professional capacity according to church ritual or religious domination. As with LPP, the Bill is not intended to regulate such areas. The purpose of subsection (5) is to ensure that the PCRP provisions only apply to communications made in the context of certain

[3] *Baker v Campbell* (1983) 153 CLR 52 at 117 per Deane J; *Goldberg v Ng* (1995) 185 CLR 83 at 93–4 per Deane J, Dawson J and Gaudron J; *Cmr of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 505 per Brennan CJ, 540 per Gaudron J.

[4] *Esso Australia Resources Ltd v Cmr of Taxation* (1999) 201 CLR 49 at [61] per Gleeson CJ, Gaudron and Gummow JJ; *Grant v Downs* (1976) 135 CLR 674 at 677.

types of relationships. The test of a 'religious confession' adopted in section 20B(5) is modelled on sections 127 of the *Evidence Act 1995* (Cth), the *Evidence Act 1995* (NSW), the *Evidence Act 2001* (Tas) and the *Evidence Act 2008* (Vic). Western Australia does not afford any protection to religious confessions in the *Evidence Act 1906*. The only protection afforded is that which exists at common law. There is yet to be any judicial affirmation of a common law privilege with respect to penitential communications to clergy.[5] Whilst there is some English authority which recognises a residual judicial discretion on grounds such as public policy,[6] it appears that in Australia, absent some special circumstances warranting the exercise of discretion or statutory recognition of the privilege, there is no clerical privilege.[7] Should some protection subsequently be adopted in Western Australia, section 20B(5) ensures that the PCRP provisions will not affect the operation of that statutory privilege.

Section 20B(6)

Subsection (6) makes it clear that a court may give a direction under the PCRP provisions in respect of a protected confidence or protected identity information regardless of any other protection or privilege which attaches to such information under the *Evidence Act 1906*. The purpose of subsection (6) is to ensure that the court retains the power to give directions under the PCRP provisions notwithstanding any further protection that may apply. This section provides practical administrative guidance as to how the PCRP provisions will operate with respect to other existing protections. Subsection (6) does not otherwise affect the legal status of any protection or privilege which applies under the *Evidence Act 1906*, unless that other provision imposes some limitation or restriction.

Section 20B(7)

Subsection (7) makes it clear that the PCRP provisions do not exclude or limit the powers of a court under section 5 of the *Evidence Act 1906* or the powers of a court to do such things as are necessary in the interests of justice. Section 5 of the *Evidence Act 1906* provides:

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[5] See *Halsbury's Laws of Australia*, [365-605].

[6] *Attorney-General v Mulholland* [1963] 2 QB 477 at 498-90; per Denning MR; *Broad v Pitt* (1828) 172 ER 528 per Best CJ; *R v Griffin* (1853) 6 Cox CC 219 per Aldeson B; *Normanshaw v Normanshaw* (1893) 69 LT 468.

[7] Halsbury's Laws of Australia, [365-605]; *Re Buchanan* (1964) 65 SR (NSW) 9. See also *McGuinness v A-G (Vic)* (1940) 63 CLR 73 at 92 per Starke J, at 104-5 per Dixon J

5. This Act not to derogate from existing powers

The provisions of this Act shall be in addition to and not in derogation of any powers, rights, or rules of evidence existing at common law, or given by any law at any time in force in the State not inconsistent with the provisions of this Act.

The purpose of subsection (7) is to ensure that courts overseeing the application of the PCRP provisions retain the greatest possible discretion to receive or exclude evidence depending upon the facts of each case. In sensitive and complex matters such as the PCRP provisions, it is essential for the judiciary to have the capacity to make fair and just decisions based upon all the available evidence. Subsection (7) gives effect to this purpose and rationale in two ways: it reinforces the continuing application the powers, rights and rules of evidence at common law to the PCRP provisions and, in the event that any gap exists in those powers, subsection (7) also empowers a court to do such things as the interests of justice require.

(c) Section 20C

Section 20C is modelled on section 126B of the *Evidence Act 1995* (NSW). This section is the empowering provision in Part 2 with respect to the PCRP provisions.

Section 20C(1)

Subsection (1) provides that a court may direct that evidence not be adduced. The court may make such a direction if it concludes that disclosing the evidence would disclose a protected confidence, the contents of a document recording a protected confidence or protected identity information.

Section 20C(2)

Subsection (2) outlines the administrative process by which a court may give a direction under subsection (1). Subsection (2) provides that a court may direct that evidence not be adduced either on the application of the protected confidant or confider or by the court on its own initiative. There is no requirement for either the confider or confidant to be a party to the case in respect of which the application is made. This ensures that confidential information is not inadvertently disclosed without the knowledge and participation of interested persons.

Section 20C(3)

Subsection (3) outlines when a court must direct that evidence not be adduced. Subsection (3) requires a court to engage in a balancing exercise. The court must give a direction under subsection (1) if it is likely that adducing the evidence would or might cause harm to the protected confider and the court is satisfied that the nature, extent and likelihood of the harm that could or would be caused to the confider if the evidence is adduced outweighs the desirability of the evidence being given. Subsection (3) ensures that an individual's interests are weighed against the interests of justice. Whether or not the balance referred to in subsection (3) favours giving a direction under subsection (1) is a question of fact and will turn on the circumstances of each case.

Section 20C(4)

Subsection (4) is drafted in similar terms to section 126B(4) of the *Evidence Act 1995* (NSW). Subsection (4) lists the matters that the court is required to take into account when deciding whether a protected confidence should be disclosed. The factors contained in subsection (4) assist in determining whether or not the balance referred to in subsection (3) requires a court to direct that evidence not be adduced. There are 10 factors listed in subsection (4), 8 of which are taken from section 126B(4) of the *Evidence Act 1995* (NSW). These factors include:

- the probative value of the evidence;
- the importance of the evidence;
- the nature and gravity of the offence/cause of action/defence; and
- the likely effect of adducing evidence.

Two further factors were also inserted into subsection (4). These two factors are modelled on sections 126B(4)(i) and (j) of the *Evidence Act 2001* (Tas) and sections 126B(4)(i) and (j) of the *Evidence Amendment (Journalist Privilege) Act 2011* (NSW). These factors are:

- the public interest in preserving the confidentiality of protected confidences; and
- the public interest in preserving the confidentiality of protected identity information.

The purpose of subsection (4) is to provide some guidance to the courts as to which factors to consider in determining whether or not the possible harm to the confider outweighs the public interest in the evidence being given. The factors listed in subsection (4) are not the only the factors which a court can consider in determining whether or not to give a direction. The court must, however, have regard to the factors listed in subsection (4). By insisting that a court must take these factors into account, subsection (4) has the effect of making the factors listed mandatory relevant considerations. It is an established principle of administrative law that a decision-maker must take into account all relevant considerations when making a decision.[8] If a court fails to address a factor that court could fall into error by failing to take into account a relevant consideration.[9]

Section 20C(5)

Subsection (5) is unique to the Bill. The purpose of this provision is to limit the capacity of a court to disseminate defamatory material. Subsection (5) makes it clear that a court must not give a direction in defamation proceedings unless first satisfied that the protected confidence is accurate. If the court is satisfied that it is accurate, then subsections (3) and (4) apply. Imposing a requirement of this nature ensures that necessary consideration is given to the substance of a protected confidence. If a court was to inadvertently further some defamatory material it could not be liable for defamation by virtue of section 29 of the *Defamation Act 2005* (WA) which provides a defence for material which was published in a report of any proceedings of public concern. It is, however, preferable as a matter of policy that the judiciary is not implicated in the publication of defamatory material.

Section 20C(6)

Subsection (6) is modelled on section 126(5) of the *Evidence Act 1995* (NSW). Subsection (6) provides that a court must state its reasons for giving or refusing to give a direction under this section. The purpose of the provision is to enable an aggrieved party to determine why a direction was or was not given. Whether or not the reasons given by a court are sufficiently detailed will depend upon the circumstances of the case in question. At common law, a decision-maker is usually required to give reasons which are sufficiently detailed so as to:

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[8] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J

[9] See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.

> "…enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'".[10]

If a court fails to give sufficiently detailed reasons, the decision may be subject to challenge.

(d) Section 20D

Section 20D is modelled on section 126C of the *Evidence Act 1995* (NSW). Section 20D provides that that the PCRP provisions do not prevent evidence being adduced where the protected confider consents to the adducing of such evidence. The provision enables a protected confider to waive the protection afforded in section 20C in an uncomplicated manner.

(e) Section 20E

Section 20E is modelled on section 126D of the *Evidence Act 1995* (NSW). The overall purpose of the provision is to provide an exception to the PCRP provisions in the event of misconduct on the part of the protected confider.

Section 20E(1)

The introduction of such an expansive and detailed misconduct provision is unique to Western Australia. Subsection (1) defines the term misconduct and is modelled in part on the definition of misconduct in section 4 of the *Corruption and Crime Commission Act 2003* (WA). Subsection (1) sets out a series of actions which, if done by a protected confider, will constitute misconduct for the purposes of the Bill. There are 9 types of actions which constitute misconduct under subsection (1). These include:

- committing an offence;
- performing an act or making an omission which renders the confider liable to a civil penalty;

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[10] *ARM Constructions v Commissioner of Taxation* (1986) 10 FCR 197 at 204; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507 per Woodward J. See also *Re Parole Board; Ex parte Forbes* (1996) 89 A Crim R 139; *Rechici v Parole Board* [2001] WASCA 363; and *Hancock v Executive Director of Public Health* [2008] WASCA 224.

- acting corruptly or corruptly failing to act;
- misusing information or material acquired by the confider; and
- undertaking conduct which provides reasonable grounds for terminating the protected confider's employment.

Subsection (1) differs from 126D(1) of the *Evidence Act 1995* (NSW) insofar as it avoids using 'fraud' as an example of misconduct. The term 'fraud' is inherently vague and, to the extent that it means fraud in the sense of being an offence under the *Criminal Code*, adds little to the meaning of misconduct. By defining the term in a more detailed manner, subsection (1) carefully outlines the types of actions which constitute misconduct for the purposes of the Bill. This will ensure that courts are more readily able to determine whether or not misconduct has been committed by the confider and apply the PCRP provisions accordingly. The need to guard against misconduct and deceit specifically is illustrated by a recent example in the United Kingdom, where the editor of a prominent newspaper allegedly supplied a phone to the mother of a young murder victim, ostensibly to allow her to "maintain contact with her supporters", but in fact to facilitate the hacking the phone to procure news stories.

Section 20E(2)

Subsection (2) is modelled on 126D(1) of the *Evidence Act 1995* (NSW), and particularly on the aspect section 126D(1) which addresses the effect of misconduct on the protection. Subsection (2) provides that the PCRP provisions do not prevent evidence being adduced of a communication made or the contents of a document prepared in furtherance of misconduct by the person who makes that communication. The intent of this provision is to ensure that the PCRP provisions are not abused. By creating an exception for misconduct, subsection (2) ensures that persons who rely on the protection provisions come to court with 'clean hands'.

Section 20E(3)

Subsection (3) is an important deeming provision and provides necessary administrative guidance on the operation of the PCRP provisions. Subsection (3) is modelled on section 126D(2) of the *Evidence Act 1995* (NSW). The purpose of subsection (3) is to enable a court to make a finding of misconduct where the occurrence of such

misconduct is a fact in issue. While modelled on section 126D(2) of the *Evidence Act 1995* (NSW), subsection (3) departs from the NSW approach in one crucial way. Instead of using the term 'finding' as in "reasonable grounds for finding", subsection (3) instead uses the term 'believing' as in "reasonable grounds for believing". The term 'believing' was preferred over 'finding' as there was some concern that using the term 'finding' may imply that the court in question had the jurisdiction to conclusively determine the claim of misconduct. This will not always be the case such as, for example, where the case is a civil case but the alleged misconduct is said to be the commission of a criminal offence. Retaining the term 'finding' could therefore create problems in subsequent hearings concerning the PCRP provisions where misconduct is alleged if the court cannot 'find', in a jurisdictional sense, whether misconduct has occurred.

Using the term 'believing' has the effect of broadening and more clearly defining the standard of satisfaction which a court must reach before determining whether or not there was misconduct. It also avoids touching upon the jurisdiction of the court to make the determination in question. What constitutes a reasonable ground for holding a particular belief was addressed in the seminal case of *George v Rockett* (1990) 170 CLR 104. In that case, the High Court said:

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."[11]

It follows from *George v Rockett* (1990) 170 CLR 104 that providing there were objective circumstances which justified the court's inclination towards assenting to rather than rejecting an allegation of misconduct, the court will be entitled to find that misconduct occurred under subsection (3).

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[11] *George v Rockett* (1990) 170 CLR 104 at 115-6.

(f) Section 20F

Section 20F is modelled on section 126E of the *Evidence Act 1995* (NSW). Section 20F makes it clear that the court has the power to make appropriate orders to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information. The purpose of section 20F is to provide further guidance on the powers of courts with respect to the PCRP provisions.

Courts already possess an array of ancillary powers. For example, the court may order that evidence be heard in camera or may make a suppression order in relation to the publication of evidence. Section 20F does not limit the existing powers of a court to make ancillary orders. However, the situations in which courts will suppress proceedings in open court or make suppression orders (including suppressing the publication of names, interlocutory orders, and in some cases final orders) are rare. By including this provision, the Bill clarifies that a court may order suppression in cases concerning the PCRP provisions where suppression is necessary to ensure the safety and welfare of the protected confider and is in the interests of justice.

4. Part 2 – Protection of identity of journalists' informants

The second part of Part 2 addresses the protection that is afforded to the identity of journalists' sources. The decision to introduce a further protection for journalists' sources, in addition to the general PCRP provisions, was inspired by recent amendments to the *Evidence Act 1995* (NSW) and the *Evidence Act 1995* (Cth). The Commonwealth was the first jurisdiction to introduce a protection for journalists' sources. In doing so, however, they removed the PCRP provisions. New South Wales responded to this change by enacting the Evidence Amendment (Journalist Privilege) Act 2011 (NSW). The amendments made by that Act introduced a like protection for journalists' sources but retained the general PCRP provisions as they applied to both professionals and journalists. The changes adopted in the Bill do not directly follow those made in New South Wales. Sections 20G-20M nevertheless ensure the free flow of information and news by providing a further protection for journalists. By enabling journalists to promise to keep secret the identity of a source, it is anticipated that persons will more readily disclose information on matters of public interest.

(a) Section 20G

Section 20G is a definitional provision. Section 20G is modelled in part on section 20A(1) of the Bill and section 126J of the *Evidence Act 1995* (NSW). Section 20G defines certain words and expressions used in proposed sections 20H to 20M of the *Evidence Act 1906*.

The definitions provided in 20G(1) are largely self-explanatory. 'Direction' is defined as a "direction given under section 20J(1)". Section 20J(1) outlines the power of a court to direct that evidence as to the identity of a journalist's source be given.

'Identifying evidence' is defined as having the meaning in section 20I. Section 20I introduces the proposition that a journalist is not compellable to give evidence which would identify their source if they had promised not to. The wording of section 20I is modelled on section 126K(1) of the *Evidence Act 1995* (NSW).

'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 definition adopted in section 20G is modelled on the definition in section 126J of the *Evidence Act 1995* (NSW). The definition clarifies that an informant is a person who discloses information with a view that it may be published. This may be contrasted against a protected confider under the PCRP provisions who discloses information with the expectation that it will remain confidential.

The definition of a 'journalist' is likewise modelled on section 126J of the *Evidence Act 1995* (NSW). '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". A narrow definition of journalist was adopted to ensure the protection afforded in the Bill only extended to persons who were employed as journalists and who were acting in a professional capacity. The Bill is not intended to afford protection to persons such as web bloggers, persons who assist others to write their autobiography or persons who comment on, or disseminate information on, matters of public interest via social networking media such as twitter and facebook. The definition in section 20G can be contrasted against that in the *Evidence Act 1995* (Cth) which is much wider.

The definition of 'national security' has the same meaning as in the *National Security Information (Civil and Criminal Proceedings) Act*

2004 (Cth). National security is defined in that Act to mean "Australia's defence, security, international relations or law enforcement interests".

'News medium' is defined to mean "a medium for the dissemination to the public or a section of the public of news and observations on news". As with the definitions of journalist and informant, the definition of news medium in section 20G is modelled on the definition in section 126J of the *Evidence Act 1995* (NSW). The definition requires information to be published in media which are capable of disseminating news to the public. As with the definition of journalist, news medium was defined in this way to limit the overall scope of the protection.

'Protection provisions (journalists)' is defined to mean section 20G, and sections 20I-20M. The definition clarifies which provisions in the *Evidence Act 1906* constitute the journalist protection provisions.

(b) Section 20H

Section 20H is similar to section 20B of the Bill and section 126L of the *Evidence Act 1995* (NSW). The purpose of section 20H is to clarify the application of the Bill.

Section 20H(1) and section 20H(2)

Subsections (1) and (2) are almost identical to sections 20B(1) and (2). Subsection (1) provides that that the journalist protection provisions do not apply to a proceeding if the hearing began before commencement of the provisions. However, under subsection (2), the protection applies to information given by an informant to a journalist before or after the commencement of the protection provisions.

Section 20H(3)

Subsection (3) provides that the journalist protection provisions apply to a person acting judicially even in circumstances in which that person's authority to hear, receive and examine evidence excludes the application of the *Evidence Act 1906*.[12] The purpose of subsection (3) is to increase the scope of the protection afforded to journalists' sources. Unlike the general PCRP provisions, the protection for journalists' sources applies in any proceeding where the decision

[12] See for example *State Administrative Tribunal Act 2004,* s 32.

maker is a person acting judicially and not just courts. A person acting judicially is defined in section 3 of the Evidence Act 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, tribunals and inquiries, such as hearings before the Legislative Assembly or Legislative Council, or committee hearings of both Houses of Parliament. Subsection (4) and the phrase "a person acting judicially" must also be understood in light of the *Evidence Act 1906* as a whole. Section 4 of the *Evidence Act 1906* provides that:

> **4. Application of Act**
>
> All the provisions of this Act, except where the contrary intention appears, shall apply to every legal proceeding.

Proceedings such as Parliamentary Inquiries may not appear on their face to be legal proceedings and as such the *Evidence Act 1906*, and thus the amendments made in the Bill, would not otherwise apply. The definition of a legal proceeding is, however, very broad. Section 3 of the *Evidence Act 1906* provides that:

> ***legal proceeding*** or ***proceeding*** includes any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given, and includes an arbitration;

The definition of legal proceedings specifically refers to an inquiry. Accordingly, the phrase "a person acting judicially" also refers to those circumstances in which a journalist is required to appear before an inquiry, such as a Parliamentary Inquiry, to give evidence.

Subsection (3) also addresses some of the complexities that arise from affording journalists protection before courts, tribunals and inquiries. If the Bill is adopted into law, the protection for journalists' sources will be incorporated into the *Evidence Act 1906*. Under the empowering legislation of many tribunals the *Evidence Act 1906* and the rules of evidence are expressed to not apply to the tribunal's proceedings. For example, section 32(2) of the *State Administrative Tribunal Act 2004* (WA) provides that:

32. Practice and procedure, generally

(1) ……

(2) The *Evidence Act 1906* does not apply to the Tribunal's proceedings and the Tribunal —

(a) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures or the regulations or rules make them apply; and

(b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

If the *Evidence Act 1906* does not apply to a tribunal's proceedings then the protection afforded to journalists in the Bill will also theoretically not apply. Subsection (3), however, provides that the protection provisions apply to any proceeding before a person acting judicially even if the law by which the person has authority to hear, receive and examine evidence provides that the *Evidence Act 1906* does not apply to the proceeding. Subsection (3) ensures that the journalist protection provisions apply irrespective of whether the tribunal's rules exclude the application of the *Evidence Act 1906*.

Section 20H(4)

Subsection (4) is modelled on section 20B(7) of the Bill. Subsection (4) makes it clear that the journalist protection provisions do not exclude or limit the operation of section 5 of the *Evidence Act 1906* or the powers of a person acting judicially to do such things as are necessary in the interests of justice. The purpose of subsection (4) is to ensure that persons overseeing the application of the protection provisions retain the greatest possible discretion to receive or exclude evidence depending upon the circumstances of each individual case. Subsection (4) achieves this purpose by reaffirming the continuing power of a person acting judicially to take such action as the interests of justice require.

(c) Section 20I

Section 20I gives effect to the protection the Bill affords to journalists.

Section 20I is modelled on section 126K(1) of the *Evidence Act 1995* (NSW). Section 20I provides that where a journalist has promised not to disclose the informant's identity, neither the journalist nor the person for whom they worked at the time of the promise, is compellable to give evidence disclosing the informant's identity. While modelled on section 126K(1) of the *Evidence Act 1995* (NSW), section 20I uses the phrase "person for whom the journalist was working at the time of the promise" instead of "his or her employer". The different terminology ensures that only the relevant employer receives protection under the Bill; that is, only the person for whom the journalist was working when the promise was made. The phrase adopted in the Bill also ensures that freelance journalists and journalists working under contract also receive protection for their sources under the journalist protection provisions. Using the phrase "for whom the journalist was working" as opposed to "employer" avoids some technical construction of the word "employer" under section 20I. Instead, the provision ensures that the protection extends to all professional journalists, whilst preventing the protection from applying to other commentators, such as web bloggers.

The term 'give' is also used in section 20I rather than 'adduce'. 'Give' is intended to have the same meaning as it does in section 7 of the *Evidence Act 1906.* Using the term 'give' instead of 'adduce' makes it clear that the protection applies to the process of giving evidence in court as well as swearing an affidavit with respect to the protection claimed.

(d) Section 20J

The purpose of section 20J is to limit the prohibition on disclosure introduced by section 20I.

Section 20J(1)

Subsection (1) provides that, despite section 20I, a person acting judicially may direct that identifying evidence be given. Subsection (1) makes it clear that the presumption that a journalist is not compellable to give identifying evidence is not absolute.

Section 20J(2)

The test to be applied to determine whether or not the discretion introduced in subsection (1) should be exercised, is set out in

subsection (2). Subsection (2) is modelled on section 126K (2) of the *Evidence Act 1995* (NSW). Subsection (2) provides that a person acting judicially may order that the presumption does not apply if satisfied that the public interest in the disclosure of the informant's identity 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. Introducing this test ensures that the appropriate balance is reached between two important public interests: the public interest in supporting the capacity of journalists to investigate and disseminate information about matters of public concern, and the public interest in ensuring that decisions-makers are informed of evidence that could influence their decisions.

Section 20J(3)

Subsection (3) is modelled on section 20C(4) of the Bill and section 126B(4) of the *Evidence Act 1995* (NSW). Subsection (3) lists the matters that a person acting judicially is required to take into account when deciding whether or not to direct a journalist to give evidence identifying their source. Many of the matters listed in subsection (3) are also contained in section 20C(4), including

- the probative value of the evidence;
- the importance of the evidence;
- the nature and gravity of the offence/cause of action/defence; and
- the likely effect of giving the identifying evidence including the likelihood and extent of harm if the evidence is adduced.

In addition to those matters, several further matters have been specifically included with respect to the journalist protection provisions. These matters include:

- the risk to national security or to the security of the State; and
- whether or not there has been misconduct on the part of the informant or journalist as defined in section 20K(1).

Subsection (3) provides guidance to decision-makers as to which factors should be considered in determining whether the balance contemplated in subsection (2) favours the evidence being given. In

deciding whether to give a direction under subsection (1), a person acting judicially must consider the matters in subsection (3) but is not limited to those matters. As the protection is unique to journalists, a decision-maker must weigh these matters against the purpose of the presumption that a journalist is not compellable to give evidence. The purpose of the presumption is to preserve the freedom of the press and ensure the continued free flow of news and information on matters of public interest.

Section 20J(4)

Subsection (4) is modelled on section 20C(6) of the Bill and section 126(5) of the *Evidence Act 1995* (NSW). Subsection (4) provides that a person acting judicially must state their reasons for giving or refusing to give a direction under this section. The purpose of the provision is to enable an aggrieved party to know why a direction was or was not given.

(e) Section 20K

Section 20K addresses the effect of misconduct on the presumption that a journalist is not compellable to give evidence identifying their source. Section 20K is modelled in part on section 20E of the Bill and section 126D of the *Evidence Act 1995* (NSW). The overall purpose of the provision is to assist a person acting judicially in the exercise of their discretion to give or not give a direction in the event of misconduct.

Section 20K(1)

The introduction of an expansive misconduct provision in the context of journalist shield laws is unique to the Bill. Subsection (1) defines the term misconduct. The provision is modelled in part on section 20E(1) and section 4 of the *Corruption and Crime Commission Act 2003* (WA). The provision outlines a series of actions which if done will constitute misconduct for the purposes of the Bill. These actions include:

- committing an offence;
- performing an act or making an omission which renders the confider liable to a civil penalty;
- acting corruptly or corruptly failing to act;

- misusing information or material acquired by the confider; and
- undertaking conduct which provides reasonable grounds for terminating the protected confider's employment.

While similar to section 20E(1), subsection (1) differs from the general PCR misconduct provisions in one essential respect. As the list of factors makes clear, both the conduct of the informant and the journalist is capable of constituting misconduct under section 20K. The purpose of this restriction is to ensure that journalists and informants seeking to rely on the protection provisions have acted consistently with the public interest in the free flow of information and news.

As with section 20E(1), subsection (1) also avoids using the term 'fraud'. The reasons for avoiding the use of this term were explained in respect of section 20E(1).

Section 20K(2)

Subsection (2) is modelled on section 20E(2) of the Bill and section 126D(1) of the *Evidence Act 1995* (NSW). Subsection (2), however, departs from section 20E(2) in the manner in which it operates. Under section 20E(2), where a court believes that misconduct has occurred the PCRP provisions do not prevent evidence being adduced. Under subsection (2), however, the exclusion of the journalist protection provisions is not automatic.

Subsection (2) provides that if a person acting judicially finds that there was misconduct on the part of an informant or journalist in relation to the obtaining, using, giving or receiving of information, the person acting judicially may, but is not bound to, give a direction. Subsection (2) also provides that a person acting judicially must have regard to the principles set out in subsection (3) when deciding whether or not to give a direction. The purpose of this provision is to ensure that both journalists and informants comply with a particular standard of conduct in order for the protection to apply. The provision recognises, however, that the standard of conduct may be violated, but the violation may be insufficiently reprehensible as to warrant excluding the protection.

Section 20K(3)

Subsection (3) outlines the principles to which a person acting judicially must have regard when deciding whether or not to give a direction.

Subsection (3) outlines six principles which, if satisfied, generally require a direction to be given. Subsection (3) makes it clear that certain types of misconduct are more likely to warrant a person acting judicially directing that identifying evidence be given.

Section 20K(3)(a)

A direction is to generally be given under subsection (3)(a) where three conditions are satisfied: first, the misconduct must be the commission of a criminal offence under section 81 of the *Criminal Code* or a breach of a public sector standard or code of conduct or ethics under the *Public Sector Management Act 1994*; second, the breach or offence must concern the disclosure of public interest information; and third, the information could have been but was not disclosed in accordance with the *Public Interest Disclosure Act 2003*. The purpose of subsection (3)(a) is to ensure that the protection does not apply where a crime is committed with respect to sensitive public interest information. The provision makes it clear that the proper avenues should be followed for disclosing public interest information under the *Public Interest Disclosure Act 2003* and not simply disclosed to journalists in the first instance.

Section 20K(3)(b)

Subsection (3)(b) provides that a direction should generally be given if information provided to a journalist could have been provided to another person in a manner that did not constitute misconduct. This provision ensures that the expansive protection provided by the journalist protection provisions only applies where the information disclosed was appropriately disclosed. There is no policy basis which justifies the protection applying when information could have been disclosed to a more appropriate person.

Section 20K(3)(c)

Subsection (3)(c) provides that a direction should generally be given if the information given to the journalist could have been obtained under the *Freedom of Information Act 1992* or by other lawful means. This

provision again ensures that necessary limits are placed on the scope of the protection. Where information can be obtained lawfully, it is preferable for the purposes of transparency that the information is obtained by lawful means. If these legal processes are not followed, subsection (3)(c) makes it clear that there is generally no basis for the protection applying.

Section 20K(3)(d)

Subsection (3)(d) provides that a direction should generally be given if the misconduct involved a breach of privacy that was not warranted in the circumstances. To determine what is warranted in the circumstances, a person acting judicially is required have regard to the value attached to:

- the privacy of personal information;
- the privacy of commercial information; or
- Cabinet confidentiality, or other principles which allow the free exchange of ideas on a confidential basis during the development of public policy matters.

Subsection (3)(d) ensures that the protection for journalists' sources does not afford journalists or informants a means of violating the public's privacy. While there is not 'right to privacy' as a matter of law, the public, business and government rely on the ability to undertake certain acts or transactions in private. Subsection (3)(d) makes it clear that unnecessary and unwarranted invasions of privacy by journalists or other persons who provide information to journalists will generally not attract protection under the Bill.

Section 20K(3)(e)

Subsection (3)(e) is modelled on repealed section 126B(4) of the *Evidence Act 1995* (Cth). Subsection (3)(e) ensures that the journalist protection provisions do not jeopardize State or national security. The provision provides that a direction should generally be given if a communication made to a journalist, if published, would pose a risk to national or State security. Subsection (3)(e) makes it clear that persons who are responsible for jeopardising State or national security should not be protected under the Bill. The greater public interest in the preservation of State and national security outweighs the public interest in the free flow of information and news.

In addition, subsection (3)(e) specifically maintains public interest immunity, which is a well accepted protection of other forms of sensitive information that may not be subject to Cabinet confidentiality – foremost, information such as the identity of police informants or protected witnesses.

Section 20K(3)(f)

Subsection (3)(f) provides that a person acting judicially may give or refuse to give a direction in the event of misconduct where it is otherwise in the public interest to do so. Subsection (3)(f) is effectively a saving provision, which vests the ultimate discretion to give or not give a direction with the decision-maker. It ensures that a person acting judicially can take such action as is necessary in the circumstances of a particular case.

Section 20K(4)

Subsection (4) is an important deeming provision and is modelled on section 20E(3) of the Bill and section 126D(2) of the *Evidence Act 1995* (NSW). The purpose of subsection (4) is to enable a court to make a finding as to misconduct where the occurrence of such misconduct is a fact in issue. While modelled on section 20E(3), subsection (4) differs insofar as the provision refers to misconduct in relation to "obtaining, using, giving or receiving information". The difference in terminology stems from the different nature of the protection afforded under the journalist protection provisions. Under the journalist protection provisions it is not possible to commit misconduct with respect to protecting the identity of the source. Instead, misconduct can only be committed in relation to obtaining the information which is subsequently published. Subsection (4) clarifies the relationship between the protection and the misconduct in this respect.

Subsection (4) also adopts the terminology "reasonable grounds for believing" rather than "reasonable grounds for finding" which is used in section 126D(2) of the *Evidence Act 1995* (NSW). The reasons for adopting this terminology are explained in respect of section 20E(3). In essence, the phrase "believing" was adopted to broaden and more clearly define the standard of satisfaction a person acting judicially must reach before making a finding as to the existence misconduct.

(f) Section 20L

Section 20L is modelled on section 20D of the Bill and section 126C of the *Evidence Act 1995* (NSW). Section 20L provides that that the journalist protection provisions do not prevent evidence being given or adduced with the informant's consent.

(g) Section 20M

Section 20M is modelled on section 20F of the Bill and section 126E of the *Evidence Act 1995* (NSW). Section 20M provides that a person acting judicially has the power to make appropriate orders to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information. For example, a person acting judicially may order that the evidence be heard in camera or may make a suppression order in relation to the publication of the evidence. The purpose of section 20M is to provide further guidance on the powers of courts with respect to the journalist protection provisions. Section 20M does not limit the possible actions a person acting judicially may otherwise take regarding the disclosure of evidence.

5. Part 3 – Amendments about further protections under the *Public Interest Disclosure Act 2003*

Part 3 of the Bill proposes a series of amendments to the *Public Interest Disclosure Act 2003* (WA) (***PID Act***). The purpose of Part 3 is to expand the protections available to persons under the *PID Act* in a manner consistent with the new protections available to journalists. The amendments made to Part 3 are largely modelled on equivalent provisions in other Australian jurisdictions.

(a) Division 1 – Preliminary

Clause 6 – Act amended

Clause 6 provides that Part 3 amends the *PID Act*.

(b) Division 2 – Amendments about injunctions concerning reprisals

Clause 7 – section 15A inserted

Clause 7 inserts section 15A into the *PID Act*.

Section 15A applies to persons who have disclosed public interest information under the *PID Act*. Section 15A is modelled on sections 20 and 21 of the *Whistleblowers Protection Act 2001* (Vic) and sections 21 and 22 of the *Public Interest Disclosure Act 2002* (Tas).

Section 15A(1)

Subsection (1) enables a person who believes that detrimental action has been or may be taken against them to apply to the Supreme Court for an order remedying the detrimental action or for an injunction. The phrase "detrimental action" is defined broadly in section 3(1) of the *PID Act* as follows:

> ***detrimental action*** includes action causing, comprising, or involving —
>
> (a) injury, damage, or loss;
>
> (b) intimidation or harassment;
>
> (c) adverse discrimination, disadvantage, or adverse treatment in relation to a person's career, profession, employment, trade, or business; or
>
> (d) a reprisal;

The purpose of subsection (1) is to empower the Supreme Court to take preventative measures to restrain the occurrence of some detrimental action or cure the occurrence of some detrimental action by a remedial order. By providing increased protection for persons who disclose public interest information, it is hoped that a greater number of persons will be encouraged to make such disclosures without fear of reprisal.

Section 15A(2)

Subsection (2) sets out the powers of the Supreme Court on an application under subsection (1) if satisfied that a person has taken or will take detrimental action in reprisal for a disclosure of public interest information. Subsection (2) provides that the Supreme Court may order the person who took the detrimental action to remedy it or grant an injunction on such grounds as the Supreme Court sees fit.

Section 15A(3)

Subsection (3) sets out the interim powers of the Supreme Court with respect to an application made under subsection (1). Subsection (3) provides that the Supreme Court may, pending the final determination of the application, make an interim order or grant an interim injunction. The purpose of subsection (3) is to enable to Supreme Court to maintain the status quo while the application is determined and ensure that no further detriment is suffered.

(c) Division 3 – Amendments about relocation

Clause 8 – section 15B inserted

Clause 8 inserts 15B into the *PID Act* after section 15.

Section 15B is modelled on section 47 of the *Public Interest Disclosure Act 2010* (Qld). Section 15B applies to public service employees who have been, or may be, subject to detrimental action and who wish to relocate as a result. The purpose of section 15B is to allow a public service employee to apply to be relocated to avoid suffering from possible or further detrimental action as a result of disclosing public interest information.

Section 15B(1)

Subsection (1) defines certain words and expressions used in proposed section 15B of the *PID Act*. In particular, it defines the terms 'employing authority', 'public service employee' and 'organisation'. The definitions of 'employing authority' and 'organisation' in the Bill adopt the definitions of those terms in the *Public Sector Management Act 1994* (WA).

Section 15B(2)

Subsection (2) provides that a public service employee may apply in writing to their employing authority requesting to be relocated. An application for relocation may be made under subsection (2) if detrimental action has been, or may be, taken against the employee in reprisal for disclosing public interest information and the only practical means of removing or substantially removing the danger of reprisal is to relocate the employee.

Section 15B(3)

Subsection (3) imposes an obligation on the employing authority to relocate the employee where the employing authority is satisfied that the grounds in subsection (2) are made out. Subsection (3) provides that the employing authority must, as far as practicable, arrange to relocate the employee away from the employee's existing work place whether within the employee's current department or organisation or not.

Section 15B(4)

Subsection (4) makes it clear that the relocation arrangements made by the employing authority under subsection (3) must be approved by the employee. If the employee does not consent to the arrangements, the public service employee cannot be relocated under subsection (3).

(d) Division 4 – Amendments about anonymous disclosure

The purpose of Division 4 is to introduce the possibility for a person to disclose public interest information anonymously. Division 4 is modelled on similar provisions in the *Public Interest Disclosure Act 2010* (Qld), the *Public Interest Disclosure Act 1994* (ACT), the *Public Interest Disclosure Act* (NT), and particularly the *Whistleblowers Protection Act 2001* (Vic).

Clause 9 – section 5 amended

Clause 9 inserts section 5(6A) into the *PID Act* after section 5(5). Clause 9 provides that a person may disclose public interest information anonymously.

Clause 10 – section 8 amended

Clause 10 inserts section 8(4) into the *PID Act* after section 8(3). Section 8(3) imposes an obligation on a proper authority to provide a person who makes a public interest disclosure the authority's reasons for failing or ceasing to investigate. Clause 10 provides that section 8(3) does not apply in respect of an anonymous disclosure.

Clause 11 – section 10 amended

Clause 11 inserts section 10(4) into the *PID Act* after section 10(3). Section 10(3) requires a person who has made a disclosure to be

provided with a status report on any investigation which has arisen as a result of their disclosure. Clause 11 provides that this obligation does not apply in respect of anonymous disclosures.

Clause 12 – section 12 amended

Clause 12 inserts section 12(5A) into the *PID Act* after section 12(4). Section 12(4) requires a progress report to be made to any person who discloses public interest information. Clause 12 excludes this obligation from applying to anonymous disclosures.

Clause 13 – section 16 amended

Clause 13 inserts section 16(3A) into the *PID Act* after section 16(2). Section 16(2) imposes an obligation on a person who discloses information which might identify a person who properly disclosed public interest information to notify the person that the disclosure is going to be made and the reasons for making it. Clause 13 provides that the duty to notify does not apply in respect of an anonymous disclosure.

Clause 14 – section 17 amended

Clause 14 inserts section 17(2A) into the *PID Act* after section 17(1). Section 17(1)(a) provides that a person who makes a disclosure but who fails to assist with the subsequent investigation without a reasonable excuse forfeits the protection in section 13 of the *PID Act*. Clause 14 makes it clear that the duty to assist with the investigation does not apply if the disclosure was made anonymously.

(e) Division 5 – Amendments about disclosure to journalists

The purpose of Division 5 is to create further protections for persons who release public interest information to journalists in certain circumstances. Division 5 is modelled on the *Protected Disclosures Act 1994* (NSW) and the *Public Interest Disclosure Act 2010* (Qld).

Clause 15 – section 7A inserted

Clause 15 inserts section 7A into the *PID Act* after section 6. This clause is modelled on section 20 of the *Public Interest Disclosure Act 2010* (Qld).

Subsection (1) defines the word 'journalist' for the purposes of proposed section 7A of the *PID Act*. Proposed section 7A provides that a journalist is "a person engaged in the profession or occupation of journalism in connection with the publication of information in a medium for the dissemination to the public or a section of the public of news and observations on news". The definition contained in section 7A is modelled on that contained in proposed section 20G of the *Evidence Act 1906*. Defining journalist in this way ensures that the term is applied consistently across the reforms to the *Evidence Act 1906* and the *PID Act*.

Subsection (2) provides for public interest disclosures to journalists. The ability of a person to make a disclosure to a journalist is an avenue of last resort. Subsection (2) provides that a person may only disclose substantially the same information to a journalist that was disclosed as public interest information if the entity which received the disclosure:

- has refused to investigate or discontinued investigating a matter raised by the disclosure;
- has not completed the investigation within 6 months of the disclosure being made;
- has completed the investigation but has not recommended any action be taken in respect of the matter; or
- has failed to comply with the notification obligations in sections 10(1) or 10(4).

Clause 16 – section 16 amended

Clause 16 inserts section 16(1)(d) and section 16(3)(e) into the *PID Act*.

Section 16(1) provides that a person must not make a disclosure which identifies any person who has made an appropriate disclosure of public interest information (***an identifying disclosure***) unless certain preconditions exist. Section 16(1)(d) adds a further possible precondition by providing that a person may make an identifying disclosure if it is made in accordance with the order of a court or other body or person who has the authority to hear, receive and examine evidence. The purpose of section 16(1)(d) is to permit an identifying disclosure being made in circumstances where a court or person

acting judicially has ordered that evidence be given under the PCRP provisions or journalist protection provisions.

Section 16(3) is similar in purpose and effect to section 16(1) except that it applies to identifying information. Section 16(3) provides that a person must not disclose information that might identify someone unless certain preconditions are met. Section 16(3)(d) adds an identical precondition to that added by section 16(1)(d). The purpose of including such a provision is again to permit identifying information being disclosed in circumstances where a court or other person has ordered that evidence be given under the PCRP provisions or journalist protection provisions.

Clause 17 – section 18A inserted

Clause 17 inserts section 18A into the *PID Act* after section 17.

Section 18A is a deeming provision and is modelled on section 20(3)(a) of the *Public Interest Disclosure Act 2010* (Qld). Section 18A provides that a person who makes a disclosure to a journalist under section 7A(2) is to be taken to have made a disclosure of public interest information for the purposes of Part 3 of the *PID Act*. Section 18A ensures that a person who discloses information to a journalist which is substantially the same as previously disclosed public interest information also receives protection under Part 3 of the *PID Act*.