

PUBLIC SECTOR REFORM BILL 2009

Consideration in Detail

Resumed from 22 June.

Clause 34: Section 33 replaced —

Debate was adjourned after the following amendment had been moved by Mr E.S. Ripper (Leader of the Opposition) —

Page 25, line 23 — To delete “delegate” and insert —

, in an extreme or emergency situation, delegate, for a defined time,

Mr C.J. BARNETT: When we adjourned last night, there was some discussion about the delegation of powers and responsibilities, and there was a concern that they might be delegated out to people who are not within the government sector. One of the examples was a situation in which powers might be delegated to a police officer—the police officer not being a public servant—or to other jurisdictions. I have been given some further examples that might apply. One such example relates to Kings Park and Botanic Garden. When a boab tree was transported from Broome to Perth, it was necessary to delegate powers to a scientific expert to direct and organise the scientific staff involved. Apparently the powers were delegated outside for someone to have the capacity to supervise the transfer and management of the boab tree over an extensive and difficult journey. It was an unusual situation, but a real example.

Mr J.C. Kobelke: What powers were required to delegate that authority?

Mr C.J. BARNETT: Basically, it was the power to direct staff; the power was given to the outside scientific expert to direct the staff of the Botanic Gardens and Parks Authority as the tree was moved. It was a unique, specialised task that did not fall within the existing experience of the Botanic Gardens and Parks Authority. Someone was appointed from outside and was delegated the power to manage and supervise the staff in the operation of moving the boab tree—namely, lifting it out of the ground, moving it and replanting it. The point is that that was not an extreme or emergency situation. The Leader of the Opposition’s amendment refers to extreme cases. Moving the boab tree was not an emergency or extreme case, but it was a very unusual situation in which the capacity to direct staff and manage the whole operation needed to go to someone with the scientific knowledge to remove the boab from the ground in Derby and safely transport and replant it. It was not an emergency situation, but it was real situation.

Mr C.J. Tallentire: What would have happened had something gone wrong; if there had been an accident on the way and the boab had fallen over, for example?

Mr C.J. BARNETT: These are just powers to carry out that task. All the other responsibilities would remain with the agency, so if something were to go wrong, it would be dealt with in the normal way. These are very specific applications. Other examples relate to security issues. We may well have, for example, with the forthcoming Commonwealth Heads of Government Meeting next year, the ability to delegate particular security operational powers to commonwealth officials who are engaged in the joint management of security relating to that; that is probably one of the more obvious ones. It is not an extreme situation, but again, one in which we would not hesitate to make sure that powers are delegated to responsible people.

Ms J.M. Freeman: Unusual situations?

Mr C.J. BARNETT: I think the boab tree and CHOGM are both unusual situations. They do not illustrate emergency or dangerous situations.

Ms J.M. Freeman: What if the amendment had “unusual, emergency or extreme situations”?

Mr C.J. BARNETT: I do not think it is necessary to try to define it that way. The government’s amendment allows that to happen. To put the caveat on it that it has to be extreme, an emergency or unusual would unnecessarily restrict it. There is no wrong intent here; it is just to deal with odd situations that no-one would anticipate. No-one drafting legislation 10 years ago would have anticipated needing delegation powers to move a boab tree, but those things occur. I refer to the forthcoming amendment. For those delegations to occur, the Public Sector Commissioner must be satisfied that the delegation is necessary. It cannot just be for some superfluous or convenient reason; it has to be something that is seen to be necessary. In this case of moving the boab tree, only one person could be found who had the required knowledge of that species to transport it and replant it so that it survived—and it has.

Mr J.C. KOBELKE: Premier, this gets curiouser and curiouser. We are dealing with an amendment addressing issues in the amendment proposed in clause 34 of the Public Sector Reform Bill 2009. Section 33 of the Public Sector Management Act 1994, “Delegatory powers of chief executive officers and chief employees”, applies to a

CEO delegating powers only within the agency. The amendment in the bill—which the amendment before the house is seeking to put some control over—will allow that power to be delegated to any person so chosen.

Mr C.J. Barnett: With the approval of the commissioner; it is not open ended.

Mr J.C. KOBELKE: We are talking about to whom this power can be delegated and why this power to delegate so widely is needed. The current provision is fettered in that it provides for the CEO to delegate power to someone within the agency to carry on a statutory responsibility with all the powers that go with that responsibility. The Premier is seeking to enable the delegation of those powers and responsibilities to a contractor or some person who meets some unspecified criteria. When I asked for an example, the Premier referred to bringing a boab tree from the Kimberley, which leaves me totally nonplussed. It happened without these powers. Where was the problem? In thousands, if not millions, of examples every year, government agencies contract out work. They call in a plumber or an electrician. Power does not have to be delegated to use the services of someone from outside the agency. The transportation of a boab tree 3 000 kilometres may be a complex and difficult process that needs specialist expertise, and so the government contracts the only botanist in the world who has ever transferred a boab tree. This unique specialist is not employed by government and is needed to help with the project.

Mr C.J. Barnett: And you need them to have some authority over staff, to be able to instruct them and direct them on how to look after the case.

Mr J.C. KOBELKE: Normally—I assume it was done in this case; I am just guessing—the Botanic Gardens and Parks Authority would delegate a middle level or senior officer to be the agency’s lead organising officer. That officer would build a relationship with the specialist botanist, and they work out the demarcation of responsibilities. If they need to use any powers under the Botanic Gardens and Parks Authority Act, the delegated officer exercises those powers in a close cooperative working relationship with the specialist who is not from the department. It has been done; we do not need these powers. I ask the Premier to explain where I am wrong or to give me a cogent example illustrating the need for these powers.

Mr C.J. BARNETT: Security would probably be a more common example. For example, in the lead-up to CHOGM, if the officer in charge of state security issues is for some reason unavailable—perhaps a personal matter—he may want to delegate the administration of his powers to a commonwealth officer. That could happen. It is not necessarily an emergency. It is not necessarily that unusual, but it is entirely appropriate. As long as the Public Sector Commissioner is satisfied that it is necessary, I think it is quite proper. I know where the member for Balcatta is coming from, but there are enough safeguards to ensure that this cannot be used at will by agency CEOs. They will need to have good reason and the agreement of the Public Sector Commissioner, according to set criteria. I think the safeguards allow commonsense to apply. There is a theme in this and perhaps in future legislation about trying to free up the public service to operate effectively. That is what we are trying to do.

Mr E.S. RIPPER: The real issue is that we do not want to see this delegation of power used as a cover for privatisation.

Mr C.J. Barnett: Yes.

Mr E.S. RIPPER: There are two ways to look at that. There is the present government’s intention and there is what the legislation creates as options for future governments. Let us move to the present government’s intention. The government, through the Economic Audit Committee, has an announced intention to shift services to the non-government welfare sector, and perhaps has an intention to contract out—to use the Premier’s preferred term—other services. We are concerned about that and that is why I asked the Premier yesterday to put on the record his intentions about how this clause will be used or not used with regard to the privatisation issue. The second issue is, of course, that even if the Premier has entirely good intentions and a good heart on this issue —

Mr C.J. Barnett: And I do.

Mr E.S. RIPPER: — the legislation possibly creates options for future governments. I am not sure, given the events of the past 24 hours, whether I should ever reach agreement with the Premier on a matter like this.

Mr C.J. Barnett: No.

Amendment put and negatived.

Mr C.J. BARNETT: I move —

Page 25, line 25 — To delete “to any person.” and substitute —
to —

Extract from Hansard

[ASSEMBLY - Wednesday, 23 June 2010]

p4460b-4470a

Mr Colin Barnett; Mr Eric Ripper; Mr Chris Tallentire; Acting Speaker; Mr Vincent Catania

- (a) a public service officer; or
- (b) any other employee; or
- (c) a person who is appointed, employed or holds office in an entity that is —
 - (i) listed in Schedule 1 column 2; and
 - (ii) prescribed for the purposes of this section;or
- (d) with the approval of the Commissioner, any other person.

This amendment will do something similar to what the opposition was advocating a moment ago, although it is not as prescriptive and does not require the establishment of an extreme or emergency situation. The government seeks this amendment to allow the delegation of powers to deal with practical issues and to not be restricted to an extreme or highly unusual situation.

Mr C.J. TALLENTIRE: I still have concerns about the direction taken with this delegation, especially in relation to confusion about to whom an officer would be reporting. A person from an outside entity could have, with the approval of the Public Sector Commissioner, some delegated authority and could be reporting to a director general of an agency and also reporting to the CEO of another entity. That entity could be a government trading enterprise or a private commercial entity. There is potential for the terrible conflict that can arise when someone effectively has two masters to report to. I think we need greater detail about how this delegation would work and we also need some safeguards to ensure that it will not be abused and that it will not lead to situations of conflict.

Mr C.J. BARNETT: There are already delegation powers. I think that the higher profile cases would probably be the emergency situations to which the member is trying to restrict this. As the member for Gosnells was speaking, I was thinking back to the Gracetown tragedy. I think that in terms of the delegation of responsibilities, there was a gap in the way in which that was dealt with, and some decisions were taken somewhat unilaterally to try to deal with that clear emergency situation. However, this is not about such limited cases. There could be other cases in which this delegation of power is required. The member also mentioned government trading enterprises. Groups such as Western Power have extensive powers in any case. Although it is government owned and a trading entity, it has extensive statutory powers over a range of issues, not the least of which is safety matters.

Mr E.S. RIPPER: The difficulty with the Premier's amendment is that it still takes us to a position in which the commissioner can approve the delegation of power to any other person. I can see that the amendment puts more process around the delegation, but the critical thing is, in the end, delegation can be to any other person and the only safeguard is the requirement of the commissioner's approval. I do not think the opposition's concerns about this issue have been dealt with. There is still the possibility that a government could use this for the privatisation of services. I think that we heard the Premier say last night that that was not the government's intention—that it was not intending to do that. I hope that that is on the record.

Mr C.J. Barnett: Yes.

Mr E.S. RIPPER: We will certainly quote that to the Premier if it ever appears to be the case that the government is doing that. That still leaves open the question that another government, another Premier or this Premier with a change of heart might use this clause.

Mr C.J. Barnett: Only with the commissioner's approval. We must have trust in the Public Sector Commissioner, whoever it might be. This is placing trust in that person to administer this law that is being put in place appropriately.

Mr E.S. RIPPER: In the end, the Public Sector Commissioner is the Public Sector Commissioner and it would be remarkable if he decided that he would not cooperate with a major policy announced by the elected government. It would be an unusual approach by a Public Sector Commissioner to say, "Yes, there is this government policy, but I have an independent view that delegation shouldn't occur outside the public sector; therefore in this circumstance I will not allow it." The elected government, even though it is pursuing a policy that I do not agree with, might nevertheless be justified in saying that it is entitled to have the public service respond to its policy wishes.

Mr J.C. KOBELKE: I support the Leader of the Opposition's comments. I hark back to the Court government and acknowledge that its privatisation agenda was not this government's agenda. However, in the term of the Court government there was a belief that the government should privatise out and downgrade the public sector. Although this government talks about privatisation, it is more in terms of the delivery of services; it is not its ideological bent. A government with an ideological bent to privatise certain sections of government work with

private providers could use this amendment to delegate powers to people outside the public sector. The Premier said that the Public Sector Commissioner must approve it. However, if the government of the day has an ideological objective to pass certain public sector work to the private sector and wanted to delegate powers within the Public Sector Management Act to the private sector, I am concerned that clause 34, together with this amendment, would provide that power. This chamber does not want to support that. The opposition is not saying that this government has this intention, but this provision will, by this series of amendments, put in the statute powers that could be used in that way. I do not think the Premier has justified his reason for this amendment. The opposition is concerned about this amendment and it wants to ensure that caveat controls are put in place to cover emergencies. What has been lost is that it applies to not only emergencies but also a specific time. We might allow for power to be delegated outside the public sector for two weeks or so during the Commonwealth Heads of Government Meeting, but this amendment will not provide for that.

Mr C.J. Barnett: It does not preclude that. The commissioner might approve powers to be delegated for three months or whatever.

Mr J.C. KOBELKE: The Premier is missing my point; that is, I am not suggesting that under this government and with the Premier's stated intentions there is a fear of abuse of this provision. However, once it is in the statute, a future government—it might still be the current government with a new Premier when this Premier has moved on to Toodyay —

Mr C.J. Barnett: I will give another example—that is, delegating powers to a local government ranger, maybe on animal welfare issues.

Mr J.C. KOBELKE: Animal welfare generally comes under a different statute. We are dealing with the Public Sector Management Act. It comes down to the issue of what responsibilities fall within an agency.

Mr C.J. Barnett: No, it is moving the delegation of powers under animal welfare legislation to a non-public service agency. That might be appropriate.

Mr J.C. KOBELKE: Currently that can be done under a memorandum of understanding.

Mr C.J. Barnett: There are examples out there that are not extreme or unusual.

Mr J.C. KOBELKE: The Premier's response really underlines my concerns. This amendment will provide the potential for the statute to be used in a way that will not cause great concern to the public sector or the wider community. However, when the amendment becomes black-letter law it might allow the government of the day to delegate powers within the Public Sector Management Act to a Joe Blow who is not related to a government agency. That is what these amendments will do. I am not saying that this government will use it in that way. I am not saying that a commissioner, who would be required under the amendment to approve it, will not run his eye over it and make sure that there are good reasons. At the end of the day, as the Leader of the Opposition said, by his amendment the Premier is giving the power to a future government to privatise out to the public sector that will be delegated the necessary powers. The opposition totally opposes that. It does not want to allow a statute to include that provision, even though it is not the Premier's intention for it to be used in that way. A caveat should be placed on this amendment, if we are to proceed with it, to limit it to a time or certain circumstances.

Under this amendment the delegation of powers will apply to any public sector officer—a public service officer. Power could be delegated to a person outside the agency; another employee, and it is not clear from where that employee would come; a person who is appointed under schedule 1, column 2; or, finally, with the approval of the commissioner, any other person. That is too broad and wide a power to be contained in the Public Sector Management Act.

Mr C.J. TALLENTIRE: Following on from the comments of the member of Balcatta, I see that this amendment could eventually provide the public service with an excuse to no longer have people with specialised expertise, because the answer would be, "Oh, well, we'll just contract them in and delegate out when we need specialised knowledge." There are many areas for which we need a public service that has people with specialist knowledge and capacity. It is the role of the public service to nurture that to ensure that those people are properly integrated into various government agencies. We should not allow ourselves to fall into a situation in which it is found that, if or when the need arises, we can delegate out to them. I ask the Premier to reconsider this and perhaps provide better examples.

The Premier used the example of the Animal Welfare Act and how the powers in that act could be delegated to local government. If we are concerned about animal welfare issues we should ensure that there is the capacity within the public service to actually deliver the provisions of the Animal Welfare Act.

Mr C.J. Barnett: Powers lie with the RSPCA, a non-government agency.

Mr C.J. TALLENTIRE: Perhaps there is a need to have those powers also within the public service and not just within the RSPCA, which is after all an organisation that does not receive adequate funding. It is reliant on donations to a very large extent. If it is the Western Australian community's desire to have the full implementation of a high standard of animal welfare in Western Australia, we should do that through the public service as well as through non-government organisations.

Mr C.J. Barnett: I would not tell the RSPCA that. That is my gratuitous advice to you.

Mr C.J. TALLENTIRE: I am a member of the RSPCA and very proud of that. I respect its work enormously, but I do not think, given the breadth of its responsibilities, that we should be forcing a non-government organisation like it to have to deal with the challenges it faces. We should be ensuring that there is full capacity within the public service to do that work. That is what this gets back to. By having the opportunity to delegate out, it becomes an excuse to not look after the public service in a way that gives it the capacity to deliver on the expectations of the Western Australian community.

Ms J.M. FREEMAN: I asked the Premier by way of interjection whether he would accept an amendment that included unusual, extreme or emergency situations. The Premier said that was not necessary because we had to trust the Public Sector Commissioner and allow that person the flexibility. I raised in my second reading contribution that it concerns me that this can be a soft option to privatise out. I know the Premier said that it is not about privatising out. I have worked with the people contracted out and they see this as privatisation.

This bill amends the Public Sector Management Act. It appears that the government does not want to manage its workers and wants to delegate out its work, which it said it could do under this clause when we talked about child protection workers. The Premier accepted a comment from the Leader of the Opposition that the role and work of a child protection worker could be delegated to a large non-government organisation. One assumes, then, that it would become a delegation of workers across to the NGO with the application of public sector regulations for redundancy, redeployment and retraining.

I reiterate: if the government does not want to manage its workers, it needs to have a debate and dialogue with the community about that. It does not need to do that through a backdoor method such as this. No-one is saying that the Public Sector Commissioner should not have the capacity to delegate. Certainly that is not something the opposition is opposing. The opposition is saying that in doing that, it should be in unique, emergency, unusual or extreme situations and should be only for a defined time.

Mr C.J. Barnett: What about, for example, delegating some powers to elders in a remote Aboriginal community in the justice area?

Ms J.M. FREEMAN: Something like that, given the debate that goes on in the Indigenous community, would have to be debated, and should be given respect through legislation so that it is done on an ongoing basis. It should not just be a situation of suddenly delegating.

Mr C.J. Barnett: Only with the commissioner's approval.

Ms J.M. FREEMAN: I do not doubt that there are people in Fitzroy Crossing who would want the capacity to talk about alcohol issues and who would want the responsibility for the distribution of alcohol in their community delegated to them. But there are also just as many people who would argue that that is not a good model to prevent alcohol abuse in their community. What the Premier is saying has very good application in extreme and unusual situations, but that is what we need to put into the act to make sure that it occurs. It is not enough to simply put on record a trust-me statement or put the Public Sector Commissioner in a situation of pressure with a lack of capacity for transparency. There are real governance issues in the difficult position in which this clause will place the commissioner because some parameters have not been put around it. That senior worker will be put in a difficult position, should the current Premier not be the Premier and some other Premier wants to privatise by a backdoor method. We see that currently happening with the retail trading situation.

Mr C.J. Barnett: Criteria are basically put in place in the following amendment on the notice paper. It is not open slather.

Ms J.M. FREEMAN: I understand that and I have looked at the following amendment. I accept that it puts some parameters around it, but those parameters are not, I suppose, limited to time and they do not actually convey what the Premier has put on record here today. It is very important that these things be put in an act, or at least in regulations, so that it is clear to people what these delegation powers are. I know, from the opportunities I have had to sit on boards, that delegation is not something that is done lightly. Delegation is regarded by people who have that role as a major responsibility because they are delegating their decision-making powers.

Amendment put and passed.

Mr C.J. BARNETT: This amendment does what members opposite have been talking about—perhaps not to the extent they would want. I move —

Page 25, after line 25 — To insert —

- (2A) The Commissioner must not approve a delegation under subsection (1)(d) unless the Commissioner is satisfied that the delegation is necessary or convenient having regard to —
- (a) the functions of the department or organisation in relation to which the chief executive officer or chief employee has the power or duty; or
 - (b) the specialised knowledge, expertise or resources of the person to whom the power or duty is delegated.

I think this does put some parameters around this delegation authority so that the commissioner must in particular look at whether the person has specialised knowledge, expertise or capacity to undertake whichever responsibility is delegated.

Amendment put and passed.

Mr C.J. BARNETT: I move —

Page 26, after line 4 — To insert —

- (5A) If a power or duty is delegated under subsection (1), the power or duty is, when exercised or performed by the delegate, to be taken to be exercised or performed by the person who delegated it.

I guess this amendment just closes the loop in terms of responsibility.

Amendment put and passed.

Mr E.S. RIPPER: I move —

Page 26, after line 7 — To insert —

- (6) A person to whom a power or duty is delegated under this section is bound by this Act.

The reason I moved this amendment is, again, for accountability reasons. We would not want power delegated to someone who is not subject to the same rights, responsibilities and obligations as is a member of the public sector. It is a relatively straightforward amendment that I think would help preserve accountability and proper standards of behaviour.

Mr C.J. BARNETT: I would ask the opposition leader to have a re-think on that. The point has been made to me that, once the power is delegated under proposed new subsection (5A), the ultimate responsibility still lies with the person who has delegated. So, we are not taking the responsibility away. If I delegate power to the Leader of the Opposition, I am still responsible for the delegation and ultimately responsible for the Leader of the Opposition's performance in that role. I think that is correct. If I delegated also the responsibility, there would be a separation. I suggest that perhaps the Leader of the Opposition's motivation in this amendment is not quite right. The wording of the amendment sounds okay, but I think the responsibility should stay with the person who has delegated the power. The person cannot delegate it and then walk away from the issue. The person has taken the decision to delegate and the commissioner has approved it, but ultimately responsibility stays with the authorised officer.

Mr E.S. RIPPER: I just ask for that to be clarified. Is the Premier saying that the effect of passing this amendment would be to remove legal obligations from the person making the delegation, and that person would be able to say, "Finished; over; that other person is bound by the Public Sector Management Act; I've discharged my responsibilities"?

Mr C.J. Barnett: Yes, that is the advice I have got—exactly that. That would be the implication, although it is not intended, of the Leader of the Opposition's amendment.

Mr E.S. RIPPER: Certainly it is not intended by my amendment.

Mr C.J. Barnett: No.

Mr E.S. RIPPER: My amendment is to deal with the sort of circumstance in which someone takes disciplinary procedures. If a public servant misbehaves or harasses or bullies a person with whom the public servant is working, there can be disciplinary action under the act. If a public servant has delegated powers to someone and that person in the course of the exercise of those powers bullies or harasses another public servant, what is the

redress under this act for that act of bullying or harassment? That person would be outside the public sector and it appears that perhaps only the usual criminal laws and so on of our society are the only laws that would apply. I would be very interested in how the Premier might respond to that scenario.

Mr C.J. BARNETT: Again, as I said, responsibility, in the government's view, should be retained with the responsible officer who has delegated the power to someone else. If that other person who has those delegated powers in some way abuses that power, the victim of that abuse still has recourse back to the responsible original officer who has delegated the power; and, again, that could weaken that link. So, ultimately, person A delegates to person B, and if person B offends in some way against person C, person C can go back to person A who made the original delegation. So, the responsibility, I think quite properly, should lie with the original person who has the permanent responsibility. I think that is actually safer. I know what the Leader of the Opposition is trying to say, but I think his amendment actually weakens —

Mr E.S. Ripper interjected.

The ACTING SPEAKER (Mrs L.M. Harvey): One at a time, members.

Mr C.J. BARNETT: The Leader of the Opposition's amendment, although not intended, I think would actually weaken the ability of someone who suffers some abuse—for example, mistreatment in the workplace—to go back to the responsible officer. On the Leader of the Opposition's analogy of the handball, people can delegate a power but they cannot delegate away the responsibility that goes with that power.

Dr J.M. WOOLLARD: I think that it is usual in administrative law that if we delegate a power, that person then has responsibility for his or her actions. What the Premier has moved actually states that in delegating that power, the person still retains responsibility. That is not usual practice; however, if that is how the Premier wishes to introduce the legislation, that is the way this legislation will be enacted, but it is not usual practice within administrative law.

Mr C.J. BARNETT: The member for Alfred Cove makes a fair point. She is correct in that, but what the government's drafting of this bill will do is to force the person who makes the delegation to still retain responsibility. Therefore, people can delegate a power but they cannot delegate away ultimate responsibility. That is in fact a protection against some of the concerns that members opposite have raised about delegation. Therefore, I can delegate a power or a function to do something, but I cannot delegate ultimate responsibility; that is retained with me as person A, if we like.

Mr E.S. RIPPER: I think that to a certain extent we are arguing at cross-purposes. I understand the point that the Premier is making but I am concerned about the potential for someone to not necessarily misuse the powers that have been delegated to that person, but behave in other ways that are contrary to the public sector code of ethics or the public sector standards and not be liable to sanctions under the code of ethics or for breaches of public sector standards, because my amendment has not been supported. I put on the record that I think both my point and the Premier's point should be accommodated in the legislation. However, I do not want to delay the house by having a tussle of wills over the issue; I simply state for the record that I still think, despite the point that the Premier has made, which I appreciate has some validity, there is validity to the point that I make.

Mr C.J. BARNETT: Just briefly, it is an extra check; if person A delegates certain powers and functions to person B, person A still retains the responsibility. That will be a cautionary element in the decision to delegate and in the decision to whom to delegate because person A will ultimately be responsible.

Ms J.M. Freeman: Why would you delegate if you're going to be ultimately responsible?

Mr C.J. BARNETT: A person might delegate to someone who has scientific knowledge to perform a task, but that person will still be responsible. That plus the commissioner's approval is a legislative check power on delegation. As I say, this provision is not open to be used willy-nilly. I understand the concerns of members opposite, and I appreciate that they say that it is not intended by this government, and it is not, but I still think there are substantial checks on this provision being misused.

Amendment put and negatived.

Mr E.S. RIPPER: The opposition intends to vote against this clause for all the reasons that we have outlined in our arguments on the amendments. We do not think that the power of delegation has been sufficiently constrained in the way that it has ultimately emerged from the votes on the amendments that have occurred; therefore, we will vote against the clause.

Clause, as amended, put and a division taken with the following result —

Ayes (29)

Mr P. Abetz	Mr M.J. Cowper	Mr R.F. Johnson	Mr A.J. Simpson
Mr F.A. Alban	Mr J.H.D. Day	Mr A. Krsticevic	Mr M.W. Sutherland
Mr C.J. Barnett	Mr J.M. Francis	Mr W.R. Marmion	Mr T.K. Waldron
Mr I.C. Blayney	Mr B.J. Grylls	Mr P.T. Miles	Dr J.M. Woollard
Mr J.J.M. Bowler	Dr K.D. Hames	Ms A.R. Mitchell	Mr J.E. McGrath (<i>Teller</i>)
Mr T.R. Buswell	Mrs L.M. Harvey	Dr M.D. Nahan	
Mr G.M. Castrilli	Mr A.P. Jacob	Mr C.C. Porter	
Mr V.A. Catania	Dr G.G. Jacobs	Mr D.T. Redman	

Noes (22)

Ms L.L. Baker	Mr J.C. Kobelke	Mr P. Papalia	Mr A.J. Waddell
Ms A.S. Carles	Mr F.M. Logan	Ms M.M. Quirk	Mr M.P. Whitely
Mr R.H. Cook	Ms A.J.G. MacTiernan	Mr E.S. Ripper	Mr B.S. Wyatt
Ms J.M. Freeman	Mr M. McGowan	Mrs M.H. Roberts	Mr D.A. Templeman (<i>Teller</i>)
Mr J.N. Hyde	Mr M.P. Murray	Ms R. Saffioti	
Mr W.J. Johnston	Mr A.P. O’Gorman	Mr C.J. Tallentire	

Pairs

Mr I.M. Britza	Mr P.B. Watson
Dr E. Constable	Mrs C.A. Martin

Clause, as amended, thus passed.

Clauses 35 to 40 put and passed.

Clause 41: Section 45 amended —

Leave granted for the following amendments to be considered together.

Mr C.J. BARNETT: I move —

Page 28, lines 12 and 13 — To delete the lines.

Page 29, lines 3 to 31 — To delete the lines.

Page 29, line 33 — To delete “45(13) delete “nominated or”.” and substitute —

45(13):

(a) delete “nominated or”;

(b) delete “or the Minister, as the case requires.”.

The effect of those three amendments to this clause is to remove from the bill the capacity for a responsible minister to direct the Public Sector Commissioner to recommend to the government the appointment or reappointment of a CEO or a particular person nominated by the minister.

Mr E.S. Ripper: You still have the capacity for a term-of-government appointment elsewhere in the bill.

Mr C.J. BARNETT: That is correct.

Mr E.S. Ripper: It will have only one mechanism for the government, in effect making a political decision on a CEO. That is the term of government and you are deleting the other mechanisms.

Mr C.J. BARNETT: The minister cannot direct a commissioner to make a permanent appointment as a CEO but the government can appoint a term-of-government CEO.

Mr E.S. RIPPER: I just reiterate the remarks I made in the second reading debate that I think there has to be a residual power to direct the commissioner for accountability reasons. I can accept the government’s amendments but in the end the Parliament will want to hold the government accountable for what happens in the public sector. It will not be an acceptable ask of this Parliament if the minister says that he is independent and he does not have the power to direct him. I agreed with the Premier that it is unfortunate, unsatisfactory or unfair but we do not have any power to intervene.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 42: Section 46 amended —

Leave granted for the following amendments to be considered together.

Mr C.J. BARNETT: I move —

Page 30, lines 10 to 12 – To delete the lines.

Page 30, lines 25 to 28 – To delete the lines.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 43 to 54 put and passed.

New clause —

Mr J.C. KOBELKE: This amendment arises out of a matter that I raised in my speech on the second reading relating to the appointment of Mr Peter Conran. The Public Sector Management Act was clearly established to ensure that the government could not parachute people in by bringing them in as term-of-government appointments, whether it is under section 68 of the Public Sector Management Act or whether it is a contract for services under section 100(1) because both of those are caught by section 73, which makes it very clear that if a person is appointed by those means and is not a public servant—we are not talking about a public servant who is seconded into a ministerial office but an employee in a ministerial office who is an appointment under section 68 or under a contract for services under section 100(1)—that person is not permitted to apply for a public sector position. The person has to resign and then apply. Mr Conran applied when he was employed on contract to the Premier. By the time he then terminated that contract—he was no longer employed—he would have been eligible for appointment. Section 73 makes it very clear that while a person remains employed as a ministerial officer or is so engaged under contract for services, he or she is not eligible to apply for or to be appointed to any office, post or position in any department or organisation. Mr Conran got around that because he was employed through a company; that is, the Premier employed him through the name of his company. He was the one employed but because it was a company, he was not caught by that. Part of the government legal advice that was given to the Public Accounts Committee and that appears in our report states —

If Mr Conran had been directly engaged under a contract for service, to assist the Premier, under section 100(1), he would have been while so engaged ineligible to apply for or be appointed Director General of the department of the Premier and Cabinet.

Because he was engaged through a company, he is not caught by the current provisions. Therefore, I move —

Page 34, after line 28 — To insert —

54. Section 73 amended

(1) In section 73 delete “Notwithstanding” and insert:

(1) Despite

(2) At the end of section 73 insert:

(2) For the purposes of subsection (1)(b), a person engaged under a contract for services under section 100(1) to assist a political office holder includes a person who is a director of, or engaged or employed by, a body corporate that —

(a) is engaged under a contract for services under section 100(1) to assist a political office holder; and

(b) is providing the person to assist a political office holder under the contract for services referred to in paragraph (a).

This closes off that loophole that Mr Conran used. There might be other ways we can get around that but they would be fairly dubious, such as employing a partnership or some other non-corporate entity. If the person being employed is actually the employee or director or is engaged through a body corporate, that person would have to resign or step down from that position in order to apply for a public sector job. That was the clear intent of the legislation brought on by the Court government. I will not quote it as it is in the Public Accounts Committee report. The very clear intention of then Premier Court was that we should not be able to parachute political operatives in through this means. This amendment would close that off.

Mr C.J. BARNETT: The member is right. The intent of the original legislation was to stop, to paraphrase, the parachuting of people from ministerial offices into senior positions within the public service. That should not happen. The example of the appointment of Peter Conran is an oddity but members should bear in mind that that appointment was made in a transition period and a change of government. He was not in any sense a long-term employee and he was employed through a contract for services. This issue is not entirely black and white. We have to be careful not to place too many restrictions on it. Later on in the legislation there is a provision allowing for the government to make a term-of-government CEO appointment. As I said last night, if Mr Conran had been appointed as a term-of-government employee, he would not have had the full powers and functions of a CEO

under the Public Sector Management Act. There should be some limited scope for elected governments to appoint a person that they wish to appoint as long as it is very transparent and done openly. Ideally, they should be appointed on a term-of-government basis. That was precluded at the time because of the way in which the legislation operated. It was not a perfect series of events but it was a series of events constrained by the legislation as it stood. This bill proposes to give the government the right to appoint a CEO but only to do so for its term of government. To some extent that is a change to our system of operation. It is an acceptable change as long as it is open and transparent. It would most likely apply to the CEO position in Premier and Cabinet. There is no doubt that should there be a change of government tomorrow, I imagine the opposition would not want Peter Conran heading up Premier and Cabinet. I expect he would leave. That is what would happen in practice; we all know that. I am sure Mr Conran would understand my saying that. At the time of Mr Conran's appointment, he could not be given a head of Premier and Cabinet position as a term-of-government employee. It would not have been realistic.

Mr E.S. Ripper: Is the Premier going to convert him to a term-of-government contract?

Mr C.J. BARNETT: I am not proposing to do that. I would say that if this legislation had been passed and that scenario had arisen, Mr Conran would have been appointed as a term-of-government employee but a full CEO of Premier and Cabinet with all the powers and responsibilities of a CEO, but with that one caveat—he would be a term-of-government employee. I think that would have been appropriate.

Mr J.C. Kobelke: This legislation would not stop the Premier employing Mr Conran; he simply would have finalised, concluded or resigned from that contract. The next day he could apply. The issue is a person cannot apply while in a contract of employment.

Mr C.J. BARNETT: I do not know the application, but that contract had terminated —

Mr J.C. Kobelke: No; he terminated the contract the day after he applied.

Mr C.J. BARNETT: Okay, there was an overlap—but his contract had finished. The whole process of assessment and interview, maybe short of submitting the application, was done when Mr Conran was not under the employ of the incoming government. I am not arguing that it was a perfect scenario. This legislation is attempting to clarify that so that a government has the ability to make a term-of-government CEO appointment with the full powers of a CEO. However, if it is a decision made by a government—by a minister or Premier and therefore deemed to be political, whether it is or not—that should be for the term-of-government period. I genuinely believe that that is the only area in which either side of politics is likely to use this power. Should the opposition come into power, I am sure it would have its choice for the head of the Department of the Premier and Cabinet. It should be entitled to make that choice. One reason to separate the Public Sector Commission role from Premier and Cabinet is that I imagine the opposition would not—we certainly would not—make a government appointment or political appointment to the position of Public Sector Commissioner. That is the notional head of the public service and should be kept separate. The head of Premier and Cabinet, and Premier and Cabinet as an agency, is there to drive the agenda of a democratically elected government. We need to move on a little and recognise that that is the reality and allow that reality to take place in a smooth way.

Question put and a division taken with the following result —

Ayes (19)

Ms L.L. Baker	Mr W.J. Johnston	Mr P. Papalia	Mr A.J. Waddell
Ms A.S. Carles	Mr J.C. Kobelke	Ms M.M. Quirk	Mr M.P. Whitely
Mr R.H. Cook	Ms A.J.G. MacTiernan	Mr E.S. Ripper	Mr B.S. Wyatt
Ms J.M. Freeman	Mr M.P. Murray	Ms R. Saffioti	Mr D.A. Templeman (<i>Teller</i>)
Mr J.N. Hyde	Mr A.P. O’Gorman	Mr C.J. Tallentire	

Noes (27)

Mr P. Abetz	Mr M.J. Cowper	Dr G.G. Jacobs	Mr C.C. Porter
Mr F.A. Alban	Mr J.H.D. Day	Mr R.F. Johnson	Mr D.T. Redman
Mr C.J. Barnett	Mr J.M. Francis	Mr A. Krsticevic	Mr A.J. Simpson
Mr I.C. Blayney	Mr B.J. Grylls	Mr W.R. Marmion	Mr M.W. Sutherland
Mr J.J.M. Bowler	Dr K.D. Hames	Mr P.T. Miles	Mr T.K. Waldron
Mr G.M. Castrilli	Mrs L.M. Harvey	Ms A.R. Mitchell	Mr J.E. McGrath (<i>Teller</i>)
Mr V.A. Catania	Mr A.P. Jacob	Dr M.D. Nahan	

Pairs

Mr P.B. Watson	Mr I.M. Britza
Mrs C.A. Martin	Dr E. Constable

New clause thus negatived.

Clauses 55 and 56 put and passed.

Clause 57: Section 99 amended —

Mr V.A. CATANIA: I oppose the clause with a view to moving a new clause; that is, to delete section 99. As I outlined in the second reading debate last night in relation to the deletion of section 99, this would allow public service employees to have the same rights as —

The ACTING SPEAKER (Mrs L.M. Harvey): Members, I am having difficulty hearing the member for North West to whom I have given the call.

Mr V.A. CATANIA: As I said, deleting section 99 of the Public Sector Management Act will allow public sector employees to have the same rights as private sector employees, which they currently do not have. As I outlined last night, I was quite surprised that this was not tackled earlier. One of the reasons to delete section 99 is that when it is found that there is a breach of public sector standards, the Office of the Public Sector Standards Commissioner has no power to direct the employee to remedy the breach. The office can only make recommendations, which the employee can ignore. If the Western Australian Industrial Relations Commission had jurisdiction, it could make a direction to the employee after reviewing the decision. There is a lack of credibility when it comes to the public sector standards process by public sector employees; therefore the system to seek relief is not used. If we go back over the claims in 2006 and 2007, there were 164 breaches that led to claims. The investigators only found five allegations proven. There is a real need to ensure that section 99 is deleted to give employees confidence in knowing that the public service has that protection to go to the Industrial Relations Commission, as does the private sector. It is only fair to do that. I think all members would agree that this is a simple deletion to gain a maximum amount of support for an absolutely vital part of government—that is, a strong public sector. I urge members to consider this proposal to give the protection needed and to ensure that we have a level playing field between the public and private sector.

Debate interrupted, pursuant to standing orders.

[Continued on page 4511.]