EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Second Reading

Resumed from 9 November.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [11.28 am] — in reply: At the conclusion of the last episode, I was winding up addressing a number of aspects of the policy of the Evidence and Public Interest Disclosure Legislation Amendment Bill in which the government believes it has struck the right balance between the competing interests of a free press that is able to disclose matters that are in the public interest, and the disclosure of information that may be relevant to inquiries conducted by parliamentary committees or other tribunals and the need for the disclosure of relevant evidence in courts. After addressing a number of other issues raised by speakers, perhaps I will now turn to the question of submissions that were received in respect of the bill, which was a matter raised by not only Hon Sue Ellery but also Hon Giz Watson. The government approached, at a very early stage, various media representatives from the print, radio and television media, and also judicial and legal representatives, for comment regarding the government's intentions with respect to this bill, or to shield laws generally. I am not in a position to disclose the submissions that have been received as they were sought on the basis they would assist in informing government policy and drafting of the bill, and it was never understood that those submissions would be made public. The government would be reluctant to disclose that material without the various submitters being aware that they are being disclosed and seeking their views on that.

Hon Sue Ellery: Did you even ask if they minded?

Hon MICHAEL MISCHIN: I have not sought that, no, but I am in a position to provide a summary of what those submissions were. It must be understood these were received at a fairly early stage. A number of views were expressed as to the shape that the various stakeholders thought the legislation should take and were not comments on the bill as introduced to the house. They were at a fairly early stage in the process and helped inform the government's thinking on the issue but are not actually comments on the bill itself.

As far as television organisations are concerned, submissions were sought from Ten news, Nine news, Seven news, ABC news, *Stateline* and *Today Tonight*. As far as the print media were concerned, submissions were sought from *The West Australian*, *The Sunday Times*, the Community Newspaper Group and *The Australian*. As far as the radio media were concerned, submissions were sought from 98.5 Sonshine FM, 92.9 FM, Nova 93.7 FM, Mix 94.5 FM and 6PR, and generally from the Media, Entertainment and Arts Alliance of WA. We received written responses from Channel 10, *The West Australian*, *The Sunday Times*, *The Australian*, Channel Seven, and the Media, Entertainment and Arts Alliance.

As a general proposition, the responses received from the media stakeholders were of the view that the government's legislation should not be modelled on the protections that had previously been in force in New South Wales and the commonwealth. The range of opinions varied, but the substance of specific views expressed were as follows. There are conflicts between them; they are not in any way homogenous, but these are the range of opinions that were received in substance. One was that any shield laws must include a presumption that journalists should not be compelled, or compellable, to reveal sources. In other words, they should not be required to make an application to the courts to obtain the protection. The onus should be on the party seeking to void the protection to establish that the protection should be lost. Another submission expressed an awareness of the need for courts to weigh up matters that might qualify the privilege. Another was that the protection should not be absolute; however, misconduct should only be one factor courts take into account when determining whether privilege should be lost. Misconduct should not be automatic grounds for the protection to be lost. Protection should only be lost in circumstances in which serious wrongdoing had occurred. Another submission was that protection should apply in fora other than courts; for example the Corruption and Crime Commission. Another was that the courts are best equipped to determine what categories of media the protection should apply to, but the definition should take into account the changing nature of journalism. I think what was being driven at there was that we are traditionally accustomed to print media. Media, of course, have evolved over time to embrace radio media and now television media. Much journalism is now reduced to access to the internet by way of websites or other forms of electronic media. Another view stated the development of a suitable level of protection is long overdue and should be proceeded with forthwith.

As I mentioned, the government also sought comment from the legal and judicial fraternity regarding the approach, and received comment from representatives of the judiciary, the Law Society and the Western Australian Bar Association. A divergent set of views was expressed. I will summarise some of the salient submissions. It will be noted that quite a number of them are contradictory or inconsistent with each other, but these are examples of the range of views received by the government on certain aspects of how the bill should be framed. They included concerns regarding proposals to grant privilege to journalists at all, and the view that the present level of protection for journalists was adequate. Another was that, for clarity, the law should set out the

factors leading to the protection being granted, were a protection to be granted. Another view was that proposals that the privilege not be lost in circumstances involving misconduct would require "careful consideration". Another view was that it was essential that privilege should not apply to persons privately engaged in blogging or citizen journalism. Privilege should not apply to persons who have been shown to engage in conduct that would constitute a clear breach of journalistic ethics. Another view was that expansion of the whistleblower legislation would likely be a more direct and appropriate route to ensure protections for such persons who leak to journalists. The matter should be the subject of a further Law Reform Commission reference and protection should extend to tribunals other than courts. Another view was that no such privilege should be created at all. If such a privilege was to be created, a presumption in favour of the privilege should not be supported. Members will see that the government has taken a different view to that.

It was said journalists should have to make an application to seek the protection of sources. Another view was that laws of this nature are being agitated for by journalists to remove or weaken one of the few available sanctions to control the power of the media. Another view was that any benefit discerned by the proposed change should not outweigh the public interest that exists in prosecuting people who break the law, allowing private citizens to protect their reputations by uncovering the source of defamatory statements, allowing people or companies to protect private information or preventing journalists from sheltering behind anonymous or fictitious sources. Another view was that there is a risk of informants providing deliberately false information to journalists to safeguard their own interests; for example, to manipulate financial markets or damage the reputation of third parties. Another view was that if the privilege is introduced in a limited fashion, those reforms could apply to tribunals, parliamentary inquiries or commissions of inquiry. If a privilege is introduced, it should be automatically lost in the event of misconduct or wrongdoing, and that there can be no basis for an informant in such circumstances having their identity protected. Members will see that the balance that has been struck by the government is somewhat short of that. Another view was that if such a privilege were to be created, a presumption in favour of the privilege would not be supported by that particular submitter. Another view was that if a presumption were to be created, it would be desirable to list the factors that the court might take into account in overriding the presumption. Members will see that the government has endeavoured to do that. Another view was that privilege should not be automatically lost due to the presence of misconduct, and the government has taken heed of that. Another view was that the definition of "journalist" should be limited to those who derive income from that occupation and should not extend to bloggers, tweeters and the like. Members will see that a wide range of views were expressed at a fairly early stage in the process about the form that this legislation should take, and the government has done considerable work in achieving what it considers to be a reasonable balance of competing public interest considerations.

Hon Giz Watson raised the issue of section 81 of the Criminal Code and asked a few weeks ago a question without notice of which some notice was given about whether a review had been conducted in accordance with the recommendation, I think, of the select committee report. She was informed that, yes, a review had been conducted. With respect, it is not a matter germane to the purposes of this bill, but suffice it to say that the review had been conducted and the government received advice from Mr Tannin, in his capacity as State Counsel. I will discuss with the Attorney General to what extent the substance of that advice can be revealed at some later stage. That deals with the disclosure of confidential information in a particular context. It really does not have a bearing on the merits of this bill. This bill deals with the matter of whether a journalist ought to be compelled and under what circumstances a journalist ought to be compelled to reveal the source of information, which might very well be derived from a breach by a public servant or someone else under a duty not to disclose information within the scope of section 81. It is not germane to the way that section 81 operates or to any deficiencies in that section; it looks at another aspect of the situation. I am not in a position to go into the merits or otherwise of section 81; that is an argument for another day. But I have explained to Hon Giz Watson that I will raise that issue with the Attorney General, and it may be that some further information can be disclosed outside the house about that advice and the government's position on that section.

I have already mentioned the balance being struck and the relevance of misconduct. One of the factors, of course, is that we have to be careful that we are not encouraging dishonesty, breaches of trust and breaches of confidentiality in order to provide material for publications. A line has to be drawn. There are certain breaches of the law that might reveal some more grave public interest matter that warrants a breach of confidentiality, but in many cases that would not be the case. We have to be careful in balancing the various public interest considerations that we are not, by providing these sorts of protections and shields, simply encouraging dishonesty by people who wish to provide information to the press, or for what might be a purpose of a private nature and have nothing to do with the public interest.

Hon Giz Watson raised the issue of a time limit in proposed section 7A, which is one of the amendments proposed to the Public Interest Disclosure Act 2003, and asked why a six-month time limit had been selected. Frankly, some kind of time limit had to be picked. To leave it up in the air as whatever is reasonable is open to

argument. This will allow for some kind of certainty. An inquiry can be quite an involved matter. Twelve months is probably too long. One might argue whether it ought to be nine months, six months or three months, but six months seems to be a reasonable period in which to allow a responsible authority to complete an inquiry in a satisfactory way and make recommendations as a result of that inquiry, and to expect some kind of action from the responsible authority on that issue. In a sense it is an arbitrary figure, but it is not an unreasonable one. Again, one might argue whether it ought to be a month here or there, but it will allow more certainty than simply saying something like "a reasonable time", which would have to be based on relevant circumstances and be fairly subjective. Six months seems to be a reasonable period.

Hon Giz Watson asked whether these sorts of amendments more properly ought to be included in standing orders. There are a couple of responses to that. In a sense, they could be, but they have not been. Parliament has been seized of the report of the select committee for quite some time, and nothing has happened in that regard. The government has responded to the need for some form of limited protection and, after considerable work, has articulated that in this bill. Standing orders are certainly the expression of the will of this house of Parliament, not Parliament generally. This bill, when made an act, will be an expression of the will of Parliament as a matter of law rather than as a matter of practice and standing orders.

Hon Adele Farina: But still of this house.

Hon MICHAEL MISCHIN: It will be, hopefully, of the Parliament. We are part of a bicameral system.

Hon Adele Farina: That's true, but given how long it takes to change standing orders in this place, you can reasonably argue that once the standing order is made, it's going to be around for a very, very long time!

Hon MICHAEL MISCHIN: That is true, and it will probably be easier to change —

Hon Adele Farina: The legislation than it will be to change a standing order.

Hon MICHAEL MISCHIN: Entirely so! There will also be a little more certainty, because the same principles will be applied to committees that are agents of this house in receiving evidence as will be applied to committees that are agents of the Legislative Assembly and also to courts and other tribunals. There is no inconsistency; the same principles will be applied.

The other feature, of course, is that if a situation were to arise in which one particular party, or combinations of parties in this place, were to be of a mind to do so, standing orders could be suspended and those rules would then be inapplicable, whereas this will be the law of the land. To the extent that it does qualify the behaviour of this house—I have already gone through the levels of that—it would still be applicable to proceedings by committees of this house and the things that this house ought to be taking into account. There is an element of transparency and certainty for those who are subject to inquiries by this Parliament. I would have thought that what we are proposing is not an abdication of the powers and privileges of the Parliament or of this house, but a statement of the principles that will be applied, and that they will be applied by not only the Parliament and committees of the Parliament but also courts, tribunals and others, such as the Corruption and Crime Commission, who are receiving evidence. There is that level of certainty and transparency. They cannot simply be suspended by the whim of a party or parties of the day which might seek to suspend standing orders and which have obtained an absolute majority in that regard in a particular case.

Some mention has been made of potential penalties and the like. Again, that is an argument for another day. We are not affecting parliamentary privileges and the avenues that Parliament has to enforce the recommendations and decisions of the committees that it creates and that act on its behalf. A question has been raised about opening up Parliament to challenges from the courts. With respect, that simply cannot be substantiated. There are no clear words in the legislation that would permit that, there is no standing to be able to challenge a ruling of a parliamentary committee, and there is simply no cause of action that could be brought that would allow a court to interfere with the workings of Parliament, bearing in mind Parliament's paramountcy in that regard.

I have already pointed out and tabled the advice of counsel on those issues. The government is of the view that it correctly expresses the law and Parliament's intent. I should add that it ought to not be thought that the tendering of that privileged information will set a precedent. It has been done in this case for particular reasons relating to the need to answer concerns of the Clerk of the Council. It contains no sensitive information or any factual information that may be in dispute. It simply answers legal issues, and the government in this particular instance is content that it be made available to the house. Having made those comments, I move that the bill be now read a second time.

Question put and passed.

Bill read a second time.

Discharge of Order and Referral to Standing Committee on Procedure and Privileges — Motion

HON GIZ WATSON (North Metropolitan) [11.53 am] — without notice: I move —

(1) That order of the day 7, Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, be discharged and referred to the Standing Committee on Procedure and Privileges for consideration of clause 5, proposed sections 20G to 20M, and to report not later than 8 March 2012.

(2) That the committee has the power to consider the policy of the bill.

Hon Norman Moore: If I had been given some notice of that, it would have been useful.

Hon GIZ WATSON: I did discuss it yesterday.

Hon Norman Moore: Not the motion.

Hon GIZ WATSON: Not the words. I understand that. I have only just finished —

Hon Norman Moore: People yell at me when I do not tell them things in advance.

Hon GIZ WATSON: I apologise for not being able to give the Leader of the House the form of the words. Perhaps if I might speak to the motion?

The DEPUTY PRESIDENT (Hon Brian Ellis): Order, members. We will not resume debate on this motion until a copy of it has been circulated to the leaders of the relevant parties. You may now proceed, Hon Giz Watson.

Hon GIZ WATSON: I apologise to members that I was unable to provide the exact wording of that motion ahead of moving it, but I had foreshadowed, certainly with the Leader of the Opposition and the Leader of the House and, indeed, with the parliamentary secretary, that it was my intention to move for a committee referral.

I thank the parliamentary secretary and counsel for the additional information that was provided this morning before we commenced sitting. We had an opportunity to canvass some of the issues around privilege. However, I still have some residual questions that I think would be properly addressed by the Standing Committee on Procedure and Privileges. I remind members that under the schedule to the standing orders, the Standing Committee on Procedure and Privileges is to —

> … keep under review the law and custom of Parliament, the rules of procedure of the House and its committees, and recommend to the House such alterations in that law, custom, or rules that, in its opinion, will assist or improve the proper and orderly transaction of the business of the House or its committees.

The first question for me was: does this bill still raise a question of impacting on parliamentary privilege? As I said, despite the conversations that we had this morning, I am still of the view that by constraining the operation of parliamentary privilege, the bill does in fact meet that threshold of waiving the powers of the Parliament to be in control of its own business.

I want to respond to a number of comments. I listened carefully to the response of the parliamentary secretary to the second reading debate. It was on the basis of those responses that I decided to still proceed with the referral. The proposition I put in the second reading debate was that we basically agree with the policy of the bill. The chamber agrees with the policy inasmuch as we have just passed the second reading. We all want the bill to basically achieve the same outcome—that is, to provide journalists with a degree of protection from the requirement to reveal sources of information, including in the parliamentary context. The question that remains is whether this is appropriately dealt with in the statutes or under the Parliament's own rules, which are the standing orders. Despite what has been said, the standing orders have a higher threshold for how they can be changed. It was suggested to me that the standing orders are all very well but they can be suspended. However, they can only be suspended by an absolute majority of this place, and they can only be amended by an absolute majority; so, in fact, there is a higher threshold for changing the standing orders of Parliament than there are for bills that pass through the Parliament, which can pass with a simple majority. Therefore, they are more secure.

It is not correct to say that the standing orders are not transparent. The standing orders of this house are available on the website, in the public realm and to every journalist who might want to access them. Unlike the suggestion that these are merely rules by which the Parliament operates, they have the same power and effect as laws of the land, so they are significant. I suggest that if we want to set up these criteria by which we test whether a journalist should be excused or that the presumption should prevail, then the standing orders is the correct place.

I notice the parliamentary secretary said that the Parliament had not responded to recommendations by the Select Committee into the Police Raid on *The Sunday Times* suggesting changes to standing orders. The select committee did not suggest that was necessary—again, without revisiting my second reading speech—because it

came to a good and fair decision and there was no impact on the journalist for refusing to answer that question. It does raise the question that a future committee might not be so generous and might interpret matters differently. That is why I agree with the way this debate has moved, certainly in the public realm, that there is reason to put some other criteria in place by which committees will be guided. The question is how we do that.

I also ask the chamber to consider what other act removes or waives parliamentary privilege and puts into statute something that will impinge on parliamentary privilege. The only act that I can think of is the Corruption and Crime Commission Act, which is a relatively controversial act in and of itself. I again say that the commonwealth took a different position on parliamentary privilege, and I understand that it would have thought long and hard about this as well. I have a sense that the commonwealth's position is the right one. Its decision was to enact shield laws, but it did not alter in any way the commonwealth Parliament's privilege.

The other reason I believe that standing orders is the appropriate place to deal with this—I know we have debated this—relates to whether there will be any interplay between the Parliament and the courts over these changes. The judiciary can look behind the statutes and read them down; whereas the standing orders of this place cannot be interrogated in that way. Again, that maintains the separation of powers and the Parliament's right to make its own rules, which we should all be defending with vigour.

Members will note that my motion limits this inquiry's consideration of clause 5 to proposed new sections 20G to 20M to the Evidence Act 1906, which is that part that deals with parliamentary privilege. From what I have heard in this debate, members have no objection to the rest of clause 5, which we would all like to see passed as soon as possible. This section should be appropriately scrutinised by the Standing Committee on Procedure and Privileges because that committee can take evidence, hear evidence and present that evidence to the house from expert witnesses such as constitutional lawyers, journalists or indeed the Clerk of this place, from whom we have had evidence provided by correspondence, which is appropriate. For those of us who are members of committees—most of us are at some point or other—the opportunity to cross-examine and question witnesses is vital. It is a vital part of this Parliament, so why would we not use a committee that we have set up to do this? It is so rare that we get a question on a bill on this threshold question that it almost beggars disbelief that we would not take it seriously enough to look at it within a parliamentary committee. It might prove, when the Standing Committee on Procedure and Privileges looks at this, that we are all comfortable with it and it is not going to be a problem, but we would be abrogating our duties as members of Parliament if we do not do that.

We can hear from expert witnesses and we can view the submissions that we have just heard about from the parliamentary secretary. This is the other frustration with this bill. We are told that comments have been made and submissions given, but we do not get to see them. I note that a lot of journalists' organisations have been consulted, but I do not recall the parliamentary secretary suggesting that the officers of the Parliament or constitutional lawyers have been consulted. When we are dealing with matters of parliamentary privilege—members who want to do the reading can go way back—there are reasons why parliamentary privilege is defended by the Parliament. If we do not do that, I suggest we are doing a disservice to this Parliament and to future Parliaments. We need to see those submissions and we need to be able to consult with all those who we consider might have a useful view on this.

In finalising my comments and calling on the chamber to support this motion, I hope that members in this place are not motivated or driven by a fear that the media will criticise us for delaying or blocking important legislation. I can see the headlines now! I am a bit beyond all this. I am quite happy to argue in the public arena and to the media that this is an important change that we have to get right—for their sake as much as ours—and we do not want it to be subject to misinterpretation, confusion or legal challenge, or any of the above. I am also really clear that if the commonwealth has taken a certain course of action, we need to understand why it chose that and why it did not choose to do what we are contemplating today. For those reasons, I encourage members to put to one side that anxiety, if it is there, that we will be criticised in the media for delaying or blocking legislation, because I can anticipate that that might well be the reaction. We are not dealing with a simple proposition. It requires careful consideration and it requires the benefit of that consideration to be reflected back in the house so that we can all make an informed decision. If there is an anticipation that this bill should get through before Christmas, or whatever has been promised to the journalists—I do not know what has been said—I suggest that sort of promise and those sorts of expectations should not have been raised, because the Parliament has an important job to do and we are not driven by the media in our decision making. We are driven by good process and ensuring that we make decisions in full knowledge of their implications and in full knowledge of what we are setting in place for future Parliaments, not just for this one. The intersection between the media and the Parliament always has the potential for friction. They are our accountability body. However, the Parliament must remain in control of its business and rules.

I reiterate that I am seriously concerned that if this bill remains unaltered, we will be handing over some of that parliamentary privilege, at least in part, to the statutes. I think it is certainly something the commonwealth did

not do and I do not understand why we cannot resolve this question in another way. I think with a little thought and consideration in the committee and a report back to this place, we can do that. I realise that some members might suggest we have a shorter inquiry. I am open to discussion around that, but at the very least, let us pause for breath and take some expert advice on the implications of what we are contemplating voting on today. I think it is extraordinary. We need to take a little more time and use the systems and committees this Parliament has had in place for however long to do the job that they are expected to do. Everyone will have a chance to debate what comes out of that. People can accept or reject that but let us at least have that information before us.

Point of Order

Hon NORMAN MOORE: On a point of order, is it the member's intention that part 2 of the motion remain in the motion? The house has agreed to the policy of the bill. If we want to deal with just one section of the bill, we can hardly deal with the policy of the bill. I want clarification of the actual motion.

Hon Adele Farina: That depends on what the policy is.

Hon NORMAN MOORE: I am not talking to Hon Adele Farina; I am speaking to the member who has moved the motion. I want a yes or no.

Hon GIZ WATSON: My advice is that an investigation of clause 5 covering proposed sections 20G to 20M will require inquiring into the policy. But I am not unattracted to the idea of removing part 2, because I think the key is to look at clause 5. I agree with what the Leader of the House is saying—that basically, in voting on the second reading, the house has agreed to the policy.

Hon NORMAN MOORE: I am seeking clarification so that I know what we are debating. If the member wants to leave in part 2 of her motion, that is her prerogative; if she wants to take it out, she can let us know so we know what the debate is about.

Hon Giz Watson: I will be happy to remove it.

Hon NORMAN MOORE: We are dealing with part 1. Is the house comfortable with that?

The PRESIDENT: That is up to the house to determine. If the house determines that way, I will rephrase the motion I put to the house.

Adjournment of Debate — Motion

HON NORMAN MOORE (Mining and Pastoral — Leader of the House) [12.12 pm]: In view of the fact it has been moved in the form it is in, I move —

That the debate be adjourned to a later stage of this day's sitting.

HON SUE ELLERY (South Metropolitan — Leader of the Opposition) [12.13 pm]: I wonder if it might not be possible, so that we know the leader's intentions, for you to leave the chair, Mr President until the ringing of the bells —

Hon Norman Moore: We'll deal with it today. I wanted to spend a bit of time to find out what it means in reality, before making a decision on the floor of the house without taking advice.

Hon SUE ELLERY: Okay, I am trying to establish whether it is the Leader of the House's intention that we not deal with that bill until we have resolved that question.

Hon Norman Moore: Yes, you are quite right; that is the motion before the house.

Hon SUE ELLERY: I am trying to figure out what is the Leader of the House's intention next; do we jump to the next bill, or whatever? That is all I am trying to find out.

Hon Norman Moore: We'll go to the next bill now and later in the day we will come back to this.

Question put and passed; debate thus adjourned.

[See page 9302.]