EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Committee

The Deputy Chair of Committees (Hon Alyssa Hayden) in the chair; Hon Michael Mischin (Attorney General) in charge of the bill.

Clauses 1 to 4 put and passed.

Clause 5: Sections 20A to 20M inserted —

Hon MICHAEL MISCHIN: Before I move the amendment standing in my name on the supplementary notice paper, I think it is appropriate to outline a little of the history of the Evidence and Public Interest Disclosure Legislation Amendment Bill given the time that has elapsed since it was last before this place, which was in November last year.

This bill was introduced in the Council on 20 October last year. The stated purpose of the bill is to introduce responsible and accountable protections for confidential communications to professional persons and journalists, which in appropriate circumstances preclude them from being compelled to give evidence of certain matters. The substance of these protections is set out in clause 5 of the bill. Confidential communications generally are the subject of proposed sections 20A to 20F of the bill. By their terms, these sections apply only to proceedings in court. Protection of the identity of journalists' informants is set out in proposed sections 20G to 20M. By their terms, these provisions apply to evidence before a "person acting judicially". Relevantly to the immediate issue under discussion, the protection will prevent a journalist from being compelled to give evidence disclosing the identity of the journalist's source of information unless it is determined that the protection should not apply in the circumstances of the proceedings in question. The sections proposed to be inserted into the Evidence Act set out those circumstances and the considerations to be taken into account in making that decision. I add that although it is anecdotally termed a "journalist's privilege" and like terms, the intent is not so much to benefit journalists but to protect confidential sources—hence the proposed complementary amendments to the Public Interest Disclosure Act 2003 that are set out in this bill.

Getting back to so-called journalist's privilege and the bill, it was explicitly the government's intent that the protection apply to not only judicial and other proceedings in which evidence is taken, but also hearings before the Legislative Assembly of this Parliament and the Legislative Council or committee hearings of either house of this Parliament. It was the government's view that the definition in section 3 of the Evidence Act 1906, which is the principal act that is being amended by the bulk of this bill, of a "person acting judicially" was sufficiently broad to embrace the taking of evidence by Parliament and its committees. However, in light of the view expressed by the Clerk of this house that the language of the bill was not sufficiently explicit to extend to Parliament and its organs, the government proposed amendments to ensure that the policy of the bill was to be effected. The second reading debate on the bill resumed on 8 November. In the course of the debate, the issue was raised first by Hon Giz Watson on behalf of the Greens (WA) as to whether it was appropriate that parliamentary privilege be qualified in the manner proposed by the government. She proposed that it would be more appropriate that the protection of confidential sources be included in the standing orders of Parliament and sought to refer the bill to the Standing Committee on Procedure and Privileges for its consideration. That proposal was supported by Hon Sue Ellery on behalf of the opposition, Hon Wendy Duncan on behalf of the Nationals, and the government. The bill was read a second time on 10 November, thus expressing the collective view of Parliament that the policy of the bill be implemented. Later that day, the bill was discharged from the notice paper and referred to the Standing Committee on Procedure and Privileges "for consideration of clause 5 sections 20G to 20M and their effect, if any, on parliamentary privilege".

The Procedure and Privileges Committee of this house is a cross-party committee. It was chaired by the President and comprised Hon Matt Benson-Lidholm, Hon Brian Ellis, Hon Jon Ford, Hon Col Holt and Hon Ken Travers in their capacities as Deputy Chairs of Committees. At that time both Hon Giz Watson and Hon Wendy Duncan were co-opted to the committee for the inquiry on the basis, it is reasonable to assume, that the committee should have a broad cross-party representation. I was a member of the committee, but for obvious reasons it was not appropriate for me to be involved in that inquiry; I was the Parliamentary Secretary to the Attorney General sponsoring this bill and facilitating its carriage through this house. Therefore, Hon Donna Faragher was substituted for me on that committee. I need not reiterate the detail of the committee's report, as it has been tabled and is part of the public record. Suffice it to say, the committee found that clause 5 and proposed sections 20G to 20M of the bill, as agreed to at the second reading stage, may qualify the parliamentary privilege in the terms in which they were then formulated. However, the government amendments in supplementary notice paper 232, issue 1, extending the relevant definitions to Parliament and its committees put the matter beyond doubt.

The question of judicial oversight of any decision of Parliament or its committees on the question of whether a source ought to be protected in a hearing was raised in the course of the second reading debate. On 10 November 2011, I expressed the view, based on my understanding of the law and the legal advice the government had to hand, that there was no risk of opening up Parliament to challenges in the courts if the provisions of the bill extended to Parliament. The committee also considered that issue, but there is no need for me to say anything more about that for reasons that will become apparent very shortly.

The committee proposed two options. The first I will dub "the legislative option" or "option 1" and the second I will dub "the standing order option" or "option 2". The standing order option is essentially the one that was proposed by Hon Giz Watson when she raised concerns about the bill extending to Parliament. It was her view that the bill ought not do so and that this issue should be dealt with by way of amendments to standing orders. In essence, the standing order option is that parliamentary privilege be preserved intact and the relevant provisions relating to the protection of journalist sources be adopted in standing orders crafted to that effect by each house of Parliament if it saw fit. There was a dissenting view from the majority position stated by the committee in its report, and that was the view of Hon Ken Travers who, on balance, as I understand his comments, preferred the legislative option.

Hon Ken Travers: I was supporting the then parliamentary secretary.

Hon MICHAEL MISCHIN: That is very kind of the member. The government has given careful consideration to the submissions made in the course of the second reading debate and to the committee's report. It takes the point that the proposal in the bill to qualify parliamentary privilege, even in the limited way proposed by the bill, is a significant step and one that will potentially set a precedent. Therefore, it ought not be taken lightly. The government is conscious that the committee was a cross-party committee; that decisions in cases before Parliament to date have been made with regard to principles not unlike those reflected in the bill; and also that the committee recommended that the protections contemplated by the bill be included in standing orders.

The government has taken into consideration the legitimate reservations and concerns of members generally about any step that will too hastily affect the privileges of Parliament, which have taken centuries to establish. The government is anxious to have this bill made law before Parliament rises at the end of this year as it will benefit not only the narrow interests of journalist sources, but also others who have provided confidential communications to professional people acting on their behalf and who are protected by other provisions in the bill. Accordingly, the government accepts the committee's recommendation in the expectation that this house will address the issue of amendment to standing orders with expedition to provide the fullest possible protection consistent with the policy of the bill and as contemporaneously as possible with the passage of the bill through this place and the other place.

I take the liberty of foreshadowing that the government will support a reference to the Standing Committee on Procedure and Privileges of any suitably worded motion to formulate appropriate standing orders picking up the principles elucidated in the bill. The purpose of the proposed amendment is to make it plain that the term "person acting judicially" does not extend to Parliament or its committees. Given the considerations raised by the Clerk of the Parliaments and reflected in the committee report, the government believes it is important that any ambiguity about the term and any argument that it might extend to Parliament and its committees be dealt with and all doubt removed from it, so as to avoid the possibility of fruitless and vexatious litigation based on whether the definition in the Evidence Act 1906 does give rise to that possibility.

The amendment I propose makes plain that the term "person acting judicially" as it appears in the principal act, the Evidence Act—which the government thought, at least at first sight, was broad enough to embrace Parliament and evidence taken in proceedings—does not extend that far and also the question of any proceedings referred to does not include those before Parliament or its committees.

I move —

> Page 10, after line 19 — To insert —
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> > ***person acting judicially*** does not include a member of a House of Parliament or a Committee of a House, or both Houses, of Parliament who, by law, has authority to hear, receive, and examine evidence;
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> > ***proceeding*** does not include a proceeding before either House of Parliament or a Committee of either House, or both Houses, of Parliament, in which evidence is or may be given;

Hon GIZ WATSON: I rise to indicate support for the amendment, and I was pleased to hear the Attorney General's preceding comments. This matter has taken a while to come back to this chamber for further debate and I appreciate that full consideration has been given to the report of the Standing Committee on Procedure and Privileges, which I think took a very thorough look at this issue. I am pleased to see the concerns that I raised

about protecting parliamentary privilege reflected in this amendment and also note that the foreshadowing of a motion for a referral, again, to the Standing Committee on Procedure and Privileges, will I hope speedily result in recommendations for changes to the standing orders, basically to accommodate the policy of this bill in the standing orders; that is, to achieve the objective of protecting sources of information in circumstances in which a journalist takes information in confidence, but at the same time not run the risk of tying up the proceedings of this Parliament in judicial challenges and preserving the separation of powers. I put on the record that I appreciate this amendment has been a recognition of this solution and support for the recommendation of option 2 from the twenty-third report of the Standing Committee on Procedure and Privileges report in November 2011. I think this is a positive step, and the Greens (WA) support it.

Hon SUE ELLERY: The opposition's position at the second reading, and it remains so now, was that we will support the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011 in its original form. The Attorney General has canvassed what occurred around the bill since the matter was last before us on 10 November. Members will recall that on that date the chamber passed the second reading stage of the bill and then supported a motion to discharge the bill and refer it to the Standing Committee on Procedure and Privileges for a very narrow inquiry into proposed sections 20G to 20M and to report back by 29 November. The background to that referral was to examine those particular provisions, as they may have impacted on the privileges of the Parliament. The debate in the chamber was focused on whether the provisions to provide journalists with certain protections from revealing sources of information were most appropriately housed within legislation or in the standing orders of the house. I think it is important to recall that the relevant provisions offering those certain protections are not unfettered. That is the point I made in my contribution to the second reading debate and others made it as well. They are not unlimited protections. They provide protection unless it is determined that there are particular reasons why protection should not be granted. Our position, although absolutely respectful of such an august committee as that which was chaired by the President, is that there is a broader public interest test that needs to be met, and we fall on that side of the debate. On balance, it is our view that given the protection is indeed a limited one—it is not unfettered—we will not support the amendment before us now. As I said, we will support the bill in its original form.

The Attorney General referred to the committee report, the majority recommendation and the minority view expressed by Hon Ken Travers, and I am sure he will talk to that in a moment. The view Hon Ken Travers took then was to support the first option, which was that if the chamber considers that adoption of the legislation is the preferable option, the chamber should agree to the government's proposed amendments and otherwise allow the bill to proceed through the remaining stages in the chamber. The point he made in his minority report was that the Parliament has traditionally had the power to punish people for a range of contempts against the Parliament and, over time, some Parliaments have transferred this power to the court system. It is the case that these matters evolve, and have evolved, over time and incrementally change. It is important to consider whether every change is an appropriate change. Therefore, I was perfectly relaxed about referring the matter to the committee and about considering the matters that the committee reported back to us on. But I do hold the view that housing that mechanism within the standing orders offers less protection to journalists—less protection of the protection of sources, if you like—than does legislation. The numbers in this chamber are such that the government can deliver an absolute majority itself right now. So, on any day it can use that absolute majority in the chamber to change standing orders, if that is the view of the government of the day. It may still have the numbers to come into the chamber and change a piece of legislation, but that requires a variety of mechanisms, a length of time and a level of scrutiny that are different from it choosing to use its absolute majority on any given day to change the standing orders.

From the public policy position of the bill, which is to offer in certain circumstances a certain level of protection, the standing orders will err on the side of whoever controls an absolute majority in the chamber on any day. I think that is a lesser objective. I understand that the alternative argument is that that is as it should be because we need to protect the privileges of the Parliament. Albeit it is important to question ourselves and make sure that we are protecting the privileges of the Parliament, we need to err on the side of protecting this narrow, limited protection. The best way to do that would be to include those protections within the legislation. For those reasons, we will not support the amendment.

Hon KEN TRAVERS: I want to add a few words and elaborate a bit on my comments in the report outlining the reasons I dissented from the majority position. In layman's terms it is fair to say that the intent of this bill is to protect journalists' sources unless a number of tests are met, at which point there is a requirement that they disclosed in the public interest before a judicial body. The next question becomes whether that process will apply to the Parliament.

The first thing we need to think about is: when will this really ever come into being? It will be a circumstance in which a judicial body, whether the Parliament or a court, has decided that it will require a journalist to reveal their sources. I suspect we will find that 99 per cent of the time a journalist will be able to stand back and not

reveal their sources, and will be able to rely on this legislation in either its current or amended form. The next stage we need to look is what will then happen in Parliament. If the Parliament or a parliamentary committee requires a journalist to disclose their sources, a position will need to be arrived at by Parliament—whether it is in the legislation or the amendment that has been outlined by the Attorney General—to establish that the relevant tests to require that person to disclose their sources to the Parliament or the committee have been met. Once that is done, a conflict will occur. If the journalist still refuses to disclose and the Parliament—if we just think about Parliament for now—does not believe they have not disclosed their sources, the final test is the question: what will the Parliament then do? We have seen this occur. As part of their code of conduct, journalists have gone to jail rather than reveal their sources. The question then becomes: will the Parliament take some form of sanction against the journalist? I do not want to get into that debate, because it is probably a separate debate for another day and it could take a few weeks to debate the whole issue around sanctions, how they apply and the ability for this Western Australian Parliament to apply sanctions. There have been other committee reports about that issue. We had the situation of this Parliament referring to the Director of Public Prosecutions the matter of looking at whether someone lying to a parliamentary committee can be prosecuted, and whether the Criminal Code or penal sanctions can be applied. That issue still needs to be addressed by the Parliament as a whole. Whether the Parliament has the ability to apply some sort of penalty or penal sanction is probably still a debatable point. The question we have to ask is that if we get to that endpoint in the chain where some sort of sanction is sought to be taken—it could be a fine or it could be basically to jail someone until they disclose their sources, which is how I suspect how it will play out in a court situation in most cases; that is, a person will be held in contempt and locked in a cell somewhere until they disclose their source —

Hon Nick Goiran: That's not necessarily the case.

Hon KEN TRAVERS: I am not saying it is, but I suspect that often the first response from the court will be to ask the person to disclose their source. If they do not disclose it, they will probably be given a couple of options and may even be sent away for a couple of days to think about it. I suspect that that would be one of the primary sanctions of the courts. Fines could be used; I am not saying that there are no other mechanisms. However, I envisage that often it will be about holding a person in contempt and hoping that they will crack and reveal their sources. Or the courts could enter into a process of seeking to apply a penalty, and could say "You have not supplied it; here is a fixed punishment for you and we will give up on trying to get you to reveal your sources." I am trying to do it in shorthand. I accept, Hon Nick Goiran, that there are variations on it. It will be about trying to apply some sort of sanction against that person, whether monetary or penal.

The question we have to then ask ourselves as a Parliament is whether Parliament is the appropriate place to make those ultimate determinations. As I said earlier, there is a question mark about whether if someone lies to a Parliament, it is done as a process of the Parliament or a process of the courts. It is my view that in this day and age the appropriate place for those questions to be determined is the court system. I understand and respect the importance of protecting parliamentary privilege. We have to be careful how we use it. It has to be used as a shield, not as a sword, as I am often reminded by the learned people who advise this chamber. Parliamentary privilege first arose at a time when there was often great conflict between what are now the three arms of state—the executive, the judiciary and the Parliament. Often the lives of members of Parliament were put at risk. We still have the tradition of accompanying and forcing the President into the Chair, because that was a symbol that if things went wrong, it was often the President of the Parliament whose head was taken first if the Parliament and the executive did not agree. I do not think our society and our democratic institutions operate in that way. I have not seen a President being taken out by the Governor in recent times and not come back. Our Parliament and the relationships that underpin it have moved on. That is not to say that there is not still an important role to say that what happens in this Parliament needs to be able to be dealt with in this Parliament. When we are dealing with people outside the Parliament in the matters that we are talking about and dealing with here, it is time to move on and have a clear process. The Parliament should be the controller of its own destiny, but if we get to a point where we believe that someone should answer a question and they continue to refuse, and that is when this is really going to apply, then that should be determined by a body outside the Parliament and independent of the Parliament. The public would expect that. I think it provides a guarantee. Without in any way casting aspersions on this place, there are always people who come into this place with agendas and who probably will not look at it in the same way as the judiciary, who do this sort of thing on a regular and ongoing basis.

The other issue with respect to the difference between what is now being proposed by the government and the original legislation is the ability to change these rules—the ability for that protection to be removed at any time by a single house of the Parliament. If the bill is passed, it will mean that if people want to change that, it will not be a simple matter of either house signing off on it; it will require both houses and the Governor to sign off on it. As Hon Sue Ellery pointed out, a standing order cannot be changed by just this house; the other house has to do the same thing. They could change it. They may do that at some point in the future in a politically charged

situation. If they believe that the public is on their side against a journalist who refuses to reveal their source—it may be that they have the right to not disclose it—they could do one of two things; they could say that they have met the test and that it is in the public interest to disclose it and the person discloses their source and there is no right of appeal to an independent arbitrator, or they could simply remove from the standing orders the protections that will be guaranteed under this bill. That does not provide the same safety and security to journalists that is intended by the passage of this legislation. It is for those two reasons I oppose the amendment that has been proposed and support the bill in its substantive form.

Hon GIZ WATSON: I want to add a little more to this discussion because I have taken a close interest in it. I wanted to respond to a couple of propositions. The first is that it is relatively easy to change standing orders. I am surprised that members are arguing that because one of them spent 18 months with me amending standing orders. It is a very lengthy —

Hon Sue Ellery: That is because we agreed to do it by committee.

Hon GIZ WATSON: I am just using that as an example. My experience in this place is that amendments to standing orders are discussed between all parties and require a motion to be debated in this place.

Second, Hon Ken Travers made the point that we should consider the circumstances of when this bill might be used. I wanted to remind members of the example on page 8 of the report of the Standing Committee on Procedure and Privileges about a select committee inquiry into the police raid on *The Sunday Times*. I was a member of that select committee, as was Hon George Cash and Hon Adele Farina. That very question arose in relation to a journalist who declined to reveal his source. It is worth reiterating what the report said about that. The Procedure and Privileges Committee report states —

> 9.9 Firstly, the Committee observes that the circumstances under which a journalist would be asked to reveal the identity of a journalist's source relate, at least in the first instance, to the operations of the House's committees. If the journalist refuses to answer such a question, the committee is empowered to do nothing more than refer the matter to the House—the non-compliance by the witness (journalist) is a matter for the House to consider and deal with.
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> 9.10 In considering whether to require an answer, the House must act in accordance with section 7 of the *Parliamentary Privileges Act 1891* (PPA), which provides (in part) that the House "may excuse the answering of such question … as the circumstance of the case may require". The advice received from independent senior counsel also noted the existence of this current statutory provision.
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> 9.11 The only occasion when these precise circumstances have arisen for the Legislative Council was during the proceedings of the *Select Committee into the Police Raid on The Sunday Times*. In this Committee's report to the House, it reported that a journalist had refused to answer a question regarding the source of information published by the journalist, and further that the Committee recommended that the journalist be excused from answering that question by the House (in accordance with s7 of the PPA). The House subsequently adopted this recommendation and excused the witness for his failure to answer the question.

Hon Ken Travers: I agree that 99 per cent of the time that will occur. That is the point I made. You need the protection when the house insists they answer it.

Hon GIZ WATSON: I am arguing that those protections are adequately covered in an amendment to the standing order. I just wanted to point out that it is not as though we have not already considered an issue to do with this and come to what I think was the correct position, which was to basically say that the fact that the journalist declined to give an answer to that specific question did not impede the operation of that select committee. We were able to report. We already have a lot of latitude within standing orders as to how we deal with any witness who declines to answer a question. I wanted to add that to this debate so we have that information on the record as well.

Hon NORMAN MOORE: I want to raise a matter that Hon Ken Travers discussed. He talked about the issue of penalties. That has been a problem for the Parliament for a long time. I remind members of a Legislative Council committee that, some time ago, made some recommendations on parliamentary privilege and how it should be implemented. Regrettably, that report has languished. I hope somebody might get hold of it one of these days and deal with it. It looked at those circumstances in which activities in Parliament should be judged by a court and which should be judged within the house itself. The general thrust of the recommendations was that Parliament should look after its own affairs fundamentally. Some of the provisions in the Criminal Code should not remain in the Criminal Code but should be part of the jurisdiction of the house to deal with its own affairs.

Hon Ken Travers said that if we go down the path of standing orders, and a journalist refuses to answer a question, we have to decide what to do about it. He somehow suggested that if we stick with the existing bill, it will be dealt with by the courts when, in fact, it will not be. Any issue under the current bill, without being amended, would see a similar situation with respect to punishment as would apply under the amended version.

Hon Ken Travers: But arguably under this legislation, if it was amended, you would take an appeal to the courts.

Hon NORMAN MOORE: There is a proposal that that not be the case. That was the original proposition. I would argue that it should not be justiciable because I think Parliament can look after its own affairs.

Committee interrupted, pursuant to standing orders.

[Continued on page 5333.]

Sitting suspended from 4.15 to 4.30 pm