EVIDENCE AND PUBLIC INTEREST DISCLOSURE LEGISLATION AMENDMENT BILL 2011

Second Reading

Resumed from 8 November.

HON GIZ WATSON (North Metropolitan) [9.05 pm]: I have just under five minutes on the clock. I would like, under standing order 73, to extend my comments for a further 15 minutes.

The DEPUTY PRESIDENT (Hon Brian Ellis): Once the time has run out, it has run out.

Hon GIZ WATSON: When time ran out on this discussion last night, I was talking about the particular case that I was involved with, which was the inquiry by the Select Committee into the Police Raid on *The Sunday Times*. It reported to this place in April 2009. I was trying to explain to the house how this chamber has dealt with questions of journalists' confidentiality. I think this case is worth explaining in a little more detail.

Page 162 of the select committee report refers to Mr Paul Lampathakis, who was *The Sunday Times* journalist, and the questions we asked in relation to the source of the leak of cabinet information. I quote from the report —

> The Committee had previously heard evidence that the WAPOL investigators had formed the view that Mr Lampathakis would not voluntarily disclose the source of the leaked Cabinet information. The WAPOL investigation had proceeded on this basis and, as a result, the execution of a search warrant on *The Sunday Times* building was determined by the investigators to be the best means of locating evidence that may identify the source of the leak.
>
> Based on this evidence, the Committee was of the view that it was necessary to test the WAPOL's assumption regarding Mr Lampathakis' willingness to reveal his source.

At the hearing Mr Lampathakis made the following comments in his opening statement —

> I want to be as helpful as possible—hence my presence today. However, I will decline to answer any questions that may either directly or indirectly identify the source or sources of the story in question. I will decline for two reasons. Firstly, I do not see those questions being relevant to the committee's terms of reference to inquire into the circumstances surrounding the raid on the Sunday Times on 30 April 2008. Secondly, I will decline to answer such questions because I am bound by a code of ethics to maintain the confidentiality of the identity of the source or sources of information relied on for the story.

The following exchange took place at a later stage of that hearing. The chairman, Hon George Cash in this case, said —

> *... The committee asks if you are aware of the identity of the person or persons who provided you with the confidential information that you used in your 10 February article published in the Sunday Times at page 3, under the heading "Bid to 'buy' Labor win". Can you indicate if you are aware of that identity of that person or persons?*
>
> ***Mr Lampathakis**: Can I just take one moment?*
>
> ***The CHAIRMAN**: Yes, Mr Lampathakis.*

He conferred with his counsel; he had legal counsel present at the hearing. Mr Lampathakis's answer was —

> *I was aware of the identity of the source or sources.*

The committee then proceeded to ask the following questions —

> ***The CHAIRMAN**: ... Can you advise the committee of the identity of that person or persons?*
>
> ***Mr Lampathakis**: As I have said before, for the reasons that I have given in my statement, I decline to answer that question.*
>
> ***The CHAIRMAN**: Will you just expand again, so that the committee is aware, the reason that you are refusing to answer the question, so that we are very clear in our minds—and you are clear in your mind—about the grounds that you are refusing to answer?*

Mr Lampathakis reiterated the same two previous points. Further exchanges are laid out at pages 164 and 165 of the committee's report. Previously, Mr Lampathakis declined a second time to answer the question. The committee reported to the Legislative Council the refusal by Mr Lampathakis to answer a relevant question put to him by the committee. The report notes —

> 14.11 In considering the effect of the witness's failure to answer the questions put to him, the Committee has regard to the maxim that "*parliamentary privilege should be used as a shield rather than a sword*".

14.12 The Committee also notes the approach of the Procedure and Privileges Committee in its recent reports that, in line with current United Kingdom House of Commons practice, it is recommended that the House exercise its penal jurisdiction "*as sparingly as possible and only when satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its officers from such improper obstruction or attempt at or threat of obstruction causing or likely to cause, substantial interference with the performance of their respective functions*".

[Leave granted for the member's time to be extended.]

Hon GIZ WATSON: The quote continues —

14.13 The Committee has determined that the failure of the witness to answer the questions put to him did not obstruct or impede or cause substantial interference with the functioning of the Committee. In fact, Mr Lampathakis' responses to the Committee's questioning confirmed for the Committee that the WAPOL investigators' assumption about Mr Lampathakis' unwillingness to divulge his source to them had been correct.

14.14 The Committee notes that the House of Commons practice, in relation to cases of conduct which offends the authority or dignity of the House, is to take no further action if the matter is considered trivial.

Recommendation 6: The Committee recommends that, in accordance with s 7 of the *Parliamentary Privileges Act 1891*, the Legislative Council excuse the answering of the question asked of Mr Paul Lampathakis by the Committee as set out in paragraph 14.9 of this report.

The reason I wanted to go through that in some detail is to indicate to the house that on this question of a circumstance in which journalists may come before a committee of the house, or indeed before the Bar of the house, and be asked a question that seeks an answer that would reveal the source or sources of information, I would argue that this Parliament has a very recent and clear example of where that balance was struck in the right way. Current provisions under the Parliamentary Privileges Act, and under the guidance of practices of the House of Commons, for example, indicate that the committee made the right decision—although we note that the question was not answered—that is, it did not interfere with the functioning of that inquiry and therefore no consequence should flow for the journalist. I raise that because I think this bill is seeking to remove that discretion from Parliament and enshrine it in legislation that is external to Parliament. As I say, I might have been in Parliament too long, but I have come to understand the importance of Parliament being in charge of its own business. Parliament is the highest order in decision making. On the question of the separation of powers, Parliament must be in charge of its own business. If this house is of a mind to include the criteria that are currently in proposed section 20J in the bill, which set a series of considerations that should be taken into account when deciding whether protection is afforded to a journalist from revealing a source of information, I personally do not have a problem with Parliament considering putting that criteria in the standing orders and basically taking that on board, if that is the will of this Parliament. I do have a problem with placing it in legislation that is outside the Parliament's ambit. Although we are sympathetic to the shield provisions, we argue that they should not be expressed in this place; they should be put in the standing orders.

The bit that I felt uncomfortable about in the inquiry into the raid on *The Sunday Times* and the almost incidental matter of pressing a journalist to reveal his source was that if the journalist had refused to answer the question, as he did, and the committee had decided that action should be taken, the only action that could have been taken was to impose a fine or imprisonment, or imprisonment for not paying the fine. I think what is wrong with that is the imprisonment. In fact, we have sought to remedy that. I had a conversation with Hon Norman Moore behind the Chair and he reminded me that we have looked at the question of whether imposing a sentence of imprisonment on witnesses and members of the public who are brought before committees or before the house remains appropriate in the twenty-first century. Personally, I think that is the problem, and we should leave the capacity for a fine but remove the capacity for imprisonment to be imposed by the Parliament. In fact, we made that recommendation; it has just never been progressed through Parliament. If I can recall the public debate at the time, the worst element of it was that the poor journalist might have been thrown into the dungeons in Parliament House! I agree that that was problematic and seemed bizarre in our current day and age. I am suggesting other ways of fixing this problem other than that proposed in this bill.

These are very important questions that go very much to the heart of the separation of powers, the ability of Parliament to determine its own rules, the questions that have been raised about constitutional issues, particularly in the correspondence provided to us by the Clerk, and the potential to open up an avenue for court challenges to Parliament and offend that separation of the courts from Parliament. My way of trying to resolve this issue so that we can support the policy intent of the bill would be to refer the bill to a standing committee of this place so that we can answer those very serious questions. This is not the sort of bill that we want to rush. It potentially has

some very serious consequences if we open up the Parliament to challenges from the courts, including on issues such as injunctions.

Again, I have been involved in inquiries in this place that have involved some very serious and concerted attempts by highly qualified lawyers to try to impact on the processes within parliamentary committees. Let me tell members, it tied this place up in knots for quite a considerable time. Many people who were around then—I can see a few of them in this place—would not like to open up that field again. It creates enormous problems for the operation of Parliament and its committees if we engage in those legal debates and legal challenges. I sound a word of warning that when we start to make changes in this area, there might be unintended consequences. I finish my comments there.

The Greens are very strong supporters of shield laws and we have long advocated for them. However, we again note that the commonwealth has changed the existing provisions that protect parliamentary privilege. When the commonwealth made its very recent changes to provide shield laws, it left that part unchanged. I think it left that part unchanged for a very good reason. I would argue that this Legislative Council should take its job very seriously. It is interesting that we are debating this bill ahead of any debate in the other place. As the senior house of Parliament, it is incumbent upon all of us to ensure that the good workings of the Legislative Council are not interfered with by this proposed bill.

I feel as though I need more time to hear both sides of the argument on whether the bill will or will not impinge on parliamentary privilege, whether that is a good idea and what, if anything, the unintended outcomes are. The committee process is the best way to have that discussion and to hear from other informed sources. I do not know about anyone else in this place, but I do not feel as though I have all the information at my fingertips. I would like to hear from a few people before a committee. We have committees so that we can call in those people and take that evidence and so that this Parliament can produce a recommendation that lays out what we have considered and why we have chosen to go one way or another. I strongly advise that some sort of committee inquiry of a very limited nature—dealing only with the question of parliamentary privilege—is essential to understand the impacts of this bill. I will not move that formally now. I guess I hold that in reserve for a further part of this debate if and when I think that might be necessary.

HON MICHAEL MISCHIN (North Metropolitan — Parliamentary Secretary) [9.23 pm] — in reply: I thank the Leader of the Opposition and Hon Giz Watson for their contributions to the debate. I thank the opposition for its support of the Evidence and Public Interest Disclosure Legislation Amendment Bill 2011. I thank Hon Giz Watson for her indication of support for the intent of the bill, albeit with some qualifications and a desire to have further elucidation of some aspects of the operation of the bill, particularly on the question of its impact on parliamentary privilege and the prerogatives of the house. Albeit it may not go as far as the Greens would desire, I would hope that, notwithstanding those reservations and subject to her concerns being addressed, Hon Giz Watson will be supportive of at least this stage in the process and the bill as it is drafted in its current form.

The question has been raised, and I suppose I should deal with that to start with, about the correspondence from the Clerk of the Legislative Council in respect of certain aspects of the potential impact of the bill on the prerogatives and powers of the house. Advice has been obtained in respect of that correspondence, and yesterday I provided a copy to Hon Sue Ellery for her consideration overnight. I did that also because she was foreshadowing some amendments to the bill in order to deal with, partly, those questions; and the advice that has been received from Mr George Tannin, SC, State Counsel, may help in her consideration of that matter. I do not think Hon Giz Watson has copies of that correspondence yet, and I am happy to provide those. I will table a copy of that correspondence and provide a copy to Hon Giz Watson in due course.

THE PRESIDENT: Are you tabling that correspondence now?

Hon MICHAEL MISCHIN: Yes, Mr President. There are two documents, in fact. One is a letter, on the letterhead of the State Solicitor's Office, and under the hand of George Tannin, SC, dated 31 October 2011. It deals with the first letter from the Clerk of the Legislative Council. The second is a two-page letter, again under the hand of Mr Tannin, SC, dated 8 November 2011.

[See paper 4067.]

Hon MICHAEL MISCHIN: Perhaps if I address those letters to start with. In substance, the first concern raised by the Clerk of the Legislative Council was that although the second reading speech setting out the policy of the bill made it plain that the government was intending to extend this shield, or this limited confidentiality protection, to journalists, even before parliamentary committees and Parliament, the bill would not achieve that policy objective, because in essence to do so would require clear wording in the act that was passed by Parliament. In the first of the two items of correspondence—namely, the letter dated 31 October—State Counsel argues that, in his opinion, as a matter of construction, section 3 of the Evidence Act 1906 is broad enough to

embrace proceedings before parliamentary committees as well, as they are bodies that are hearing evidence. However, as a matter of caution, and in order to fulfil without doubt the government's policy intent, amendments have been foreshadowed in the supplementary notice paper to extend the definition of "proceedings" for the purposes of specific sections of the proposed act that deal with a journalist's confidentiality, in order to make plain that parliamentary committees and the like are also embraced by the term "proceedings", and also to extend for those same sections in the proposed act the definition of "judicial officer". That mechanism will make it quite plain that journalists will be provided with the protection intended by the bill before not only courts, tribunals and any other body that is hearing evidence, but also parliamentary committees.

It has another consequence by doing it the way the government proposes because there was that latent question as to whether the Evidence Act did apply to parliamentary committees that were hearing evidence. As a matter of statutory construction now, by extending the definition of proceedings to embrace parliamentary proceedings, for the purposes of those sections, it will make it plain that Parliament's intent and understanding of the Evidence Act is that the bulk of the Evidence Act—those bits that are not covered by those particular sections—are not things that affect parliamentary proceedings. If anything, the government's proposed amendment will reinforce the uniqueness of parliamentary proceedings and that these specific protections will apply only to parliamentary proceedings; the rest of the Evidence Act will not. In due course, I will move those amendments to the Evidence Act.

The second item of correspondence and advice from State Counsel deals with the second of the letters from the Clerk of the Council and, in essence, those concerns related to the potential for the courts to be involved in and adjudicate upon decisions made by Parliament or a parliamentary committee in respect of whether to relieve a journalist of the protection of the confidentiality provisions and whether, by the inclusion of a reference to Parliament, Parliament's privileges are being abrogated and made subject to judicial review or are otherwise justiciable. Members will see from the analysis conducted by Mr Tannin that that is not the case at all. In fact, if one uses the proposition that it requires the clear words of Parliament to abrogate parliamentary privilege and to abrogate its prerogatives, the amendments we have proposed will make it quite plain that parliamentary privilege is being affected only insofar as those specific provisions go, and there is nothing in the bill or in any other statute that would provide a mechanism by which a court could adjudicate over proceedings of a parliamentary committee or proceedings of Parliament itself. Unless someone can point to a provision somewhere that allows a court to adjudicate over the proceedings and decisions of a committee of Parliament, there is no mechanism by which a court can do so. It does not change the common law position and it does not change the constitutional position in any way, so the concerns that somehow by extending this protection to journalists before parliamentary committees is going to enable a court to adjudicate over those decisions is misconceived, with respect. It would require clear words in the statute to enable that to happen and those words are not there. The position would be no different from any other matter before a parliamentary committee. There is simply no mechanism by which a court could be seized of the issue.

It is a different position with courts. Arguably, if proceedings were before a court and a court made a decision requiring a journalist to reveal his source, even then it is unlikely that an appeal avenue would be available. Appeal avenues are available only when they fall within the provisions of the Supreme Court Act, the Criminal Appeals Act in the case of criminal matters, or some other provision providing for a right of appeal or review. Unless that can be demonstrated, the journalist would have no other avenue to pursue the matter further. Even if he did, it would be only in those proceedings and would have to be connected with those proceedings. Parliamentary proceedings and parliamentary committee proceedings are in a totally different category, and there would be nothing a court could fasten onto that would enable it to deal with it or to allow a journalist standing in order to have it reviewed before a particular court.

With respect to the legitimate question and concern raised by the Clerk of the Legislative Council—it was quite proper to do so as a matter that ought to attract the attention of the house—in fact, when one considers the analysis of Mr Tannin and goes back to basic principles, there is nothing a court could adjudicate on or be seized of in a parliamentary committee. It has to be understood that the purpose of this legislation is not to grant an absolute protection for journalists under any circumstances. I know that the Greens (WA) might take a different view and think that the line ought to be drawn differently in this matter—so be it; those are policy decisions and the government has chosen to take a particular course. But it does provide something that is not available in law at present, which is a presumption that a journalist who has been provided information on the understanding that the source will remain confidential will be able to protect that source as a matter of law.

Of course, there have to be qualifications to that because it is a balancing of public interests. Journalists, of course, would argue that it ought to be as absolute as possible, but journalists look only at their own particular interests and the public interest as they see it. Courts and judges and the like would have a very different attitude as to which public interest is paramount. I will get to some of that in due course, because the question has been raised on the submissions that have been received about the policy behind this bill. But plainly a balancing act

has to be conducted, and indeed a different one perhaps for parliamentary committees and the prerogatives of Parliament, because no protection of that nature can or ought to be, in the government's view, absolute. A case of misconduct, for example, would be a factor that ought to be taken into account, and there may be a need to get to the truth of something that outweighs the confidentiality involved.

The most absolute privilege that we have in law is that of legal professional privilege, and for very sound public interest reasons, so that a person can be full and free and frank with his or her lawyer to get appropriate legal advice on their legal position, and particularly so in criminal matters where the liberty of the subject may be at stake. In the case of journalists, things do not generally turn on that to any great extent. There may be public interest considerations to encourage the flow of information when there is scandal to be exposed, but often journalists reveal information of a confidential nature only to sell newspapers. That is just a plain fact. Things such as the current scandal of the News Ltd telephone bugging activities in the United Kingdom are examples of why there cannot be an absolute protection of confidential sources. In the government's view, the commonwealth legislation and the proposals advanced by the Greens for a more absolute privilege would allow journalists to protect the sources of illegally obtained information, as has happened in the United Kingdom. It would be a scandal, in the government's view, if journalists were to conduct illegal activities, such as tapping phones and stealing material, and then claim that their sources ought to be kept confidential.

Hon Giz Watson: I am not sure how what I said could be interpreted to extend to that.

Hon MICHAEL MISCHIN: A more absolute privilege may very well do that. At any rate, where one draws the line is a matter of policy.

Hon Giz Watson: I am certainly not looking at protecting phone hackers.

Hon MICHAEL MISCHIN: No. Although the focus of much of the debate has been the exposure of corruption or bad practice in government and the like, of course, that is only a small part of the sorts of information that a journalist might obtain confidentially. We must also consider the privacy rights and protection of citizens in the event of defamation or the revelation of private, personal and embarrassing information. In many cases a citizen who takes action against a journalist ought to be able to find out who the source of the information was. That is a balancing exercise that is properly left to the courts. The legislation hopes to achieve, by articulating the relevant sorts of public interest considerations, an environment in which that balancing exercise is allowed to take place. I entirely accept that others might have a different view about where the line should be drawn and what should be weighed on the one hand against the other. The government has chosen this course and, as I understand it, the opposition believes that the government has drawn a line that is largely acceptable to its perception of how things should be done.

I am not necessarily going through what was said by the two opposition speakers in order, but it might be a useful occasion to pick up on what Hon Giz Watson said about misconduct being one of those factors. As I understand it, Hon Giz Watson would prefer not to specify different types of misconduct, as opposed to having a general misconduct provision.

Hon Giz Watson: No, I said that the definition of "misconduct" is very broad. I understand that this bill contains the same definition of "misconduct" that is contained in the CCC act and I noted that New South Wales has a much more constrained definition of "misconduct". I was simply pointing out that journalists may think they are getting a protection that, in a lot of cases, they will not get because the definition of "misconduct" is construed to be so broad. I do not have a view about whether it is too broad; I just noted that it is broad.

Hon MICHAEL MISCHIN: Everyone is going to be disappointed about something in this legislation, I am sure. Unless there is something that is particularly egregious about it, picking up the provision in the Corruption and Crime Commission Act is about as good an articulation of what "misconduct" might involve as anything. There cannot be anything particularly objectionable about that. It is a tried and proven set of criteria for the purposes of that act.

Hon Giz Watson: A few public servants might think that it has been construed as too broad.

Hon MICHAEL MISCHIN: That might be right. Our object is not to make everyone happy but to try to achieve good public policy. In any event, it is not as though those provisions are unprecedented; they are reflected in the CCC act, as has been mentioned.

I understand that the Greens (WA) would prefer the definition of "journalist" to be a little broader. Again, a balance must be struck between journalists as we understand them to be and those who attempt to avail themselves of these fairly important protections but who are not responsible to a code of ethics or who may simply fancy themselves to be working in the public interest by writing material, blogging, tweeting or setting up a website. Those who are engaged in the profession of journalism at least have a code of ethics by which they can abide, or ought to abide. I do not want to get into an argument about whether they abide by that code all the time. Each of us has our own experience with journalists and I am sure that journalists could speak about their

experiences with members of Parliament too. However, we had to draw the line somewhere. With all due respect to the commonwealth legislation and other views on the matter, the criteria that has been chosen is those who, in essence, practise in the profession and can be identified as members of the profession rather than those who purport to be journalists but who are not bound by any code of ethics and do not purport to be bound by any professional associations and the like. There will always be a grey area, but this is the best formula that the government has been able to come up with. Again, I accept that others might take a different view of it, but unless there is something particularly egregious about this provision, we would hope to secure the Greens' support for it and to agree to differ on the finetuning. It may be that in due course the bill can be refined, generally, should it become law, in light of experience. However, it is the government's view that this bill strikes an appropriate balance.

Debate adjourned, pursuant to temporary orders.