Speech by

Mark McArdle

MEMBER FOR CALOUNDRA

Hansard Thursday, 8 March 2007

WHISTLEBLOWERS (DISCLOSURE TO MEMBER OF PARLIAMENT) AMENDMENT BILL

Mr McARDLE (Caloundra—Lib) (2.33 pm): Before I commence in detail with regard to the bill, it is very clear that the Whistleblowers Protection Act 1994 is there to protect whistleblowers where a government is not prepared to subject itself to open and public examination about legitimate matters of public concern. The member for Greenslopes just two seconds ago stood up in this House and read out a statement. I take it that the member for Greenslopes is stating that he is the member the Premier has referred to the CMC for investigation.

Mr MOORHEAD: I rise to a point of order. I ask what relevance this poses to the bill before the House.

Mr McARDLE: I take a point of order with the language used by the honourable member.

Mr DEPUTY SPEAKER (Mr Hoolihan): Order! Members, we have a point of order raised by the member for Waterford in relation to relevance. The matter raised is not relevant to the debate. I would ask the member to refrain from any further comment.

Mr McARDLE: Mr Deputy Speaker, may I seek your ruling on the issue of whistleblowers. I understand the Premier stood in this House earlier this morning and made the comment that he had been approached by two persons from the media. They are therefore, in a loose sense, whistleblowers. I therefore ask—

Government members interjected.

Mr DEPUTY SPEAKER: Member for Caloundra, are you finished?

Mr McARDLE: No, I am not. In those circumstances, this does fall within the issue of whistleblowers. This is exactly what this act is all about—the right of individuals to make a statement so that maladministration is viewed and looked at by the appropriate body. It is whistleblower to the very heart and core of what this House and this bill is all about.

Procedure—Deputy Speaker's Ruling—Relevance to Bill

Mr DEPUTY SPEAKER: In terms of your request for a ruling, if you look at the objectives of the bill, and indeed if you look at the whistleblowers act of 1994, you have referred to two journalists as whistleblowers. My ruling would be that they do not constitute whistleblowers. Whether it was mentioned in this House or not, the matter is not relevant. I have ruled that the matter is not relevant to the debate and I have asked you to discontinue that line of comment.

Mr McARDLE: Thank you, Mr Deputy Speaker. I certainly comply with your ruling.

This bill causes the opposition to once again have serious concerns about the willingness of the Beattie government to subject itself to open and public examination of legitimate matters of public concern, and we state at the outset that we will not be supporting it. Following the traumas of the Fitzgerald inquiry

and the reforms implemented to public sector administration in this state, the Whistleblowers Protection Act 1994 was introduced with the intention of providing a mechanism to provide whistleblowers in units of public administration in Queensland with protection from discrimination, harm and other consequences from the system when they raised matters of legitimate public concern, and to enable them to continue to pursue their career in public administration after raising these concerns. The intention of the act is to protect those whistleblowers who become aware of major issues of public maladministration which can only be addressed by a disclosure mechanism outside the traditional hierarchical structures of public administration.

Unfortunately, as we all know, hierarchical bureaucrats have a great tendency to protect themselves and the governments they serve and conceal issues that might embarrass the government. The establishment of the whistleblower protection mechanisms, whilst having the potential to lead to short-term embarrassment for particular governments, was generally agreed to as being an important advance in ensuring an effective and efficient public sector free of the level of corruption that commonly appears when power is exercised which affects the actions of individuals and the potential profits available to individuals. There has been in Queensland bipartisan support for these principles and for their extension to the widest possible areas of the public sector.

The government claims that the current bill is based on recommendations of the PCMC in its three-year review of the CMC in 2004 and recommendations arising from the Davies commission of inquiry and the Forster review arising from the Dr Patel incident. The bill, however, does not—and I repeat does not—address the recommendations of the PCMC in its report No. 71 of October 2006, which was yet another three-year review of the Crime and Misconduct Commission. These recommendations were many in number, but I will only cite a few because they are very relevant to the bill today. Recommendation 22 reads—

The Committee recommends that Government public interest disclosures received by an agency, other than those involving official misconduct, should be referred to the Ombudsman in the first instance with the Ombudsman either investigating the disclosure or referring it back to the agency to conduct the investigation. The Ombudsman would retain the power to monitor, take over or review the investigation.

Recommendation 23 states—

The Committee recommends that the categories of persons who may make a public interest disclosure protected by the Whistleblowers Protection Act be expanded in cases involving danger to public health and safety, and negligent or improper management of public funds, to include any person or body.

Recommendation 24 states—

The Committee recommends that:

(1) Whistleblowers should be able to escalate their complaint in the event that there is no satisfactory action taken by the relevant department within 30 days. If the matter is not resolved in that time to the satisfaction of the Ombudsman, the whistleblower should be able to make a public interest disclosure to a Member of Parliament; and

(2) If disclosure to a Member of Parliament does not result in resolution, to the satisfaction of the Ombudsman, within a further 30 days, the whistleblower should be entitled to make a further public interest disclosure to the media.

Recommendation 25 states—

The Committee recommends that the Ombudsman takes the lead role (supported by the CMC) for ensuring that agencies are appropriately administering their responsibilities under the Whistleblowers Protection Act 1994.

Recommendation 26 states—

The Committee recommends that the CMC (in conjunction with the Ombudsman and the Office of the Public Service Commissioner) work together to develop guidelines to assist agencies to properly handle and record details of public interest disclosures.

The bill ignores these recommendations, which were reflected in a private member's bill, the Whistleblowers Protection Amendment Bill 2006, which the opposition introduced and which the government used its numbers to defeat. This bill incorporated the recommendations of the Davies report into the Dr Patel disgrace at the Bundaberg Base Hospital as well as those latest amendments that were recommended by the PCMC. The Beattie government's action raises real questions about the willingness of the government to make the Whistleblowers Protection Act truly effective.

The coalition will oppose this bill because of the failure of this government to properly address those real issues confronting whistleblowers who seek to expose the failures in public administration of the Beattie government. The terms of this bill raise concerns about the government's real intentions. Clause 4 provides that a member of this House is a person to whom a public interest disclosure can be made. It further provides that the member may refer the disclosure to a public sector entity.

The original explanatory notes at page 3 provided that the member 'must' refer the public interest disclosure to a public sector entity identified under the division. That would mean that the system would have the capacity to protect itself from matters which whistleblowers might raise with a member of parliament. On 23 January 2007, virtually three months after the bill was introduced, the government issued an amendment to the explanatory notes indicating that the original notes were in error and that the

government's intention is that a member may refer the disclosure to a public sector entity, not must. The question that has to be asked by the people of Queensland is very clear: is this just a drafting error or is this, in fact, the real intention of this Beattie government as disclosed in the original explanatory notes?

If the intention of the government was that members of parliament who receive a public interest disclosure must refer it to the relevant authorities for investigation, that would constitute a grave attack on both whistleblowers and on the rights and privileges of members to use this House as a forum in which they could raise matters of significant public concern. The Attorney-General must give a very clear explanation as to what led to these circumstances in order to assure the House and the people of Queensland of the real intentions of this government. I am certain that the Attorney-General will do exactly that in his reply.

This clarification is needed because clause 5 of the bill amends section 26 of the act to provide that a member of this House is not an appropriate entity to receive public interest disclosures about courts, tribunals, judicial officers, government owned corporations or corporatised corporations unless permitted to do so other than under proposed section 26(1A) or section 261(1)(c) of the act. It is claimed that the act's administration does not detrimentally affect judicial work or independence or the commercial operation of GOCs and corporatised corporations.

This clause may impact on the capacity of a member of parliament to receive complaints about judges and judicial bodies and to raise such complaints in parliament or publicly. Public scrutiny of judicial action is a fundamental protection for all citizens. Members of parliament must not be inhibited from playing their part in this scrutiny of the judiciary. The minister must specify clearly what impact this provision will have on the capacity of members to raise in this House legitimate matters—and I mean that: legitimate matters—of concern about the actions of judicial officers.

Similarly, concern exists about the impact of these provisions on the capacity of members to raise concerns about the many corporatised entities through which the government now operates. The minister must state clearly whether any element of this legislation impacts on the capacity of members to use this House as a forum in which to pursue issues relating to these bodies, which deliver so many vital services to Queenslanders.

Clause 8 of the bill inserts a new section 28A which provides that a public interest disclosure or purported public interest disclosure made to a member of this House may be referred to any appropriate entity that the member considers has the power to investigate or remedy the conduct which is the subject of the disclosure. Under this provision, a member may refer a public interest disclosure to an appropriate entity that is not another member of the House.

Proposed new section 28A(2) provides that a member of the House who receives a public interest disclosure or purported public interest disclosure has no role in the investigation of the matters disclosed. This clause raises significant concerns for the opposition, because the possibility exists that this provision limits the capacity of a member of parliament who has been approached by a potential whistleblower from investigating further any complaint brought to their attention by a potential whistleblower before determining whether the matter will be raised in the House or referred to the appropriate public sector entity. This is a potential limitation on the role that members can play in investigating whether major public malfeasance has occurred.

As I have said in this House in the past, this is the House of the people. If a member of parliament is hamstrung in any way in relation to his obligation to investigate malfeasance or maladministration for and on behalf of a member of the public or the community at large, this House no longer has a basis on which to stand. The terms of proposed new section 28A(2) go to the very heart of what a member of parliament does on a daily basis both here and outside of this House.

Clause 8 also inserts new section 28B which provides specifically that the operation of the act does not limit the manner in which members of this House deal with matters in the parliament. It is not intended that the Crime and Misconduct Commission will have any role in relation to breaches committed within the confines of parliamentary privilege. The role of the Crime and Misconduct Commission in relation to section 57 of the act is intended to be limited to breaches committed outside the scope of parliamentary privilege, leaving parliament to address breaches committed within the confines of parliamentary privilege.

The explanatory notes acknowledge that the bill infringes fundamental legislative principles. If this amending legislation becomes law without amendments to the parliamentary standing orders, a member of parliament would be free to discuss most public interest disclosures within the Assembly because of the broadness of privilege in this House. The implications of this situation relate to protecting the whistleblower, protecting against unfounded allegations being made public and preserving the integrity of any investigation process.

Therefore, the government proposes to amend the standing orders to provide guidance to members about how to balance the objective of the act to protect the identity of the person making the public interest disclosure and the integrity of the investigation process with parliamentary privilege and the legitimate rights of members to raise issues in parliament. The effect of the proposed amendments to standing orders

will potentially limit the capacity of both whistleblowers and members of parliament who they approach to take action following complaints about matters of concern.

The standing orders are a critical component of the day-to-day operations of this House. Every member understands that. But if the standing orders are and have the intent of compromising or limiting the operation or powers of a member of parliament to investigate whistleblower suggestions or disclosures made to him or her, in my opinion they are against the true intention of the act and against the true intention of a member of parliament having the right to protect the rights of individuals and the community.

The coalition is deeply concerned about this potential, particularly as it follows the government's amendments to legislation that was designed to remove the potential for members and ministers being subject to criminal sanctions for lying to the parliament. If a member who receives a public interest disclosure refers such matter to a relevant authority to investigate, the member must arguably surrender any further role in pursuing an investigation of the matter. If a member does not refer the matter but raises it in the House, then the potential exists for the government through the standing orders that it enacts to regulate and control how and what a member might raise in the House.

Parliamentary privilege is a fundamental protection which protects not only members but also the community through a member's capacity to raise matters without fear or favour. The coalition remains deeply concerned about the capacity of a government, particularly the Beattie government, to impose limitations through standing orders on our capacity to pursue issues—particularly given recent experiences.

The explanatory notes provide that clause 15 is not intended to limit the powers, rights and immunities of the Legislative Assembly and its members and committees in relation to a disclosure received by a member. Nor is it intended that the Crime and Misconduct Commission will have any role in relation to breaches committed within the confines of parliamentary privilege. The Crime and Misconduct Commission's role in relation to section 57 of the act is intended to be limited to breaches committed outside the scope of parliamentary privilege, leaving parliament to address breaches committed within the confines of parliamentary privilege.

It is clear from these comments that clause 15 continues the approach that the Beattie government adopted in relation to former minister Nuttall lying to a parliamentary estimates committee of using its parliamentary numbers to protect those it favours. This means that a member of parliament who discloses a matter raised by a whistleblower to the parliament which embarrasses the government runs the risk that the government, through its control of parliamentary numbers in this House, can punish that member for contempt of the parliament. It is because of these concerns that the coalition will be opposing this bill.

If we look at the various legislation throughout Australia and overseas as well, we will see that there is a great divergence in what whistleblower protection encompasses and who individuals can report to. In New South Wales, section 19 of the Protected Disclosures Act 1994 allows disclosure to a member of parliament and to a journalist provided certain conditions apply. As I understand it, New South Wales is the only state to allow disclosures to the media. In South Australia, variations include allowing disclosure to a minister, while in Victoria disclosure can be to the Ombudsman. Tasmania's legislation mirrors that of Victoria with subtle differences. Western Australia's legislation is similar to that of Tasmania and Victoria, yet they are not at this point in time uniform anywhere throughout the Commonwealth.

I also understand that the UK Public Interest Disclosure Act allows disclosures to the media. The bill before the House does not do so, and I would have thought that would have been a natural progression if we are now incorporating members of parliament as having the authority, or at least the right, to receive disclosures. In addition, I understand the Commonwealth has no real legislation on this issue. Accordingly, we have a series of acts dealing with the one principle but nothing uniform across the country.

Due to the importance of whistleblowers in ensuring maladministration and other public sector complaints are properly investigated, I would ask the Attorney-General whether he would consider referring this matter to SCAG to establish uniform legislation across the Commonwealth covering this very important principle that dictates many lives throughout this country. I consider this an appropriate consideration given the importance of this type of legislation, based upon our own very recent history here in Queensland. I reiterate that the coalition will not be supporting this legislation.