



MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE

COMMUNICATIONS TO MEMBERS, MEMBERS' REPRESENTATIONS TO GOVERNMENT AND INFORMATION PROVIDED TO MEMBERS

ISSUES PAPER NO. 4 – APRIL 2002

This is an issues paper, not a report, and the committee has formed no firm conclusions on any matters raised within the paper.

The committee has released the issues paper to assist in its consideration of its inquiry and to facilitate public submissions from interested persons and organisations by:

- providing the community with information on the focus and scope of the committee's inquiry;
- stimulating discussion; and
- identifying the issues that submissions to the committee should address.

Submissions should be lodged by Friday 21 June 2002 with:

The Research Director
Members' Ethics and Parliamentary Privileges
Committee
Parliament House
George Street
Brisbane Qld 4000

The committee encourages the lodgement of submissions in electronic form. A submission form is available on the Internet at www.parliament.qld.gov.au/Committees/.

Emailed submissions must include the author's name, postal address and telephone number.

In the ordinary course of parliamentary inquiries, submissions are tabled in the Legislative Assembly, or otherwise publicly released by the committee.

Therefore, all requests for confidentiality should be clearly marked.

Submissions may not be tabled, particularly if they contain offensive language, defamatory allegations, etc.

Submissions to the committee must not be disclosed prior to when they are tabled in the Assembly without the committee's express prior authorisation.

1. FOCUS OF THE INQUIRY

Safeguarding the confidentiality of constituents and their communications with members of Parliament is an important consideration for members discharging their representative functions. Protecting constituents from legal action brought against them on account of those communications is also a fundamental concern.

With this underlying focus, the committee is inquiring into the extent to which legislation and parliamentary law and practice protect communications—

- between constituents and members on constituency matters,
- between members and Ministers on constituency matters, and
- from persons who voluntarily provide information to members,

with a view to developing recommendations for the Legislative Assembly where necessary to ensure

that constituents are adequately protected in their communications with members.

In undertaking this inquiry, the committee will have particular regard to the key issues identified in Part 20 of this issues paper.

2. COMMITTEE'S RESPONSIBILITY AND INQUIRY BACKGROUND

Section 14 of the *Parliamentary Committees Act 1995* (Qld) established the Members' Ethics and Parliamentary Privileges Committee ('the committee' or 'the MEPPC') and states that one of the areas of responsibility of the committee includes parliamentary privilege.

The MEPPC of the 49th Parliament ('the previous committee') commenced a comprehensive inquiry into parliamentary privilege in Queensland. The previous committee stated in MEPPC Report No. 26 (*First Report on the Powers, Rights and Immunities of the Legislative Assembly, its Committees and Members*) that the issues of members' constituency correspondence, and members' sources of information, were matters which the committee believed deserved further attention and possible future report.¹

The committee of the 50th Parliament ('the committee') resolved to continue with the previous committee's inquiry into parliamentary privilege in Queensland.

The committee noted that the increasing trend is for members of Parliament to represent constituents not only in Parliament, but also in correspondence with Ministers, government departments and other public bodies.

Members also have an important role in raising matters of public concern, which may be brought to their attention by persons voluntarily providing members with information.

It is crucial that parliamentary privilege reflect the contemporary roles and responsibilities of members. It may be, however, that the current law does not take into account the constituency duties and functions of members, or the discharge by members of those duties and functions outside the Parliament. It is arguable that parliamentary privilege should evolve to protect members' communications in connection with those roles and responsibilities.

3. THE NEED FOR REVIEW

Of concern to members is the uncertainty attached to constituency correspondence and other communications between constituents and members, and members and Ministers or government agencies. Members regularly act on behalf of their constituents and communicate with Ministers, government departments and other public bodies in connection with their constituency role.

In certain circumstances, a third party might take legal action against a constituent if the constituent provides information to an MP that contains anything defamatory of the third party. The fear of legal action may inhibit constituents from approaching members on constituency matters and inhibit members in corresponding with Ministers about constituency issues. Similarly, there is a concern that constituents' sensitive or private information could be divulged by agencies.

The issue of whether or not persons who voluntarily or in a personal capacity communicate information to members are protected by parliamentary privilege or other sufficient immunity, and questions about the types of communications that are and are not protected, have been a matter of contention for many years.

In certain circumstances, there is a real possibility of legal proceedings being taken against a person who voluntarily provides information to a member (a 'member's informant'), or even a member, if such communications contain defamatory imputations. As a consequence, members may find that their information sources 'dry up' due to fears of legal action. This would significantly affect the ability of members to discharge their parliamentary duties, and would potentially impede their ability to raise important matters of public concern in Parliament.

4. REFERRAL OF THE DEFAMATION AMENDMENT BILL 1999 TO THE PREVIOUS COMMITTEE

The Defamation Amendment Bill 1999 ('the Defamation Amendment Bill') was introduced in the Legislative Assembly on 26 August 1999 as a private member's bill.² The stated objective of the bill was to take away much of the uncertainty regarding the protection of members' representations to government on behalf of their

constituents.³ The provisions of the Bill are discussed more fully in Part 14 of this paper.

The Defamation Amendment Bill concerned not only the provisions of the *Defamation Act 1889* (Qld) but also went to the heart of the powers, rights and immunities of the Legislative Assembly, its committees and members.

Importantly, it was directly relevant to the issues that the previous committee stated in Report No. 26 that it would undertake further inquiry into.

Consequently, during the second reading debate on the bill, the Chair of the previous committee⁴ moved and the House agreed that the bill “be referred to the Members’ Ethics and Parliamentary Privileges Committee for consideration and report back to the House”.⁵

5. PARLIAMENTARY PRIVILEGE AND FREEDOM OF SPEECH

The term “parliamentary privilege” is used to describe the powers, privileges and immunities from aspects of the general law that are bestowed upon the Parliament, parliamentary committees and members of Parliament.

The privilege of freedom of speech is one such immunity that is fundamental to the effective execution of a member’s responsibilities in Parliament.

Section 40A of the *Constitution Act 1867* (Qld) provides that, until defined by statute, the powers, privileges and immunities conferred on the Queensland Parliament are the same as those enjoyed by the United Kingdom House of Commons.⁶

For this reason, Article 9 of the *Bill of Rights 1689* is part of Queensland law. Article 9 provides that:

The freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place outside of Parliament.

Effectively, this means that members can speak openly in the Legislative Assembly without the fear of their speech being the subject of any legal proceedings. This includes (but is not limited to) proceedings for defamation. The protection afforded by Article 9 enables open debate in

Parliament, where matters of public concern can be freely and fearlessly discussed.

Whilst a member’s statements in the Assembly are absolutely protected, the position of members making representations outside of the Assembly to Ministers, government departments and other bodies, and of persons voluntarily providing information to members, is less certain.

6. “PROCEEDINGS IN PARLIAMENT”

The question of whether immunity is afforded members’ representations (such as correspondence) to Ministers or departments, and informants’ communications with members has rested on whether or not the communications concerned are “proceedings in Parliament”.

Commonwealth and State legislation has been enacted to reduce the uncertainty attached to the meaning of “proceedings in Parliament”.

6.1 Parliamentary Privileges Act 1987 (Cth)

Section 16(2) of the *Parliamentary Privileges Act 1987* provides:

16(2) For the purposes of the provisions of article 9 of the Bill of Rights 1688 as applying in relation to the Parliament, and for the purposes of this section, “proceedings in Parliament” means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;*
- (b) the presentation or submission of a document to a House or a committee;*
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and*
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*

6.2 Parliamentary Papers Act 1992 (Qld)

Section 3(2) and (3) of Queensland’s *Parliamentary Papers Act 1992* provides:

(2) All words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the House or a committee are “**proceedings in Parliament**”.

(3) Without limiting subsection (2), “**proceedings in Parliament**” include—

- (a) giving evidence before the House, a committee or an inquiry; and
- (b) evidence given before the House, a committee or an inquiry; and
- (c) presenting or submitting a document to the House, a committee or an inquiry; and
- (d) a document laid before, or presented or submitted to, the House, a committee or an inquiry; and
- (e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c); and
- (f) preparing, making or publishing a document (including a report) under the authority of the House or a committee; and
- (g) a document (including a report) prepared, made or published under the authority of the House or a committee.

7. ABSOLUTE AND QUALIFIED PRIVILEGE

Proceedings in Parliament attract absolute privilege. Absolute privilege means that no legal action can be taken in respect of the proceeding and the proceeding cannot be questioned or impeached by a court or tribunal.

Some communications, while not attracting absolute privilege, are protected by qualified privilege. Qualified privilege means that the matter is immune from defamation action so long as the communication is made without malice.

Butterworths *Concise Australian Legal Dictionary*, defines qualified privilege as:

*A privilege offering protection in an action in defamation where the person who made the communication had an interest or a duty, ‘legal, social, or moral’, to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it ... It will not be available if the publication was motivated by malice or an improper purpose ...*⁷

8. ADEQUACY OF QUALIFIED PRIVILEGE

As noted by the previous committee in its Issues Paper No. 3,⁸ there is some uncertainty in Queensland about the extent to which members’ communications with Ministers on behalf of constituents, and communications between members and their informants, is protected. It appears that such communications may attract qualified privilege.

The Clerk of the Senate, Mr Harry Evans, addressed to some degree the issue of whether or not qualified privilege is adequate protection for members’ informants in an article published in *The Table*.⁹

Evans noted that generally the people who come forward with information to members of Parliament are those that may not always be afforded qualified privilege. Evans writes:

*The problem with this is that the kinds of persons who supply information about corruption or malfeasance to members of parliament, the kinds of persons commonly known as whistle blowers, are often persons who can be represented as having an improper motive ... Qualified privilege is not a satisfactory substitute for parliamentary privilege in such cases.*¹⁰

9. EXTENSION OF PARLIAMENTARY PRIVILEGE

One option available to members to ensure that information they receive from constituents or informants is fully protected is to reveal the matter in the Parliament. This would afford the member’s communication absolute privilege. However, the issue would then become public. Should the matters raised in the member’s speech be defamatory, the matter would receive far wider publicity. Arguably this would inflict far greater damage to a person’s reputation than if the matter were to be communicated outside the Parliament between the member concerned and the relevant Minister or government department in order to determine an outcome, or to establish the veracity of the allegations.

To some extent, encouraging members to seek information from Ministers before raising such matters in the House could offset this result. However, in the case of particularly sensitive

matters, this may not be in the interests of the parties concerned.

Professor Gerard Carney, in his text *Members of Parliament: law and ethics*, notes:

*... It is suggested ... that privilege attaching to a communication between a member and a minister on a constituency matter is justified given the efficiency, discreteness and utility of such a communication when parliament is not sitting.*¹¹

*... The extension of parliamentary privilege to communications between a member and a minister, if they are concerned with parliamentary or constituency matters, can be supported on at least two grounds: first, it enables a member to disclose information on a restricted basis to the appropriate minister, instead of having to make a public statement in the course of parliamentary proceedings; secondly, a member is able to pursue the matter with the minister while parliament is not sitting.*¹²

Professor Carney believes, that:

*... communications between members in relation to constituency or other matters should be protected only if this is necessary in order for members to perform their parliamentary and constituency functions.*¹³

*... As regards communications between members and constituents or other persons, it is difficult to isolate those which are necessary for members to receive for the purposes of their parliamentary and constituency functions. The solution is offered by the Queensland Court of Appeal in O'Chee v Rowley [(1997) 150 ALR 199] which confers protection only on those communications which are acted on by the member for the purpose of transacting business of the House.*¹⁴

10. THE UNITED KINGDOM EXPERIENCE

In regard to these issues, it is helpful to examine the precedents of the UK House of Commons whose powers, privileges and immunities the Queensland Parliament has adopted.

There is some ambiguity regarding proceedings in Parliament and members' representations to government. *Erskine May's Parliamentary Practice* takes the view that:

*Similar protection [as that afforded to members] is not afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such information is subsequently used in proceedings in Parliament being immaterial ... a person providing information to a Member for the exercise of his parliamentary duties has been regarded by the courts as enjoying qualified privilege at law ...*¹⁵

A number of prominent cases from the UK illustrate the ambiguity regarding proceedings in Parliament and members' representations to government.¹⁶

10.1 The King v. Rule

An interesting case in point is *The King v. Rule*.¹⁷ Mr Rule was charged with criminal defamation for writing two letters of complaint to a member of Parliament. These letters contained defamatory statements about a police officer and a justice of the peace. The correspondence also included a request by Mr Rule for the matter to be taken up with the relevant Minister.

Initially, Mr Rule was committed to the matter of the defamatory letters, which were later held by the Court of Appeal to be protected by privilege. The conviction was quashed and Mr Rule's appeal against the conviction allowed. The Court of Appeal's judgment read:

*... a Member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of some public official acting in that constituency in relation to his office, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion ...*¹⁸

10.2 Rivlin v. Bilainkin

In *Rivlin v. Bilainkin*,¹⁹ Dr Rivlin was granted an interim injunction to restrain Mr Bilainkin from repeating an alleged defamatory communication. Believing his actions would be protected by privilege, Mr Bilainkin sent letters to five members of Parliament, which repeated the defamatory statements. In response, Dr Rivlin's solicitors sought an order for breach of the injunction.

Mr Bilainkin filed an affidavit in which he stated that he did not realise his communications with the members were a breach of the injunction.

The presiding judge held that Mr Bilainkin's communications were not an occasion of privilege, stating in his judgment:

*... I am satisfied that no question of privilege arises, for a variety of reasons, and particularly I rely on the fact that the publication was not connected in any way with any proceedings in that House ... [and therefore not protected under parliamentary privilege].*²⁰

However, the judge did not order a breach of injunction as he found that Mr Bilainkin acted in ignorance of his legal rights. The judge stated:

*Having given the matter my most anxious consideration, I have decided that I am prepared to accept that expression of regret, and accordingly I will make no order on the application ...*²¹

The *Rivlin v. Bilainkin* case illustrates that the publication of information to a member of Parliament does not automatically give rise to parliamentary privilege.

10.3 The Strauss case

The *Strauss* case²² is the most well known case relating to members' correspondence and the scope of Article 9 of the *Bill of Rights*. The case involved a letter from Mr Strauss, a member of the House of Commons, to a Minister of the Crown alleging misconduct by the London Electricity Board. Solicitors, acting on the board's behalf, wrote a letter to Mr Strauss threatening him with defamation proceedings if he did not withdraw his comments.

Mr Strauss drew the threatening letter to the attention of the House of Commons. The matter was referred to the Privileges Committee which found Mr Strauss's letter to be a proceeding in Parliament and within the scope of the *Bill of Rights*. The Privileges Committee took the view that the threatening letter from the board's solicitors to Mr Strauss was a breach of privilege and constituted contempt of Parliament. However, the House overruled the decision of the committee and declared that members' correspondence with Ministers was not part of the proceedings in Parliament.

Furthermore, the House was concerned that the treatment of litigation against Mr Strauss as a breach of privilege was contrary to the *Parliamentary Privilege Act 1770* (UK). The issue was referred to the Judicial Committee of the House of Lords. The Judicial Committee held that the words in s. 1 of the act did not apply to members acting as representatives to Parliament, but members acting as individuals.²³ The act, therefore, did not in any way affect the protection provided by Article 9 of the *Bill of Rights*.

The Judicial Committee did not express an opinion on whether they found the member's correspondence to be a proceeding in Parliament. However, Lord Denning, a member of the Judicial Committee, expressed his personal view in a dissenting memorandum that became public in 1966. Lord Denning wrote:

*A Member of Parliament is entitled to ask a question of a Minister—on the floor of the House or by letter—and to expect an answer in the House or by letter. The letter and the answer are a "proceeding in Parliament."*²⁴

10.4 House of Lords/House of Commons Joint Committee on Parliamentary Privilege

In March 1999, following a wide-ranging inquiry into parliamentary privilege, the Joint Committee on Parliamentary Privilege tabled its report.²⁵ As part of its inquiry, the joint committee considered in detail the issue of members' constituency correspondence.

The joint committee noted that the 1967 House of Commons Committee on Parliamentary Privilege, the 1977 Committee of Privileges and the 1970 Joint Committee on Publication of Proceedings in Parliament were all agreed that "the argument in favour of correspondence with ministers having the benefit of absolute privilege in defamation actions was so compelling that the law should be changed".²⁶ The Joint Committee on Parliamentary Privilege, however, considered that "[a]n extension of absolute privilege to members' correspondence with ministers ..." would "create problems of principle".²⁷ The Joint Committee argued that "the boundary of privilege has to be drawn somewhere, and the present boundary is clear and defensible".²⁸

Noting that members generally enjoy qualified privilege at law in respect of their constituency correspondence, the Joint Committee

recommended “that the absolute privilege accorded by article 9 to proceedings in Parliament should not be extended to include communications between members and ministers”.²⁹

11. THE UNITED STATES OF AMERICA

The following decisions in the United States further illustrate the treatment of constituents’ communications with members of Parliament by the judiciary.

11.1 Brown & Williamson Tobacco Corporation v. Williams

In the 1995 case of *Brown & Williamson Tobacco Corporation v. Williams*,³⁰ an action for defamation was issued against Williams, a former employee of the tobacco corporation. During the proceedings it was uncovered that Williams had stolen documents from the tobacco corporation and handed them over to two congressmen. The attorneys acting for Brown & Williamson Tobacco Corporation issued subpoenas to inspect and copy the documents that were in the possession of the congressmen.

In its decision, the Court of Appeals recognised the effect that court processes such as initiating discovery proceedings to reach documents are capable of having on legislative activity by “chilling” Congress’s ability “to attract future confidential disclosures necessary for legislative purposes”.³¹

Interestingly, the judgment indicated that immunity from litigation extended beyond the proceedings of the Houses or their committees.³² This judgment is contrary to the strict interpretations of parliamentary proceedings that were evident in the UK cases noted above.

The judgment for the *Brown & Williamson Tobacco Corporation v. Williams* case held that:

*... the nature of the use to which documents will be put—testimonial or evidentiary—is immaterial if the touchstone is interference with legislative activities ... A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen ...*³³

11.2 United Transportation Union v. Springfield Terminal Railway Company

The 1990 case of *United Transportation Union v. Springfield Terminal Railway Company*³⁴ further demonstrates the judicial view that matters outside of the Houses could operate within the scope of privilege.

In that case, the railway company sought to set aside an arbitration award concerning a strike by union members over the railroad’s alleged safety issues. Springfield Terminal alleged that the arbitration was biased due to the arbitrator’s contacts with various political factions and the National Mediation Board.

To establish their case, Springfield Terminal sought to subpoena various documents and communications from Senator George Mitchell and his legislative assistant. The senator withheld a group of documents that he believed were irrelevant to the case, and another set of documents that the senator claimed were subject to privilege under article 1, s.6 of the United States Constitution—the Speech or Debate clause. The clause provides that:

*[F]or any Speech or Debate in either House [Senators and Representatives] shall not be questioned in any other place.*³⁵

The judge ruled that the internal congressional memoranda and drafts of documents, which related to the railroad strike and the railroad leases, were areas of potential legislation. Therefore, these communications were protected by privilege and Springfield Terminal’s Motion to Compel Discovery was declined. The court observed that:

*In order to be effective at their legislative tasks, legislators must be able to confer among themselves and with their assistants. Just as they must be able to obtain information pertinent to potential legislation ... they must be able to discuss and analyze issues that are subjects of pending or potential legislation in order to plan for and work on that legislation.*³⁶

However, the external communications from the office of the senator that related to political and constituent activities and attempts to influence the arbitrator, were not protected. The reasoning behind this was that the documents did not relate to congressional efforts to influence the arbitrator on behalf of the transportation union.

In particular, the judge granted Springfield Terminal's Motion to Compel Discovery of the communications between the senator and the Interstate Commerce Commission (ICC) regarding ICC's 1987 proceedings about the strike. According to the judgment:

... To qualify for the privilege, an activity other than actual speech or debate must meet a two part test ... It must be "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" ... The activity also must address proposed legislation or some other subject within Congress's constitutional jurisdiction.³⁷

12. THE AUSTRALIAN EXPERIENCE

In both the UK and USA experience, judicial decisions were made according to the individual circumstances of each case. These precedents helped guide the nature of the following judgments in recent Australian cases involving the protection of members' informants.

12.1 Rowley v. O'Chee

In 1995, Mr Michael Rowley sued (then) Senator William O'Chee for defamation due to an alleged radio broadcast between Senator O'Chee and Radio HCA Cairns regarding Mr Rowley's fishing practices.

During the proceedings, it was disclosed that Senator O'Chee based his radio broadcast on 43 documents that were in his possession. The senator's counsel argued that all, or at least some, of these documents were protected by the immunities conferred by Article 9 of the *Bill of Rights 1689* and s. 16(2) of the Commonwealth's *Parliamentary Privileges Act 1987*. These provide that proceedings in Parliament include:

... all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of business of the House or of a committee ... [Emphasis added.]

Initially, counsel did not establish the documents' connection with the immunity of privilege and Senator O'Chee was ordered to produce the alleged material for inspection by Mr Rowley's solicitors.³⁸

In 1997, Senator O'Chee successfully appealed the disclosure order on the basis that the documents

were proceedings in Parliament and disclosure would interfere with the processes of the Senate.³⁹

Fitzgerald P, in the judgment delivered on 4 November 1997, stated:

Creating, preparing, bringing into existence or coming into possession of a document is an "act" within the meaning of s. 16(2) of the Parliamentary Privileges Act. An act "done ... for the purposes of ... the transacting of the business of" the Senate is a "proceeding in Parliament". So is an act "done ... incidental to ... the transacting of the business of" the Senate. Article 9 of the Bill of Rights provides that "... proceedings in Parliament ought not to be impeached or questioned in any court ...". The literal result of a combination of the material portions of the prohibition in article 9 of the Bill of Rights and s. 16(2) of the Parliamentary Privileges Act is that, if his statements in his affidavit are accepted, Senator O'Chee's creation, preparation, bringing into existence or coming into possession of documents "for the purposes of or incidental to" his speeches of 8 and 19 June 1995 cannot be "impeached or questioned" in Mr Rowley's action.⁴⁰

12.2 Current case re member's informant (Case No. 1)

A related legal action is currently pending appeal before the Queensland courts and for sub judice reasons will not be commented on in detail. Suffice to say that the matter concerns a defamation action commenced by a citizen against an informant to two members of Parliament for oral communications that the informant had with the MPs. The judge in the case did not regard making a communication to a parliamentary representative by an informant as participating in "proceedings in Parliament".

This judgment meant that the informant was not afforded any protection under the *Parliamentary Privileges Act*.

The judgment stands in contrast to the findings of the Senate Committee of Privileges.⁴¹ The Senate committee's report found that the information provided by the informant to one of the MPs was directly connected with the actual proceedings in the Senate.

The Senate committee also found that the citizen had committed a contempt of Parliament by

proceeding with a defamation action against the informant. In other words, by threatening a defamation action, the citizen was punishing the informant for providing information to a member of Parliament. This type of interference was found by the Senate committee to be a contempt of Parliament.⁴²

The Clerk of the Senate, who wrote an advice⁴³ to the Senate Committee of Privileges, noted the fact that the judgment did not consider the character of the communication or its relationship with parliamentary proceedings:

*Whether the provisions of the Parliamentary Privileges Act apply depends on whether the communication is for purposes of, or incidental to, parliamentary proceedings. The character of the particular communication and its relationship with proceedings has to be examined.*⁴⁴

The views contained in *Ersine May's Parliamentary Practice* on the protection of members' informants was given particular emphasis by the judge. In his 1996 article on members' informants, Evans wrote of the generalised nature of the *Ersine May* passage and its irrelevance to the question of whether informants' communications are proceedings in Parliament:

*It would be unfortunate if advice ... were based solely on a glance into Ersine May's Parliamentary Practice ... [His statement] cannot be taken at face value. It is based on two cases in the 1950s in the House of Commons, neither of which justify such a sweeping generalisation.*⁴⁵

12.3 Current case re member's informant (Case No. 2)

A similar ruling was made in another matter currently before the Queensland courts and again, for sub judice reasons, the matter will not be commented on in detail. In this matter, defamation action was commenced by a citizen against an informant who had provided information to a member of Parliament. The member used the information as the basis of a speech in Parliament. The member's speech and the subsequent newspaper reports were protected by privilege. The defamation action later in effect became a counterclaim in another action. However, in respect of an application to strike out the counterclaim, the

judge ruled that the communication between the informant and the member did not constitute a "proceeding in Parliament" because the conveying of information in the manner alleged could not be characterised as a "proceeding in Parliament". Instead, the judge ruled that the communication could attract qualified privilege.

12.4 Observation on Australian cases

The above Australian cases illustrate the following.

- Members of Parliament are protected by privilege if the communication is a "proceeding in Parliament", but a communication to a member by an informant is not necessarily a proceeding in Parliament, despite what happens with the information.
- The extent to which the communication is close to proceedings in Parliament is an important variable.
- Any communication with a member does not automatically attract the privilege of immunity from litigation.
- Protection may be afforded an informant by way of a qualified privilege.
- Section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) and in the case of Queensland s. 3(2) of the *Parliamentary Papers Act 1992* (Qld) are crucial to cases where communications between an informant and a member are indirectly related to proceedings in Parliament.
- The House can charge the instigator of a defamation action with contempt of Parliament if the House establishes that the action interferes with parliamentary processes.

12.5 Commonwealth Joint Select Committee on Parliamentary Privilege

During a review on parliamentary privilege,⁴⁶ the Commonwealth's Joint Select Committee on Parliamentary Privilege considered the *Strauss* case.

The Exposure Report of the Joint Select Committee recommended that for the purposes of the law of defamation, "proceedings in Parliament" should include:

*... all things said, done or written between Members and Ministers of the Crown for the purpose of enabling any Member or Minister of the Crown to carry out his functions as such, provided that the publication thereof be no wider than is reasonably necessary for that purpose.*⁴⁷

However, the Joint Select Committee reconsidered its view and concluded in its final report that “no specific recommendation should be made to confer absolute immunity on communications between members and Ministers”.⁴⁸ As noted by Professor Carney:

*The Committee preferred to make no recommendation on this situation given the need for compelling reasons before further eroding the protection of reputation by an extension of absolute privilege.*⁴⁹

12.6 House of Representatives Standing Committee of Privileges

The House of Representatives Standing Committee of Privileges recently inquired into the status of the records and correspondence of members. In its report⁵⁰ tabled in November 2000 the committee recommended that “there should be no additional protection, beyond that provided by the current law, given to the records and correspondence of Members”.⁵¹

The committee noted that the protection afforded by privilege already “is very powerful” and “very wide”.⁵² The committee believed that “Any extension would need to reflect an overwhelming and pressing concern about the adequacy of the current position”.⁵³ However, the committee had not been presented with evidence that would support a broad extension of privilege.⁵⁴ Nor was the committee persuaded that correspondence between members and Ministers should be given additional protection.⁵⁵ The committee was of the view that the current protection of qualified privilege was sufficient to prevent members being constrained in communicating fully with Ministers.⁵⁶

13. DEFAMATION LEGISLATION

13.1 Defamation Act 1889 (Qld)

The *Defamation Act 1889* (Qld) (‘the Defamation Act’) is silent on the matter of members’ representations to Ministers and government

departments on behalf of their constituents. The act is also silent regarding members’ informants.

The *Defamation Act* provides (at s. 14) that it is lawful under certain circumstances⁵⁷ to publish a fair comment even if defamatory. It is also lawful (under s. 15) to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

Qualified privilege under s. 16 of the *Defamation Act* may also afford some protection from legal proceedings. For example, under certain circumstances,⁵⁸ an otherwise defamatory communication may be lawful if the publication is made in good faith:

- (a) ... by a person having over another any lawful authority ...
- (b) ... for the purpose of seeking remedy or redress for some private or public wrong or grievance ...
- (c) ... for the protection of the interests of the person making the publication ...
- (d) ... in answer to an inquiry made of the person making the publication ...
- (e) ... for the purpose of giving information to the person to whom it is made ...
- (f) ... on the invitation or challenge of the person defamed ...
- (g) ... in order to answer or refute some other defamatory matter published by the person defamed ...
- (h) ... in the course of, or for the purposes of, the discussion of some subject of public interest ...

The qualified protection provided by the *Defamation Act* appears to cover defamatory publications, which may be forwarded by a member to a Minister or government department in connection with a member’s constituency duties. The act would protect constituents if they were acting in good faith without malice and/or staff of members (particularly when they are acting in constituency matters on the member’s behalf).

The Defamation Amendment Bill 1999 sought to provide absolute clarification that the act protects constituents, and that the act applied to staff members when republishing a constituent’s communications to the member, provided that the

publications were made without malice. (See part 14 below.)

13.2 Position in other jurisdictions

The defence of qualified privilege is applicable through the common law without any statutory modification in Victoria, South Australia, Western Australia, the Northern Territory and the Australian Capital Territory.

In NSW the common law defence is applicable but a statutory provision has been added in s. 22 of the *Defamation Act 1974* (NSW) which extends the defence. Section 22 provides that the defence of qualified privilege applies where in respect of matter published to any person:

- (a) *the recipient has an interest or apparent interest in having information on some subject,*
- (b) *the matter is published to the recipient in the course of giving to him information on that subject, and*
- (c) *the conduct of the publisher in publishing that matter is reasonable in the circumstances.*

The common law defence has been replaced in Tasmania by the statutory defence of qualified protection in s. 16 of the *Defamation Act 1957* (Tas). Section 16 provides that it is a lawful excuse for defamatory material to be published if the publication is made in “good faith” and in a number of stated circumstances.

14. DEFAMATION AMENDMENT BILL 1999

In the second reading speech of the Defamation Amendment Bill 1999, Mr Paff brought to the attention of the House a situation that occurred under a previous government.⁵⁹

The case concerned a constituent’s letter of complaint about an officer of the Department of Transport in relation to a new bypass project. The letter contained a number of derogatory statements about the Department of Transport officer. The letter was forwarded to the then Premier requesting assistance in the matter. In response, the Premier forwarded the letter to the Department of Transport. Consequently, the officer referred to in the letter sued the constituent for damages.

Ultimately, the matter was resolved without litigation proceeding.

The Defamation Amendment Bill 1999 sought to provide protection for constituents and staff members who communicate with their MPs. The bill did *not* seek to extend protection to staff members who forward constituency correspondence to Ministers and government departments on the member’s behalf.

The bill was limited in its application to ‘constituents’ and may therefore not have provided protection to persons who ordinarily are not entitled to vote in the State.

In other words, the bill as it was drafted may not have adequately addressed the mischief it sought to solve because it may not have given protection over and above that which is already provided at law.

The bill also moved to limit the protection to information that is published without malice. Therefore, the bill may not have covered those types of informants that Evans referred to as “whistle blowers”.

The bill provided as follows:

Protection—communications to Minister, member of Legislative Assembly or staff member

15A.(1) It is lawful for a constituent to publish defamatory matter to a member of the Legislative Assembly or to a person who is a member of the member’s staff (a “staff member”) if the publication is made without malice.

(2) It is lawful for a staff member to publish the defamatory matter to the member if the publication is made without malice.

(3) It is lawful for the member to publish the defamatory matter to a Minister or to a staff member if the publication is made without malice.

(4) In any proceeding about the publication of defamatory matter mentioned in subsection (1), (2) or (3), the onus of proving the publication was made with malice is for the party alleging it was made with malice.

(5) In this section—

“constituent” means a person ordinarily entitled to vote in the State.

In its Alert Digest No. 12 of 1999, the Scrutiny of Legislation Committee ('the SLC') reported on the Defamation Amendment Bill and raised three concerns about the bill.

First, there currently exists a defence of truth in Queensland defamation law and in theory the proposed legislation "would only extend protection to those accusations that are false (though not malicious). In practice, the protection is wider as it also protects those who are reasonably confident of the truth of their allegations but do not have the resources or stamina to defend those allegations in court".⁶⁰

Secondly, the SLC considered that proposed s. 15A⁶¹ was insufficiently "clear, precise and unambiguous, in that it is not clear what precise meaning should be given to the term 'without malice' and how it would relate to other tests in the Act and in other law".⁶²

Thirdly, the SLC noted that "A higher level of protection against defamation proceedings could adversely affect the rights and liberties of individuals".⁶³

The bill lapsed with the dissolution of the Parliament in January 2001, and to date has not been reintroduced.

15. WHISTLEBLOWER PROTECTION

15.1 Electoral and Administrative Review Commission

In its review of whistleblower protection, the Electoral and Administrative Review Commission ('the commission' or 'the EARC') considered the range of persons or bodies to which public interest disclosures could be made (ie. "proper authorities").⁶⁴ In its report titled *Report on Protection of Whistleblowers*, the commission noted that there was little support in submissions for public disclosures being made directly to the media.⁶⁵ The commission also noted that very few submissions suggested a role for parliamentary committees.⁶⁶ Public interest disclosures to individual members of Parliament appear to have not been raised.

15.2 Parliamentary Committee for Electoral and Administrative Review

The Parliamentary Committee for Electoral and Administrative Review ('the PCEAR') examined EARC's recommendations and proposed Whistleblowers Protection Bill.⁶⁷ The PCEAR generally endorsed EARC's recommendations but recommended that:

*... the liability for defamation for public interest disclosures other than to proper authorities be referred to the Attorney-General for consideration in the context of the development of a uniform law of defamation among the Australian states, as outlined in the Defamation Bill currently before the Parliament.*⁶⁸

15.3 Whistleblowers Protection Act 1994 (Qld)

Queensland's *Whistleblowers Protection Act 1994* ('the *Whistleblowers Act*') is also silent regarding information provided to members of Parliament by informants. The act is primarily concerned with public interest disclosures by public officers to an "appropriate authority"⁶⁹ regarding a limited range of situations, including:

- official misconduct (s. 15);
- maladministration (s. 16);
- negligent or improper management affecting public funds (s. 17); and
- danger to public health or safety or to the environment (s. 18).

Under s. 19 of the *Whistleblowers Act*, anybody may make disclosures of danger to the health or safety of a person with a disability, or disclosures of substantial and specific danger to the environment.

A member of the Legislative Assembly may also make a public interest disclosure under the act⁷⁰ (for example, on behalf of an informant). However, the limited matters on which public interest disclosures may be made under the act cannot provide for every case and therefore may not adequately provide for serious matters which informants may bring before members.

15.4 Whistleblower protection in other legislatures

A number of legislatures provide either absolute or qualified protection to persons making “public interest” disclosures to certain authorities.

South Australia’s *Whistleblowers Protection Act 1993* protects persons disclosing illegal, dangerous or improper conduct (“public interest information”). Section 5 of the South Australian act provides that a person who makes an “appropriate disclosure of public interest information” incurs no civil or criminal liability by doing so. The act sets out the appropriate authority to which disclosure must be made. The person making the disclosure must believe on reasonable grounds that the information is true, or that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated.

The *Protected Disclosures Act 1994* (NSW) provides that a person is not subject to any liability for making a protected disclosure. Under s. 21 of the act, a person who has made a protected disclosure has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in certain proceedings for defamation.

16. OTHER LEGISLATION

In Queensland, there are a number of other statutes that provide some protection to persons in respect of communications that may be defamatory.

16.1 Crime and Misconduct Act 2001

The *Crime and Misconduct Act 2001* (Qld) provides for absolute protection from liability for commission staff in specific circumstances. For example, s. 335(3) states:

In a proceeding for defamation there is a defence of absolute privilege for a publication by the commission or a commission officer for the purpose of performing the commission’s functions.

A person who discloses information to the commission for the performance of the commission’s functions does not incur any civil liability, including liability for defamation (s. 343).

16.2 Freedom of Information Act 1992

The *Freedom of Information Act 1992* (Qld) provides protection for certain communications by public officers. Section 102(1)(c) and (d) states that:

(c) no action for defamation or breach of confidence lies against the State, an agency, a Minister or an officer because of the authorising or giving of the access [to a document]; and

(d) no action for defamation or breach of confidence in relation to any publication involved in, or resulting from, the giving of the access lies against the author of the document or another person because of the author or another person having supplied the document to an agency or Minister.

The immunity is absolute, not qualified.

16.3 Commission for Children and Young People Act 2000

The *Commission for Children and Young People Act 2000* (Qld) provides that a person is not civilly or criminally liable “for disclosing to the [children’s] commissioner information that would help the commissioner in assessing or investigating a complaint” (s. 162). The SLC considered the relevant clause of the Commission for Children and Young People Bill 2000. That committee noted that the provision contained no requirement “that the person act in good faith or without negligence or recklessness”.⁷¹

The explanatory notes to the Commission for Children and Young People Bill 2000 stated:

*The conferral of immunity from prosecution or proceedings is considered reasonable, given the nature of the commission’s work and the overriding need to safeguard the interests of vulnerable children. Clause 162 is a standard provision which accords with the protection afforded to whistleblowers under the Whistleblowers Protection Act 1994.*⁷²

In other words, persons providing information to the Children’s Commissioner may be absolutely protected even if, in making the disclosure, they are actuated by malice.

17. FALSE, MISCHIEVOUS AND MALICIOUS INFORMANTS

It is recognised that, unfortunately, it is possible for abuses to occur in the provision of information to members of Parliament. For example, an informant could, for malicious reasons, provide a member with false information.

The question of how to deal with false, mischievous and malicious information, including whether or not any protection should apply in such circumstances, is an important consideration.

A related issue is whether the provision of false, mischievous or malicious information to MPs by an informant should be treated as a contempt of Parliament.

18. MEMBERS' ELECTORATE OFFICES

There is increasing recognition of the functions that members discharge in their electorates. To support them in their constituency roles members have obtained electorate offices, electorate officers and other forms of assistance. The status of records and communications held by members in their electorate offices is therefore important to members and their constituents.

The status of members' constituency records is related to the service and execution of search warrants on members' offices. There have been occasions in other jurisdictions where such legal processes have caused concern, particularly where the removal of information that might be protected by parliamentary privilege is involved.

19. CONCLUSION

It is crucial that parliamentary privilege reflect the contemporary roles and responsibilities of members of Parliament.

There is increasing recognition of the functions that members discharge in their electorates, as evidenced by the assistance provided to members to discharge these duties.

It is arguable that with the increasing trend for members to represent constituents not only in Parliament, but also in correspondence to Ministers, government departments and other public bodies, parliamentary privilege should evolve to protect communications that are a result of the trend.

Members also have an important role in raising matters of public concern, which may be brought to their attention by informants.

It may be that the current law does not reflect the modern responsibilities and functions of members of Parliament, or how they operate, in practice, to discharge their responsibilities and functions.

20. ISSUES THAT MAY BE ADDRESSED BY SUBMISSIONS

The committee has identified the following key issues, which it will address as part of its inquiry. The committee invites response to these issues. It would be helpful if submissions addressed the questions as numbered.

1. Should protection (parliamentary privilege¹ or qualified privilege²) be afforded to (a) constituents or other persons making complaints to members of Parliament and (b) persons who voluntarily in their personal capacity provide information to members ("members' informants")?
2. Should members' communications to Ministers regarding constituents' complaints, or other information voluntarily provided to members by members' informants, be protected or immune from the general law in any way?
3. Is the existing law sufficiently unambiguous, and does it offer adequate protection—
 - to constituents and other persons making complaints to members of Parliament,
 - for communications between members and Ministers on constituency matters, and
 - to persons who voluntarily provide information to members?
4. If the law is ambiguous or inadequate, how can appropriate protection for constituents and

¹ Absolute immunity from liability to legal action or impeachment in respect of proceedings in Parliament, conferred by Article 9 of the Bill of Rights 1689 (see Part 5 above). See also, s.10(1) of the *Defamation Act 1889* (Qld).

² While not attracting parliamentary privilege, a communication may be immune from defamation action under the *Defamation Act 1889* in certain circumstances so long as the communication is made without malice (see Parts 7 and 13 above).

other persons, and protection for members' informants, best be achieved?

5. Is the most appropriate mechanism to protect constituents and other persons making complaints to members of Parliament, members' communications to Ministers, and persons who voluntarily provide information to members, by defining such communications as "proceedings in Parliament"?
6. Specifically, should a member's communications to a Minister, government department or other public body on a constituency matter, or information provided to a member by a constituent or other person, be included in the definition of "proceeding in Parliament" in s.3 of the *Parliamentary Papers Act 1992*?
7. Alternatively, should there be a qualified privilege for these types of communications?
8. Is the current qualified privilege provision under Queensland's *Defamation Act 1889* adequate?
9. Are briefing papers to members for their use in the Parliament in their capacity as private members and/or Ministers adequately protected?
10. Should interference with the provision of information to a member by a member's informant, or the provision of false, mischievous or malicious information to a member by an informant, qualify as a contempt of Parliament?
11. Should financial or legal assistance be provided to members who are forced to legally defend the integrity of the parliamentary process against—
 - attempts to have correspondence between a member and a constituent and/or a member's informant produced as evidence in open court, or
 - damages claims that may arise through members discharging their constituency functions on behalf of their constituents?
12. Do current procedures for the execution of search warrants (and seizure of documents) in relation to members' offices have sufficient regard to the law of parliamentary privilege?

MEMBERSHIP – 50TH PARLIAMENT

Mrs Julie Attwood MP, Chair
Mrs Joan Sheldon MP, Deputy Chair
Mrs Peta-Kaye Croft MP
Mr Gary Fenlon MP
Mr Bill Flynn MP
Ms Anita Phillips MP
Mr Lawrence Springborg MP

STAFF³

Ms Meg Hoban, A/Research Director
Ms Sandy Musch, Executive Assistant

Phone: 07 3406 7167
Fax: 07 3406 7691
E-mail: meppc@parliament.qld.gov.au
Internet: www.parliament.qld.gov.au

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¹ Members' Ethics and Parliamentary Privileges Committee, *First Report on the Powers, Rights and Immunities of the Legislative Assembly, its Committees and Members*, Report No. 26, Queensland Legislative Assembly, Brisbane, 1999 at 4-5.

² Mr Jack Paff MP, the former member for Ipswich West, introduced this bill.

³ Mr Jack Paff MP, Queensland Legislative Assembly, *Parliamentary Debates (Hansard)*, 26 August 1999 at 3584.

⁴ Mr John Mickel MP, Member for Logan.

⁵ Queensland Legislative Assembly, *Votes and Proceedings*, 18 October 2000 at 1251.

⁶ The *Constitution of Queensland 2001*, at s. 9, amends s. 40A by linking the powers, privileges and immunities of the Legislative Assembly to the UK House of Commons as at the date of Federation—1 January 1901. This change resulted in part from Recommendation No. 1 of MEPPC Report No. 26. The act received assent on 3 December 2001 and commences on 6 June 2002.

⁷ Nygh P and Butt P (eds), *Concise Australian Legal Dictionary*, Butterworths, Brisbane, 1997 at 327.

⁸ Members' Ethics and Parliamentary Privileges Committee, *Parliamentary Privilege in Queensland*, Issues Paper No.3, Queensland Legislative Assembly, Brisbane, 1997.

³ The committee thanks Mr Neil Laurie, Deputy Clerk and Clerk of Committees and Ms Maureen McClarty, Parliamentary Committee Office for their assistance in the preparation of this paper.

⁹ Evans H, 'Members Informants: Any Protection?' (1997) The Table 19.

¹⁰ Note 9 at 22.

¹¹ Commonwealth Joint Select Committee on Parliamentary Privilege, *Final Report*, Parliamentary Paper No.219/1984 at paras 5.14-5.15, cited in Carney G, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, Brisbane, 2000 at 212.

¹² Carney G, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, Brisbane, 2000 at 218.

¹³ Note 12.

¹⁴ Note 12 at 219.

¹⁵ Sir Donald Limon and WR McKay (eds), *Treatise on The Law, Privileges, Proceedings and Usage of Parliament (May's Parliamentary Practice)*, 22nd edition, Butterworths, London, 1997 at 129.

¹⁶ Lock, G F, 'Parliamentary Privilege and the Courts: The Avoidance of Conflict', (1985) Public Law 64.

¹⁷ (1937) 2 KB 375.

¹⁸ (1937) 2 KB 375 at 380.

¹⁹ (1953) 1 QB 485.

²⁰ (1953) 1 QB 485 at 489.

²¹ (1953) 1 QB 485 at 488-89.

²² *Re: Parliamentary Privilege Act 1770* [1958] AC 331.

²³ Note 16 at 68.

²⁴ Note 16 at 83.

²⁵ UK House of Lords/House of Commons Joint Committee on Parliamentary Privilege, *Report*, The Stationery Office, London, 1999.

²⁶ Note 25 at 32.

²⁷ Note 25 at 34.

²⁸ Note 25 at 32.

²⁹ Note 25 at 33.

³⁰ *Brown & Williamson Tobacco Corporation. v. Williams* (1995) 62 F.3d 408.

³¹ Note 30 at 10.

³² Note 9 at 25.

³³ Note 30 at 15.

³⁴ *United Transportation Union v. Springfield Terminal Railway Co.* (1990) 132 FRD 4.

³⁵ Johnson, CW, *Rules of the House of Representatives of the United States One Hundred Sixth Congress*, Washington, 1999 at 42.

³⁶ (1990) 132 FRD 4 at 6.

³⁷ (1990) 132 FRD 4 at 5.

³⁸ *Rowley v. O'Chee*, Supreme Court of Queensland, 18 April 1997, William J. (unreported).

³⁹ *Rowley v. O'Chee* (2000) 1 Qd 207; *O'Chee v Rowley* (1997) 150 ALR 199.

⁴⁰ *Rowley v. O'Chee* (2000) 1 Qd 207 at 212; *O'Chee v. Rowley* (1997) 150 ALR 199 at 202.

⁴¹ Senate Committee of Privileges, *Possible threats of legal proceedings against a senator and other persons*, 67th Report, Australian Parliament, Canberra, 1997.

⁴² Note 41 at 24.

⁴³ Senate Committee of Privileges, *Matters Arising From 67th Report of the Committee of Privileges*, 92nd Report, Australian Parliament, Canberra, 2000 at Appendix A.

⁴⁴ Note 43 at 6.

⁴⁵ Note 9 at 19.

⁴⁶ 1982-1984.

⁴⁷ Joint Select Committee on Parliamentary Privilege, *Final Report*, Parliamentary Paper No.219/1984, Australian Parliament, Canberra, 1984 at 46.

⁴⁸ Note 47.

⁴⁹ Note 12 at 213.

⁵⁰ House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of members*, Australian Parliament, Canberra, 2000.

⁵¹ Note 50 at 1.

⁵² Note 50 at 43.

⁵³ Note 50 at 43-44.

⁵⁴ Note 50 at 43-44.

⁵⁵ Note 50 at 45.

⁵⁶ Note 50 at 45.

⁵⁷ See s.14(1)(a)-(h).

⁵⁸ See s.16(1)(a)-(h).

⁵⁹ Note 3 at 3584-3585.

⁶⁰ Scrutiny of Legislation Committee, *Alert Digest No.12 of 1999*, Goprint, Brisbane, 1999 at 2.

⁶¹ Proposed s. 15A provided "It is lawful for a constituent to publish defamatory matter to a member of the Legislative Assembly or to a person who is a member of the member's staff ... if the publication is made without malice."

⁶² Note 60 at 3.

⁶³ Note 60 at 5.

⁶⁴ Electoral and Administrative Review Commission, *Report on Protection of Whistleblowers*, Government Printer, Brisbane, 1991.

⁶⁵ Note 64 at 119.

⁶⁶ Note 64 at 118.

⁶⁷ Parliamentary Committee for Electoral and Administrative Review, *Whistleblower Protection*, Government Printer, Brisbane, 1982.

⁶⁸ Note 67 at 18.

⁶⁹ Schedule 6 of the *Whistleblowers Protection Act 1994* (Qld) defines an "appropriate entity" as a public sector entity to which a public interest disclosure may be made; Schedule 5 lists the relevant public sector entities.

⁷⁰ *Whistleblowers Protection Act 1994* (Qld), Schedule 6 (definition of "public officer").

⁷¹ Scrutiny of Legislation Committee, *Alert Digest No. 9 of 2000*, Goprint, Brisbane, 2000 at 16.

⁷² Explanatory Notes to the Commission for Children and Young People Bill 2000, cited in Scrutiny of Legislation Committee, Note 71 at 15-16.