LEGISLATIVE ASSEMBLY OF QUEENSLAND

MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE

REPORT ON INQUIRY INTO COMMUNICATIONS TO MEMBERS, MEMBERS' REPRESENTATIONS TO GOVERNMENT AND INFORMATION PROVIDED TO MEMBERS

REPORT NO. 60

November 2003

MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE

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CHAIR'S FOREWORD

The parliamentary duties of members of the Legislative Assembly are not confined to members' activities within the parliamentary chamber. A significant proportion of their duties take place outside Parliament in representations on behalf of members of the community to ministers, departments and other entities.

Adequate protections at law are essential if members of the community are to communicate frankly and freely with their parliamentary representatives about matters of significant public or private concern. These protections should achieve two main goals. Firstly, they should provide an appropriate level of immunity for disclosures to parliamentarians by members of the community, and action taken by members in response to those disclosures. Secondly, they should preserve the confidentiality of constituency communications.

In this report, the committee has recommended a system of protections to achieve these goals. The committee's recommendations are aimed at enhancing the democratic process in Queensland and are complementary to the current law. Recommendations include amendments to the *Parliament of Queensland Act 2001*. The amendments provide an appropriate level of immunity for communications between members of the community and their parliamentary representatives in the course of members' parliamentary duties. The amendments also provide certainty in regard to the confidentiality of constituency communications. Together, these measures will support high ethical standards of conduct by members of the Assembly in the discharge of their parliamentary duties.

This report represents the culmination of an extensive inquiry by the committee and I wish to take this opportunity to record my appreciation to my fellow committee members for their commitment to the work of the committee. I also wish to acknowledge the contribution to this inquiry by former committee members, Mr Lawrence Springborg MP (Leader of the Opposition and Leader of the National Party, and Member for Southern Downs) and Mr Bill Flynn MP (Leader of the One Nation Party and Member for Lockyer).

I also take this opportunity to recognise the valuable contribution to the committee's roundtable discussion forum by Mr Tony Morris QC, Professor Gerard Carney, Mr John Logan SC, Dr Bill De Maria and Professor Charles Sampford. In this regard, I also thank the Honourable Paul Lucas MP.

The committee is also grateful to the Clerk of the Parliament, Mr Neil Laurie, for his expert advice regarding the law and practice of parliamentary privilege.

On behalf of the committee, I thank the Parliamentary Counsel Mr Peter Drew and his officers, particularly Ms Theresa Johnson, for their assistance in preparing the draft legislation.

Finally, on behalf of the committee, I wish to acknowledge the work of the committee's secretariat staff.

Julie Attwood MP
Chair

November 2003

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SUMMARY OF RECOMMENDATIONS

Protection under parliamentary privilege and the definition of 'proceedings in the Assembly' contained within the *Parliament of Queensland Act 2001* should not be extended beyond that which is currently provided to communications to members, members' representations to government and information provided to members.

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide complementary immunity at law from proceedings for defamation for communications to members, members' representations to government and information provided to members in relation to members' parliamentary duties.

The immunity in Recommendation 2 above should not override current statutory secrecy or confidentiality obligations.

The immunity in Recommendation 2 above should attach only to relevant communications that are not knowingly false.

Where the essential elements of a contempt of the Legislative Assembly (set out in s 37 of the *Parliament of Queensland Act 2001*) are met, the Assembly may treat as a contempt of the Assembly publishing a matter to a member asking the member to take a legitimate action [as defined in the Bill] in relation to the matter if the person publishing the matter knows the matter is false or misleading in a material particular.

The immunity in Recommendation 2 above should attach to a relevant communication only from the time it is provided in the first instance to a member of the Legislative Assembly in connection with the member's parliamentary duties until it is published in the public domain, made public by the member concerned or authorised for publication by the Legislative Assembly. The Standing Orders Committee of the Legislative Assembly should consider adopting the following new standing order—

> *Disclosure of constituency representations*
>
> *Members' constituency representations which have not been reported to the House by the member making the representation shall not be referred to in the House, unless authorised by the member or the House.*

The Premier, as the Minister responsible for the *Parliament of Queensland Act 2001*, should consult with the Speaker and relevant authorities about developing, for the Legislative Assembly's approval, protocols in relation to the execution of search warrants on the offices of members of the Assembly.

Protocols developed in accordance with Recommendation 7 above should include appropriate procedures for dealing with claims of parliamentary privilege for communications that are held in the offices of members and which are seized under warrant.

Protocols developed in accordance with Recommendation 7 above should affirm that, where parliamentary privilege is claimed or can reasonably be claimed in respect of communications seized under warrant from a member's office,

the communications should be examined by an independent assessor; and that the Assembly may, by resolution, authorise the Speaker where necessary to commission an independent assessor to examine such communications to determine if they are exempt from the warrant by virtue of parliamentary privilege.

The Members' Ethics and Parliamentary Privileges Committee should be charged with responsibility for publishing, within four weeks of the protocols developed in accordance with Recommendation 7 above being adopted by the Legislative Assembly, explanatory material for the assistance of members of the Assembly and their staff in relation to the privileges of the Assembly and the execution of search warrants on members' offices.

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide legal assistance for a member of the Legislative Assembly against whom proceedings are taken or threatened in respect of (a) the immunity established under the draft Bill, or (b) a proceeding involving the powers, rights and immunities of the Assembly, its committees and members.

The assistance in accordance with Recommendation 11 above should be in the form of legal advice, legal representation, or financial assistance to privately obtain such legal advice or representation, the type and amount of which should be at the discretion of the Speaker having regard to any relevant guidelines adopted by the Legislative Assembly.

The Members' Ethics and Parliamentary Privileges Committee should be charged with responsibility for publishing, within four weeks of the enactment of the proposed Parliament of Queensland (Constituency Communications) Amendment Bill 2003, for the Legislative Assembly's approval, guidelines to assist the Speaker in determining whether a submission for assistance under Recommendation 11 above satisfies the criteria established under section 63I of the draft Bill.

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide that matter in a document of an agency or an official document of a minister within the meaning of the *Freedom of Information Act 1992* is exempt matter if it consists of information communicated to a member of the Legislative Assembly, or by or for a member or former member, seeking or taking a legitimate action in relation to the information, as provided under the draft Bill.

A member of the Legislative Assembly, or former member, should be able to sign a conclusive certificate stating that specified matter is exempt matter for the purposes of the *Freedom of Information Act 1992*.

Section 84 of the *Freedom of Information Act 1992* should apply to the issue of a conclusive certificate by a member of the Legislative Assembly.

To preserve the confidentiality of constituents, members of the Assembly at their discretion should be able to subscribe (on a case by case basis) to any government privacy guidelines established for the disclosure of constituents' personal information to members. The onus should be on agencies to establish that the constituent has consented to the disclosure.

1. INTRODUCTION AND BACKGROUND

1.1 MEPPC RESPONSIBILITIES

Section 80 of the *Parliament of Queensland Act 2001* establishes the Members' Ethics and Parliamentary Privileges Committee (the MEPPC). Section 90 of the act states that the committee has the following areas of responsibility—

- the ethical conduct of members (s 92 of the act provides that this responsibility includes the reform of legislation and standing rules and orders about the ethical conduct of members of the Legislative Assembly); and
- parliamentary powers, rights and immunities (s 93 of the act provides that this responsibility includes the powers rights and immunities—or parliamentary privilege—of the Assembly, its committees and members).

The MEPPC of the 49th Parliament undertook a comprehensive inquiry into parliamentary privilege in Queensland. In its Report No. 26, tabled in January 1999, that committee stated that the issues of members' constituency correspondence, members' sources of information, legal assistance for members and the execution of search and seizure warrants on members' offices were matters that warranted further attention and possible future report by the MEPPC.[1]

1.2 INQUIRY FOCUS

Following its appointment by resolution of the Legislative Assembly in May 2001, the MEPPC of the 50th Parliament (the present committee) resolved to continue with the previous committee's inquiry into parliamentary privilege in Queensland, with the focus on communications with members, members' representations to government and information provided to members.

Members of the community[2] should be able to communicate with parliamentarians on issues of significant public or private concern without being subjected to, or threatened with, legal proceedings by third parties for doing so. Parliamentarians should also be able to pursue their parliamentary duties concerning matters raised with them by members of the community without legal proceedings being instituted against them by third parties as a result of their representations on behalf of members of the community.

Threats of legal proceedings have the potential to significantly affect the free flow of information between members of the community and members of Parliament, and between parliamentarians and ministers. The committee is aware of instances where members acting on behalf of members of the community have had little option but to raise sensitive constituency matters publicly in the Assembly (to attract parliamentary privilege in order to ensure adequate protection from legal proceedings) rather than pursuing the matters in private with the relevant minister.

In undertaking its inquiry, the committee was conscious that the preservation of confidentiality is a significant issue for members of the community who make representations to members of the Legislative Assembly. Ensuring that their constituents' confidentiality is preserved is also an important consideration for members of the Assembly when discharging their parliamentary duties both within and outside the parliamentary chamber.

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

2 In the context of this report, the term 'members of the community' includes members' constituents and members of the wider community.

The committee's privileges inquiry therefore focused on how best to ensure appropriate protection and confidentiality for members of the community in their communications with members of the Legislative Assembly.

The committee also sought to ensure that members of the Assembly are supported in acting, and encouraged to act, in the most ethical manner possible in their parliamentary duties arising from communications with members of the community.

With this focus, the committee inquired into the extent to which current legislation, and parliamentary law and practice, protect communications upon which members of the Legislative Assembly act in the course of their parliamentary duties. In particular, the committee considered correspondence and other communications between—

- members of the Legislative Assembly and members of the community who provide information to members in order to resolve some private wrong or grievance;
- members of the Assembly and members of the community who voluntarily provide information to members in the public interest in order to expose some public wrong or grievance such as misconduct; and
- members of the Assembly and ministers, departments and other entities when members pursue matters arising from their communications with members of the community.

1.3 CONSULTATION

To assist with its inquiry, the committee tabled Issues Paper No. 4, titled *Communications to members, members' representations to government and information provided to members.*[3]

The committee advertised in the Brisbane and regional newspapers seeking public submissions, with a consultation period of eight weeks. Submissions were received from members of the community, government departments and legal experts. The committee thanks all those who provided submissions for their valuable input into the committee's inquiry.

During its inquiry, the committee surveyed members of the Legislative Assembly about the key issues set out in the issues paper. The committee wishes to place on record its appreciation to all members who responded to the survey for their assistance and their constructive comments regarding key areas of concern.

In order to gain an appreciation of developments in other parliaments in relation to these matters, the committee held discussions with members and parliamentary officers of the Commonwealth Parliament and the Parliaments of New South Wales and Victoria. The committee thanks all those people who generously gave their time to meet with the committee.

The committee also convened a roundtable discussion forum at Parliament House in October 2002. A number of specialists with recognised expertise in parliamentary privilege law, practice and litigation were invited to participate in the forum and all members of the Assembly were invited to attend. The committee takes this opportunity to extend its appreciation to all who participated in the discussion forum for their valuable contribution to the inquiry.

[3] Members' Ethics and Parliamentary Privileges Committee, *Issues Paper No. 4, Communications to members, members' representations to government and information provided to members*, Brisbane, Goprint, 2002, at 14-15. The issues paper (tabled on 30 April 2002) is available on the Internet at: www.parliament.qld.gov.au/Committees.

1.4 REPORT OUTLINE

This report discusses the major issues considered by the committee during its inquiry, including—

- the nature of members' parliamentary duties, and the existing protections afforded to the communications of members of the community and members of the Legislative Assembly (including parliamentary privilege and defamation legislation);
- options for extending those protections;
- preventing possible abuse of protections;
- the execution of search warrants on members' offices and the preservation of the confidentiality of communications to which parliamentary privilege attaches;
- legal assistance for members of the Legislative Assembly who are compelled to personally defend the collective powers, rights and immunities of the Assembly in legal proceedings; and
- freedom of information and the confidentiality of constituency communications held in ministers' offices and departments, and information privacy.

One significant issue raised in the committee's issues paper which is not reported here relates to protection of members' and ministers' briefing papers prepared for use in Parliament.[4] This is an important issue which the committee believes warrants further inquiry by the committee and possible future report.

This report consists of five parts—

Part 1—Introduction and background

Part 2—Immunity for constituency communications

Part 3—Legal assistance

Part 4—Freedom of information and privacy

Part 5—Conclusion.

The draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 recommended by the committee is at **Appendix A** to the report. The explanatory notes to the bill are at **Appendix B**. The transcript of the proceedings of the committee's roundtable discussion forum is at **Appendix C**. A list of the submissions tabled in conjunction with this report is at **Appendix D.**

4 Note 3, at 15.

2. IMMUNITY FOR CONSTITUENCY COMMUNICATIONS

2.1 MEMBERS' PARLIAMENTARY DUTIES

As part of their parliamentary duties, members have an important role in raising matters of serious public concern which may be brought to their attention by members of the community who voluntarily disclose information to members in the public interest. Members may act upon such information in speeches in Parliament, or they may ask ministers questions on, and without, notice about the matter. However, there are limited opportunities for backbench members to bring up 'private business' in the Legislative Assembly.

Members therefore discharge many of their parliamentary duties outside the Legislative Assembly chamber. Members often communicate directly with ministers, departments and other entities about matters raised by members of the community. Members' written communications with ministers have been viewed as a legitimate substitute for members raising issues with ministers when Parliament is not sitting, or away from the glare of the parliamentary proceedings.[5] Such communications are recognised as a significant component of a contemporary member's parliamentary duties.[6] The Legislative Assembly both recognises and assists members' parliamentary duties outside Parliament by providing electorate office accommodation, facilities, staff and support.

While the increasing trend is for members of Parliament to act as advocates for members of the community on a range of matters in communications outside Parliament, it is arguable that parliamentary immunities to facilitate members' parliamentary duties have not kept pace with this trend. As a result, members of the community are not assured of absolute protection from legal proceedings if the information they provide to a member contains any material that may be defamatory. Nor are members of the Assembly able to guarantee to members of the community that confidential or sensitive information they raise with the member will not be made public by a third party.

Members' parliamentary communications can vary widely in nature. They include correspondence with ministers, departments and other entities; attachments to letters; file notes; diary entries; and emails and other electronic communications. Typically, members' parliamentary communications may reside or circulate within the bureaucracy for many months, or even years, during the course of the resolution of particular wrongs or grievances.

For many years, the extent to which members of the community are protected by parliamentary privilege when they provide information to members (or by some other sufficient immunity) has been a matter of concern. Questions about the types of communications that are, and are not, protected have also been a matter of contention. There remains some uncertainty as to the status of members' communications that fall outside the strict definition of 'proceedings in Parliament' (and thus outside the absolute protection of parliamentary privilege).

2.2 THE NEED FOR IMMUNITY

It appears that there may be inadequate protection for constituents in their communications with members of Parliament. Some communications, while not attracting absolute parliamentary privilege, or absolute protection, may be afforded qualified protection under defamation legislation. This means

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5 Carney, G, *Members of Parliament: law and ethics*, Prospect Media Pty Ltd, Sydney, 2000, at 218; Mr John Logan SC, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 6.

6 House of Lords/House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume 1—Report and Proceedings of the Committee*, The Stationery Office, London, 1999, at 32.

that in certain circumstances[7] the matter is immune from defamation proceedings so long as the communication is made without malice.[8] A real concern exists that qualified protection may not adequately protect certain categories of disclosures to members of Parliament. This is because qualified protection can be defeated by evidence of malice. As noted by the Clerk of the Senate, Mr Harry Evans, in an article published in *The Table*—

> *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.*[9]

In his article, the Clerk of the Senate referred to circumstances where a former employee who "blows the whistle" on a former employer could be represented as being actuated by a desire for revenge against the former employer.[10] If a former employee (a discloser) were to provide information to a member of Parliament that contained anything defamatory about their former employer, the former employee risks an action for defamation against them. The problem that arises for members of the community is well illustrated by reference to this example. A discloser who provides information about some alleged wrongdoing to a parliamentarian may very well be a disgruntled employee, or a former employee. They may, however, also be motivated by the public interest in making their disclosure.

It is fundamental to the system of parliamentary democracy that the powers, rights and immunities of Parliament should support members of Parliament in the discharge of their parliamentary duties. Where protection in respect of communications between members of the community and members of Parliament is inadequate, a fear of legal action may—

- inhibit members of the community from approaching parliamentarians about constituency matters;
- inhibit members of Parliament from communicating directly with ministers, departments and other entities about constituency matters;
- lead to members raising in the parliamentary chamber (in order to attract parliamentary privilege) matters of a confidential or sensitive nature that relate to their parliamentary duties outside Parliament;
- inhibit members of the community from approaching members of Parliament in the public interest, about confidential or sensitive matters;
- affect the ability of members to effectively discharge their parliamentary duties on behalf of members of the community; and
- impede members of Parliament in raising important concerns about some public wrong or grievance.

Anecdotal evidence suggests that members of the community may be increasingly hesitant to report wrongdoing.[11] This may partly be due to a fear of legal proceedings being taken against them as a

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7 For example, where the provider and the recipient have an interest or duty in providing and receiving the communication, qualified protection would be afforded the communication.

8 House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of members*, Commonwealth of Australia, Canberra, 2000, at 22.

9 Evans H, 'Members Informants: Any Protection?' (1997) The Table 19, at 22.

10 Note 9.

11 Mr Tony Morris QC, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 17; Dr Bill de Maria, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 21-22; Mrs Joan Sheldon MP; Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 22.

consequence of insufficient protections under current law. While members of the community must in certain circumstances rely on protection under qualified protection when they disclose alleged wrongdoing to a member of Parliament, members are protected by absolute parliamentary privilege for any statement they might make if they raise the same allegation in Parliament.

2.3 EXISTING PROTECTIONS: PARLIAMENTARY PRIVILEGE AND DEFAMATION LEGISLATION

The term 'parliamentary privilege' is used to describe the powers, rights and immunities from aspects of the general law that are collectively bestowed upon the Parliament, parliamentary committees and members of Parliament, without which Parliament would be unable to discharge its functions.

Section 9 of the *Constitution of Queensland 2001*[12] provides that the powers, rights and immunities of the Legislative Assembly and its members and committees are—

> *(a) the powers, rights and immunities defined under an Act; and*
>
> *(b) until defined under an Act—the powers, rights and immunities, by custom, statute or otherwise, of the Commons House of the Parliament of the United Kingdom and its members and committees at the establishment of the Commonwealth (that is, 1 January 1901).*[13]

This, in effect, means that article 9 of the United Kingdom *Bill of Rights 1688* is part of Queensland law. Article 9 provides the immunity of absolute privilege of freedom of speech in Parliament.[14] This is a fundamental immunity for the effective discharge by members of their parliamentary duties within Parliament. The *Parliament of Queensland Act* reinforces the provisions of article 9 at s 8 of that act by providing that—

> *(1) The freedom of speech and debates or proceedings in the Assembly can not be impeached or questioned in any court or place out of the Assembly.*
>
> *(2) To remove doubt, it is declared that subsection (1) is intended to have the same effect as article 9 of the Bill of Rights (1688) had in relation to the Assembly immediately before the commencement of the subsection.*

In other words, members are able to speak freely in the Legislative Assembly without fear that their speeches will be the subject of legal proceedings. This includes (but is not limited to) proceedings for defamation.

The protection afforded by article 9 is a powerful instrument that enables open debate in Parliament, where matters of public concern are able to be freely and fearlessly raised. Indeed, parliamentary privilege has been described as one of the basic 'tools' of the 'job' of a parliamentarian.[15]

2.3.1 Meaning of 'proceedings in Parliament'

Commonwealth and state legislation has been enacted which includes a definition of the term 'proceedings in Parliament'. The question of whether absolute immunity is afforded to members'

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12 Prior to the commencement of the *Parliament of Queensland Act 2001* on 6 June 2002, the relevant section was s 40A of the *Constitution Act 1867* (Qld).

13 The *Constitution of Queensland 2001*, at s 9, amends the previous linkage of the powers, privileges and immunities of the Legislative Assembly to the United Kingdom House of Commons from time to time. This change resulted in part from Recommendation No. 1, Members' Ethics and Parliamentary Privileges Committee, *Report No. 26, First Report on the Powers, Rights and Immunities of the Legislative Assembly, its Committees and Members*, Queensland Legislative Assembly, Brisbane, 1999, at 23. The act received assent on 3 December 2001 and commenced on 6 June 2002.

14 Article 9 of the *Bill of Rights* provides that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

15 Mr Tony Morris QC, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 7.

correspondence (and other communications) with ministers, departments and other entities, or to communications between members of the community who provide information to parliamentarians in the course of the members' parliamentary duties and members, rests on the nexus between the communication and the proceedings that take place in Parliament. Section 9 of the *Parliament of Queensland Act*[16] provides the following meaning for 'proceedings in the Assembly'—

> *(1)* ***"Proceedings in the Assembly"*** *include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*
>
> *(2) Without limiting subsection (1),* ***"proceedings in the Assembly"*** *include–*
>
> *(a) giving evidence before the Assembly, a committee or an inquiry; and*
>
> *(b) evidence given before the Assembly, a committee or an inquiry; and*
>
> *(c) presenting or submitting a document to the Assembly, a committee or an inquiry; and*
>
> *(d) a document tabled in, or presented or submitted to, the Assembly, 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 Assembly or a committee; and*
>
> *(g) a document (including a report) prepared, made or published under the authority of the Assembly or a committee.*

2.3.2 Judicial consideration of 'proceedings in Parliament'

The courts' interpretation of the term 'proceedings in Parliament' and the scope of that term has been a crucial factor when immunity has been afforded to such communications under parliamentary privilege.[17] The immunity has depended on how closely the communication is connected to the actual or potential proceedings of Parliament—that is, whether or not the communication is an 'act done' for the purposes of, or incidental to, the proceedings in Parliament.

For example, the Queensland Court of Appeal considered the meaning of 'proceeding in Parliament' in the case of *O'Chee v Rowley*.[18] That court held that where a member acts on a communication which has been disclosed to them with a view to raising it in Parliament (that is, for the purpose of transacting the business of the House), the communication falls within the definition of an 'act done' under s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*, attracting parliamentary privilege.[19] In the judgment, McPherson JA referred to a United States decision which recognised the 'chilling' effect that court processes are capable of having on the flow of information to members of Parliament, stating—

> *The decision in Brown & Williamson Tobacco Corp v Williams … and other American decisions on the subject, recognise the "chilling" effect that court processes, like that being used by the plaintiff in this action, are capable of having on legislative activity; that is, by "chilling" the ability*

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16 Prior to 6 June 2002, the relevant section was s 3(2) and 3(3) of the *Parliamentary Papers Act 1992* (Qld).

17 The *Parliamentary Privileges Act 1987* (Cth) has been the subject of judicial consideration in proceedings involving communications between parliamentarians, in the course of their parliamentary duties, and members of the community. The terms of s 9 of the *Parliament of Queensland Act 2001* are enacted in similar terms to s 16(2) of the Commonwealth act.

18 (1997) 150 ALR 199.

19 (1997) 150 ALR 199, at 209.

of Congress "to attract future confidential disclosures necessary for legislative purposes": (1995) 62 F 3d 408 at 417.[20]

In the 1995 United States case of *Brown & Williamson Tobacco Corporation v. Williams*[21] referred to above, 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. Interestingly, that judgment indicated that immunity from litigation extended beyond the proceedings of the Houses or their committees.

Most relevantly to the Queensland Parliament, the Supreme Court of Queensland, in the case of *Rowley v Armstrong*,[22] held that the act of communicating information to a member of Parliament is not regarded as participating in 'proceedings in Parliament',[23] and does not automatically attract immunity from legal consequences. Statements contained in Erskine May's *Parliamentary Practice*,[24] based largely on United Kingdom cases, appear to have been a factor in the decision in this latter case. That judgment stands in contrast to the findings of the Senate Committee of Privileges[25] which found that the provision of information by the person concerned to a parliamentarian was directly connected with the actual proceedings in the Senate.[26]

2.3.3 Defamation legislation

Queensland's *Defamation Act 1889* provides some protection to persons who publish information to members of Parliament that is allegedly defamatory, and to members who make representations to ministers, departments and other entities on behalf of members of the community.

The *Defamation Act* provides that it is lawful under certain circumstances[27] to publish a fair comment even if defamatory. These circumstances include where the provider and recipient have an interest or duty in providing and receiving the communication. It is also lawful (under s 15) to publish defamatory matter if the matter is true,[28] and if it is for the public benefit that the publication complained of should be made.

Qualified protection under s 16 of the *Defamation Act* may also afford some immunity from legal proceedings. For example, under certain circumstances,[29] an otherwise defamatory communication may be lawful if the publication is made in good faith. The qualified protection provided by the *Defamation Act* appears, on the face of it, to cover defamatory publications which may be made by a member to a minister, department or other entity in connection with the member's parliamentary duties. The act would also appear to protect members of the community who provide information to members, but only if they act in good faith, without malice.

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20 (1997) 150 ALR 199, at 214.

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

22 [2000] QSC 88.

23 [2000] QSC 88, at 11.

24 Limon D and McKay WR (eds), *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, (*May's Parliamentary Practice*), 21st edition, Butterworths, London, 1977, at 133 cited in [2000] QSC 88, at 6.

25 Senate Committee of Privileges, *67th Report, Possible threats of legal proceedings against a senator and other persons*, Senate Printing Unit, Canberra, 1997.

26 Note 25, at 19.

27 See s 14(1)(a)-(h).

28 The Criminal Code at s 599 also deals with the defence of truth for unlawful publication in the public interest.

29 See s 16(1)(a)-(h).

There have been attempts to extend protection from defamation to others. For example, the Defamation Amendment Bill 1999[30] sought to clarify that the *Defamation Act* protects staff of parliamentarians when republishing a constituent's communications to a member, provided that the publication is made without malice. The stated objective of the bill was to take away much of the uncertainty regarding the protection of members in their representations to government on behalf of their constituents.

In its review of the bill, the Scrutiny of Legislation Committee of the Queensland Parliament observed[31] that the bill was directed at supporting the institution of Parliament and was intended to improve the flow of information to parliamentarians so that they may perform one of their most important parliamentary duties—the pursuit of constituency concerns and interests.

The Defamation Amendment Bill went to the heart of the powers, rights and immunities of the Legislative Assembly, its committees and members. It was also directly relevant to the issues that the previous MEPPC believed warranted further inquiry.[32] Consequently, the chair of the previous committee[33] 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.[34]

2.3.4 Other parliamentary reviews of members' correspondence, and parliamentary privilege

The issue of members' correspondence and records, and parliamentary privilege has been considered by a number of parliaments, including the United Kingdom House of Commons[35] and the Commonwealth House of Representatives. In particular, consideration has been given to the status of constituency communications and whether parliamentary privilege attaches, or should be extended, to such communications.

In recent years, there has been little parliamentary support for extending parliamentary privilege to such communications. In 1999, the United Kingdom Joint Committee on Parliamentary Privilege recommended that "the absolute privilege accorded by article 9 to proceedings in Parliament should not be extended to include communications between members and ministers."[36] The joint committee concluded—

> *In principle this exceptional protection [parliamentary privilege] should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege.*[37]

The joint committee's recommendation was at odds with recommendations on the matter by previous committees which "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."[38]

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30 The Bill was introduced into the Legislative Assembly on 26 August 1999.

31 Scrutiny of Legislation Committee, *Alert Digest Issue No. 12 of 1999*, Queensland Legislative Assembly, Brisbane, at 1.

32 Note 1.

33 Mr John Mickel MP, Member for Logan.

34 Queensland Legislative Assembly, *Votes and Proceedings*, 18 October 2000, at 1251. The Defamation Amendment Bill 1999 lapsed in January 2001 with the dissolution of the Legislative Assembly for a general election, before the previous committee was able to report to the House on the matter.

35 Note 6.

36 Note 6, at 34.

37 Note 6, at 34.

38 Note 6.

In 1985, the New South Wales Joint Select Committee Upon Parliamentary Privilege also recommended that absolute privilege should attach to correspondence between members of Parliament and ministers of the Crown in the course of performing their parliamentary duties.[39] That committee also recommended that absolute privilege should apply to the Minister's reply to the member. To date, the recommendations have not been implemented.[40]

The matter has also been considered by the Commonwealth House of Representatives Standing Committee of Privilege. In its 2000 report on the status of the records and correspondence of members, that committee noted that the "first and most direct impact" of extending the protection of parliamentary privilege would be to "reduce the ability of courts to obtain all relevant material to help their determination of matters."[41] The committee observed that "… *Members would not seek to have an extension [of protection] that might either cloak wrongdoing or be seen to provide the opportunity for wrongdoing*"[42] and recommended that there be no additional protection, beyond that provided by the current law, given to the records and correspondence of members.[43]

2.3.5 Arguments surrounding extension of parliamentary privilege

There was strong support in submissions to the MEPPC for some form of immunity (either parliamentary privilege or an alternative measure that would provide absolute protection) to be provided to communications to members and to members' representations to ministers, departments and other entities.

Referring to the advocacy role of members of Parliament, Education Queensland supported absolute protection for communications from members to ministers, stating—

> *Education Queensland's position is that communications to Ministers from Members of Parliament that accurately reflect their constituent's concerns about constituency matters or informant information should be accorded the protection of absolute privilege. This is because the Member of Parliament is fulfilling their duty of representing their constituency to the executive government, and should not be placed at danger of prosecution for defamation merely for performing this duty.*[44]

The Department of State Development acknowledged the important public interest duty of members of Parliament, stating—

> *There have been instances in the past where information provided to Members and disclosed under parliamentary privilege has resulted in issues of public interest being revealed and acted upon. In many cases, the formal legal and administrative systems have not provided the relevant medium to raise such concerns.*[45]

In relation to protection for members of the community, a number of submissions supported the clarification of qualified protection to expressly state that qualified protection extends to situations such as where constituents communicate to members on constituency matters.[46] One submission supported the provisions in the *Defamation Act* that define 'qualified' and 'absolute' protection being

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39 Joint Select Committee Upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, Parliament of New South Wales, Sydney, 1985, cited in submission by Mr Russell Grove, at 2.

40 Submission by Mr Russell Grove, at 2.

41 Note 8, at 41.

42 Note 8, at 41.

43 Note 8, at 1.

44 Submission by Education Queensland, at 1.

45 Submission by Department of State Development, at 1.

46 For example, n 44, at 3.

stated in terms which expressly cover situations where constituents communicate with members of Parliament on constituency matters, and where disclosers communicate with members on matters of public concern.

A number of submissions expressed concerns about the wider implications of extending parliamentary privilege to such communications. A key concern was to ensure adequate safeguards against abuse of absolute privilege.

Members of the Assembly who responded to this issue in the members' survey generally supported additional protection being afforded to members of the community who disclose information to members, for legitimate purposes, in connection with members' parliamentary duties. In particular, members supported parliamentary communications to ministers being afforded additional protection (particularly in the form of parliamentary privilege).

Members responding to the survey also highlighted instances in the performance of their parliamentary duties where they had felt vulnerable in the past due to a lack of adequate protection, at law, outside the parliamentary chamber.

The wide protection afforded by absolute parliamentary privilege was raised in discussions with members and officials of other parliaments. The nature of the protection was also considered at length at the committee's roundtable discussion forum, at which Professor Gerard Carney noted that parliamentary privilege affords a very wide immunity which may not be required to adequately protect communications outside the proceedings in Parliament from liability for defamation.[47] Professor Carney pointed to the extraordinary effects of absolute parliamentary privilege, noting that a document is not only absolutely privileged in defamation proceedings; it is also absolutely privileged in relation to any legal proceedings whatsoever.[48]

A key rationale for affording parliamentary privilege to members' parliamentary communications with ministers outside Parliament was outlined by Mr John Logan SC during the committee's roundtable discussion forum. Mr Logan stated—

> *… To my way of thinking, one has to regard that sort of activity [writing letters on behalf of a constituent] as a substitute … for asking a question [in parliament] … in the sense that in our modern democracy this is what people expect of their MPs. It is a way of making our system work—keeping everyone honest, if you like, or at least making sure that their communication lines are open and red tape is cut as far as it can be. So I regard a member's letter on behalf of a constituent—and I mean by 'constituent' not just an elector but a corporate citizen as well—in effect as a substitute for asking a question in parliament. To my way of thinking in terms of rationale, if a privilege is to be afforded to someone who stands up [in parliament] … and asks a question in terms of advancement of democracy, there is the same rationale behind writing a letter which could equally well, were there time to do it, be the subject of a question.*[49]

A further ground for affording a higher level of immunity to members' communications was summarised during the discussion forum by Mr Tony Morris QC, who commented:

> *… the parliament is much more than a legislature. It is that, but it is a lot more. … Chief Justice Denman called it the grand inquest of the nation, and that is what it is … We do not just have separation of powers; we also have responsible government, which means that the government of the day is answerable to members of the House and we have a system of privileges designed to ensure that every parliamentarian has the right to investigate, to examine, and to inquire into any*

47 Professor Gerard Carney, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 12.

48 Note 47.

49 Mr John Logan SC, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 6.

> *issue of interest to any member of the community concerning the good government of our community. If you start off on that footing—that parliament is more than just a law-maker; that it is that grand inquest of the nation—then it seems to me that the answer to some of these questions becomes almost self-evident. Of course, parliamentarians have to have the privilege to obtain information and to communicate information without it being used against them. … They are here to investigate problems in our community and sort them out. … it becomes quite self-evident that on issues like freedom of information, protection and parliamentary privilege the privilege should be absolute with communications made by parliamentarians in the course of their duty.*[50]

During the discussion forum, the (now) Clerk of the Parliament, Mr Neil Laurie, raised with the committee the changing nature of members' parliamentary duties outside the Legislative Assembly chamber. Mr Laurie stated—

> *… the fundamental role and duties of members of parliament have changed and their duties have changed to become almost mini Ombudsmen … but the law existing from 1688 has not necessarily changed. It is an issue in that the duties of a member have changed and so therefore must the law. There is a legal dimension to it and there is an ethical dimension to it. The ethical dimension is that the law should encourage members to behave in the most ethical manner. Currently, the law is encouraging quite the opposite, because it is encouraging members to raise matters in the House in a public forum—perhaps damaging its reputation …*[51]

2.3.6 MEPPC position

The committee considered at length the purpose of, and need for, additional protections for parliamentary communications that fall outside the definition of 'proceedings in the Assembly' and concluded that there are sufficient public interest reasons to justify immunity from defamation being provided to such communications.

The committee believes that additional protection will enhance the democratic process in Queensland by supporting members of the community (including constituents) in the exercise of their right to seek assistance from their elected representatives on constituency matters. It will also support members in their parliamentary communications with ministers, departments and other entities.

The confidentiality of members of the community who provide information to members of Parliament about matters of public concern will also be preserved with adequate immunity. This will ensure the free flow of information from members of the community to parliamentarians about matters of significant public concern.

Adequate immunity will also promote high ethical standards in the Queensland Parliament by ensuring that constituents' confidentiality is preserved. Members would be supported where they discharge their parliamentary duties on behalf of constituents outside the public forum of Parliament in situations where the public disclosure of constituents' representations is not the most ethical course to take.

The committee considered a number of measures that could achieve an appropriate level of immunity and confidentiality. In view of the difficulty these matters have caused in the past, and the desirability of a comprehensive system of protections,[52] the committee concluded that proactive legislative measures to provide the necessary protection were justified.

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50 Note 15.

51 Mr Neil Laurie, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 17.

52 Note 51; n 47, at 20.

One way to provide immunity from defamation is by extending parliamentary privilege to communications; for example by including them within the statutory definition of 'proceedings in the Assembly'. The committee considered at length the advantages and disadvantages, and the possible unintended consequences, of extending parliamentary privilege.

A significant disadvantage of extending such a powerful and all-embracing immunity to members' communications is the possibility that the immunity could be used by unscrupulous persons to bring false information before a member of the Assembly with the specific intention of improperly attracting immunity. Parliamentary privilege would mean that the communication could not be used in any court proceedings against the person.[53]

The committee believes that such a possibility—no matter how slight—is significant enough to outweigh the public interest benefits of extending parliamentary privilege.

The committee believes also that including such communications within the statutory definition of 'proceedings in the Assembly' would afford a far wider protection to the communications in question than is either needed or justified at this time.

In considering whether or not to extend parliamentary privilege, the committee was also persuaded by the view that it is simply not practical to continue to include ever more parliamentary material within the meaning of 'proceedings in Parliament'.[54]

The committee concluded, therefore, that while there is sufficient justification for additional immunity for communications in relation to members' parliamentary duties, there is insufficient justification to extend parliamentary privilege to such communications—either by including the communications within the definition of 'proceedings in the Assembly' under s 9 of the *Parliament of Queensland Act*, or by enacting a separate legislative provision to provide privilege to the communications.

Committee recommendation 1

Protection under parliamentary privilege and the definition of 'proceedings in the Assembly' contained within the *Parliament of Queensland Act 2001* should not be extended beyond that which is currently provided to communications to members, members' representations to government and information provided to members.

Evidence before the committee clearly supports the need for some form of additional protection that is complementary to the current law, to be provided to communications to members, members' representations to government and information provided to members. The deterrent effect of possible defamation actions against members of the community and parliamentarians, both threatened and taken, arising from the discharge of members' parliamentary duties justifies an appropriate protection from such proceedings.[55]

An appropriate level of protection would support and encourage full and frank disclosures to and by members of Parliament. It would also ensure the free and unimpeded exercise by Queenslanders of their right to communicate on matters of public concern with members of the Assembly, in the knowledge that their confidentiality will be preserved.

53 Ms Anita Phillips MP, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 12.

54 Note 51; n 15, at 21.

55 See, for example, Ms Carolyn Male MP, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 16-17; Mr Lawrence Springborg MP, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 19.

The committee concluded that absolute immunity from defamation proceedings for certain communications that occur outside Parliament in respect of members' parliamentary duties is justified on public interest grounds.

The committee notes that any higher level of protection than currently exists against defamation proceedings has the potential to affect the rights and liberties of individuals. Therefore, the committee concluded that any complementary protection should be limited only to that which is absolutely necessary. The immunity should also be clear and unambiguous.

The committee concluded that a system of protections should be enacted, through a stand-alone 'package' of protections and immunities contained within the *Parliament of Queensland Act* rather than being contained within various statutes that deal with evidence, public interest disclosures and defamation.

The immunity should continue to apply to a relevant communication notwithstanding that the member of the Legislative Assembly ceases to be a member.

Committee recommendation 2

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide complementary immunity at law from proceedings for defamation for communications to members, members' representations to government and information provided to members in relation to members' parliamentary duties.

2.4 PREVENTING ABUSE OF IMMUNITY

The right of members of the community to communicate with parliamentarians in the free and unrestricted exercise of their democratic right carries with it a responsibility not to abuse that right. Any legislative protection in favour of persons who provide information confidentially to members of Parliament must, therefore, include safeguards against possible abuse.[56]

The need to guard against possible abuse of a protection is recognised in legislation such as the *Whistleblowers Protection Act 1994*. It is an offence, for example, under section 56 of the act for a person to intentionally make false public interest disclosures. Penalties of up to two years imprisonment are provided for intentionally making such statements with the intention of them being acted upon as a public interest disclosure.

2.4.1 Safeguards against abuse

Submissions to the committee stressed the need to ensure that the potential for misuse of any additional protection is minimised.[57] Submissions also pointed out that an appropriate mechanism for dealing with the provision of deliberately false information to a member should be included in any additional measure. It was suggested, for example, that immunity should not be afforded to documents or communications that contain information that a person knows to be false, misleading or deliberately incomplete.

There were mixed views in submissions as to whether the provision of false, mischievous or malicious information to a member should be treated as a contempt of Parliament,[58] or if some other form of

56 Submission by Mr Tony Morris QC, at 11.
57 For example, n 56, at 13.
58 See for example, n 44, at 3; n 45, at 3.

sanction or safeguard was more appropriate. A number of submissions suggested that a person making a disclosure to a member of Parliament should have reasonable grounds for believing that any information they provide to the member relating to a matter of public concern is substantially true.

The overwhelming majority of members of the Legislative Assembly who responded to the committee's survey on this issue also believed that the provision of false or mischievous information to a member, by a discloser, should attract an appropriate sanction. There was also some support for this type of misuse—when carried out with the intention of deliberately misleading a member, or with the intention of interfering with the discharge by a member of their parliamentary duties—to be treated as a contempt of Parliament.

During the roundtable discussion forum, Professor Charles Sampford raised a number of issues regarding the reinforcement of the institution of Parliament and the processes that might be adopted to ensure that any additional protections were not abused.[59] Professor Sampford commented—

> *The way that I see this is that parliament is the peak integrity institution of our integrity system. It is something that we often ignore. … It is really important that that be recognised.*
>
> *…when somebody comes with a query or a problem or a complaint to a member of parliament: what process do we want the MP to follow? What damage would happen if they do not follow that process? What negative consequences, if any, should be imposed upon the complainant or the MP if they do not follow the process?*[60]

Concern was also expressed about possible conflicts between any additional immunity and existing statutory confidentiality or secrecy provisions. The Department of Industrial Relations' submission summarised the concern as follows—

> *… the existing set of obligations upon public service employees in relation to non-disclosure of official information should not be diluted by possible changes to rules of privilege between Members of Parliament and their constituents and/ or informants.*
>
> *Should the Inquiry conclude that it is appropriate to extend the protection of "proceedings in Parliament" or provide some other form of absolute privilege to communications between Members of Parliament and constituents and/or informants, consideration should be given to making it subject to provisions such as those contained in the Public Sector Ethics Act 1994 and clauses in codes of conduct pertaining to disclosure of official information.*[61]

2.4.2 MEPPC position

The committee gave detailed consideration to the scope of the proposed new immunity and to issues raised by the Department of Industrial Relations and others concerning the dilution of existing non-disclosure obligations on public sector employees. The committee concluded that there are valid public interest grounds for preserving the current statutory confidentiality and secrecy obligations.

Committee recommendation 3

The immunity in Recommendation 2 above should not override current statutory secrecy or confidentiality obligations.

While instances of abuse of specific immunities may be relatively uncommon, the committee acknowledges the concerns that exist about possible misuse. The committee accepts the need for an appropriate deterrent to ensure that any immunity is not abused.

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59 Professor Charles Sampford, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 7-9.

60 Note 59, at 8.

61 Submission by the Department of Industrial Relations, at 3.

The committee considered the practicalities of imposing a specific monetary or other penalty on members of the community or members of the Legislative Assembly who misuse the proposed immunity. The committee believes, however, that it would more appropriate for the immunity to not apply where there is a deliberate breach of the statutory conditions attaching to the immunity, such as by publishing matter that is knowingly false. In circumstances of misuse, the person concerned would then be dealt with under the defamation law.

Committee recommendation 4

The immunity in Recommendation 2 above should attach only to relevant communications that are not knowingly false.

In circumstances where an alleged abuse might be claimed against a member of the Legislative Assembly, the matter should be dealt with by the Assembly. This is in keeping with the sovereignty of Parliament, and Parliament's jurisdiction over the conduct of its members. The internal system of self-regulation by the Legislative Assembly is well-established under the *Parliament of Queensland Act* and the *Standing Rules and Orders* adopted by the Assembly. Evidence indicates that the current regime governing the conduct of members is working well.

The Parliament has established the Members' Ethics and Parliamentary Privileges Committee with responsibilities in relation to the ethical conduct of members and Parliament's powers, rights and immunities. Under procedures adopted by the Legislative Assembly on 8 April 2001, the MEPPC considers matters of privilege and allegations of contempt referred to it by the House or the Speaker.

Should an abuse of the proposed immunity satisfy the statutory elements of a contempt set out in s 37 of the *Parliament of Queensland Act*, it would be open to the Assembly to treat the matter as a contempt of the Assembly.

Committee recommendation 5

Where the essential elements of a contempt of the Legislative Assembly (set out in s 37 of the *Parliament of Queensland Act 2001*) are met, the Assembly may treat as a contempt of the Assembly publishing a matter to a member asking the member to take a legitimate action [as defined in the Bill] in relation to the matter if the person publishing the matter knows the matter is false or misleading in a material particular.

The committee also believes that, as an additional safeguard against possible abuse, the immunity should apply to a communication only until the communication is made public (beyond its legitimate purpose under the act) by the member of the community, the member of the Assembly or by another person, or until it is published under the authority of the Legislative Assembly. For example, the immunity should not apply where a member of the community, after obtaining a member's assistance on a constituency matter, circumvents the process by publishing relevant communications about the matter to another person.

The Legislative Assembly has adopted a number of voluntary restrictions on its own freedom of speech in the public interest.[62] A similar voluntary restriction could be effected in relation to the disclosure in the Legislative Assembly (without the consent of the member concerned or the House) of

[62] For example, following a recommendation of the MEPPC, the Legislative Assembly adopted sessional orders that place restrictions on members asking questions or tabling documents in the Legislative Assembly that would identify, or is likely to lead to the identification of, a child the subject of either the *Child Protection Act 1999* or the *Juvenile Justice Act 1992*.

constituency matters, to ensure that constituency representations are not disclosed in the House by anyone other than the member or with the authority of the House. The committee believes that an appropriate standing order could deal with such disclosures.

Committee recommendation 6

The immunity in Recommendation 2 above should attach to a relevant communication only from the time it is provided in the first instance to a member of the Legislative Assembly in connection with the member's parliamentary duties until it is published in the public domain, made public by the member concerned or authorised for publication by the Legislative Assembly. The Standing Orders Committee of the Legislative Assembly should consider adopting the following new standing order—

Disclosure of constituency representations

Members' constituency representations which have not been reported to the House by the member making the representation shall not be referred to in the House, unless authorised by the member or the House.

2.5 PRIVILEGE AND THE EXECUTION OF SEARCH WARRANTS

In examining the protection of constituency communications, the committee looked at other issues where the immunity of a communication might be impinged upon. One such area is in the execution of search warrants on a member's office.

In the course of their parliamentary roles (for example, as members of parliamentary committees) members often hold communications in their offices that clearly fall within the statutory definition of 'proceedings in the Assembly' and which are subject to absolute parliamentary privilege. The use in court proceedings of documents to which parliamentary privilege attaches would be a clear infringement of the powers, rights and immunities of the Assembly.

During the course of executing a search warrant on a member's office, vast amounts of material may be seized under the warrant—some of which may be immune from seizure because it is subject to parliamentary privilege.

While there has been no specific difficulty in this regard for the Queensland Parliament, it has been an issue at the federal level. One recent incident is dealt with in a report by the Senate Committee of Privileges.[63] In its report, the committee observed—

> *It appears to be the current custom of some police when executing search warrants to sweep up every piece of information in an office and then spend weeks, months or years examining it to determine whether it has any relevance to the alleged offence. It may be that this is seen as an "easy way out" of the problem created by the vast amount of information which can be stored in a computer. …*
>
> *In respect of material which may be subject to a claim of parliamentary privilege, the Committee of Privileges has for some years advocated that appropriate protocols be developed between the Presiding Officers and law enforcement authorities to provide agreed procedures for the execution of search warrants in senators' and members' offices.*[64]

Under the established practices of the Legislative Assembly, the Speaker's permission would be obtained as a matter of courtesy before executing a search warrant on a member's Parliament House

63 Senate Committee of Privileges, *114th Report, Execution of Search Warrants in Senators' Offices—Senator Harris: Matter arising from the 105th report of the Committee of Privileges*, Senate Printing Unit, Canberra, 2003.

64 Note 63, at 9.

office.[65] This is a necessary protocol to minimise any potential disruption to the proceedings of the Assembly rather than to provide members with special concessions.

There are, however, no protocols in place concerning the execution of search warrants on members' electorate offices that could assist members and their staff in complying with the terms of a legitimate search warrant whilst at the same time dealing with any parliamentary privilege issues.[66]

2.5.1 Claims of privilege

Submissions to the committee that commented on this issue stressed that members are not—nor should they be—exempt from the execution of legitimate search warrants by the police on their electorate or Parliament House offices.

As noted by the Honourable Alan Demack AO, Queensland Integrity Commissioner, in his submission to the committee—

> *… Search warrants are an essential mechanism for allowing parties in litigation to place relevant evidence before the Courts. To restrict the use of search warrants will have a significant effect upon the operation of the Courts. Similarly, search warrants should not be used to impede the business of the House, and its committees and inquiries.*[67]

The majority of members responding to the committee's survey believed that the current procedures for the execution of search warrants and the seizure of documents do not have sufficient regard to the powers, rights and immunities of the Assembly.

Concern was expressed that potential clearly exists for material that is unrelated to a warrant—including material that is protected by parliamentary privilege—to be seized, and for Parliament's powers, rights and immunities to be breached.

2.5.2 MEPPC position

There is no direct evidence before the committee to suggest that the execution of search warrants on the offices of members of the Legislative Assembly is currently a problem. The potential exists, however, for the proceedings of the Assembly, and the performance by members of their parliamentary duties, to be impeded in circumstances where such warrants are executed.

The fact that there are no established protocols in place in relation to the execution of search warrants on members' offices places at risk the confidentiality of material that is immune from seizure.

It is apparent from anecdotal evidence that there is a lack of certainty within some electorate offices as to the appropriate procedures to be adopted in these circumstances, particularly with regard to identifying material that may be privileged. It may be that an independent assessor, with suitable expertise in the law of parliamentary powers, rights and immunities, could be engaged where necessary to identify material that is subject to parliamentary privilege and which is therefore outside the terms of a warrant.

The lack of protocols places members and their staff in a difficult position. The committee believes that the potential for problems to occur, coupled with the experience at the federal level in relation to the execution of search warrants, justifies the Legislative Assembly adopting a proactive approach to the matter. This should ensure that the integrity of the parliamentary process is preserved and that any

65 Note 1.
66 Note 1.
67 Submission by the Honourable Alan Demack AO, at 7.

material to which a claim of privilege attaches can be identified. Appropriate protocols, developed for the assistance of members and staff, parliamentary officers and law enforcement agencies, agreed by the Speaker and the relevant authorities, could achieve this aim. The committee believes that the type of protocols advocated by the Senate Committee of Privileges provide an appropriate model in this regard.[68]

Committee recommendation 7

The Premier, as the Minister responsible for the *Parliament of Queensland Act 2001*, should consult with the Speaker and relevant authorities about developing, for the Legislative Assembly's approval, protocols in relation to the execution of search warrants on the offices of members of the Assembly.

Committee recommendation 8

Protocols developed in accordance with Recommendation 7 above should include appropriate procedures for dealing with claims of parliamentary privilege for communications that are held in the offices of members and which are seized under warrant.

Committee recommendation 9

Protocols developed in accordance with Recommendation 7 above should affirm that, where parliamentary privilege is claimed or can reasonably be claimed in respect of communications seized under warrant from a member's office, the communications should be examined by an independent assessor; and that the Assembly may, by resolution, authorise the Speaker where necessary to commission an independent assessor to examine such communications to determine if they are exempt from the warrant by virtue of parliamentary privilege.

Committee recommendation 10

The Members' Ethics and Parliamentary Privileges Committee should be charged with responsibility for publishing, within four weeks of the protocols (developed in accordance with Recommendation 7 above) being adopted by the Legislative Assembly, explanatory material for the assistance of members of the Assembly and their staff in relation to the privileges of the Assembly and the execution of search warrants on members' offices.

[68] For example, see Senate Committee of Privileges, *75th Report, Execution of search warrants in senators' offices*, Senate Printing Unit, Canberra, 1999, at Appendix C.

3. LEGAL ASSISTANCE

3.1 PARLIAMENTARY PRIVILEGE AND COURT PROCESSES

Legal actions such as those identified in the committee's issues paper,[69] and referred to in paragraph 2.3.2 above, have the potential to significantly impede the parliamentary process.

Where legal actions arise from members of the Legislative Assembly discharging their parliamentary duties, members may be forced into the uncertainty (and the inevitable distraction from their parliamentary duties) of individually—and at personal cost—defending the powers, rights and immunities of the Parliament. While those powers, rights and immunities attach collectively to the Parliament, its committees and members, the onus is generally on individuals to defend such legal actions. Australian examples show there is a significant cost in doing so.

3.1.1 Defending the integrity of parliamentary processes

A number of jurisdictions have taken steps for Parliament to intervene in proceedings that involve parliamentary privilege. For example, the Commonwealth Senate authorised the President of the Senate to engage counsel, if necessary, to appear in court as *amicus curiae*[70] to deal with matters involving the powers, rights and immunities of the Parliament.

The House of Representatives Standing Committee of Privileges has also recommended that—

> *At the discretion of the Speaker, the House may intervene to assert the protection of parliamentary privilege in court proceedings in which the records and correspondence of Members may reasonably be argued to fall within the definition of 'proceedings in Parliament' as contained in subsection 16(2) of the Parliamentary Privileges Act 1987.*[71]

In New South Wales, public officers, ministers and members are covered for ex gratia legal assistance.[72] A policy for the provision of ex gratia assistance for legal representation for members of the Legislative Assembly was put in place in 2001. As noted in the submission by the Clerk of the New South Wales Legislative Assembly, Mr Russell Grove—

> *The guiding principle behind the policy is that a member should be assisted in some way when legal proceedings have arisen as a consequence of the member undertaking his or her official duties.*
>
> *… It should be noted that legal representation will be granted only in proceedings that have not been initiated by a member. Except with the exception of an apprehended violence order (AVO) application where the member fears for his or her safety arising from alleged threats or other forms of harassment are genuine and reasonable.*[73]

In Queensland, public officers are also provided with access to legal assistance in relation to the performance of their duties. For example, legal assistance is available to police officers, staff members or recruits under the *Police Service Administration Act 1990*. Section 10.7(1) of the *Police Service Administration Act* provides that—

> *The commissioner may provide legal representation on behalf of any officer, staff member or recruit against whom any action, claim or demand or proceeding in respect of an offence is*

69 Note 3, at 7-9.

70 Resolution agreed to by the Senate on 4 September 2000, *Journals of the Senate*, p 3192, cited in Senate Committee of Privileges, *102nd Report*, *Counsel to the Senate*, Senate Printing Unit, Canberra, 2002, at 1.

71 Note 8, at 1.

72 Note 40, at 6.

73 Note 40.

> *brought or made otherwise than by or on behalf of the Crown in any of its capacities on account of any action done or omission made by the officer, staff member or recruit acting, or purporting to act, in the execution of duty.*

The majority of members responding to the committee's survey on this question believed that the personal cost of legal proceedings has the capacity to deter members of Parliament from pursuing matters fearlessly on behalf of their constituents. It was stressed to the committee that members of Parliament need to be able to pursue their parliamentary duties without fear of legal proceedings for making representations on behalf of their constituents.

There was also strong support in submissions for some form of legal assistance to be provided to members who are forced to defend the integrity of the parliamentary processes in legal proceedings.

The submission by the Department of State Development raised the issue of criteria for determining whether such assistance should be provided. The department stated—

> *Generally, it would be appropriate for all attacks on the integrity of parliamentary process to be defended from public funds. However, there may be rare instances where public funding is not justified. … Such a decision could be determined by the Parliament on a case by case basis.*[74]

The committee sought the advice of the Premier, the Honourable Peter Beattie MP, regarding legal assistance available to ministers and Crown employees. Material provided to the committee indicates that within strict guidelines legal assistance may be provided by the State to ministers and parliamentary secretaries in matters that relate to their ministerial duties.

The Premier advised the committee that guidelines in respect of legal assistance for Crown employees are under review. It appears, however, that subject to strict guidelines, officers who have diligently and conscientiously endeavoured to carry out their duties would be indemnified.

A number of members of the Assembly also indicated that there is a need to provide guidance to members regarding the use of confidential material provided to them, and to constituents regarding the implications of publishing defamatory matter in their communications with parliamentarians.

3.1.2 MEPPC position

Backbench members of the Legislative Assembly are disadvantaged in regard to access to legal assistance. There is clearly a public interest justification for providing access to legal assistance in connection with matters arising from the performance of members' parliamentary duties. Members should be in a position to defend the powers, rights and immunities of Parliament when required, and also to ensure that the confidentiality of communications in relation to the performance of their parliamentary duties on behalf of members of the community is preserved, and the parliamentary processes are not impeded.

In respect of the proposed immunity in Recommendation 2 above, legal representation should be available to all members of the Legislative Assembly against whom an action, claim or demand, or a proceeding, is taken in respect of the proposed immunity.

Similarly, where a member of the Assembly is forced to personally defend the collective powers, rights and immunities of Parliament, or the integrity of the parliamentary processes, the Parliament should provide that member with access to legal assistance. Such assistance could be in the form of direct legal services to the member, a financial contribution to enable the member to engage their own legal services, or other assistance or advice deemed appropriate in the circumstances.

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[74] Note 45, at 3.

Legal assistance should be a statutory entitlement for members of the Legislative Assembly, as it is with public officers.

Assistance should only apply in connection with a hearing or proceeding, an appeal or a damages claim commenced or threatened against a member. It should apply—

- only in respect of members discharging their parliamentary duties; and
- only where the member concerned is subject to proceedings arising from—
  - a communication falling within the proposed immunity under Recommendation 2 above; or
  - a matter involving the powers, rights and immunities of the Legislative Assembly (parliamentary privilege).

Assistance should not be provided to enable members to initiate, or progress, defamation or other proceedings against third parties.

Committee recommendation 11

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide legal assistance for any member of the Legislative Assembly against whom proceedings are taken or threatened in respect of (a) the immunity established under the draft Bill, or (b) a proceeding involving the powers, rights and immunities of the Assembly, its committees and members.

The committee also believes that all applications for legal assistance should be made through the Speaker as custodian of the powers, rights and immunities of the Legislative Assembly. The Speaker should have the authority to decide, after consideration of the circumstances giving rise to the proceedings, the type and amount of assistance to be provided, and the conditions under which it should be provided.

Given the very few occasions in the past where the Speaker has had cause to intervene in matters before the courts to assert the powers, rights and immunities of the Legislative Assembly, it is unlikely that the proposal will involve an unreasonable cost.

Committee recommendation 12

The assistance in accordance with Recommendation 11 above should be in the form of legal advice, legal representation, or financial assistance to privately obtain such legal advice or representation, the type and amount of which should be at the discretion of the Speaker having regard to any relevant guidelines adopted by the Legislative Assembly.

The Members' Ethics and Parliamentary Privileges Committee is the appropriate parliamentary body to develop—in consultation with the Speaker, for the approval of the Legislative Assembly—guidelines to assist the Speaker in deciding whether a particular circumstance meets the required criteria for legal assistance under the draft Bill.

Committee recommendation 13

The Members' Ethics and Parliamentary Privileges Committee should be charged with responsibility for publishing, within four weeks of the enactment of the proposed Parliament of Queensland (Constituency Communications) Amendment Bill 2003, for the Legislative Assembly's approval, guidelines to assist the Speaker in determining whether a submission for assistance under Recommendation 11 above satisfies the criteria established under section 63I of the draft Bill.

4. FREEDOM OF INFORMATION AND PRIVACY

4.1 CONFIDENTIALITY FOR CONSTITUENCY COMMUNICATIONS

The immunity conferred on member-constituency communications by Recommendation 2 above does not completely allay concerns held by the committee about protecting such communications. The immunity confers protection against defamation; however, of itself, it does not ensure *confidentiality* of communications. It is possible that such communications could be accessed by a third party under the *Freedom of Information Act 1992* (the FOI Act), and while a third party might be limited in the action they could take upon receiving material, the confidentiality of the communication would be lost.

This raises concerns about whether freedom of information legislation needs to be amended to protect constituency communications. Related to the confidentiality of communications are issues about privacy.

4.2 CURRENT PROVISIONS IN THE *FREEDOM OF INFORMATION ACT 1992*

Currently, material held by a member of Parliament is exempt from the operation of the FOI Act by section 11(1)(b) of that act. However, where a member of Parliament corresponds with a minister, department or agency about a constituency matter, the correspondence and any reply might be amenable to the FOI Act and therefore could be disclosed to a third party under an FOI application. The Information Commissioner held this to be the case in *Re A Member of the Legislative Assembly and Queensland Corrective Services Commission.*[75]

In conducting this inquiry, the committee examined the issue of whether there should be some form of extension to the FOI exemption in s 11(1)(b) to explicitly protect communications about constituency matters, no matter who possesses the communications that contain information about the matter.

4.3 PARLIAMENTARY REVIEW OF FREEDOM OF INFORMATION

In this regard, the committee notes the comments of the Legal, Constitutional and Administrative Review Committee (LCARC) of the Queensland Parliament in its *Report No. 32, Freedom of Information in Queensland.*[76] In considering specific exemptions under the FOI Act, the LCARC looked at the issue of constituency correspondence. The LCARC outlined the position that had been put to the LCARC in correspondence by the MEPPC. The LCARC noted that the MEPPC supported a separate exemption under the FOI Act in respect of communications between members and ministers, departments and agencies concerning constituency matters, for the following reasons—

- *It would clarify the law as to whether constituency correspondence in the hands of an 'agency' is subject to disclosure under the Act.*
- *It is essential that MPs are able to perform their representative and scrutiny role in a frank and fearless manner and that they are not deterred from doing so in any way. Currently, under the Act, there is a distinct possibility that the representative and scrutiny role of members could be compromised by a minister or agency releasing constituency correspondence to a third party.*
- *Many issues raised by constituents are highly sensitive but they may require that confidential information be provided to ministers and agencies in an effort to resolve a particular issue. Constituents believe and expect that their communications with an MP are confidential and will*

[75] (1998) 4 QAR 99.

[76] Legal, Constitutional and Administrative Review Committee, *Report No. 32, Freedom of Information in Queensland*, Goprint, Brisbane, 2001.

be treated confidentially both within the members' electorate office and by the minister or agency to whom the matter might be referred for action. A constituent's right to confidentiality, privacy and fairness could be compromised by a third party obtaining access to confidential constituency information via a minister or agency.

- *Individual MPs are in the best position to determine the appropriate release of their confidential constituency correspondence with ministers or agencies.*
- *Currently, there is an inconsistent approach to the handling of constituency correspondence – the same piece of correspondence will be exempt when held in members' electorate offices but it is prima facie accessible when sent to a minister or agency for further action.*
- *MPs should be accountable for their actions. However, MPs also have an obligation towards the welfare and confidentiality of their constituents which should be of the highest priority. There is currently the prospect of more trauma being caused to individuals by personal concerns being made available to the public under the Act than would be caused by an inability to obtain access to confidential information under the Act.*[77]

4.3.1 LCARC's recommendation

The LCARC did not support the exemption proposed by the MEPPC, concluding that the exemption was contrary to the FOI principle of openness advocated by LCARC in its report.[78] The LCARC also argued that other sections of the FOI Act could be invoked to protect member-constituency communications, including—

- Section 46(1)(b) which provides that matter is exempt if '*it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.*'
- Section 44(1) which provides that matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.
- Section 51(1) which allows an agency or minister to give access to a document that contains matter the disclosure of which may reasonably be expected to be of substantial concern to a government, agency or person **only if** the agency or minister has taken such steps as are reasonably practicable to obtain the views of the government, agency or person concerned about whether or not the matter is exempt matter. The LCARC noted that there had been inconsistent application of this section and recommended that guidelines be issued to ensure consistent application of the section.

The LCARC also stated—

> *Members need to be circumspect in what they put in their correspondence and the material they attach to their correspondence. They also need to explain to constituents at the outset the possibility of material relating to their matter being subject to disclosure under FOI legislation.*[79]

The LCARC noted that the issues would probably be canvassed by the MEPPC in this report and recommended that no amendment be made to the FOI Act but that the matter should be revisited once the MEPPC had reported.

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77 Note 76, at 231.
78 Note 76, at 231.
79 Note 76, at 232.

4.3.2 MEPPC position

The committee notes the arguments put forward by LCARC. However, the MEPPC considers that dealing with constituency matters is a vital part of the role of a member of Parliament and that, in seeking to have issues resolved for constituents, confidentiality should not be circumscribed by FOI legislation. The committee considers that—

- members should be able to preserve the confidentiality of constituency matters;
- the current exemptions in the FOI Act which might apply take the decision out of the hands of members;
- it is an anomaly that communications are exempt from FOI if they are held by a member but accessible once they are in the possession of an agency, minister or department.

Throughout this report, the committee has based its recommendations on the view that an inherent part of a member's parliamentary duties is to deal with constituency matters and that members should be able to be deal with these matters in a free and fearless manner. In keeping with this view, the committee considers that correspondence about constituency matters should be exempt from access under FOI legislation.

It is also in keeping with the approach taken by the committee in this report that relevant material of a person who is no longer a member should be exempt from FOI access.

Further, it is in keeping with the committee's view that, where practicable, legislative provisions dealing with members of the Legislative Assembly should be contained within the *Parliament of Queensland Act 2001*.

Committee recommendation 14

The *Parliament of Queensland Act 2001* should be amended in the terms of the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 to provide that matter in a document of an agency or an official document of a minister within the meaning of the *Freedom of Information Act 1992* is exempt matter if it consists of information communicated to a member of the Legislative Assembly, or by or for a member or former member, seeking or taking a legitimate action in relation to the information, as provided under the draft Bill.

4.4 MEMBERS' CERTIFICATES

The committee has considered how the exemption recommended above will be applied in practice and noted that ministers are able to sign a certificate that certain matter is exempt matter under the FOI Act.

4.4.1 MEPPC position

The committee considers that it would be inappropriate for the communication in question to be referred to the Information Commissioner for his or her view as to whether it is exempt matter.

The committee considers that the matters being protected might be extremely sensitive and require the highest level of confidentiality. The committee concluded that the member (or former member) should be able to sign a conclusive certificate stating that the specified matter is exempt matter.

In taking this view, the committee considered the practical difficulties which might be encountered if a former member is deceased, unable to be located or is incapacitated. In such circumstances the

committee considered that the Speaker of the Parliament would be the appropriate person to sign the certificate.

Committee recommendation 15

A member of the Legislative Assembly, or former member, should be able to sign a conclusive certificate stating that specified matter is exempt matter for the purposes of the *Freedom of Information Act 1992*.

4.5 REVIEW PROCEDURE

In extending the FOI exemption to constituency communications, it is arguable the principles of openness underpinning the FOI Act may be encroached. To the extent that the exemption will affect constituency communications that pre-date the enactment of the exemption, the extension may technically impinge on fundamental legislative principles by affecting the rights of an individual to obtain access to government held information.

4.5.1 MEPPC position

The committee considers that the inconvenience caused to a third party by not being able to access constituency communication information is outweighed by the public interest in constituents being able to approach members of Parliament for assistance, knowing that the confidentiality of their representations will be preserved.

To ensure that conclusive certificates are only issued in appropriate circumstances, however, the committee considers that the provisions of the FOI Act relating to review of conclusive certificates issued by ministers should apply to the exemption recommended above. While the Information Commissioner cannot review a decision to issue a conclusive certificate, section 84 of the FOI Act allows the Information Commissioner to determine whether reasonable grounds exist for issuing a certificate. The section does allow the minister to confirm the certificate within 28 days of the Information Commissioner's decision but requires the minister to table in the Parliament information about the reasons the certificate was confirmed.

This section should apply to the issue of a conclusive certificate by a member of Parliament about constituency communication to provide an extra level of scrutiny of the member's decision to protect the communication.

Committee recommendation 16

Section 84 of the *Freedom of Information Act 1992* should apply to the issue of a conclusive certificate by a member of the Legislative Assembly.

4.6 INFORMATION PRIVACY STANDARDS AND PRINCIPLES

The committee examined whether constituency communications are appropriately dealt with in information privacy standards.

In September 2001, the Queensland Cabinet approved Information Standard No. 42, *Information Privacy* (IS42) and Information Standard No. 42A, *Information Privacy for the Queensland*

Department of Health, which establish an information privacy scheme for Queensland.[80] The scheme applies to all Queensland Government agencies and statutory bodies.[81]

The government's s privacy scheme, which is outlined in IS42, is an administrative regime.[82] It is based on the 11 Information Privacy Principles contained in the Commonwealth *Privacy Act 1988*[83] and is additional to statutory privacy requirements under legislation such as Queensland's *Child Protection Act 1991, Corrective Services Act 2000* and *Health Services Act 1991*.

The scheme does not apply to members of the Legislative Assembly per se in relation to their parliamentary duties. It is, however, relevant to members in the performance of their duties when members act on behalf of their constituents in representations to government.

Information Privacy Principle No. 11: *Limits on disclosure of personal information*, prescribes the circumstances in which personal information may be disclosed other than to the individual to whom the personal information relates.

Information Privacy Principle No. 11 allows an agency to disclose personal information about a person to someone acting on behalf of the person.[84] Members of the Legislative Assembly, in the performance of their parliamentary duties, often receive personal information from government about (or on behalf of) their constituents. Government officers who are going to provide information to members of the Legislative Assembly must be satisfied that the information is provided to someone with consent.[85]

4.6.1 Guidelines for release of personal information

Guidelines for agencies are currently being developed by the Department of Innovation and Information Economy to clarify the operation of IPP11 and the disclosure of personal information to members of Parliament, or their staff, acting on behalf of constituents. Where members of the Legislative Assembly or their staff make representations to an agency for information on behalf of a constituent, the questions for government officers are—

- to what extent does an officer need to be satisfied of the authority of a member to receive personal information about a constituent;[86] and
- what level of consent needs to be evidenced from a member seeking the information?[87]

4.6.2 The need for guidelines

The Minister for Innovation and Information Economy, the Honourable Paul Lucas MP, referred to the government's administrative privacy regime at the committee's roundtable discussion forum, stating that—

> *… we have to be careful that how the regime operates does not massively increase the inefficiencies of electorate offices. For example, if a member of parliament made an inquiry about someone on a housing list, would you have to get a written authority from them so you cannot take*

80 Department of Innovation and Information Economy, *Discussion Paper—Disclosure of Personal Information to Members of Parliament or their staff acting on behalf of constituents,* Queensland Government, Brisbane, 2003, at 3.
81 Note 80, at 4.
82 Note 80, at 4.
83 Note 80, at 4.
84 Note 80, at 5.
85 Note 80, at 5.
86 Note 80, at 5.
87 Note 80, at 5.

> *the inquiry over the phone? Do you have to say, 'Come in and fill out a form'? That would be the ultimate way of doing it and the purist way of doing it, but certainly the government will appreciate the views of this committee in terms of an appropriate way to proceed.*[88]

The Minister indicated at the discussion forum that he believed that, in light of the information privacy principles, the issue of consent needed to be addressed.[89] The Minister raised the potential for a member's position to be misused to access personal information about constituents for private gain.[90]

In addressing the discussion forum, the Minister stressed that there is no evidence of which he is aware that members have, in fact, accessed personal information about their constituents and used that information inappropriately. The Minister stated—

> *I cannot recall, though I stand to be corrected, any incident where a member of parliament has without authorisation sought information about a constituent in the capacity of a constituent and then published that without that that person's permission.*[91]

4.6.3 MEPPC position

The committee gave careful consideration to statutory privacy requirements operating in Queensland such as those under the *Child Protection Act 1999*, the *Corrective Services Act 2000* and the *Health Services Act 1991*. The committee also considered obligations on government officers and others under statutory requirements, and options for ensuring adequate protection for members of the community while at the same time ensuring that members are not impeded in their representations on behalf of constituents.

Following the recent enactment of Victorian privacy legislation, which expressly exempts members of the Victorian Parliament other than in their capacity as ministers or parliamentary secretaries from its application, the Scrutiny of Acts and Regulations Committee of the Victorian Parliament inquired into the matter and recommended a voluntary Privacy Code of Practice for Members of the Victorian Parliament.[92] The MEPPC discussed issues associated with the draft privacy code with the Presiding Officers and officials of the Victorian Parliament, and with Mr Nigel Waters, specialist consultant to the Scrutiny of Acts and Regulations Committee. To date, the code has not been adopted by Victoria's Legislative Assembly. The MEPPC considered whether a privacy code for members might have merit under Queensland's privacy regime.

Evidence before the committee substantiates the Minister's view that no member of the Legislative Assembly appears to have accessed constituents' personal information from departments or agencies without authority. There is also no evidence of which the committee is aware that members of the Assembly have improperly used constituents' personal information, either in the course of their parliamentary duties or for personal gain.

On the contrary, it is clear to the committee that members are very responsible in their use of constituents' personal information.

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88 The Honourable Paul Lucas MP, Roundtable Discussion Forum, Transcript of Proceedings, 21 October 2002, at 3.

89 Note 88, at 4.

90 The Minister described one hypothetical scenario where a member who wished to buy a public housing block of land could telephone the relevant government department and purport to act on behalf of a tenant in order to improperly obtain personal information. Note 88.

91 Note 88.

92 Scrutiny of Acts and Regulations Committee, *Final Report on a Privacy Code of Conduct for Members of the Victorian Parliament*, Legislative Assembly of Victoria, Melbourne, 2002.

The committee appreciates that guidelines may be of assistance to public officers liaising with members of the Assembly or members' staff in relation to the disclosure of constituents' personal information. There does not appear to be any compelling reason, however, for guidelines that would require members to proactively demonstrate—in any express form—that they act on behalf of their constituents, or that they have their constituents' consent for agencies to disclose their personal information to the member.

During the performance by members of their parliamentary duties, members of the community (including constituents) communicate with members in person at Parliament House, at members' electorate offices, at community functions, through a third party such as a legal representative or a family member, and by email, letter, fax and telephone.[93] Anecdotal evidence before the committee indicates that a significant proportion of these communications are verbal. Some constituents—often for valid reasons, such as concerns about their confidentiality—are disinclined to write letters about, or to fill in forms regarding, the sensitive or confidential matters of public or private concern that they raise with a member.

In its submission to the Minister for Innovation and Information Economy about the proposed guidelines, the committee concluded that guidelines requiring members of the Legislative Assembly to obtain express written authority (whether by letter or a privacy release form) to receive constituents' personal information from an agency, when acting on behalf of their constituents, would impact negatively on the performance by members of their parliamentary duties.

Members should have freedom to represent their constituents in the manner in which the member determines is most appropriate. Any requirement for members to provide copies of communications from their constituents to an agency before the agency released personal information about the member's constituents—other than as currently required at law—would be contrary to the committee's long-standing position regarding the confidentiality of constituency communications.

In certain circumstances, members may choose to provide a copy of their constituency communication to an agency. The committee believes, however, that individual members on a case by case basis are in the best position to make judgments about the appropriate release of their constituency communications.

The MEPPC also believe that members of the community, when seeking the assistance of their elected representatives, impliedly consent to members receiving from relevant agencies personal information on their behalf about the matter.

For the reasons outlined above, the committee concluded that there is no demonstrated need for guidelines relating to the disclosure of personal information to members or their staff acting on behalf of constituents to be binding on members of the Assembly and that mandatory guidelines have the capacity to compromise constituency confidentiality.

Committee recommendation 17

To preserve the confidentiality of constituents, members of the Assembly at their discretion should be able to subscribe (on a case by case basis) to any government privacy guidelines established for the disclosure of constituents' personal information to members. The onus should be on agencies to establish that the constituent has consented to the disclosure.

93 Note 80, at 6.

5. CONCLUSION

During its inquiry, the committee considered a range of legislative and non-legislative remedies aimed at achieving the broad policy objectives identified regarding communications outside Parliament by members of the community and others in the course of members' parliamentary duties. The committee believes that the legislative scheme proposed is the most appropriate in all the circumstances.

The committee arrived at this decision only after the most careful and detailed inquiry into a range of alternatives by which to achieve an appropriate level of protection. At all times, the committee was concerned to ensure that any the protection is limited to that which is necessary.

The committee considered alternative legislative measures such as possible amendments to Queensland's *Defamation Act 1889* and the *Whistleblowers Protection Act 1994*. However, the committee was persuaded in the face of all the evidence that an up to date and comprehensive system of protections is the most appropriate remedy to address the committee's concerns about the matters raised in this report.

A fragmented set of protections would not achieve all the policy objectives identified by the committee. Nor would it provide for all matters relating to the Legislative Assembly's powers, rights and immunities to be contained in the *Parliament of Queensland Act* thus ensuring that they are explicit, unambiguous and readily accessible to members of the community, members of the Assembly and others.

The measures recommended in this report will form a vital component of the Legislative Assembly's integrity system, which is also currently founded in the *Parliament of Queensland Act*.

The committee believes that the system of protections recommended in the draft Parliament of Queensland (Constituency Communications) Amendment Bill 2003 represents a proactive and workable outcome, which addresses current uncertainty about the status of members' communications in regard to members' parliamentary duties outside the parliamentary chamber.

The committee is confident that the adoption of these measures will enhance the parliamentary and representative process in Queensland by ensuring that members of the community are adequately protected in their communications with members of the Legislative Assembly and by encouraging and supporting members to discharge their parliamentary duties in the most ethical manner possible.

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Queensland

PARLIAMENT OF QUEENSLAND (CONSTITUENCY COMMUNICATIONS) AMENDMENT BILL 2003

TABLE OF PROVISIONS

2003

A BILL

FOR

An Act to amend the *Parliament of Queensland Act 2001*, and for other purposes

The Parliament of Queensland enacts—

PART 1—PRELIMINARY

Clause 1 Short title

This Act may be cited as the *Parliament of Queensland (Constituency Communications) Amendment Act 2003*.

PART 2—AMENDMENT OF PARLIAMENT OF QUEENSLAND ACT 2001

Clause 2 Act amended in pt 2

This part amends the *Parliament of Queensland Act 2001*.

Clause 3 Amendment of s 37 (Meaning of "contempt" of the Assembly)

Section 37, examples of contempt—

insert—

'11. Publishing a matter to a member asking the member to take a legitimate action as defined under section 63A in relation to the matter if the person publishing the matter knows the matter is false or misleading in a material particular.'.

Clause 4 Insertion of new ch 3, pt 6

Chapter 3—

insert—

'PART 6—PARTICULAR PERFORMANCE OF MEMBER'S PARLIAMENTARY DUTIES

'Division 1—Preliminary

'63A Definitions for pt 6

'In this part—

"defamation" see the *Defamation Act 1889*, section 5.[1]

"defamatory matter" see the *Defamation Act 1889*, section 4.[2]

"delegate" of a member means—

(a) a person who is a member of the member's staff; or

(b) an officer or employee of the parliamentary service performing duties for the member.

"legitimate action" means an appropriate action to—

(a) investigate, remedy or redress some private wrong or grievance or some public wrong or grievance or to facilitate the investigation, remedy or redress of some private wrong or grievance or some public wrong or grievance; or

(b) refer for investigation, remedy or redress some private wrong or grievance or some public wrong or grievance.

"legitimate purpose" means for the purpose of seeking or taking a legitimate action.

"liability" for defamation means civil or criminal liability for defamation.

"misconduct" includes—

(a) corrupt conduct; and

(b) misconduct as defined under the *Crime and Misconduct Act 2001*.[3]

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1 A copy of the *Defamation Act 1889*, section 5 is set out in attachment 1.

2 A copy of the *Defamation Act 1889*, section 4 is set out in attachment 1.

3 A copy of the relevant provisions of the *Crime and Misconduct Act 2001* is set out in attachment 2.

"parliamentary duties" for a member does not include a duty as a Minister.

"publication" see the *Defamation Act 1889*, section 5.[4]

"public wrong or grievance" includes any of the following—

(a) misconduct;

(b) maladministration;

(c) serious and substantial waste of public money.

'63B Purpose of pt 6

'The purpose of this part is to facilitate the performance by members of their parliamentary duties, including by—

(a) protecting from liability for defamation those communicating with a member about an issue for a legitimate purpose and the member and anyone else officially communicating with others about the issue for a legitimate purpose; and

(b) exempting these communications from disclosure under the *Freedom of Information Act 1992*; and

(c) providing legal assistance for members and former members to defend particular proceedings.

'Division 2—Protection from liability for defamation

'63C Protection—publication to member or member's delegate

'A person does not incur any liability for defamation by publishing any defamatory matter to a member, or a member's delegate, if—

(a) the publication is made for a legitimate purpose; and

(b) the person has reasonable grounds for believing the defamatory matter is substantially true;[5] and

4 A copy of the *Defamation Act 1889*, section 5 is set out in attachment 1.

5 See section 37 (Meaning of "contempt" of the Assembly), examples of contempt, example 11.

(c) the manner and extent of the publication are not more than what is reasonably sufficient for the occasion; and

(d) for publication to a member's delegate, the person intends the publication to be referred to the member.

'63D Protection—publication by member

'**(1)** This section applies if a person publishes any defamatory matter to a member and the member considers the person intended the matter to be published to the member for a legitimate purpose.

'**(2)** The member does not incur any liability for defamation by publishing the defamatory matter to another person if—

(a) the member considers the other person, in the other person's official capacity, may be able to take a legitimate action in relation to the matter published; and

(b) the publication is stated to be made for the performance of the member's parliamentary duties and the member asks the other person to take a legitimate action in relation to the matter published; and

(c) the manner and extent of the publication are not more than what is reasonably sufficient for the occasion.

'**(3)** If it is clear on the face of a publication that it is published by a member as a member, then, for subsection (2)(b), the publication is taken to be stated to be made for the performance of the member's parliamentary duties.

Examples—

- a publication on the member's letterhead
- a publication by email that includes the member's parliamentary title.

'**(4)** If, after the defamatory matter is published to the member, the member becomes a former member, subsection (2) applies as if the former member were still a member.

'63E Protection—publication by member's delegate

'**(1)** If—

(a) a person publishes any defamatory matter to a member's delegate; and

(b) the member's delegate considers the person intended the matter to be referred to the member for a legitimate purpose;

the member's delegate does not incur any liability for defamation by the publication of the defamatory matter to the member.

'**(2)** Also, a member's delegate does not incur any liability for defamation by publishing any defamatory matter to another person in the other person's official capacity, if—

(a) the member's delegate has reasonable grounds for believing the defamatory matter was previously published to the member; and

(b) the publication by the member's delegate is stated to be made for the member to facilitate the performance of the member's parliamentary duties and the member's delegate asks the other person to take a legitimate action in relation to the matter published; and

(c) the member expressly authorises the publication by the member's delegate; and

(d) the manner and extent of the publication by the member's delegate are not more than what is reasonably sufficient for the occasion.

'63F Protection—publication by person for legitimate action

'**(1)** This section applies if—

(a) a person (including, for example, a member or a member's delegate), in the person's official capacity, publishes any defamatory matter to another person in the other person's official capacity (the **"protected person"**); and

(b) the publication is stated to be made for or to facilitate the performance of a member's parliamentary duties and the person asks the protected person to take a legitimate action in relation to the matter published.

'**(2)** The protected person does not incur any liability for defamation by publishing, in the protected person's official capacity, the defamatory matter to another person in the other person's official capacity, if—

(a) the protected person has reasonable grounds for believing the defamatory matter was originally published to a member who has taken a legitimate action in relation to the matter published; and

(b) the protected person considers the other person, in the other person's official capacity, may be able to take a legitimate action in relation to the matter published; and

(c) the publication by the protected person is stated to be made to facilitate the performance of a member's parliamentary duties and the protected person asks the other person to take a legitimate action in relation to the matter published; and

(d) the manner and extent of the publication by the protected person are not more than what is reasonably sufficient for the occasion.

'**(3)** If it is clear on the face of a publication that it is published by a member as a member, then, for subsection (1)—

(a) the member is taken to publish the matter in the member's official capacity; and

(b) the publication is taken to be stated to be made for the performance of the member's parliamentary duties.

Examples—

- publication on the member's letterhead
- publication by email that includes the member's parliamentary title.

'**(4)** This section applies even if the member to whom the defamatory matter was originally published is no longer a member when the matter is published to another person.

'**(5)** However, subsections (1)(b) and (2)(c) apply as if the reference in those provisions to a member's parliamentary duties included a reference to the parliamentary duties the former member would have if the former member were still a member.

'63G Division does not override secrecy or confidentiality obligation

'Nothing in this division overrides any obligation or restriction on a person under an Act to maintain secrecy or confidentiality in relation to the

disclosure of information if disclosure of the information by the person would be an offence or make the person liable to disciplinary action.

Example—

Nothing in this division overrides the restriction under the *Child Protection Act 1999*, section 186[6] on disclosure of the identity of the person who makes an official notification of suspicions a child has been, is being or is likely to be, harmed.

'Division 3—Exemption from FOI disclosure

'63H Exempt matter

'**(1)** Matter in a document of an agency or official document of a Minister within the meaning of the *Freedom of Information Act 1992* is exempt matter for that Act if it consists of information communicated to a member (a **"relevant person"**), or by or for a member or former member (also a **"relevant person"**), seeking or taking a legitimate action in relation to the information.

'**(2)** A certificate signed by the relevant person stating specified matter is exempt matter mentioned in subsection (1) (an **"exemption certificate"**) establishes that the specified matter is exempt matter under this section.

'**(3)** If the relevant person is unable to sign an exemption certificate because of the relevant person's death or incapacity or because of another reason the Speaker considers adequate, the Speaker may sign the exemption certificate.

'**(4)** The *Freedom of Information Act 1992*, section 84[7] applies in relation to an exemption certificate as if—

(a) the provisions mentioned in subsection (1) of that section included a reference to this section; and

(b) a reference in that section to the Minister were a reference to the person who signed the exemption certificate.

6 *Child Protection Act 1999*, section 186 (Confidentiality of notifiers of harm)

7 A copy of the *Freedom of Information Act 1992*, section 84 is set out in attachment 3.

'Division 4—Legal assistance

'63I Member or former member entitled to legal assistance

'**(1)** If the Speaker considers a relevant proceeding has been taken or threatened against a member or former member, the member or former member is entitled to legal assistance funded by the Assembly and parliamentary service in relation to the proceeding or threatened proceeding.

'**(2)** The type and amount of legal assistance provided to the member or former member is decided by the Speaker having regard to any guidelines adopted by the Legislative Assembly and published by the Members' Ethics and Parliamentary Privileges Committee.

Example—

The legal assistance may be in the form of direct legal services engaged by the Speaker or financial assistance to enable the member or former member to engage his or her own legal services.

'**(3)** In this section—

"relevant proceeding" against a member or former member means—

(a) a proceeding for defamation in relation to which the member or former member claims section 63D(2) applies; or

(b) a proceeding in relation to a matter involving the powers, rights or immunities of the Assembly and its committees and members.'.

Clause 5 Replacement of s 93 (Parliamentary powers, rights and immunities)

Section 93—

omit, insert—

'93 Parliamentary powers, rights and immunities

'**(1)** The committee's area of responsibility about parliamentary powers, rights and immunities includes—

(a) the powers, rights and immunities of the Assembly and its committees and members; and

(b) publishing and reviewing guidelines about—

(i) the procedure for obtaining legal assistance to which a member or former member is entitled in relation to a relevant proceeding taken or threatened against the member or former member; and

(ii) the type and amount of legal assistance to be provided to a member or former member.

'**(2)** In this section—

"relevant proceeding" see section 63I(3).[8]'.

Clause 6 Amendment of schedule (Dictionary)

Schedule—

insert—

' **"defamation"**, for chapter 3, part 6, see section 63A.

"defamatory matter", for chapter 3, part 6, see section 63A.

"delegate" of a member, for chapter 3, part 6, see section 63A.

"legitimate action", for chapter 3, part 6, see section 63A.

"legitimate purpose", for chapter 3, part 6, see section 63A.

"liability" for defamation, for chapter 3, part 6, see section 63A.

"misconduct", for chapter 3, part 6, see section 63A.

"parliamentary duties", for chapter 3, part 6, see section 63A.

"publication", for chapter 3, part 6, see section 63A.

"public wrong or grievance", for chapter 3, part 6, see section 63A.'.

8 Section 63I (Member or former member entitled to legal assistance)

PART 3—AMENDMENT OF FREEDOM OF INFORMATION ACT 1992

Clause 7 Act amended in pt 3

This part amends the *Freedom of Information Act 1992*.

Clause 8 Amendment of s 11 (Act not to apply to certain bodies etc.)

Section 11(1)(b), 'a member of the Legislative Assembly,'—

omit, insert—

'a member of the Legislative Assembly,[9]'.

9 See also the *Parliament of Queensland Act 2001*, section 63H (Exempt matter).

ATTACHMENT 1

PROVISIONS FROM THE DEFAMATION ACT 1889

footnotes 1, 2 and 4

4 Definition of "defamatory matter"

(1) Any imputation concerning any person, or any member of the person's family, whether living or dead, by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise the person, is called **"defamatory"**, and the matter of the imputation is called **"defamatory matter"**.

(2) An imputation may be expressed either directly or by insinuation or irony.

5 Meaning of "defamation" and "publication"

(1) Any person who, by spoken words or audible sounds, or by words intended to be read either by sight or touch, or by signs, signals, gestures, or visible representations, publishes any defamatory imputation concerning any person is said to defame that person.

Publication

(2) Publication is, in the case of spoken words or audible sounds, the speaking of such words or making of such sounds in the presence and hearing of any other person than the person defamed, and, in the case of signs, signals, or gestures, the making of such signs, signals, or gestures, so as to be seen or felt by, or otherwise come to the knowledge of, any person other than the person defamed, and, in the case of other defamatory matter, the exhibiting of it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by any other person than the person defamed.

ATTACHMENT 2

PROVISIONS FROM THE CRIME AND MISCONDUCT ACT 2001

footnote 3

Division 2—Official misconduct

14 Definitions for div 2

In this division—

"conduct" means—

(a) for a person, regardless of whether the person holds an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial performance of functions or exercise of powers of—

(i) a unit of public administration; or

(ii) any person holding an appointment; or

(b) for a person who holds or held an appointment—conduct, or a conspiracy or attempt to engage in conduct, of or by the person that is or involves—

(i) the performance of the person's functions or the exercise of the person's powers, as the holder of the appointment, in a way that is not honest or is not impartial; or

(ii) a breach of the trust placed in the person as the holder of the appointment; or

(iii) a misuse of information or material acquired in or in connection with the performance of the person's functions as the holder of the appointment, whether the misuse is for the person's benefit or the benefit of someone else.

"hold an appointment" means hold an appointment in a unit of public administration.

ATTACHMENT 2 (continued)

15 Meaning of "official misconduct"

"Official misconduct" is conduct that could, if proved, be—

(a) a criminal offence; or

(b) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or was the holder of an appointment.

16 Conduct happening over time, or at any time, may be official misconduct

(1) Conduct may be official misconduct even though—

(a) it happened before the commencement of this Act; or

(b) some or all of the effects or elements necessary to constitute official misconduct happened before the commencement of this Act; or

(c) a person involved in the conduct is no longer the holder of an appointment.

(2) Conduct engaged in by, or in relation to, a person at a time when the person is not the holder of an appointment may be official misconduct, if the person becomes the holder of an appointment.

17 Conduct outside Queensland may be official misconduct

Conduct may be official misconduct regardless of—

(a) where the conduct happens; or

(b) whether the law relevant to the conduct is a law of Queensland or of another jurisdiction.

18 Conspiracy or attempt to engage in conduct may be official misconduct

A conspiracy or an attempt to engage in conduct is not excluded from being official misconduct if, had the conspiracy or attempt been brought to

ATTACHMENT 2 (continued)

fruition by the taking of a further step, the further step could constitute or involve—

(a) an offence; or

(b) grounds for terminating a person's services in a unit of public administration, if the person is or were the holder of an appointment in the unit.

19 Official misconduct not affected by time limitations

Conduct does not stop being official misconduct only because a proceeding or an action for an offence to which the conduct is relevant can no longer be brought or continued or that action for termination of services because of the conduct can no longer be taken.

From **schedule 2 (Dictionary)**—

...

"misconduct" means official misconduct or police misconduct.

...

"police misconduct" means conduct, other than official misconduct, of a police officer that—

(a) is disgraceful, improper or unbecoming a police officer; or

(b) shows unfitness to be or continue as a police officer; or

(c) does not meet the standard of conduct the community reasonably expects of a police officer.

ATTACHMENT 3

PROVISION FROM THE FREEDOM OF INFORMATION ACT 1992

footnote 7

84 Review of Minister's certificates

(1) If a certificate has been given in respect of matter under section 36, 37 or 42, the commissioner may, on the application of an applicant for review, consider the grounds on which the certificate was given.

(2) If, after considering the matter, the commissioner is satisfied that there were no reasonable grounds for the issue of the certificate, the commissioner must—

(a) make a written decision to that effect; and

(b) include in the decision the reasons for the decision.

(3) A certificate the subject of a decision under subsection (2) ceases to have effect at the end of 28 days after the decision was made unless, before that time, the Minister notifies the commissioner in writing that the certificate is confirmed.

(4) The Minister must cause a copy of a notice given under subsection (3) to be—

(a) tabled in the Legislative Assembly within 5 sitting days after it was given; and

(b) given to the applicant.

(5) A notice under subsection (3) must specify the reasons for the decision to confirm the certificate.

(6) If the Minister withdraws a certificate the subject of a decision under subsection (2) before the end of the period of 28 days mentioned in subsection (3), the Minister must, as soon as practicable, notify the commissioner and each participant.

PARLIAMENT OF QUEENSLAND (CONSTITUENCY COMMUNICATIONS) AMENDMENT BILL 2003

EXPLANATORY NOTES

Title of the Bill

Parliament of Queensland (Constituency Communications) Amendment Bill 2003.

Policy Objective of the Bill

The objective of the Parliament of Queensland (Constituency Communications) Amendment Bill 2003 is to enhance the democratic process in Queensland. The Bill achieves this objective through a system of protections for (a) members of the community in their communications with members of the Legislative Assembly—upon which members of the Assembly may act outside the proceedings of Parliament—and (b) between members of the Assembly and persons with whom members communicate in the performance of their parliamentary duties in relation to such communications.

Achieving the Policy Objective of the Legislation

The Bill has been prepared to amend Chapter 3 (*Powers, rights and immunities*) of the *Parliament of Queensland Act 2001* by inserting a new Part 6 (*Particular performance of member's parliamentary duties*). Part 6 will provide—

- for members of the community, members of the Legislative Assembly and persons acting in their official capacity to be able to publish communications in relation to the performance by members of their parliamentary duties, with immunity under the *Parliament of Queensland Act* from civil or criminal liability for defamation;

- for particular communications, published in relation to the performance by members of their parliamentary duties to be exempted from disclosure under the *Freedom of Information Act 1992*; and

- for members of the Legislative Assembly to be entitled to legal assistance, under the *Parliament of Queensland Act*, in respect of proceedings arising from the performance of their parliamentary duties, and in respect of proceedings involving the Assembly's powers, rights and immunities.

Immunity

The Bill has been drawn up to remedy concerns regarding the uncertain status of members' communications that arguably fall outside the statutory definition of 'proceedings in the Assembly'. The Bill firstly defines "legitimate purpose" and "legitimate action" for the purpose of communications in the course of the parliamentary duties of members of the Legislative Assembly. Secondly, the Bill provides absolute immunity from liability for defamation for communications between members of the community and members of the Legislative Assembly, and between members of the Assembly and persons acting in an official capacity in respect of those communications.

Freedom of information

The Bill preserves the confidentiality of protected communications by exempting them from public access under the *Freedom of Information Act*.

Legal assistance

Under the Bill, members of the Legislative Assembly who are the subject of threatened or actual proceedings founded on protected communications, or who are involved in upholding the powers, rights and immunities of the Legislative Assembly in proceedings, will be entitled to legal assistance under the *Parliament of Queensland Act*.

Reasons for the Policy Objective of the Legislation

Immunity

Increasingly, members of Parliament represent constituents and members of the community not only in Parliament, but also outside Parliament in correspondence and other communications. Members regularly act on behalf of members of the community (who include, but are not limited to, their constituents) in communications with ministers, government departments and other entities when performing their parliamentary duties. Parliamentarians also have a significant role in raising important matters of public concern which may be notified or disclosed to them by members of the community. It is fundamental to the system of parliamentary democracy that members of the community are able to communicate fully and openly with members of Parliament when raising constituency matters, or when notifying members of misconduct, or concerns such as maladministration or serious and substantial waste of public money. It is also essential that members are able to communicate freely in confidence with ministers, departments and other bodies on behalf of members of the community when performing their parliamentary duties.

The issue of whether or not persons who disclose 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 by privilege, have been matters of contention for many years. The *Parliament of Queensland Act* provides members of the Legislative Assembly with absolute immunity (parliamentary privilege) for communications that are 'proceedings in the Assembly'. Not all communications between members of the community and members of the Assembly are categorised as 'proceedings in the Assembly'.

Members of Parliament and their constituents may incur liability for defamation if a communication made in the performance of a member's parliamentary duties contains any defamatory matter. Matters raised by members of the community are often of a highly confidential nature. Raising such matters in Parliament protects members of the Assembly; it does not, however, provide the discloser with adequate immunity. Under the current law, members of the community must rely on the uncertain protection afforded by qualified protection under the defamation law. The Bill provides absolute immunity from liability for defamation for protected communications with members of the Assembly.

The legislative approach contained in the Bill—providing absolute immunity from defamation—is considered to be both reasonable and appropriate because it achieves a necessary level of immunity and confidentiality for members of the community in their communications with members of Parliament. The Bill achieves these protections without extending to those communications the higher (absolute) level of immunity currently afforded under parliamentary privilege to 'proceedings in the Assembly'.

The Queensland Parliament is committed to encouraging the most ethical conduct by members of the Legislative Assembly in the performance of their parliamentary duties. However, as it currently stands, the law does not encourage the most ethical conduct by members of the Legislative Assembly because the law does not preserve the confidentiality of members of the community in their communications with members of the Assembly. To ensure absolute protection for communications with their constituents, members have no option but to raise matters in the Parliament. This may not always be the most ethical course to take as it compromises the confidentiality of the persons concerned. Often (particularly with respect to constituents' communications about private wrongs or grievances) the most ethical way to pursue the matter is for the member to take the matter up officially with the relevant minister, outside the Parliament. The law should proactively encourage members to act ethically.

The Bill supports the institution of Parliament by providing an alternative to raising sensitive and confidential matters concerning members of the community in the Legislative Assembly chamber, or in written questions to ministers.

Any extension to current protections has the capacity to affect individuals' rights regarding possible actions for defamation. A legislative remedy within the *Parliament of Queensland Act*, in clear and precise terms with appropriate safeguards, is therefore warranted.

Freedom of information

The exemption from freedom of information is considered appropriate and reasonable because it preserves the confidentiality of members of the community in their communications with members of the Legislative Assembly. The exemption also corrects a current anomaly in the *Freedom of Information Act*. Under that act, members' correspondence is exempt from access under freedom of information if it is in the possession of the member (that is, in the member's office). However, a copy of that same correspondence, when held in the offices of an agency subject to the *Freedom of Information Act*, may arguably be accessible—even by a third party unrelated to the correspondence—by virtue of its location within the records of a minister or an agency.

In extending the FOI exemption to constituency communications, the principles of openness underpinning the FOI Act will be encroached to some extent. The Bill may also impinge upon fundamental legislative principles by limiting the rights and liberties of individuals seeking access to government held information. The inconvenience caused to a third party by not being able to access constituency communications is outweighed by the public interest in constituents being able to approach members of Parliament for assistance, knowing that the confidentiality of their representations will be preserved.

Legal assistance

The access to legal assistance for members of the Legislative Assembly is considered appropriate and reasonable because it brings members of the Legislative Assembly in accord with employees of the Crown, and ministers and parliamentary secretaries, who are entitled to legal assistance in proceedings arising from the proper discharge of their duties. Under current law, members of the Assembly have no similar entitlement.

Alternatives considered

Alternative 1: No legislation

Queensland currently has no statute which absolutely protects from defamation persons who make disclosures to, or communicate with, members of the Legislative Assembly in the

performance by members of their parliamentary duties. The protection that does exist is uncertain, because it can be defeated by evidence of malice on the part of the discloser. It is untenable for the current uncertainty to continue.

Achieving the identified policy objective by non-legislative measures is not considered a viable alternative because non-legislative measures would not permanently address the uncertainty attaching to the status of the communications at issue.

Alternative 2: Amendment of individual statutes

The *Defamation Act 1889*, the *Whistleblowers Protection Act 1999* and *the Freedom of Information Act 1992* provide limited protections for communications by members of the community with members of Parliament. None provides absolute immunity from liability for defamation for such communications. Neither do the statutes guarantee constituency communications will be preserved from access under freedom of information.

It is not consistent with the recent enactment of the *Parliament of Queensland Act* to amend a number of individual statutes to provide absolute immunity to such communications. To do so would fragment matters that directly relate to (a) the parliamentary duties of members of the Legislative Assembly, and (b) the powers, rights and immunities of the Legislative Assembly between several acts. These matters have recently been drawn together in the *Parliament of Queensland Act*.

Alternative 3: Legislatively extending parliamentary privilege

Affording parliamentary privilege to the communications at issue (for example, by extending the definition of the term 'proceedings in the Assembly' under the *Parliament of Queensland Act*) is not a suitable alternative. Parliamentary privilege would render such communications immune from any proceedings whatsoever. This level of immunity is unnecessary. Immunity from defamation proceedings and protection against public access is required. Parliamentary privilege would afford a far higher level of protection than is reasonable to achieve this objective.

Administrative cost to government of implementation

The only administrative costs that the Bill will generate to the government are the costs associated with its preparation, and the passage and printing of the legislation. Any future costs associated with legal assistance for members of the Legislative Assembly would be incurred by the parliamentary service.

Consistency with fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* requires that legislation should have sufficient regard to—

- the rights and liberties of individuals; and
- the institution of Parliament.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

- makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review [s (4)(3)(a)]; and

- does not adversely affect rights and liberties, or impose obligations, retrospectively [s (4)(3)(g)].

The amendments are generally consistent with fundamental legislative principles. Aspects of the Bill that raise possible fundamental legislative principle issues are outlined below.

Immunity from liability for defamation

The proposed legislation will provide a higher level of protection to certain persons against liability for defamation proceedings through absolute immunity from proceedings for civil and criminal defamation in specific circumstances, as set out in the Bill. To that extent, the legislation may be considered as adversely affecting the rights and liberties of individuals who may wish to initiate such proceedings.

Any adverse effect in this regard is defensible when balanced against the wider public interest in ensuring that members of the community are able to communicate fully and openly with members of the Legislative Assembly in the performance by members of their parliamentary duties. It is essential that concerns about potential liability for defamation do not unduly constrain members of the community from providing full and frank disclosures to members of the Assembly about important matters of public concern. If the person notifying the member was liable to be sued for defamation, there is the risk that the person would be less likely to provide a full and frank disclosure about such matters.

The provision contained in the Bill is a standard provision in similar legislation that provides immunity to persons notifying misconduct to complaints handling bodies.

The Bill puts beyond doubt that the immunity from liability for defamation for a protected communication is not defeated by evidence of malice on the part of the discloser. The conferral of absolute immunity from liability for defamation is considered reasonable, given the nature of disclosures about matters of public concern that are made to members of Parliament. Where members of the community are placed in a position of possible legal proceedings because of their communications with members of the Assembly, they may be inhibited from raising sensitive issues with members of Parliament. This has the capacity to impede the Parliament in its functions and members of the Assembly in their parliamentary duties.

The law currently encourages members of the Legislative Assembly to raise sensitive and confidential matters in the public forum of the Assembly. This may cause irreparable harm to the reputations and livelihood of disclosers and other persons. It may also damage the standing of Parliament within the community.

This legislation promotes the institution of Parliament by encouraging members to raise sensitive and confidential matters officially with ministers outside the public forum, if the circumstances demand confidentiality. The Bill therefore facilitates the proper performance by members of their parliamentary duties on behalf of members of the community (including constituents) by preserving the confidentiality of disclosers of information to members.

A protection against possible abuse or misuse is included in the Bill by providing that the immunity does not apply to matter that is knowingly false.

Consultation

The Office of the Queensland Parliamentary Counsel prepared the Bill.

Legal specialists were consulted in developing the Bill. Comprehensive consultation regarding the key issues in the Bill occurred during an extensive inquiry by the Members' Ethics and Parliamentary Privileges Committee into communications to members, members' representations to government and information provided to members.

Members of the Legislative Assembly, ministers, departments and the community

Members of the Legislative Assembly were surveyed about these issues by the MEPPC and invited to make submissions. Ministers and government departments were also invited to make submissions on these issues. Submissions were provided by Education Queensland, the Department of Industrial Relations, and the Department of State Development. The MEPPC consulted with the Minister for Innovation and Information Economy and the Minister addressed a roundtable discussion forum (convened in relation to the committee's inquiry) about privacy issues. The committee's inquiry was advertised widely in the media (including regional Queensland) and members of the community were invited to make submissions.

Legal specialists

Legal specialists were invited to make submissions. A number of legal and academic specialists with recognised expertise in parliamentary privilege law, practice and litigation participated in the discussion forum convened as part of the MEPPC's inquiry into these matters.

Results of consultations

There is general agreement amongst those who were involved in the consultation process that there is justification for greater protection than currently exists at law in respect of these matters.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 provides that the short title of the Act is the Parliament of Queensland (Constituency Communications) Amendment Act 2003.

PART 2—AMENDMENT OF PARLIAMENT OF QUEENSLAND ACT 2001

Clause 2 provides that the Act amended is the *Parliament of Queensland Act 2001*.

Clause 3 amends s 37 (Meaning of "contempt" of the Assembly) of the *Parliament of Queensland Act* by inserting a new example (No. 11) of contempt. When determining if an act constitutes a contempt of the Assembly in particular circumstances, (including the circumstances set out in example No. 11) regard must be had to the essential elements of a contempt set out in s 37 of the *Parliament of Queensland Act*.

Clause 4 inserts a new Part 6—Particular Performance of Member's Parliamentary Duties (new sections 63A to 63I) into Chapter 3 (Powers, Rights and Immunities) of the *Parliament of Queensland Act.*

The new Part 6 affords absolute immunity from liability for the publication of any defamatory statement made in a communication to take a legitimate action for a legitimate purpose under the act. The immunity applies to communications from a member of the community to a member of the Legislative Assembly or their delegate, and between members of the Assembly and persons who could reasonably be construed as able to take a legitimate action in their official capacity in regard to the matter the subject of the communication. The immunity relates only to the publication of relevant matter to facilitate the performance of members' parliamentary duties as members of the Legislative Assembly (excluding members in their capacity as ministers and parliamentary secretaries).

Part 6 contains (at s 63A) definitions for the following terms: 'delegate'; legitimate action'; 'legitimate purpose'; liability'; 'misconduct'; 'parliamentary duties'; 'publication'; and 'public wrong or grievance'. The term 'legitimate action' is defined broadly to ensure that the immunity under Part 6 covers members' parliamentary duties outside the parliamentary chamber. The definition is specifically intended to include the whole range of members' parliamentary duties, including representative, constituency, shadow ministerial, advocacy and legislative duties (excluding members acting in their capacity as ministers and parliamentary secretaries).

The definition of the term 'delegate' is intended to include members' electorate officers, shadow ministerial staff, ministerial staff acting in regard to members' representations and parliamentary staff. The term is intended to exclude persons who are related to a member (in their personal capacity), volunteers and consultants.

The protection under new s 63C of the act is not defeated by evidence of malice on the part of a notifier or discloser, provided that the communication meets the threshold criteria set out in Part 6. The provision is intended to ensure that a member of the community who may be actuated primarily in the public interest in making a disclosure to a member of the Legislative Assembly about a public wrong or grievance, but where an element of malice may also be established, is protected from legal liability for the disclosure to the member. It is essential that concerns about potential liability for defamation do not inhibit members of the community from disclosing to members of the Legislative Assembly full and frank information regarding matters such as misconduct or some public wrong of which they are aware. Members of the community often communicate with members of the Assembly about such matters only as a last resort, after all available avenues of complaint or redress (including statutory complaints mechanisms) have been exhausted. Where members of the community who make such disclosures are liable to be sued for defamation for the disclosure, there is a risk that they will be less likely to provide members of Parliament with full information in relation to the matter where that information contains allegedly defamatory matter.

The protection in new s 63E corrects a shortcoming identified in the (now lapsed) Defamation Amendment Bill 1999 which sought to afford protection to members' staff acting on behalf of members in connection with constituency communications.

The provisions of proposed s 63E(2)(c) do not require express authorisation to be obtained by the member's delegate prior to the publication, to allow for situations where the member is not able to give prior authorisation due to their absence from the electorate.

A fundamental safeguard under the provision is contained in new s 63G (*Division does not override secrecy or confidentiality obligation*). The Bill does not affect or override any secrecy or confidentiality obligation, or any restriction on a person under an Act to maintain secrecy or confidentiality in relation to the disclosure of information, if disclosure of the information by the person would be an offence or make the person liable to disciplinary action under an act.

The conferral of immunity from defamation proceedings is safeguarded from abuse by providing that no immunity will apply to a communication by a person where that person publishes to a member matter that the person knows is not substantially true.

New Division 3—Exemption from FOI disclosure—provides (at proposed s 63H) that matter is exempt from access under the *Freedom of Information Act 1992* if it consists of information that was published to, or by, a member for a legitimate purpose in relation to a legitimate action, regardless of who has possession of the matter. This will exempt from access copies of members' constituency representations that are held in the records of a department, agency or minister.

The Bill provides at new s 63H(2) that a certificate signed by a member or former member, that states matter in the certificate is exempt matter, establishes that the matter is exempt under the section. In the event that a member or former member is deceased or unable to sign the certificate because of incapacity or another reason, the Speaker may sign the exemption certificate.

The new section allows appropriate review by providing that the certificate is reviewable by the Information Commissioner. The Bill resolves any doubt as to whether the Information Commissioner may require the production of a matter for inspection for the purpose of enabling the commissioner to decide whether the matter is exempt. The Bill provides at new s 63H(3) that s 84 of the FOI Act applies in relation to a certificate signed by the member. This provision complies with the fundamental legislative principles set out in the *Legislative Standards Act 1992*. That act provides at s 4(3)(a) that whether legislation has sufficient regard to rights and liberties of

individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

New Division 4—Legal Assistance—provides a statutory entitlement for members of the Legislative Assembly to access legal assistance in specific circumstances. If the Speaker considers that a relevant proceeding has been taken or threatened against a member, the member is entitled to legal assistance in relation to the proceeding. A relevant proceeding is a proceeding taken or threatened against a member relating to matters involving the powers, rights or immunities of the Parliament. A relevant proceeding also includes a proceeding in relation to the performance of the member's parliamentary duties. The provision has an inbuilt protection against possible misuse in the definition of a 'relevant proceeding' under the act because the entitlement to legal assistance is not provided where a member of the Legislative Assembly initiates a proceeding. Legal assistance is not available for members of the Assembly to initiate challenges or fund legal costs associated with matters of policy. The type and amount of legal assistance is decided by the Speaker having regard to guidelines published by the Members' Ethics and Parliamentary Privileges Committee and adopted by the Legislative Assembly.

Clause 5 replaces s 93 (*Parliamentary powers, rights and immunities*) of the *Parliament of Queensland Act* with a new s 93(1) and 93(2). The new section updates the area of responsibility of the Members' Ethics and Parliamentary Privileges Committee about the powers, rights and immunities of the Assembly and its committees and members. That responsibility will include publishing and reviewing guidelines concerning the procedure for obtaining legal assistance to which a member is entitled under the act in respect of a relevant proceeding, including the type and type and amount of the legal assistance that may be provided.

Clause 6 amends the schedule to the *Parliament of Queensland Act* (the Dictionary) by providing a relevant cross-reference to new definitions.

PART 3—AMENDMENT OF FREEDOM OF INFORMATION ACT 1992

Clause 7 provides that the Act amended is the *Freedom of Information Act 1992*.

Clause 8 provides a 'signpost' in the *Freedom of Information Act* as to the existence of the exemption in the *Parliament of Queensland Act* under new s 63H (Exempt matter).

ATTACHMENTS

Attachments 1 to 3 inclusive set out the following extracts from relevant legislation referred to in the Parliament of Queensland (Constituency Communications) Amendment Bill 2003. The attachments are included for information only and do not form part of the Act.

Attachment 1—ss 4 and 5 of the *Defamation Act 1889*.

Attachment 2—ss 14 to 19 and Schedule 2 (Dictionary) of the *Crime and Misconduct Act 2001*.

Attachment 3—s 84 of the *Freedom of Information Act 1992*.

MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE

MEMBERS: **Mrs J. M ATTWOOD** (Chair)
Mrs J. M. SHELDON
Mrs P. CROFT
Mr G. B. FENLON
Mr W. B. I. FLYNN
Ms A. F. PHILLIPS
Mr L. J. SPRINGBORG

STAFF PRESENT: **Ms M. HOBAN, A/Research Director**

Communications to members, member's representations to Government and information provided to members

TRANSCRIPT OF PROCEEDINGS

21 October 2002
Brisbane

The conference commenced at 6.29 p.m.

The CHAIR: On behalf of the committee, I would like to begin by welcoming Minister Paul Lucas, members of parliament and invited guests to our discussion forum. We appreciate your interest in this committee's inquiry.

To assist us here this evening we have a number of very special guests who have considerable experience in the area of privilege. We have Tony Morris, a barrister and Queen's Counsel practising at the bar in Brisbane; Dr Gerard Carney, barrister of the Supreme Court of Queensland and professor of law at Bond University; John Logan, Senior Counsel; Professor Charles Sampford, director of the Key Centre for Ethics, Law, Justice and Governance at Griffith University; Dr Bill De Maria from the Centre of Public Administration at the University of Queensland; and Mr Neil Laurie, the Acting Clerk of the Parliament. I extend an apology for Mr Bill Flynn, who was unfortunately unable to join us here today. Mr Speaker also sent an apology.

First of all I will go through the format for the evening and provide an update of the committee's inquiry to date. Hansard is actually reporting the proceedings here today, not for the purposes of tabling in parliament but to provide an accurate record of our discussions here and so that the committee can provide a synopsis of the proceedings at a later stage.

The inquiry is basically all about the protection currently afforded to communications between constituents and members on constituency matters, between members and ministers on constituency matters and to persons who voluntarily provide information to members. We have been doing this inquiry from about the beginning of this term. Our progress to date is that we have done a study tour. We visited the Victoria, New South Wales and federal parliaments to talk to various parliaments about what they are doing with regard to constituent communications. We have also called for public submissions. We have asked for survey responses from all members of parliament. From those submissions we have had widespread support for better protection for constituents. After tonight's discussion forum we will be publishing a draft report and some recommendations to the Assembly.

The program tonight will have two main strands. There will be considerable overlap between the strands. The first strand is communications on constituency matters, which will run from 6.40 p.m. to 7.30 p.m. The second strand will be information provided by informants, which is scheduled between 7.30 p.m. and 8.20 p.m.

Attached to the program is a summary of the key issues of the inquiry. Copies of the issues paper are available here if anyone requires a copy. There is a flow chart also highlighting gaps in protection as we see it. Also available to you tonight are papers presented by Joan Sheldon and me to the ASPG conference in Melbourne last week.

Tonight we will be looking at some possible solutions to improve the protections that are afforded to constituents and informants with a view to better protecting constituents. There will be two session topics. One will be led by Joan Sheldon, who is the Deputy Chair of the MEPPC, and the other will be led by Lawrence Springborg, who will introduce the second session. Each of the specialists at the table will be invited at each session to briefly give their views. Hopefully they can stick to a time frame of about five minutes if possible. This will allow for some follow-up from members in the audience. I trust that you will find the evening interesting. I will hand over to Joan.

Mrs SHELDON: Welcome all. We regard this as a very important small conference. Particularly we will value the input from the specialists who have come tonight and from members who have come as well. We sent out a survey to members. The number of responses was interesting. The great majority of people felt they were not adequately covered in their own constituency correspondence and felt that more needed to be done.

I will very quickly identify the key issues of the topic. It regards constituents' personal and sensitive information possibly being accessed by a third party under FOI. Where we see this happening more is where a constituent comes to a member about an issue. The member makes representation in writing to the minister attaching the information, which often is detailed and which the minister would need to review. This is then sent off to a department. It is often in the department that the information is FOI-able. It is actually FOI-able in the minister's office, too.

Where we have had some problems is with information being issued from a department which then has been accessed under FOI, possibly by people with some former knowledge—I do

not know how they would get that—or by people who have trawled through a number of documents. We then find that in a couple of cases this information has been acted on and suits of defamation begun against the constituent and the member of parliament.

We feel that unless something is done on this constituents may be inhibited in approaching members on constituency matters. We feel that members may be inhibited in corresponding with ministers about constituency issues. Members in their constituency function of course regularly communicate on behalf of their constituents with ministers and agencies in connection with constituency matters.

We also feel that the actual definition of 'constituency' needs to be widened so that it does actually cover most situations. A matter might be brought to a shadow minister, for instance, and sometimes to other members that someone in the public feels has been raising particular issues. The person may not live within the electorate of that member but they contact that member and the shadow minister, who then contact the minister and the department. Really, the protocol is that you go through the minister, not directly to the department. This is how this has evolved over a period of time.

As I have mentioned, access under FOI has been a precursor to legal processes. It has to be proved that there is defamatory material there but, as you well know, that involves cost and quite a bit of work before you actually get to any decision being made on that. There is an anomaly in that MPs' communications are exempt from FOI when they are held in the member's office. But as I indicated, they may not be exempt from FOI when they are in the minister's office or in the department.

There are four possible solutions we are putting forward for discussion tonight. One is to enact a broader exemption under FOI for all constituency communications. Current exemptions which are arguably applicable to constituency communications—for example section 44 relating to personal affairs of a person and section 45 relating to the disclosure of trade secrets, business affairs and research of an agency or another person—are obviously limited in their application to the situation I have just been discussing.

Secondly, we could provide members with the protection afforded the Ombudsman in his dealing with complainants. Section 93 of the Ombudsman Act 2001 provides the Ombudsman with protection against civil liability for an act done or omission made honestly and without negligence under the act. I would certainly like a little more discussion about what 'without negligence' means, because surely that has to be proven.

The third proposition is to provide members with better guidelines to deal with constituent inquiries so the constituent's confidentiality and protection is maximised without extending parliamentary privilege. That, I think, is very restricting, and I would like that discussed. We will be asking our specialists at the table to give some input, but also we would like some input from members.

After the defamation action taken by a public servant against a woman over a letter of complaint regarding an officer of the Transport Department some years ago—it is referred to in your issues paper—the then minister undertook to ensure that the department establish practices which would allow public servants with complaints to have them resolved without legal action. That is possibly something we could look at when we are looking at the position of members.

The fourth proposition is to investigate possible protections for communications with departments on constituency matters under privacy compliance obligations and requirements. The Commonwealth Privacy Act 1988 does not apply to members other than when they are acting as ministers, and the information privacy principles apply to Commonwealth agencies and the ACT government departments. In Queensland the privacy regime is an administrative regime and does not apply to members.

We have Minister Paul Lucas here. Before we ask the individual specialists at the table to speak, I will ask Paul if he would like to say a few words, particularly on the Privacy Act. After Paul has spoken I will ask each of our specialist members if they would like to speak for five minutes on the issues as raised. Then we will have some general discussion before we move on to the next part of our conference.

Mr LUCAS: Thank you, Madam Chair, Madam Deputy Chair and members of the committee. I thank the committee for the opportunity to say a few words tonight. I welcome the committee's inquiry. The issue I seek to talk to the committee about, though, is an aspect of the issue of privacy when it comes to communications with members of parliament, but in a sense it is a precursor. What the committee is primarily investigating is: what protection does that information have from disclosure to third parties in the hands of the member of parliament? There is an issue that concerns the government as well.

As you indicated, the government has adopted an administrative regime. Therefore, the information privacy principles bind the government, particularly information privacy principle 11, which talks about disclosure of personal information. That is binding on the government. When a public servant receives an inquiry from a member of parliament, then to what extent does an officer of the government need to be satisfied of the authority of the member of parliament to receive that information?

As we have indicated, our regime is predominantly administrative. There are various statutory privacy requirements that exist as well, including the Child Protection Act, the Corrective Services Act and the Health Services Act. That legislation, of course, cannot be overridden by privacy principles that are administrative. Therefore, if they required written authority or had prohibitions on disclosure then in the absence of any other legislation they would be binding on the department in providing that information.

I do not need to tell any of the members of parliament here the nature of inquiries, but perhaps for the record I should. Often as members of parliament we will have people telephone our electorate offices or they will write to us or they will come in and see us and we will write a letter. Typically, it might be someone who has a query about their place on the Department of Housing waiting list, about a local school issue or about where they are on a hospital waiting list. If one takes a strict reading of the information privacy principles, you certainly cannot provide that information to a member of parliament without consent. The question then is: what level of consent needs to be evidenced by the member of parliament in seeking that information?

I take you back to my experience when I was a solicitor, when it was decided that Medicare would require specific written authorities to provide information about your client's medical treatment when you were calculating the refund that you had to pay on the conclusion of a personal injuries claim. It ended up in a situation, which I presume it still is in now, where that information was in fact sent to the client and the client had to bring it in and fill it out. Then you would send it back to them and they would send it to the client and you would get it back. Essentially, given that solicitors, one would hope, have professional obligations as officers of the court, it massively increases the costs that one's client has to pay as a result of that administrative run-around.

I think we have to be careful that how the regime operates does not massively increase the inefficiencies of electorate offices. For example, if a member of parliament made an inquiry about someone on a housing list, would you have to get a written authority from them so you cannot take the inquiry over the phone? Do you have to say, 'Come in and fill out a form'? That would be the ultimate way of doing it and the purist way of doing it, but certainly the government will appreciate the views of this committee in terms of an appropriate way to proceed.

I cannot recall, though I stand to be corrected, any incident where a member of parliament has without authorisation sought information about a constituent in the capacity of a constituent and then published that without that person's permission. But I think if we said, 'Look, we are not going to require in all cases written authority,' we then need to say, 'What regime is in place to deal with members of parliament who might breach that?' In other words, if I rang up about someone, found out the information and for whatever reason it was not authorised by that person, then what could you do? If I want to buy a public housing block of land and I ring up and say, 'I am acting on behalf of a tenant. I want to find out some information,' that would be improper. How would one deal with that? Would it be a breach of privilege? Could one be dealt with that way, remembering that it is an administrative regime? I think that is something that would need to be considered.

Also, perhaps, there need to be guidelines for public servants in terms of certain situations. I think a member of parliament would want to be protected by having a request and an

authority in writing. I do not know whether a standard form of authority should be agreed on between members of parliament and the government. It might be something that is quite simple that one could have sitting in electorate offices for people to sign and provide that authority. But not everyone comes in to see you all the time. You might see someone at a fete or something. I have never had a complaint about a member of parliament doing the wrong thing there, but I still think once we decide to have privacy principles we have to address that issue.

Mrs SHELDON: There is one issue I would like to mention. You were talking about letters, but we now have emails and electronic information. That broadens the scope very much.

Mr LUCAS: That is right.

The CHAIR: Does anybody want to make any comments about what Paul has just talked about?

Ms PHILLIPS: When we had discussions with Victoria, they brought up the issue particularly of releasing medical information—you were talking about waiting lists—where that information can be publicised without the constituent's consent. So the constituent comes to the local member asking where they are on the waiting list and that information then becomes public knowledge through the parliamentary situation, where it is privileged but it nonetheless becomes public. They were discussing the very thing you are talking about in that people when they come in give their consent to their names and the issues being made public if necessary.

Mr LUCAS: Of course that is an extension of the issue. I think anyone who makes information about a person's personal situation public would very much want to receive their consent to do that. If someone comes in to speak to me in my capacity as a backbencher about a waiting list for something or other, I write a letter to the minister saying, 'I write on behalf of Mr and Mrs Smith of 10 Brown Street, Wynnum West. They tell me X, Y and Z. This is their patient number.' It is presumed that I have the authority of that person. I suppose in a sense by talking about them you demonstrate some level of knowledge. Of course, generally Health will not talk about personal things about that person's medical history that are not particularly relevant, but I think it is worthy for us to decide how far we want to go. As you know, once you start having authorities, then if you are sending it off to the Housing Department every time they will never get any work done.

Mrs SHELDON: As members of parliament, we all know that people really react to signing and filling in forms. They do not want to write you a letter. We all deal with this, but maybe we have to look at whether the consent, which I always ask for verbally, needs to be in writing.

Mr LUCAS: That is right. My practice generally is to write a letter to the minister and either attach a copy of the letter to the minister and confirming correspondence to the constituent, or alternatively say, 'I have written on your behalf to the minister,' which then of course makes it immediately apparent. As I have said, I have never had a complaint, but that does not obviate the need to address the issue.

Mrs SHELDON: Madam Chair, I think we could have a little more discussion as a committee, if you are prepared to do that, because it is an important issue. We need some more information from the minister, too.

Mr LUCAS: Certainly. Thank you.

Mr LAURIE: I make a comment in relation to the fact that the Queensland government privacy scheme is an administrative regime. It therefore does not actually apply to members of parliament in their duty, per se. In respect of that, I note that in Victoria a similar issue arose about the application of the privacy regime. There was a committee report in respect of, if you like, a voluntary code for members of parliament in respect to privacy. I just mention that. I am not advocating it; I am just mentioning it.

Secondly, it occurs to me that there are a lot of dealings done in the legal fraternity on the basis of undertakings that are given by solicitors. I wonder whether some sort of formal undertakings by members in their correspondence with governments may satisfy the requirements of government.

Mr LUCAS: That may be the case in many instances. Generally people say `I write on behalf of' and it is implied that the person writing has the consent of the constituent to seek that

information. Indeed, I dictate letters generally in the presence of the constituent while they see me. As you say, the information privacy principles do not bind members of parliament. The issue is that they bind government employees who are going to provide you with information. So if they are not satisfied or the government is not satisfied that that information is provided to someone with consent, then we cannot provide it.

Mr LAURIE: I was wondering whether there was an issue of mutuality; that is, because information provided to members of parliament is not necessarily subject to the same regime, whether that causes any particular problems as well.

Mr LUCAS: In terms of our receipt of information? I would have to think about that. I am not sure. Generally, as you indicated, maybe a code of conduct would be something that would protect the confidence of the public.

Mrs SHELDON: I will now ask Mr John Logan if he would like to give some input on the issues we have raised.

Mr LOGAN: I will give an insight into a court case which did involve a member of parliament and the difficulties that that member faced and which each of you would face were you to be in the same situation as the then senator Bill O'Chee found himself. That the case came into the court system at all was a reflection of his uttering words outside parliament which were considered by a Mr Rowley to be defamatory, which then generated a proceeding in the Supreme Court.

In the context of that proceeding, as in any civil court case, there then came about an obligation to give discovery as it was called at the time—disclosure as it is called these days. The occasion for Senator O'Chee's interest at all was a reflection of his being based in Cairns as a member of the Senate and being quite interested in fishing allocations and the system that the federal government had in place for fishing regulation. So he gathered a lot of correspondence together for that purpose. He corresponded with a constituent. A constituent corresponded with him. I suppose that is what initiated his interest. He also corresponded with state MPs and as it transpired then gathered a file by reference to which he came to ask questions in the federal parliament.

When it came into the Supreme Court, then, he listed out, as he was obliged to do, these documents that were in his possession, and they were relevant, so he perceived it—because that is why they were listed—to the court case, to the subject matter of the defamation proceeding. That was then the subject of challenge in the sense that he refused to produce those, because he said `they are subject to parliamentary privilege'. That was contested then at the behest of the plaintiff, Mr Rowley, before a judge of the Supreme Court. The judge at first instance found that there was no privilege attaching to that. O'Chee then appealed to our Court of Appeal and overturned, as far as the principle is concerned, the claim that he had made that had been refused at first instance—the claim that he had made for parliamentary privilege.

O'Chee faced then a special leave application in the High Court. That was ultimately unsuccessful, but it was unsuccessful really not because the High Court was not interested in looking at the area but because the factual foundation for the case was regarded as uncertain at that stage—uncertain in the sense that the Court of Appeal had said, `Well, O'Chee, you are right in terms of the principle that you assert, but the way that you have sworn up to the facts which might give rise to that principle is deficient. So you get another chance to swear up to it.' The High Court then said at the special leave stage, `It is academic at the moment because that factual foundation really is not certainly sworn to as yet.' So there the matter rested.

In all of that course of events, though, the costs associated with the assertion of parliamentary privilege were, at least in the first instance, borne by O'Chee personally. The outcome seems in hindsight to be axiomatic. An MP would say, `Well, of course the material I have gathered together for the purpose of asking a question which did indeed manifest itself in a question is privileged.' But that is the wisdom of hindsight. The course of events through the court system demonstrates that at first instance a very distinguished local judge, Justice Williams, now in our Court of Appeal, took quite a conservative view about the extent of privilege. In the Court of Appeal one detects in Justice Fitzgerald's judgment a conservative or a restrictive view, if you like. But not so much so in Justice McPherson, who had a great sense of history and brought that to bear as to why it is that it should be construed widely. And Justice Moynihan agreed with that.

The point of all of that, though, is that at a practical level this MP was facing those costs himself in the first instance and was in a sense breaking ground for each of you here who are members, as well as his federal counterparts, because in principle there is no distinction, I think, between state and federal as far as this is concerned.

What he was also doing at that early stage was transacting business that I would think each of you do. I know when I was years ago working in the tax office I used to see correspondence come in from state MPs—not federal MPs, because people did not draw a distinction. They are not concerned with the federal compact. They want their MP, whoever that might be, to make a representation.

As it turned out, O'Chee was lucky, if you can call any litigation `luck', in the sense that there had been a manifestation of his endeavours in a parliamentary question. But had it not got to that stage and O'Chee had still uttered those words outside the parliament that drew the defamation action, query as to whether or not that same garnering of information that he undertook—albeit with an end of asking a question, but had he not done that—would have been covered, even by the expansive view of what amounts to parliamentary privilege.

To translate that to the matter at hand, each of you, I would think, would regularly write letters on behalf of a constituent that are never going to manifest themselves in the other place here in any formal way. To my way of thinking, one has to regard that sort of activity as a substitute, though, for asking a question in this place in the sense that in our modern democracy this is what people expect of their MPs. It is a way of making our system work—keeping everyone honest, if you like, or at least making sure that their communication lines are open and red tape is cut as far as it can be.

So I regard a member's letter on behalf of a constituent—and I mean by `constituent' not just an elector but a corporate citizen as well—in effect as a substitute for asking a question in parliament. To my way of thinking in terms of rationale, if a privilege is to be afforded to someone who stands up in the other place and asks a question in terms of advancement of democracy, there is the same rationale behind writing a letter which could equally well, were there time to do it, be the subject of a question.

The CHAIR: Are you saying that it should be absolute privilege, this letter?

Mr LOGAN: In terms of, if you like, keeping it as simple as possible, one way of doing that is to say, `If you write a letter on behalf of a constituent that is a representation on behalf of a constituent that is on a parliamentary member's letterhead, then that's privileged—full stop.'

Mrs SHELDON: What about attachments? Would you say that was privileged as well?

Mr LOGAN: The same way as if you had tabled that document as part of your asking a question.

Mrs SHELDON: I think that is a very interesting issue. You mentioned raising questions in the House. I do not think most people realise how difficult it is to get a question up. We are all in that situation. If you had to rely on raising questions on issues that people came to you on, you would never really be following much through at all. So I think the point you made is very interesting. Thank you very much. Tony, would you like to speak to us now, please?

Mr MORRIS: Thank you, Madam Chair, Madam Deputy Chair and honourable members. May I just begin by saying how impressed I am as a citizen, as a lawyer and as someone who has had a longstanding interest in issues of parliamentary privilege that this gathering is taking place, that members are focusing on these issues that go right to the heart of our democratic system and, if I will be forgiven for saying so, that it is being handled in such a bipartisan and cooperative approach. I wish to goodness that the press and media would show interest in these fundamental issues in our democratic system and would be at occasions like this to see how 90 per cent of what goes on in this building is cooperative when they only want to publish the 10 per cent that involves differences between the two sides.

Mrs SHELDON: We wish they would, too.

Mr MORRIS: Anyway, having said that, let me begin by making a point, which may seem fairly trite, but I think is right at the heart of this: over the last 15 years or so, it has become very popular in Queensland to talk about the separation of powers. When people talk about the

separation of powers, they usually use the tags 'legislative', 'judicial' and 'executive'. For most purposes, that is sufficient. But people forget that the parliament is much more than a legislature. It is that, but it is a lot more. A great English judge, Chief Justice Denman, called it the grand inquest of the nation, and that is what it is. We do not just have separation of powers; we also have responsible government, which means that the government of the day is answerable to members of the House and we have a system of privileges designed to ensure that every parliamentarian has the right to investigate, to examine, and to inquire into any issue of interest to any member of the community concerning the good government of our community.

If you start off on that footing—that parliament is more than just a law-maker; that it is that grand inquest of the nation—then it seems to me that the answer to some of these questions becomes almost self-evident. Of course, parliamentarians have to have the privilege to obtain information and to communicate information without it being used against them. When Mr Fitzgerald constituted the Fitzgerald inquiry, he had the privilege of a royal commissioner to make inquiries, to receive information, and to be exempt from legal recourse with what he did with that information. Parliamentarians are that on a permanent basis. They are commissions of inquiry, or royal commissioners. They are here to investigate problems in our community and sort them out. So in my view, it becomes quite self-evident that on issues like freedom of information, protection and parliamentary privilege, the privilege should be absolute with communications made by parliamentarians in the course of their duty.

Of course, you run into a problem, because there are going to be those awful and rare cases where those sorts of privileges are abused. I was speaking earlier informally about the dreadful Theophanus case in Victoria. There will be times when people attempt to bribe members of parliament or attempt to exert some other sort of corrupt influence on a member of parliament. There may even be times when one or two members of parliament over many, many years succumb to that sort of temptation. If you have an absolute privilege, then maybe that is going to protect the guilty. My view, though, is that the importance of parliamentarians being able to do their job means that we have to take the risk that even improper communications will get covered up as a result of that privilege. I just think that it is so fundamental to our community.

I think that the starting point to all of this has to be to get away from the word 'privilege'. The word 'privilege' is a loaded word. People think, 'Why are we giving even more privileges to parliamentarians? Don't they have enough already?' The problem with that expression—and the same applies to legal professional privilege and Crown privilege—is that people do not understand that it is just part of the tools of your job. If a taxidriver has a taxi licence, I guess in a sense that is a privilege. But it is what he or she needs to earn a living. In the same way, the sorts of protections that I am talking about are what a parliamentarian needs to do his or her job. We should not be calling it a privilege when it is simply part of the arsenal of powers and authorities which parliamentarians absolutely need.

Mrs ATTWOOD: What would you suggest they do call it if you have a another name for it?

Mr MORRIS: The executive branch of government has found the solution. No longer do we talk about Crown privilege; we talk about public interest immunity. There is a great subtlety to that. It is public interest, it is an immunity. So yes, parliamentary immunity, and if we can work in the words 'public interest' there, that would help, too.

Mrs SHELDON: You could really use the same words, couldn't you?

Mr MORRIS: Yes, you could.

Mrs SHELDON: Thank you very much. Charles, would you like to speak?

Prof. SAMPFORD: Actually, I start from almost exactly the same position as Tony, although I think that there are a couple of little caveats which I think are quite important in responding to this. The way that I see this is that parliament is the peak integrity institution of our integrity system. It is something that we often ignore. With all the new integrity institutions—CJCs, CMCs and so forth—we forget that parliament has that peak integrity system. It is really important that that be recognised.

As far as privilege is concerned, it is interesting because I have often written about the difference between rights and privileges. I distinguish between a right and a privilege. A right is

something that everybody has and you can justify it on the basis that it is good for everybody to have that right. But a privilege is something that only a small number of people have and, therefore, you have to justify it, not on the basis that it is good for the individual, but that it is good for those who actually do not have it, which is exactly your point about Crown privilege and public interest immunity. The only reason why you can justify a privilege that is held by a small number of people—I do not mind using the word 'privilege' because it always reminds you that it has to be justified on that basis, is that it actually benefits those who do not have it rather than those who do.

The approach that I want to take, though, is to ask ourselves when somebody comes with a query or a problem or a complaint to a member of parliament: what process do we want the MP to follow? What damage would happen if they do not follow that process? What negative consequences, if any, should be imposed upon the complainant or the MP if they do not follow the process? If parliamentary privilege is going to fulfil its role in supporting the 'grand inquisitor' role, then you need to look at what processes would be followed and where it can possibly go wrong. Sometimes you might, as Tony says, say, 'Okay, it might go wrong, but that is the good with the bad.' My approach would always be to say, 'What do you want the MP to do? What are the temptations to do something different? Can you actually deal with the temptations and impose some negative consequences when they go off on the wrong path?' You might come to the conclusion, 'We just take this risk.' But you might decide, 'Well, actually, here is the path that we want them to follow. And there is a path that we do not want them to follow and there is no real risk to the reason for providing the privilege by actually providing some disincentives to those who want to abuse it.' So it may mean that, in the end, parliamentary privilege is not absolute. To preserve the ultimate integrity institution that may justify accepting various abuses that you accept. But if you can deal with the abuse, then you actually reinforce the institution rather than damage it.

The way I analyse it is this. The basic question is: what process do you want the MPs to follow? What are the things that they might do that you would not appreciate? Should you attach any negative consequences to that? I think that the Bill O'Chee example is quite interesting. Do you want MPs to actually speak out on radio? Do you actually want them to go off half-cocked in the parliament? What I would say is that if there is an issue, in fact, it is better to write to the minister and try to get some information rather than raise it in parliament initially—not just for the time reason, but if there are issues to be found out, you want them to find out, to inquire. In a sense, the parliamentarian is like an ombudsman, is like a CMC, is actually like, in some sense, a separate line of inquiry for potential criminal actions, and it is important that they have that line. So the role of parliamentarian, as I see it, is to try to follow that up. It is a critical element that they have the capacity to do that—that you do not rely on the CJC, you do not rely on the Ombudsman, you do not rely on the police; you have always got that alternative line, for the parliamentarian to push that and to keep on pushing it, and to do it privately and quietly.

There must be an absolute right of the parliamentarian at some point to say, 'This is not good enough. The investigating authorities'—whether they be the CJC, whether they be the police, whether they be the minister—'have not done a good enough job and it is my right to blow the whistle and say that this is not good enough.' But I distinguish between these two elements. One of it is the pursuit of the inquiry and the other is blowing the whistle that the inquiry is not good enough because of urgency or inadequacy of response and that you go to parliament. I think that it is actually in the public interest, to encourage parliamentarians to pass it on to the police or pass it on to the Ombudsman, the CJC, or ask the minister. That action should certainly have absolute privilege and it should provide privilege, I think, for the minister who provides the complaint and actually probably better even than qualified privilege for the person who makes the complaint, (although I think that it is like those who actually go to the police—where there are various offences if you go to the police with trumped-up charges. In fact, it is a higher standard. It is not just like qualified privilege; it is a higher standard which the police themselves or the institutions of government themselves make a decision that this is such an egregious case of a wrong thing that you will prosecute them). So my view would be that the parliamentarian, in pursuing the queries, would have absolute privilege and those who raise the issue would have the same kind of protection that somebody who goes along and complains to the police has. Actually, it is better than qualified privilege, but there is ultimately a sanction for somebody who

brings a totally vexatious and frivolous complaint, which actually takes a lot of time to investigate and can do damage to others.

But, of course, none of this does damage the potential reputation of other people, because whilst you are pursuing the inquiry, other individuals who might be affected are not going to be involved. But if, in fact, the parliamentarian decides that the inquiry is not going as the member thinks it should and they have this right to blow the whistle, that is when we need to look to questions about the information that is provided and provide guidelines for the parliamentarian in deciding to blow the whistle. So in my view, what you should have is not just a code or guidelines of when it is appropriate to say 'The government, police'—or whatever—'are not doing the right thing' you have some guidelines as to when you switch from being persistent inquirer to public whistleblower in the ultimate whistleblowing chamber. You want to have some guidelines as to what to do, which is one of those questions.

The other thing is that I would not just provide guidelines; I would also have a source of advice on the guidelines so that a parliamentarian who says, 'Is it appropriate for me to go to parliament now and blow it out?'—if you are going to the radio, the thing is that you should be liable—but if you are going to go to parliament, you have guidelines. You also have somebody similar to the Integrity Commissioner who will provide some independent source of advice separate from the government and the opposition and who will give advice as to whether it is appropriate to blow the whistle. They could still go ahead, but then if they have not sought the advice or if they have acted contrary to the advice, this may be something that the Members' Ethics and Parliamentary Privileges Committee would take up.

Mrs SHELDON: Could I just ask you: when you talk about the ultimate whistleblowing in the parliament, are you speaking about an issue that you would think whistleblowers may bring up who have gone through all of these proceedings? Quite often, the member is the first point of call. Frankly, to expedite things, it is often much better to go straight to the minister. If we were going to wait for it to go through all of these various proceedings, you would have absolute uproar out there in the streets. People want their issue dealt with. Sometimes they have been through the other bodies that you are talking about with precious little result. So they see that, coming to a member of parliament, you will either then bring it up in the parliament or you will take it up with the minister. They are not particularly interested in your going through other channels—and I have actually suggested and, on some occasions insisted, that they take an issue to the CMC and they do not particularly like that. Some of them will, particularly if you are not prepared to do anything, but they regard you as their member—'We elected you, we want you to represent us'. So it is often quite direct that it has to be done and you have not gone through any other process.

Prof. SAMPFORD: Sorry, what I am suggesting is that the MP who receives this has to make judgments on this. Normally, it is writing to the minister asking for some information. That is on the quiet side. This is the persistent inquiry and the MP can take the persistent inquiry route and become a persistent inquirer. What I am really doing is distinguishing what MPs do with information and queries provided by their constituents. One of the things that they can do is to be a persistent inquirer—to go to the minister. I am not suggesting that you send the person away and say, 'You go and do all of this.' What I am saying is what the MP does—the MP, being the persistent inquirer on behalf of the constituent—whether that be to the minister, the police, the CJC, or whatever, and passing it on. But the other question is that when the MP decides, 'This has to be raised in parliament, you have to go public on it', then I think there is a question of guidelines as to when you actually stop being a persistent inquirer and the MP themselves decides that this is the time for blowing the whistle.

Mrs SHELDON: Often in reality, that is the only way that you get any results.

Prof. SAMPFORD: Yes. I think that, in a sense, they are guidelines that you need to think through ultimately when you decide to switch from being a persistent inquirer to being a whistleblower. This is one thing that you do have to take into account. Tony referred to 88 royal commissioners. You would not want to have royal commissioners who are highly party political. We would regard that as a really dangerous thing to have. So I think that to see you as 88 individual royal commissioners and if MPs thought themselves as doing that—and I think that might be a slightly dangerous perception—for me, it is a question that they are persistent

inquirers on behalf of their constituents and then when these inquiries are unsatisfactory, and there is the question of judgment as to when that occurs, then you go public.

Mrs SHELDON: Thank you. Bill, would you like to have your five minutes of fame now? Then I will ask Gerard.

Dr DE MARIA: Thank you very much, Joan. Can I first of all echo Tony's words. I think this is a most impressive brief that this committee has. It is one of the few times in recent years that I have been proud to be a Queenslander with respect to parliamentary activities. So I would just like to say: good on you about that and keep going with it. I think that it is terrific.

Can I say that in my darkest moments I think that the relationship of trust between the elected and the electors has been breached irredeemably. That is in my darkest moments. So I tend to think that what you are on about here is a strategy of repatriation or redemption. It is not like you are doing something to add value to something. The parliamentary institution has been devalued for all sorts of reasons that we know about. So I see this very much as a redemption exercise.

Let me just quickly focus on some of the points that are at the front of your mind with respect to your agenda and I will take you to a different place from Charles. I would be cautioning you against looking to the Queensland Freedom of Information Act for stronger protection for constituency correspondence. The Queensland Freedom of Information Act as far as I am concerned was once a shelter for official secrecy. Now it is a pavilion. It is a huge pavilion of official secrecy and I think that if you go down that path of moving towards the Queensland Freedom of Information Act, you are moving to the secrecy part of the tension between openness and secrecy, which is a fundamental tension in democratic societies. So if we move down one end, we get pretty close to dictatorships. We have got to keep pushing up the other end. So I would caution against that. I think that there are other ways of getting around it.

However, I just need to take one quick issue with Tony. I think that there is a big difference between public interest immunity and parliamentary privilege. I am just paraphrasing now the statement by His Honour Justice French, in Crane v. Gething. The big difference is that with public interest immunity, the courts decide what is immune. We need to keep the courts out of deciding what parliamentary privilege is. I see the courts really wanting to get a crack at this issue. It has been a long tussle and there have been some mad decisions written with respect to judicial pronouncements on what constitutes parliamentary privilege.

The Crane matter—Winston Crane, a parliamentarian in Western Australia, and Senator Len Harris of One Nation. Both of these matters went before the Senate parliamentary committee and the Harris matter has just been reported a couple of months ago. Harris was raided by the cops. They were looking for evidence of signature fraud, I think, with respect to the registration of that party. They took away five disks loaded up with what he claimed was constituent correspondence. He said to the Queensland police solicitor, 'You cannot touch this. This is Crown. This is privilege.' The Senate privileges committee said that Harris did not have a leg to stand on, because he did not force the issue. There was a procedure in place whereby the solicitor invited Harris to come in and have a look at the material and nominate what he claimed was privileged documents. So I do not know whether Harris was playing politics or not. He never got to that stage. I wish he had, because it would have firmed up a policy that is operating at the Commonwealth level now whereby privileged communication which is taken by the cops gets locked away in a safe.

Why I am saying that is that I think that we can extend this notion of making documents, on which the claim of parliamentary privilege exists, secure until that is determined by parliament. We can make that exist with respect to the thing that concerns you here and that is the passover of correspondence from members' offices into departments. But I think that we can replicate a policy that is in existence at the Commonwealth level with respect to the Australian Federal Police whereby they hold on to material and they do not use it evidentially until a determination has been made on the merits of the privilege claim or not.

Mrs SHELDON: By whom is this determination made?

Dr DE MARIA: The parliament.

Mrs SHELDON: So this issue then has to be debated in the parliament or through a parliamentary committee?

Dr DE MARIA: I think that you can get quickly to a privileges committee on a matter like that, or you should be able to. I would not want to see it mucked around on the floor of the House—straight into a committee for a determination. If there is no determination, then the cops can use the information, or whatever. So it was a bit disappointing that Harris did not get that far.

The other matter that is of interest to me is that at the moment parliamentary privilege attaches to activity which is to do with the business of the House or the transacting of business. When you look at finer definitions of that, it is all document based definitions—a document written or a report written. It seems to have that bias in it. I would argue that simply receiving a document wraps up that document in absolute parliamentary privilege.

Mrs SHELDON: So if you received it in your electorate office, would you say that?

Dr DE MARIA: It is wrapped up. McPherson in the O'Chee case made the point that privilege does not attach to a document until a member does something with it. That is a worry for me, because we have had members in this House who did not work—who did not respond, who were derelict in their representative capacities, in their advocacy capacities. So what happens in a situation like that? I would not want that test to be applied. I would just simply say that if a document is produced free of malice to a member, then it is simply a traditional immunity that goes back to 1688, protection of a petitioner against something going wrong in the kingdom almost, rather than privilege only attaches when the member or his agent gets busy.

Mrs ATTWOOD: But what you are saying is just modified privilege. You are saying that if something is produced to a member without malice, then it is actually qualified privilege, which is actually in existence at the moment?

Dr DE MARIA: I have trouble with the distinction between absolute and qualified privilege. I just wonder how strong that definition—

Prof. SAMPFORD: You made the distinction of malice.

Dr DE MARIA: Yes.

Mrs SHELDON: Our concern—and I guess this is what Bill is saying, and correct me if I am wrong—is that privilege is attached to that document, whether it is in our office, whether is in the minister's office or whether it is in the department.

Dr DE MARIA: And indeed it is an enduring privilege. So it might spend three years circulating through the Queensland bureaucracy going from one department to another and privilege attaches all the way through. A determination of that has to be made by this committee. That would be my argument there. I would be relaxed about malice. That might sound a bit funny, but I think that we can be a bit too worried about malicious reporting. I think that too many good whistleblowers get caught up and are exposed very easily to being seen as malicious or having some sort of weird hobbyhorse. I would be more relaxed about that. If stuff is coming into the public arena, we do not need to worry too much about motivation. It is getting into the public arena and that could be the public interest test.

Mrs SHELDON: Thank you very much.

Mr MORRIS: Might I just come in on that point? I think this is again very important. Once you qualify the privilege in any way, even if it is something as key as malice, then it is not worth having it, because once you have to go to a court to decide whether someone was acting maliciously or not, there is no point in having the privilege.

Mrs SHELDON: I could not agree more. Gerard, would you like to comment now?

Dr CARNEY: I am just glad that I am one of the last speakers after this impressive panel. I have to say that when I put in a submission to the committee on these issues, I was exceedingly uncertain as to what position to take. I think that what you are doing is fabulous. I think part of my problem is that I am not obviously as familiar with the day-to-day activities of an MP. So as an academic, I am fairly hesitant to be in any way dogmatic about matters. I might just outline briefly what I stated in my submission. Is that acceptable?

Mrs SHELDON: The main points? Yes, it is.

Dr CARNEY: Yes, okay. As a preliminary, I should say that what has been proposed here, I agree with—most of what is said—but it is fairly radical what is being said here.

Mrs SHELDON: But it is not being said by radical people.

Dr CARNEY: No, but it is radical in terms of the fact that there have been committees of inquiry at the Commonwealth level on a number of occasions and also in the House of Commons in England in 1999 and all of the recommendations from those previous inquiries have said, 'No extension of privilege to cover these matters' and very little explanation is given in those reports as to why they took that approach. So in a sense, what is being proposed here is a big step—possibly forward—compared to those reports. But I think that it is imperative that this committee, if it does take this step, must in some depth justify it by specific examples in its report to indicate to the public why the extension of privilege or immunity is being sought.

Mrs SHELDON: It would be, of course, privilege to the constituent, too.

Dr CARNEY: Yes, that is right. But it might not be advantageous to other constituents who are battling with that particular constituent, so we have to look at the whole range of potential problems here. What I suggested in my submission was fairly conservative and draconian, I suppose. I said that given the extraordinary effects of absolute privilege—and that is something that has not been mentioned tonight—not only is a document absolutely privileged in defamation proceedings, it is privileged in any legal proceedings whatsoever. At the Commonwealth level, particularly under section 16 of the Commonwealth Parliamentary Privileges Act, the net is cast even wider to prevent reliance potentially on any document that is the subject of privilege. In identifying an extension of privilege here we need to think how far that will affect other matters, not just defamation proceedings, because the admissibility of those documents could then be completely prevented in any legal proceedings. The privilege is accepted as not just one that protects you in relation to written or oral evidence that you give, so that you cannot be sued for, but it also means that that evidence cannot be used collaterally, so to speak, in legal proceedings to support a particular—

Mrs SHELDON: What sort of legal proceedings might it be used in?

Dr CARNEY: The famous cases are the trials of Justice Murphy which led to the wide Commonwealth legislation. Witnesses—admittedly it is oral evidence—gave evidence to Commonwealth parliamentary committees, and counsel in the Murphy trial wanted to use that evidence or refer to it in the Murphy trial as to the consistency of the evidence given by those witnesses before that committee and then before the trial. So they were checking the reliability of the evidence. The trial judge ruled that that was okay. The Commonwealth parliament disagreed and enacted the legislation to prevent that occurring in the future.

Mrs SHELDON: If you are looking at that, it was a parliamentary committee, so surely it should be covered by the privilege of parliament.

Dr CARNEY: Yes, but the point was that—

Mrs SHELDON: If a lawyer did want to use it for whatever legal purposes they may want, you could also mount the argument surely that it is a challenge of the courts on the parliament.

Dr CARNEY: That is right, and that is the view the Commonwealth parliament took. The point is that evidence that is covered by privilege not only prevents you from being sued for that evidence but it prevents that evidence being used for other purposes in other proceedings without imposing some legal liability on you. So it has that width to it. An extension here of the sort that is being proposed could be confined so as not to go that far. So it could be confined to prevent actions based upon that evidence in defamation or breach of confidence or whatever.

Ms PHILLIPS: I make the comment that I made earlier when you were not here that this issue arose in our discussions in the federal parliament that there had been some attempt by a constituent to bring information to a Senate committee so that that information would then be privileged and could not be used in the court against that person. He was saying that the same could happen if in fact people brought us information which then became privileged which then could not be used against them. I guess this is going back to what Charles was saying as to whether in fact you have a situation which can be abused—sorry; maybe it was Tony who said it—but that we have to have it to protect the majority.

Mr MORRIS: I think it would be dangerous if this idea was developed that parliamentary privilege was like a magic wand and as soon as the magic wand is laid over a document it cannot be used for anything. It is said, I think no doubt very unfairly, that that view is taken under the Freedom of Information Act—that is, if you wheel a trolley load of documents into cabinet and wheel them out again then they have been anointed with the magic dust and they are free from freedom of information. What I am really talking about is communications which are created for the first purpose of giving it to a member of parliament, like the Murphy evidence before the Senate. That evidence would not exist unless there had been a Senate committee hearing and therefore it is perfectly reasonable that that evidence is protected from any ulterior use, otherwise people would not come before the Senate and give evidence unless they had that protection. But that does not mean that if I have an incriminating document I can stick it in an envelope and send it to my local member and that incriminating document suddenly becomes immune from use. So we have to draw that distinction between documents which are brought into existence to communicate with a member of parliament and documents which existed anyway and just happen to be attached to such a communication.

Mr LAURIE: In respect of that, in the redraft of the definitions of 'proceedings in parliament' in the Parliament of Queensland Act 2001, after the definition of 'proceedings in parliament' is given the act states—

Despite subsection (2)(d)—

which talks about a document tabled in or presented to a committee—

section 8 does not apply to a document mentioned in subsection (2)(d)—

(a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and

(b) if the document has been authorised by the Assembly or the committee to be published.

An example is given in the statute—

A document evidencing fraud in a department tabled at a Public Accounts Committee inquiry can be used in a criminal prosecution for the fraud if the document was not created for the committee's inquiry and the committee has authorised the document to be published.

So there is that exemption that is quite specific there. That exemption in part was necessary because our 'proceedings in parliament' provision actually went wider than the Commonwealth provision, which did not talk about a document tabled in or presented to but rather a 'document prepared for'. So our provision was slightly wider than the Commonwealth provision.

Prof. SAMPFORD: One distinction is: was it created for the sole purpose of parliament or for another purpose? Gerard's example of the Murphy trial and so forth shows a difference in distinction. It goes back to the drafting of the Bill of Rights in 1688 which was overly enthusiastic and was not brought into question in any court of law. Really there is the question of—and it may not be a distinction—was it created for parliament or not, but what are the things that you can do with it other than in parliament? Obviously you are not going to have defamation and there are other sorts of things you are not going to do. You are not going to be prosecuted for actually bringing that information to the parliament. But the example is that maybe even something that was created for the purpose of parliament might still be admissible for certain purposes. If somebody gets up and says one thing to the parliament and another thing to a court, there may be perjury to one or the other, but there is the idea that you cannot actually use, 'You said this and now you say this.' I do not see any of the purposes that we are talking about here or in 1688 as actually served by that. That is actually open for abuse.

Mr LAURIE: That is Justice Hunt's logic.

Prof. SAMPFORD: Yes. So in a sense the distinction that we need to look at here is not the purpose for which it was created but the purpose for which it might be used elsewhere. We classically think in terms of, 'Well, you shouldn't be able to sue for defamation', but I think it is important that we distinguish—and Gerard has pointed to it—the purposes for which such documents can be used outside parliament. For instance, my example is that if it is higher than qualified privilege but then somebody actually brings a vexatious thing which has no basis, the sort of thing that you could actually be prosecuted for such as bringing a totally false accusation

to the police and wasting police time. If you had that kind of provision, then you might be able to use it. If it is privileged, what are the uses that we want to prevent being made rather than just 'it is not used for anything' or 'it is only used if it is malice'. Let us define a distinction. For instance, the example of the Murphy case strikes me as a classic example of where you can have it even if classically produced for parliament and there might be some limited uses for which you could actually use it elsewhere.

Mrs SHELDON: Would anyone else either from the committee or the floor like to comment?

Mr FENLON: I have got two points I want to raise with you in terms of going back to some of the original ideas that John Logan raised—that is, in the context of at least drawing a line of clear privilege where you referred to the classic letter with the crest at the top and signed, et cetera. I would like you to think about stepping back further from there in terms of a great myriad other forms of communication. That might include, for example, file notes that ministerial office people make when they run from my office. They could be telephone calls from myself or one of my electorate officers. They could be emails. They could be handwritten faxes, because often matters are very urgent. I can give you an example of one in the last couple of weeks where a certain professional in my electorate was seriously assaulted and the person came back and wanted to visit the certain professional again several times. There was a lot of frenetic activity in terms of trying to make sure this person was safe. There were all sorts of communications with a certain ministerial office over this. I am still not sure exactly what might be on file mentioning the alleged assailant's name and the victim's name and other associated people through this particular exercise. But what I am saying is that there was a lot of activity. All sorts of communications and records could be there. So it is not just the classic letter with a signature.

That brings me to my second point. We have talked about protection and the idea of malice as something which might detract from privilege or deteriorate the presence or the usage of privilege. To what extent should we rather be looking at it as not malice detracting from it but perhaps a concept of acting in good faith being a concept that sustains privilege in the first instance and the existence of that act of good faith as being the primary, in a sense, positive test rather than negative test for that privilege to have operated fully and effectively over this very wide range of circumstances?

Mrs SHELDON: I think that is a very good point. Would anyone like to comment?

Mr MORRIS: I would like to in a very short way. The problem with that is that it is inviting the courts into the arena. It is inviting the courts. May I say that the very words you have used are a good indication of why that is a problem, because courts have traditionally said that good faith and malice are just both sides of the coin. So proving the presence of good faith is proving the absence of bad faith or malice. What it is doing is saying a politician's or parliamentarian's entitlement to privilege is dependent on what a judge decides, and that brings in all the problems John Logan has talked about—the cost of litigation, the uncertainty of litigation and the distraction. More importantly than all of that, it also means that the sovereign parliament is giving over to the courts the power to decide what its privileges are. I would strongly encourage the committee not to go down any path that involves the courts deciding whether or not a privilege is sustained in a particular case.

Mrs SHELDON: I guess also it would be up to the member of parliament to prove it was in good faith, so you have opened a whole can of worms anyway.

Dr CARNEY: The alternative then is to have a parliamentary committee to monitor abuses of privilege.

Mrs SHELDON: I guess that is what we are supposed to do.

Dr CARNEY: Yes, but it does not happen very often. In fact it is extremely rare, isn't it? It is rare to have a privileges committee to start with. You are one of the few states with one.

Mrs SHELDON: Yes, we found that.

Dr CARNEY: Secondly, it is very rare for any privileges committee anywhere to take action against a member for abuse of privilege. Of course, the Kirby-Heffernan—

Mrs SHELDON: This particular one has twice.

Dr CARNEY: Yes, I am sorry. So I think that is an area worth exploring—that is, beefing up the privileges committee and somehow getting some acknowledgment of its role there. If you are going to extend privilege in this way, then having a monitoring mechanism built in as Charles suggested earlier is important.

Mrs SHELDON: I think Gerard has raised an interesting point. You may not realise that we have been right around the country—myself and Lawrence internationally as well—and a number of parliaments did not really think they needed one and more or less wondered what we were all on about. I think that we may be doing some groundbreaking work here—and the suggestion has come forth, as you said—and 'radical work', but I think we should be as a committee looking at it, because unless you are proactive it sits there and nothing happens at all.

Dr DE MARIA: I think we should make every effort to disentangle public interest motivation from malice. People can actually disclose in the public interest and bear the most dire things about people and hate them and wish them dead. I think we have a duty to disentangle those things, because separated malice is a far stronger dynamic and it can swamp the public interest impulse very quickly. Picking up what Gary was saying before—subject to that reservation that Tony made about the courts intruding in it—we have to think positively rather than negatively in looking for the presence of a public interest rather than the existence of malice.

Mrs SHELDON: Maybe it is an issue the committee, if such an item came before it, could look at—in other words, guidelines for the committee rather than trying to set up whether publicly you looked at good faith or not, because that would invariably go to the courts, wouldn't it?

Prof. SAMPFORD: I would move away from the good faith standard. It is too high a standard under these circumstances. I have gone for even worse than malice before you actually even attack the constituent who has brought the matter before the parliamentarian. When it comes to keeping the courts out of it and so forth, I think that nothing is absolute. In fact, ultimately the courts have to determine the boundaries of what are parliament's powers and what are not. Some of those concepts go back before we developed our proper juris prudence and the relationship between the courts and parliaments and the nature of constitutions. The year 1688 was before the emergence of the proper idea of a written constitution, which actually changes some of these issues.

Much of the question is what is the most appropriate forum to decide these matters? One has to look at some of the weaknesses of parliaments. Of course, when you talk about privileges committees you do have a concern about those who are active participants in the debate making a decision about their colleagues. This is one of the problems. If in fact the committee makes a recommendation to the parliament and the parliament is controlled by one party, there is the concern that one from the majority party will never be criticised and maybe the parliament itself might be used as a way of abusing the minority party by picking on them. This is a genuine concern. I think privileges committees tend to be very cautious about doing anything because they do not want to avoid either mischief. But that means that the confidence of people is actually rather limited. I think that there may be a role for one of two different things. One of them is that there may be a role for the courts. They might get it right and wrong, but at least they are going to be above the political fray. If in fact it is important that privileges not be abused, even if there are no actual consequences to actually say that it is abused, you do not want that to be the hostage of party political infighting.

There are two thoughts. One is that you might leave it to the courts, although their capacity to impose consequences might be limited. The other thing is that you might constitute a subcommittee of the privileges committee in which there would be equal numbers of government and opposition members and they would then choose an independent third party to actually chair an investigation into the question of whether privilege has been abused. There is triangulation; a bit like using arbitration. You have got one person from one side, one person from another and they actually then choose an independent chairperson who will effectively have the casting vote. That is actually a good way of dealing with a really difficult issue. That is why there is an arbitration. If you leave it up to a politically charged parliament to determine these things, I am not sure you will get very far. There will not be a lot of confidence in the result. There might be a case for giving it to judges, but there would be a better case for the privileges committee to constitute a subcommittee, maybe with two members from each side of the House and a jointly

appointed independent chair, and they would report back. There is a chance that it would be much more effective and that it would have the confidence of the people. Let us face it, if the government just voted with its majority on one of these things it would not have confidence. That is a pity if in fact the parliament's treatment of its own abuse of privileges does not generate confidence. One of those two things is something the committee should look at.

Mrs SHELDON: They are important issues. We have tried as a committee not to be partisan. I firmly believe you are better having a head as chair, or a number of them anyhow, from the opposition. We do not have that here. They do federally. The situation here is that our committees consist of 4 government and 3 non government members, but the chair does have a casting vote. In fact, if it came down to it, you have a 4-3 vote. This committee has worked very hard not to do that, as did the previous one, and we have not had a dissenting motion, which meant that both sides have sometimes had to take a bit of a hit. There are certain committees here that are not prepared to do that. Your point is a very good one.

As a member of parliament, I would fight to the death not to let court intervene in a parliament. I do not mean that in terms of just being a member of parliament. Having been here a number of years now and looking at what happens, I think for the general public interest, to put it that way, parliament must be sacrosanct, even though it is abused at times. There is no doubt about that. But your issue of an independent chairman is an interesting point of view and I will certainly put a proposition to our committee, if they follow it, that we actually do write to the Premier about having some chairs from the opposition, as they do federally. But that is, I guess, another issue, but it follows on from what you said.

Mr MORRIS: Following on from what Charles said about maybe some of these things being adjudicated on by courts, if that is to happen it is vital that there be a system for parliamentarians from every side of the House to be covered for their legal costs. Never again should we see the situation that Bill O'Chee was put in where he had to decide between his own hip pocket and standing up for the privileges of parliament.

Mrs SHELDON: Which is the case here now. Only the ministers are covered. All members, regardless of whether they are government backbenchers or not, are not. I look doubly at everything that comes across my desk. Remember, we also have new members. When you are a new member of the House and there is so much on your plate at once, mistakes can happen. It is fundamental that members of parliament are covered. So far, no government has been prepared to bite the bullet on that, but it should happen. Your tale about O'Chee is exactly right, because he was fighting for parliamentary privilege as well as his own hip pocket. I think John brought up the issue that he really had to fight it until the parliament or the government decided that they would meet his costs, and that is a very invidious position to be in.

Mr LOGAN: This is a comment which overlaps. It is hard to draw a distinction between information and constituents, but I take up Mr Fenlon's point. When one looks to the types of documents that were generated in that O'Chee case, with respect, that bears out exactly the sentiments you are voicing in the sense that one sees diary note of 'attendance on constituent' as one example. Another example was 'internal memo from Diane'—that was his electorate officer—to Senator O'Chee, and 'diary note of telephone conversation with Australian Fisheries Management Authority person'. They are typical, really. You know that with respect better than those of us outside parliament. One way in which you could do that would be to amend section 9 of the Parliament of Queensland Act if you are to have a reference to constituency correspondence and to have roped into that matters that are incidental to that in the same way as is presently done in relation to matters that manifest themselves in committee evidence or questions in the House.

Ms MALE: I want to make a comment on constituent matters. I am one of the new members we were talking about earlier. A lot of the things we deal with are quite ordinary, everyday issues. But others, such as someone making allegations about child sexual abuse, are not. With those sorts of queries you are talking about very important issues that you cannot afford to just decide, 'Yes, I'll put it aside. I'll put it aside because I do not have parliamentary privilege,' or, 'I'll forward it on to the police and the relevant authorities to make sure it's checked out properly.' When we are talking about the ideas of our being covered and our constituents being

covered, we need to look at the very important high level cases as well as just the banal, everyday cases. We need to make sure we cover for those sorts of considerations.

Mr MORRIS: That is the answer to Charles' and Gerard's point about even cross-examination on credit. If a member of the public rings up a member of parliament and says that this incident of child sexual abuse has taken place, is the member of the public going to do that if he or she is aware that if the case goes to trial they will be cross-examined? 'You said it happened on seven occasions and now you say it happened on eight occasions. Why are you changing your story? Why did you tell your member of parliament one thing and now tell the court another thing?' That is why those communications in my view have to be absolutely protected and not just protected in some sort of qualified or restricted way.

The CHAIR: Apparently it has an absolute privilege if it goes to the Children's Commissioner, but not to MPs.

Mrs SHELDON: Thank you. Does anyone else want to make a comment on this before we move on?

Mr LAURIE: I do not want to delay the committee overly, but I just wanted to emphasise that I think that fundamentally we have to look at what are the functions of a member of parliament. We all seem here tonight to accept that the functions of a member of parliament are not limited to the functions that they perform within the chamber or within their committee duties. The difficulty is that the protection even taken by the O'Chee case, which is a higher watermark case and not necessarily a case that will be followed by subsequent courts, is that they have to make that nexus to something that happens in parliament or something that happens in committees. Therefore, the real point of all this is: the fundamental role and duties of members of parliament have changed and their functions have changed to become almost mini Ombudsmen, if you like, but the law existing from 1688 has not necessarily changed. It is an issue in that the functions of a member have changed and so therefore must the law. There is a legal dimension to it and there is an ethical dimension to it. The ethical dimension is that the law should encourage members to behave in the most ethical manner. Currently, the law is encouraging quite the opposite, because it is encouraging members to raise matters in the House in a public forum—perhaps damaging its reputation, perhaps doing things prematurely.

The law is not actually encouraging the ethical dimension. The law should encourage matters to be taken up officially, out of the public glare, with ministers, departments and other bodies. That is the ethical dimension. The legal dimension is that if you accept that there has to be something done to the law, what do you do? It seems to me that we have used the word 'privilege' here a lot tonight, but we should focus on what we precisely mean.

To me, there are three possible alternatives: We extend the definition of 'proceedings in parliament' to cover these sorts of transactions; we create a new protection system; or we change our procedures in the House in some way to allow for these sorts of things to be changed, if that is possible. I am not certain that the last one can achieve anything. So it comes down to either extending the definition of 'proceedings in parliament' or introducing a new protection system—a separate and distinct protection. I prefer the latter, that second one, of creating a new protection rather than increasing the definition of 'proceedings in parliament'. I think the definition of 'proceedings in parliament' has already been extended to the limit to which I would like to see it extended. I think that there is scope for a new protection that says: 'communication between a constituent and a member' or 'the publication of communication as it relates between a constituent and a member' and 'the communication from the member to a minister—or a department or whatever—is protected.'

Mrs SHELDON: Where would you put that?

Mr LAURIE: The most appropriate place would be in the Parliament of Queensland Act, and it would be a new provision. In relation to exemptions, I think that we have to forget about malice. We have to accept that in a large proportion of these matters there will be some malice. I do not think malice should affect the issue of protection, because for a start the members are not going to be aware of the malice.

Mrs SHELDON: That is quite true. That is the point you were making, Bill.

Mr LAURIE: However, there is one qualification that would have to be made if you did have such a provision; that is, a qualification that states that if the transaction between the member and the constituent itself is a criminal conduct, it is exempt from the protection. That would get over the situation where a member attempts to effectively extort or bribe or where the constituent threatens or whatever. The exemption is only for criminal conduct.

Mrs SHELDON: Between the member and the constituent?

Mr LAURIE: The transaction itself is somehow part of the criminal conduct. That should be the only exemption. Fundamentally, all the discussion tonight has pointed to the need for the protection, for change, and there is justification for the change.

Dr DE MARIA: I really do agree with what Neil is saying, particularly the point about establishing a new protection protocol. I am wondering whether that protection should extend to media commentary by parliamentarians with respect to constituent communications.

Mr MORRIS: Absolutely not. Once a parliamentarian puts it into the public domain, they are saying that it is no longer privileged but something they are putting out in the open.

Mrs SHELDON: You do not mean something you have already said in the House?

Dr DE MARIA Not necessarily said in the House. The base data would be a communication between the constituent and the parliamentarian.

Mr LAURIE: Isn't that why the House is there? If a member has reached a point at which it has to go public, then the member should take the matter to the House. Once again, if you are trying to encourage good behaviour, that is the way the law should be framed—to encourage the behaviour in private with the minister, to a committee if it is appropriate, or in the House. The other estate is not something I would necessarily think we would want to encourage.

Mrs SHELDON: Thank you very much. I thank everyone for their contributions. Personally, I have found it very valuable. I am sure the committee has as well. That is an issue that has been concerning the committee and I think we have had a lot of valuable inputs. Thank you very much.

The CHAIR: It appears that we have covered some of the material we were going to cover through Lawrence's session. I am sorry about that, Lawrence. I thought it was very important to discuss all those details as they arose so that we did not skip over anything.

Mr SPRINGBORG: There was a fair bit of cross-pollination between what I was going to be touching on and what Joan was responsible for leading in her session. That is probably not a bad thing because it is going to expedite where we are going to get to. One of the real problems is defining any of these things. I have been on this committee now since about 1996. I have had a little bit of a break now and then, but the committee has always operated in an extremely bipartisan way. It has always sought to ensure that politics is not a part of any of the decisions we have to make before this committee, whether it be a code of ethical conduct or whether it be any of the privileges or content matters we have had to adjudicate from the parliament. That is probably the case. When talking about ways of dealing with this, we need to consider some issues. We have talked about the potentiality of courts defining things. That scares me a real lot. Charles made the point that maybe some of these matters should be adjudicated by the courts and I also think Tony indicated that could be under certain circumstances. I think Charles said that they are above the political fray. That of course depends upon the individual judge and that depends on upon the respect that that particular judge has for the institution of parliament and their understanding of the institution of parliament. The mere fact that the O'Chee case went to one jurisdiction and we got one result and then it went to a higher jurisdiction and there was another result indicates that there is not always a good understanding. It might not necessarily be political; it might not necessarily be a good understanding. We have the problems of defining or dealing with issues of qualification. We have the issue that the House of Commons has not wanted to touch this. I think that that may be very well because the House of Commons tends to adopt a traditional approach and does not want to push the bounds of the ways things have necessarily been done for a long time and the world keeps moving on. Maybe the House of Commons will actually deal with that one day.

My other experience is that members have mostly been very responsible in their use of privilege or immunity in the parliament. We can consider all of those things when going to where

we have to go in a moment. Also, I have had the case—and these sorts of experiences have brought this to the fore—where I corresponded with a minister on a genuine matter of public interest with regard to contamination of a river by a feedlot. Within a couple of days I had the owners of that on the phone threatening me with defamation action and damages. It was a very intimidating experience for a new member of parliament. I had only been there for about a year or two and I was horrified. I thought, 'What do you do? Go to a lawyer. How do you do this? It's going to cost me thousands and thousands of dollars and it might not get anywhere,' but it is a terrifying experience. I acted in good faith. I do not know how it got from the minister's office to this person, but obviously it did and as a consequence it was closed down because it was a problem, but I did not know that. I went through this particular situation. Also, the people who raised it were concerned as well. How do we now best deal with that?

Neil has offered some thoughts. Everyone else has offered some thoughts as we have cross-pollinated this issue tonight, but do we deal with it only in the Parliament of Queensland Act, or do we deal with it as well under the Whistleblowers Protection Act in Queensland with regard to some redefinition and look at amending the Parliament of Queensland Act at the same time? That is probably a leading question. Is everyone comfortable with creating a whole new set of circumstances? They are the sorts of things we need to turn our mind to, because we will have to deal with the matter and bring it to some conclusion as a committee in the next few months, as well as looking at the issue of support for members of parliament who will be sued for defamation. I might ask Bill if he wants to comment on this, because I understand that he has actually presented evidence to a Commonwealth privileges committee with regard to the issue of whistleblowers and how best to protect them on information which they may take to a member of parliament. I do not know whether you believe that an amendment to the whistleblowers legislation is a useful or alternative way of looking at this or whether there is anything that we can do complementary with that in the Parliament of Queensland Act.

Dr DE MARIA: It is a good question. I did not present evidence to the Senate privileges committee; I was actually a client of the Senate privileges committee and subject to an inquiry. I gave evidence to the current committee that is looking at Senator Murray's whistleblower legislation for the Commonwealth. But with respect to your question, I did not have time today to look at the five whistleblower statues in Australia, but I think it is the South Australian one which specifically nominates a member of parliament as being jurisdictionally OK to receive whistleblowing disclosures. The rest of the acts, as far as I know, are silent on that.

I have got mixed feelings about whether to use whistleblower legislation here. I would be more inclined to go down Neil's route of extending the protection protocol through the act that he mentioned before. I have got mixed feelings because I have real worries about what I think are some of the structural flaws in the Queensland Whistleblower Protection Act. It has clearly got a lot of flaws. If it was a business, I think it would be bankrupt. It does not get too many clients. I remember that when the Human Rights and Equal Opportunities Act was enacted you had women queuing up in every state in Australia right around the block looking to go into that act. The Whistleblowers Protection Act is a chronically undersubscribed act. We have to ask fundamental questions about why Queenslanders are not using it. If you ask the Crime and Misconduct Commission now, it would say that it is overwhelmed with whistleblowers, but I wonder how it is defining them.

I think there are some structural flaws in that. The biggest, of course, is that you cannot legislatively control for unofficial reprisals. You can legislatively control for official reprisals, such as being sacked or being demoted, but you cannot legislatively control for unofficial reprisals, and the biggest one is ostracism. You cannot have a Queensland anti-ostracism act. It just will not work. Ostracism is the most common unofficial reprisal that whistleblowers experience. In our study, the *Queensland Whistleblowers Study*, that was the only reprisal that 100 per cent of the study said they experienced. There is no way of controlling it. Ostracism is the organisational equivalent of death. You could be walking down the corridor and suddenly three people in the corridor disappear into rooms. The damaging thing is that, if you have got a few psychological problems to start with, these can trigger very severe psychiatric symptomatology. I have big problems with an act trying to cover the whole waterfront there.

Dr CARNEY: I think it is much better to, as Neil has suggested, have a comprehensive package of protection. Whistleblowers would be just one aspect. That is a piecemeal approach. You would be better off with comprehensive protection.

Mr SPRINGBORG: If we went down the approach of defining this specifically in the Parliament of Queensland Act as a whole new thing, it also has the advantage of becoming simpler for the courts if the matter ever does arise, and that would depend very much on the way it was written.

Dr CARNEY: That is right.

Mr SPRINGBORG: If it was simpler and very distinct, there should not be much room for judicial involvement.

Dr CARNEY: I agree with your opening remark that you have a problem with definition. I think even Neil's proposal will involve quite a degree of challenge in terms of defining the sorts of documents covered and what that level of protection should be. Can I just say something about the role of the courts? There is a fundamental principle that has been around for 300 or 400 years that the courts will decide on the extent of parliamentary privilege but they will never judge its exercise. So that is an important thing to keep in mind. At times, that distinction is not easy to see in some cases, but it is an important one. If parliament is clear in the scope of protection it provides in the legislation, the courts' role is, quiet legitimately, to define that protection. Insofar as it is inadequate or ambiguous, the court will have to fill that in. But in terms of deciding whether someone has abused a privilege or not, it would be unheard of to give such jurisdiction to the court. It would be a ridiculous possibility to contemplate. It is a matter simply of defining the protection adequately enough to avoid judicial concern over what it means.

Prof. SAMPFORD: I agree with what Neil is saying: you should have a separate set of protections and keep away from the word 'whistleblower'. 'Whistleblower' causes problems. Any good system needs whistleblower protection. No integrity system is going to be perfect. If there were a perfect integrity system there would always be an appropriate channel to take and so there would never be any whistleblowing. The only reason you have whistleblowing is that no system is perfect. But what we are talking about here is trying to devise the system so that there is actually a way in which you can quietly come to your member and he can become a persistent inquirer. The issue arises where the parliamentarian decides that the persistent inquiry is getting nowhere and therefore has to go public. That is the biggest question. We spent a lot of time in the first session on that question. What are the conditions and what is the advice you give to members as to what you do take it from the persistent private inquirer to—what I call the parliamentarian becoming a whistleblower because they actually go public. Obviously, that is intended always to be protected, but that is when we need to think very carefully. The better the system for the persistent inquiry and the better the ministerial and bureaucratic ethics to deal with these effectively, the less you have to have somebody getting up in parliament.

There is always going to be a problem. If constituent A has complained about constituent B, the MP is trying to resolve it and is pressing it as far as they can. Ultimately, if it goes public, in that case it is a matter between constituent A and constituent B, and something negative is said about constituent B. The important thing is that the parliamentarian has pushed it as far as they can, firstly, because you would prefer not to have it in public; also, the parliamentarian needs to be pretty well satisfied that when they do get up in parliament and say, 'Constituent A is a good person. Constituent B is a really bad person,' they have actually satisfied themselves that they have got the right end of the stick. I think it is better to put these things together into a code, say what you want them to do and to give advice, because there are choices to be made. Leave the choices up to the individual parliamentarian, but give them advice beforehand and then have an effective parliamentary committee to second-guess them afterwards if they decide to go against the advice.

Mr LAURIE: I think one of the things that in any provision would be a mistake—and that is to ever focus on the type of person who is going to walk through the door. And you just avoid in any legislative sense talking about a constituent, whistleblower, informant—because they are just descriptive terms that you do not want to become the focus. The focus should be on the transaction or the publication, if you like.

Mr SPRINGBORG: The information provided by a person to a member of parliament.

Mr LAURIE: Any person is A, the member is B, the minister's department or whatever is C, and it is the transaction between A and B that is protected and the transaction between B and C that is protected. As long as B is a member of parliament, you do not have to focus on anyone else's status. The moment you start talking in terms of whistleblower, informant, constituent, then you are fundamentally weakening the whole basis of the protection and you get into definitional arguments about what is somebody. Quite frankly, in a lot of cases I think there are a lot of people who walk through your door who might in technical terms be whistleblowers but who would feel quite upset to be called so; or 'informant', which is even a worse name!

Mr MORRIS: I just wanted to make three points. The first is to embrace something Neil said about legislative drafting. I do not think there is any other branch of the law where people would be silly enough to go back to an act of 1688 and try to sweep something in under the cover of that act. The language of it is still obscure—'proceedings in parliament shall not be impugned or challenged in any other place'. What on earth does that mean? It is time we got away from this whole idea. It is like a very old antique rug that is pretty threadbare and has lost a lot of its colour but people keep trying to sweep new things under it. I think we need a whole new drafting process.

The second point is about the courts. I take on board what Lawrence said about the O'Chee case, and there have been other very unsatisfactory decisions in relation to parliamentary privilege. I think in fairness to judges it has to be said that it is not because they are politically biased or even that they do not apprehend the seriousness of the issues. The problem is that judges are very good at deciding the merits of a particular case between one person and another but they are not particularly adept, because it is not part of their job, to look at the ramifications of this for the parliamentary system as a whole. When you have got a piece of litigation before a judge—criminal, civil or whatever—it is very easy for the judge to say, 'We should narrow down this parliamentary privilege because it is going to keep out important relevant evidence, and we might get an unfair result in this case if that evidence is kept out.' So judges are just seeing the case before them rather than seeing the whole ambit of it.

That is why, when we come to this new legislative immunity that we are talking about, I see it as something that should be based on the proposition that once a member of parliament asserts parliamentary privilege, as Bill said earlier, the documents get put away in a safe until the committee of the parliament decides whether the privilege applies or not, and that decision is what determines the matter, not the decision of a court or a judge.

The third thing I wanted to say is relating to this whistleblowers concept. I agree with everything that Charles said about that. I think probably the greatest whistleblower in the history of this state was the late Mr Kev Hooper, the member for Archerfield. Whether you were on his side of politics or not, he did a great job at a time when things were pretty rotten in the state of Denmark to blow the whistle on inappropriate conduct. Sometimes he got it wrong, but that is not the point. The point was that he was there as a champion for the diggers in his electorate who came to him and trusted him to take on board the information they provided and use it in the right way to ensure that corruption, if it did exist, was exposed. That is why I think we should not even be talking about whistleblowers and so on, we should simply be talking about members of parliament who receive information and who act on that information. That is where the privilege is relevant.

Dr DE MARIA: I agree with what Neil is saying, except for one point. He was saying that terms like whistleblower and informant are descriptive terms. They are not, really. They come with enormous ideological baggage. Every time we think of 'informant' we think of something and every time we think of 'whistleblower' we think of something else. I think he has got the solution right, and that is that we do not worry about protecting the person who comes bearing information, we protect the transaction. We are interested in transaction protection. That neutralises people, systems and so on.

I will boomerang now to the first point I made here. You could go ahead and get through a new protection protocol. Let us say that happens. But if the level of trust in the community has not been boosted up, you will have the shingle outside the door but you will not get much business. That is the difficulty here. You could have a wonderful service inside. We know from studies here and overseas that something like 85 per cent to 95 per cent of people who see

wrongdoing do not report it. It is way out. We are talking about a statistically freakish group of people who in the public interest we should be trying to increase up so that it is the majority. But at the moment most people walk away from wrongdoing and will not report it. We could establish this, but we may find ourselves looking at the watch and wondering where the business is going.

Mrs SHELDON: I think a lot of people do not report wrongdoing because they are concerned about how they could legally get caught up themselves, and that is becoming more and more an issue with people. What we are trying to do is break that down, because they are not going to be legally caught up. Even people seeing someone being robbed or whatever think, 'My God. I will have to do this, this and this,' and walk on.

Dr DE MARIA: That is a very good point. It is good because a solution to that is within the ambit of your terms of reference. But there is another point—this is only my personal view—and that is that we are also experiencing a decay in civic responsibility, which is outside your terms of reference.

Mr SPRINGBORG: We cannot really do much about that. We are trying to protect and encourage people who want to do the right thing. There have probably been only two or three occasions in my parliamentary career when somebody has come to me and provided information where I could have potentially ended up in strife, not because there was anything wrong or whatever, but because somebody was well-heeled or wanted to use the resources available to them to frustrate a transaction between my constituent, or a person, me and a minister. But this is about ensuring that people who want to come forward are able to come forward. It is not going to be the thing that they chatter about in the streets every day. Very few people will talk about this. But the people who are interested to know will know that they are protected and they might tell someone else.

Mr LOGAN: I heard earlier in our discussions a reference to a member of parliament being like an ombudsman. I would prefer to turn that on its head and say that the Ombudsman is like a member of parliament. If you go back to tintacks, the Ombudsman is an officer of parliament. There is something of an inconsistency, if you like, in affording the Ombudsman particular protections for particular good reasons and yet a member who is really the master of the Ombudsman—or at least the House is—not enjoying, when the member does exactly the same role, the same sort of protection. I would urge you, even if you have no other outcome, to mirror the constituency business protection with what the Ombudsman is already given for very good reasons. The effects that our current deputy chair described of having in terms of, 'Gosh, I get this letter which is threatening defamation,' is a real world experience lying behind what is described as the quote 'chilling effect' in O'Chee's case and other cases in this branch of the law. That is exactly what it is. It gives you a second thought: 'I know I should be doing this for good reasons. But I am not willing to stake the family farm or house on it.'

The propositions about which we are talking are radical. I agree with that. But they are only radical in the same way that in the middle of the seventeenth century, after a quite terrible civil war, there were then what were radical proposals put forward. All that we are doing, if we do extend the privilege, is without the bloodshed acknowledging that times have moved on and perhaps in a way that the House of Commons has been reticent to do. But we are bringing up to date and making of continuing relevance the role that an MP has in our society. We are just updating it.

The other thing one might reflect on is what is called the Strauss case, which was to do with members' correspondence—writing off to a board, I seem to recall—which did not go through the parliament. The House of Commons Privileges Committee was not old fashioned; it did regard that as being covered by parliamentary privilege, that members' correspondence. It was just that when it was put forward to the full House for adoption it was lost on a vote of 218 to 213. It was a very narrow vote, yet it has been given some sort of sacrosanct status, that is, that members' correspondence is not covered because the House of Commons vote was lost.

Mr LAURIE: Maybe by the Attorney-General on the debate, who very much—

Mrs SHELDON: Was it a political decision?

Mr LOGAN: With respect, everything that happens in parliament in one way or another, depending on how you define it, is political.

Mrs SHELDON: Some are more political than others.

Mr LOGAN: Some are more political than others.

Prof. SAMPFORD: I do not think it was a party political decision.

Mr LAURIE: In that respect the Attorney-General, who was absolutely averse to extending the privilege to correspondence, led the debate.

Mr LOGAN: The other matter I would like to mention is that, if one does change—and I can, with respect, see some very good sense in perhaps not polluting section 9 of the Parliament of Queensland Act and having a 9A or whatever come in, one would need also to make a corresponding amendment to section 9 of the Constitution of Queensland Act, which would just insert 'subject to the Parliament of Queensland Act, the privileges of the Legislative Assembly are as per the Commons House of Parliament,' so that one would get symmetry between those two pieces of legislation.

Mr MORRIS: I am not sure that that is necessary, because 9(2) states 'until defined by another act'. So in a sense you would be defining it.

Mr LAURIE: It has been defined.

Mr SPRINGBORG: When we get to that stage we can take some further professional legal advice on it. Have any of my colleagues got any points they would like to offer? Anyone?

Ms LEE LONG: Would a change to the Queensland Constitution have to go to a referendum?

Mr MORRIS: No, not that provision. As Lawrence says, that provision is not an entrenched one so you would not need a referendum.

The CHAIR: It worries me that no other parliament has taken this step to go that little bit further to give that extra privilege, not even the House of Commons, and we do not really know what the reason is.

Mrs SHELDON: I think moving around we have a fair idea why—to stop ourselves being trailblazers, because no-one else has been prepared to do it.

The CHAIR: I know that. I cannot understand why it has been stopped all the time.

Mr MORRIS: Leaving aside New Zealand for the moment, this is the only unicameral legislature. Most other parliaments have an upper house with extensive committee systems where a lot of these issues can be raised in committees that we just do not have the luxury of here. Secondly, we are a state in which for a period of a quarter of a century or so the principles of parliamentary democracy were not even paid the barest lip-service. All political parties have now moved on from that time. But I think we have a lot of baggage that we have to get rid of from, if you like, the pre-Fitzgerald era.

Mr FENLON: This is an interesting point in terms of how some of the other jurisdictions have become activated. The New South Wales people seem to have been activated primarily by the Franca Arena case, which came onto the horizon—this is a further dimension that we still have not touched on. I think it became particularly of interest there when the officers of the parliament were also roped in to consideration because they had actually sighted or processed some of the documentation that was tabled. I think there is a whole set of questions we have not even explored tonight in terms of our electorate officers, officers of the parliament, the formal officers and other employees. I am not sure how much we can simplify the proposal so that these considerations are included, but we do not also want to overcomplicate it by bringing in those considerations.

Mr LAURIE: We should not necessarily be frightened of other jurisdictions not doing these things. Many of them also do not have a register of pecuniary interests. They certainly do not have a register of pecuniary interests that goes as far as the Queensland one does. Many do not have a citizens' right of reply. The ones that do, they are not necessarily as expeditious as the Queensland one.

The CHAIR: I know we are well ahead of other states in terms of what we come up with at times, but it appears to me that these things have not happened for no real reason. There is nothing documented to say why they have gone that way or not gone that way.

Mrs SHELDON: Possibly the issue just has not arisen. We have certainly looked at these issues and debated them a lot more than most other parliaments we have been to. Would you not agree?

The CHAIR: Yes.

Mrs SHELDON: The House of Commons and House of Lords—I went over and saw them—had a joint committee looking at a number of issues. Primarily, it is from there that they got their code of conduct, or whatever one calls what they produced. Lord Nicholls chaired that. I hear what you are saying. You are saying: is there a reason they have not done it? I cannot answer that question. But sitting here tonight, I am quite surprised at the answers. I thought we would get all of you people saying, 'What are you doing even considering doing this?' It has been quite refreshing to hear the excellent points of view that have been put across.

Mr SPRINGBORG: I think some of the difficulty here is that probably a lot of other parliaments have realised there is an issue but they have probably had some difficulty in coming to grips with where you draw the line and how you do it, because it is a whole new area. It is not that they do not have a desire to do it, but who puts that very long first toenail into the water and starts to submerge themselves? That is where we come in. Many other peripheral issues have come up tonight. We have looked at the issue of the publication of matters of correspondence that may happen between A, B and C and whether that should be protected. Quite clearly, it should not be protected if it has not been raised in the parliament. But the other matter that I think Bill touched on was matters raised in the parliament then being said outside the parliament. We have the Parliamentary Papers Act, which gives that qualified privilege to matters that were published if it is a direct reproduction of what was is the House. I find it bizarre that you can say something in the parliament which attracts privilege but walk outside and say exactly the same words, which are in the public interest, and bang! I think there are other issues that we may have to look at some other time.

Dr CARNEY: I received a copy of a case from the Court of Appeal in New Zealand, decided three months ago, where an MP allegedly defamed someone in the House, walked outside—and in the O'Chee case I think it was, or Lawrence and Katter—simply said, 'I stand by what I said in the House' and is sued, and the Court of Appeal held that they can refer to what was said in the House, because he has incorporated it by reference. That is an extraordinary decision.

Mrs SHELDON: That was in New Zealand?

Dr CARNEY: The New Zealand Court of Appeal.

Mr LAURIE: There have been a number of similar decisions. I think I briefed Tony in a Queensland matter involving a similar situation where there was a republication outside.

Mrs SHELDON: That is bit outside the scope of what we are doing here.

Mr SPRINGBORG: I know, but it was raised. There have been a whole lot of issues raised.

Mrs SHELDON: It is very valid. It seems a nonsense that, from the information I have had, if you do make a speech it could possibly be regarded by some people as defamatory and they wish to sue you; you produce an exact copy to the media or anyone else, and you could possibly be sued, but if the media or whoever gets on to—correct me if I am wrong on this—the parliamentary web site and takes it from that, that is all right.

Mr SPRINGBORG: Yes.

Mrs SHELDON: Even though you have uttered it in there.

Mr SPRINGBORG: I think there are other matters that we have to look at. Is there any other comment on these issues?

Prof. SAMPFORD: I am not sure that this is all that radical. In some ways, people have not done it. But it seems to be just working through the logical conclusions of other bits of the integrity system. I think Queensland is a bit different because it went through the EARC process in which we are used to the idea of taking an issue, looking at what other jurisdictions did, going down to the very basics of why we have this particular institution, and then trying to work it through. Although there are some things that are done very differently elsewhere, the basic

architecture of what we are looking at is an application of an Ombudsman principle, back to parliament, and those sorts of things. I think this is not radical in conception. It is nothing like 17th or 18th century changes. Most of this is just working through the logic of what parliamentarians are expected to do.

Dr CARNEY: All right. I withdraw the word 'radical.'

Prof. SAMPFORD: It is radical in being actually systematic about it.

Dr CARNEY: It was a poor choice of words. It would be better to have said simply 'different'.

Mrs SHELDON: You have livened up the debate by saying 'radical'.

Mr LOGAN: We do not want to draw another comment, though, do we?

Mr SPRINGBORG: It is a significant extension on where we are.

Dr CARNEY: Is it really? All of the situations you have outlined tonight where you have been threatened with defamation, you have all been covered by qualified privilege. The only basis upon which that could be removed is malice. All you are doing is providing a new regime which removes that malice requirement, in effect. Is that too simplistic? In that sense it is a small step, but a significant one.

Mr LAURIE: It probably extends it beyond that. The malice exception is primarily when we are thinking in terms of defamation action. But there are many other actions that can be taken. There are other actions that could be taken that involve these transactions.

Dr CARNEY: Defamation would be the most significant problem.

Mr LAURIE: It is the primary one. Therefore, it is the one where malice is most raised.

Mr SPRINGBORG: What about damages?

Dr CARNEY: Damages for what?

Mr SPRINGBORG: Defamation and damages are two separate things. Somebody has suffered what they believe to be some loss because of a negative reflection on their business or whatever the case may be.

Mr MORRIS: Slander of title.

Dr CARNEY: Other tortious claims.

Mr SPRINGBORG: There are other matters. If it was more clearly defined, then it would be far less likely that you are going to have these adventurous letters coming forward from certain people towards members of parliament as well.

Mr LAURIE: You would certainly have an easy answer.

Mr SPRINGBORG: That is right.

Mr MORRIS: That actually reminded me of something that I wanted to say in response to Neil's comment. Neil was saying that the only restriction on the privilege should be when the transaction is criminal. The drafting of that would have to be very careful because, of course, defamation itself is a criminal offence in Queensland.

Mr LAURIE: It is—

Mr SPRINGBORG: It is a simple offence under section 9 of the Defamation Act and it is not mentioned in the Criminal Code.

Mr LAURIE: I was thinking there in terms that we have some examples under the Parliament of Queensland Act. Evidence given by a witness is protected except if the witness commits perjury and other similar offences. I think that there is a template that you could use from even the Commissions of Inquiry Act, which has those sorts of exemptions.

Mr MORRIS: It is something that you have to be very careful about. Let us say, for example, I became aware that a public servant was using his computer to distribute child pornography, and to bring this matter to the attention of the authorities I got one of these images and sent it by email to Lawrence so that he could follow up the inquiry. I would be committing an offence in making that transmission. But the whole point of the privilege would be to protect the fact that I am able to give that information to him so that he can make use of it. That is very

different from sending him a letter saying, 'I will give you $5,000 if you ask this question in parliament,' which plainly should not be protected. So we have got to be careful as to what sort of criminality needs to be covered by that.

Prof. SAMPFORD: I just want to say, you talk about removing malice. My view is that you should look at some remedy for extreme abuses—not by the parliamentarian, but by the complainant. I still think that you should look at that. The other thing, though, I think is that one of the consequences of actually increasing the privilege for these communications is to guard against the abuse element. The thing that I said at the beginning is that you need to have guidelines for parliamentarians as to how they use privilege when they actually go public on it—trying to make it easier to be the persistent inquirer. But I think that you need to have some guidelines and the provision of advice for when you actually do go public with it because, of course, if you are going to increase the protection for the provision of the information, then you have to be that much more careful about the abuse on going public. So I think that you actually achieve a lot more by giving greater privilege, but also bringing in greater guidance as to how that privilege is exercised. I think if you just increase the privilege without giving the guidelines as to how to use it, then it might actually, firstly, be criticised and, secondly, that it could be more damaging.

Dr DE MARIA: The difficulty I have with that is that I think that we are losing sight of the main game here. The main game is to protect the flow of information. I think that we should not lose sight of that. We are protecting a conduit in which information flowed.

I just want to make a very quick point about something else. It occurs to me that you are doing two very important things here. We are not only working around the whole issue of protecting constituent communication between yourself and the constituent, but you are also working on protecting that communication in a bureaucratic afterlife. In other words, once it leaves you, it could circulate in a bureaucracy for some months or years. So I think that you are doing two things here: protecting the primary communication and then the afterlife communication.

Mrs SHELDON: Which is very important. Files stay in departments for an inordinate amount of time.

Dr DE MARIA: Because it could well be that the original parliamentarian has gone—lost her seat, or died, or whatever—but the thing still stays on.

Mr SPRINGBORG: I think on that point we might hand back to the chair, because our time is getting on. I think that no doubt we will all be corresponding a little bit more as we head down the track of finalising our position on this. I know from my perspective, we very much appreciate the great knowledge that you respectively have in this area and your interest and the assistance that you are providing to the committee in that interest.

Mrs ATTWOOD: I second that motion. I would just like to say thank you very much for your participation here tonight. I could have gone on for another couple of hours, I think, because it has just been so interesting. The more we talk, the inquiry gets larger. We have got more to talk about. But a couple of things that I have picked up here tonight, in summary, is that we need to define the protection adequately enough to avoid court intervention. That is something that I think is very important. We need a whole new code or system apart from the old code—leave the old code there but bring in our own code. It certainly changed my view on how I was looking at the solutions to our problem in the first place. Privilege to me was a track that really we should not be going down at the beginning of all of this and I have changed my perception totally of how I am thinking about the situation now. I thank everybody very much, and thank you very much, Rosa, for staying so long. I am sure that we will be in touch. I guess what we are going to do next is meet as a committee and discuss the findings of this forum and look at the submissions again and see what we can come up with in terms of a draft report, which you will be privy to. Thank you very much, everybody.

The conference concluded at 8.45 p.m.

APPENDIX D

SUBMISSIONS:

- Mr Ray Blackburn
- Mr Anthony J H Morris QC, Barrister-at-Law
- The Honourable Alan Demack AO, Integrity Commissioner
- Mr Russell Grove, Clerk of the New South Wales Legislative Assembly
- D G Burton
- Mr Greg Thomson
- Mr Paul Fennelly, Director-General, Department of State Development
- Mr Peter Henneken, Director-General, Department of Industrial Relations
- Mr Tom Gordon
- Dr Gerard Carney, Professor of Law, Bond University
- Mr Jim Varghese, Director-General, Education Queensland

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