Submission No 70

Submission to Standing Committee on Legal and Constitutional Affairs

Whistleblowing protections

The present position

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Parliamentary Service Act

The *Parliamentary Service Act 1999* provides protection in the following terms:

M.R.

A person performing functions in or for a Department must not victimise, or discriminate against, a Parliamentary Service employee because the employee has reported breaches (or alleged breaches) of the Code of Conduct to:

> (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
>
> (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner; or
>
> (c) a Secretary or a person authorised for the purposes of this section by a Secretary[1].

The key points to note are that the provisions:

- protect parliamentary service employees;
- apply in respect of the reporting of breaches or alleged breaches of the Code of Conduct (which is set out in s.13);
- apply to actions by persons performing functions in or for a Department of the Parliament;
- provide that persons 'must not victimise or discriminate against' a parliamentary service employee because the employee has reported a breach or an alleged breach of the code; and
- specify the recipients of reports as the Parliamentary Service Commissioner, the Parliamentary Service Merit Protection Commissioner or the Secretary (which include the relevant Clerk), or their delegates.

The Parliamentary Service Act was enacted in 1999 at the same time and in conjunction with the *Public Service Act 1999*. Key provisions of the Parliamentary Service Act mirror key provisions of the Public Service Act, the differences between the two acts reflect recognition of the distinction between the parliament and the executive, and the resultant implications for the supporting departments and their employees. Consistent with this approach section 16 of the Parliamentary Service Act embodies the same principles as section 16 of the Public Service Act.

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[1] Section 16.

Parliamentary Service Act Determination 2003/2 sets out complementary provisions for the consideration of matters raised under section 16:

- specifying office holders to whom reports may be made;
- specifying certain procedures for the handling of reports;
- allowing office holders who consider on reasonable grounds that a report or a part of a report is frivolous or vexatious to decide not to investigate the report or the part of the report;
- allowing secretaries to issue procedures for the handling of reports, but requiring among other things that such procedures must not be inconsistent with directions issued by the Parliamentary Service Commissioner for determining breaches of the Code of Conduct; and
- allowing office holders to delegate powers or functions under the determination, except the power of delegation.

As I understand it there have been no cases of what would be regarded as whistleblowing reports in connection with the Department of the House of Representatives since the act commenced in 1999, and so the Department has no experience on the practical application of the protections set out in section 16.

Members of the House

Members are not specified in either the Parliamentary Service Act or the Public Service Act as a class of persons to whom protected reports may be made. As far as I know members are not specified for similar purposes in any other Commonwealth law.

House committees and committees such as the Joint Committee of Public Accounts and Audit sometimes receive submissions and oral evidence from individuals that make allegations about activities in or by federal government departments and agencies. The protection of absolute privilege applies to such submissions and to such evidence in accordance with the provisions set out in the *Parliamentary Privileges Act 1987*. The House also has the power to punish persons who or organisations which intimidate, harass, discriminate against or interfere improperly with witnesses or prospective witnesses. In addition to the House's ability to impose penalties for contempts, section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given, or induce another person to refrain from giving any such evidence – ie as well as the immunity available in respect of evidence forming part of proceedings in Parliament, a statutory offence provision in addition to the traditional parliamentary power is available to ensure the protection of witnesses who provide information to parliamentary committees[2].

[2] And see *House of Representatives Practice*, 5th edn, pp 671-5.

There is no doubt that individual members would sometimes also receive information or claims concerning federal government departments and agencies and that sometimes such information or claims would probably be thought of by those making them as having the character of public interest disclosures.

Whether the protection of parliamentary privilege would be available in respect of the communication of such information or claims would depend on the connection the action would have to 'proceedings in Parliament'. The protection is available, among other things, in respect of '.... all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee ..... and includes .... The preparation of a document for purposes of or incidental to the transacting of any such business ...'. The Queensland Court of Appeal has accepted a claim that a number of documents obtained by or provided to a Senator which related to a subject he raised in the Senate did not need to be produced in response to an order because of the provisions of subsection 16(2) of the Parliamentary Privileges Act[3].

It is likely that members also receive information or claims concerning departments and agencies in circumstances where there is no connection with 'proceedings in Parliament'. The present legal position seems clear: the protection of parliamentary privilege is not available in respect of such communications. The Committee of Privileges (now Privileges and Members' Interests) has provided advice to members which has acknowledged this position[4].

It is possible that action taken against a person who had provided information to a member even where there was no connection with proceedings in Parliament could itself be dealt with as a matter of contempt – the ability of the House to punish for contempt is not dependent on an action having a connection with 'proceedings in Parliament'[5]. The requirements of section 4 of the *Parliamentary Privileges Act 1987* would need to be satisfied in such circumstances:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free performance ....by a member of the member's duties as a member.

Defences of qualified privilege could also be available in respect of actions for defamation against persons communicating information or allegations concerning a federal department or agency to Members in circumstances where there was no connection with proceedings in Parliament.

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[3] *O'Chee v Rowley,* 1997 QCA 401.

[4] Committee of Privileges report, November 2002.

[5] Thus, for example, the former Committee of Privileges has considered matters such as the disruption of mail deliveries and the execution of a search warrant on the electorate office of a member.

Possible Changes

Parliamentary Service Act

The provisions of section 16 of the Parliamentary Service Act can be subject to the same comments that could be made about the parallel provisions of the Public Service Act. Thus for example:

- it is likely that many matters that could be regarded as public interest disclosures would also constitute Code of Conduct issues – that is they would be found to be covered by the section 16 protections;
- the provisions apply to reports by parliamentary service employees, among other things they do not apply to protect former employees – but that said any reprisal or action by an employee against a former employee on account of a complaint the former employee had made would itself be most likely to involve a breach of the Code of Conduct; and
- the prohibition is against actions 'by persons performing functions in or for a Department' so that, for example, actions by a member or by a former member against an employee would not be covered.

Conceptually, if amendment to the provisions of the Public Service Act were to be recommended there would be good reason to consider parallel amendments to the Parliamentary Service Act. As was the case when the current legislation was enacted, regard would need to be had to the distinction between the parliament and the executive and to the implications of this distinction for the supporting departments. Also, if the primary purpose of legislation concerning disclosures is to protect those who make reports concerning executive government, it should be acknowledged that provisions concerning the parliamentary departments would not assist directly the achievement of that objective.

As noted, in these matters the Department has no experience of reports under section 16 from which it could draw conclusions about the adequacy of the current provisions. These comments are therefore of a theoretical nature, and are not observations based on practice.

I am not in a position to comment on whether new legislation solely for the purpose of the protection of persons making disclosures would be preferable to amendment and extension of the provisions set out in the Public/Parliamentary Service Acts, although in respect to current or former public servants and parliamentary officers, amendment to the existing legislation may be preferable. Our Department has not had responsibility for the administration of the Members of Parliament (Staff) Act, although it would not be surprising if its operation had given rise to issues similar to some of those that could arise in respect of employees of the public service or of the parliamentary service. The Committee may be interested in comments on the experience of the Parliament of New South Wales with regard to

employment issues concerning members' staff and protected disclosures and complaints - see current inquiry by the Joint Committee on the Independent Commission Against Corruption, submissions by the Clerk of the Legislative Assembly and the Clerk of the Legislative Council and oral evidence taken on 1 December 2008.

The implications of including members as authorised recipients of disclosures

The inclusion of federal members as authorised recipients of reports of wrongdoing or alleged wrongdoing would have positive implications. It would be respectful of members in that it would give them a potentially important role in matters of government and it would group them with significant officers such as the Public/Parliamentary Service Commissioner, the Merit Protection Commissioner, departmental heads and the Ombudsman.

At a practical level, and depending on the detail, the inclusion of federal members would give those wishing to make protected disclosures a vastly increased range of choice, for there would be as many as 226 additional authorised recipients of reports[6]. Whether there was a practical need for such additional choices would depend on whether it was believed that there was or would be sufficient confidence in the way matters reported to the other recipients, such as the Public/Parliamentary Service Commissioner, departmental secretaries or the Ombudsman, or their delegates, would be dealt with[7].

It is possible that not all members would welcome their inclusion as authorised recipients of disclosures – some may feel that they already had a broad and demanding range of responsibilities. It is also possible that some protected disclosures made to members could come to feature in the political contest. This could be because of the personal or political ambitions or interests of a member, the interests of a person making a disclosure or because of some form of collaboration between a member and a person who wished to use the cover of the provisions to provide information to the member – for example a report of alleged wrongdoing by a member, perhaps a Minister, could be provided to a rival or opponent of the member. Should protected disclosure processes lead to information or allegations being used for political purposes the risk of harm to the reputations of people would be increased considerably[8], and the integrity of the system could be questioned.

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[6] As noted earlier, members also currently can be the recipients of information of this nature.

[7] The move to include members as authorised recipients under Queensland's Whistleblowers Protection Act appeared to follow from complaints that internal departmental processes had not worked satisfactorily in a high profile case concerning Bundaberg Base Hospital.

[8] Presumably an awareness of the practical significance of any extension of immunity from the ordinary course of the law is reflected in the fact that the Parliament has not extended the scope of parliamentary privilege. Thus, for example, and despite arguments that it should do so, immunity has not been extended to correspondence from members to Ministers. The convenience and certainty such a change would give members has been acknowledged, but the significance of such an extension in terms of reducing the ordinary rights of citizens has been recognised.

The successful operation of legislation on protected disclosures requires authorised recipients of reports such as departmental secretaries, Public/Parliamentary Service Commissioners or Ombudsmen, and the delegates of such persons, to discharge significant responsibilities.

Responsibilities, and the restrictions that may go with them, should also, in my view, fall to any member who received a report as an authorised recipient, but this is not an easy matter. Although it could be the case, and perhaps should be the case, that legislation on protected disclosures should impose restrictions on members who receive reports such a proposal would probably be objected to. It could be criticised as a restriction on freedom of speech, and also as removing or reducing the possibility that, for example, a delayed investigation, or a decision not to conduct an investigation could be raised in Parliament.

The maintenance of confidentiality during investigations is usually important in such matters. Confidentiality should help protect the rights and reputations of those against whom allegations may be made, and it may be important in a practical sense in the gathering of evidence. In addition, if an important objective is the protection of persons who make reports of wrongdoing or alleged wrongdoing, one practical way to help reduce the risk of punishment or reprisal is to limit, as far as is consistent with a thorough investigation, the dissemination of information about complaints.

If members were to be made authorised recipients of reports and not made subject to responsibilities or restrictions in the legislation, the integrity and credibility of the system would require that their behaviour in respect of reports was beyond reproach.

The Queensland Parliament has faced these matters recently. In 2007 amendments to the Whistleblower Protection Act (Qld) provided for members to be authorised recipients of disclosures. Shortly after the act was amended a new standing order was adopted. This required that members:

> ...should exercise care to avoid saying anything inside the House about a public interest disclosure which would lead to the identification of persons who have made public interest disclosures ("whistleblowers"), which may interfere in an investigation of a public interest disclosure, or cause unnecessary damage to the reputation of persons before the investigation of the allegations has been completed.

A schedule to the standing orders sets out guidelines which are not mandatory but which state that members are called on to observe them. The guidelines provide, among other things, that members should avoid disclosing the substance of a disclosure or referral in proceedings unless:

- the member was not satisfied that the matter was being investigated or otherwise resolved; or

- the matter had been referred for inquiry but the member had a reasonable belief that further disclosure in a parliamentary proceeding was justified to prevent harm to any person, or
- the matter had been referred for inquiry but the member decides to bring it to the attention of a committee of the House with responsibilities in the area.

I understand that some opposition members spoke against these proposals, seeing them as an attempt to restrict debate. The Speaker also made a statement, saying, among other things, that freedom of speech remained absolutely and that the standing order and guidelines were only cautionary. A point of order has been taken against a member when he was raising in the House the matter of a disclosure he had received, but he was not prevented from proceeding[9].

The *Protected Disclosures Act 1994* of New South Wales also allows disclosures to be made by 'public officials' to members of Parliament, but essentially the public official must have already made substantially the same disclosure to an investigating authority or officer and the authority or officer must have decided not to investigate the matter, or the authority or officer has decided to investigate it but not completed the investigation within 6 months, or the matter has been investigated but no action recommended[10]. The official must have reasonable grounds for believing the disclosure is substantially true and the disclosure must be substantially true[11]. I am not aware of any complementary changes to the standing orders of either House in New South Wales.

If members were to be made authorised recipients of reports the detail of the provisions would be important. The Queensland Act provides that members 'may' refer reports to specified offices. Such provisions would seem practical, even if they imply that members may only be referral points through which reports are routed. It is also possible that a person whose report to a member had not been referred on or who believed that the matter had not been handled satisfactorily could seek to raise a grievance against a member.

Interaction with the Parliamentary Privileges Act

Any potential issue in respect of new legislative provisions and the Parliamentary Privileges Act would depend on the detail of the new provisions. If members were to be specified as authorised recipients of reports but not made subject to any restrictions or obligations a form of words could

[9] Hansard, 16 October 2007, p 3545.
[10] Section 19
[11] Subsections 19(4) and (5).

be used to make it clear that Parliament intended that there would not be any derogation from the application of the law on privilege. Such provisions have been included in the Whistleblowers Protection Act of Queensland[12], in the New South Wales Protected Disclosures Act[13] and in the bill on Public Interest Disclosures[14] introduced by Senator Murray in 2007.

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[12] Section 28B provides that the act does not limit the powers of the Assembly and of its members and committees in relation to a disclosure received by a member.
[13] Section 23.
[14] Clause 6.