

Parliamentary Privilege and Members' Sources of Information

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Parliamentarians receive information from various sources including constituents. This information can be sensitive and may be defamatory. Absence of clear protections could deter informants. This article is about some measures which could be adopted in Queensland to address this situation including clarification of parliamentary privilege and a strengthening of whistleblower protection legislation.

Members of parliament have an important role in highlighting in parliament matters of significant concern to the wider community. In raising such matters, parliamentarians may act on information provided to them by members of the public (in this context referred to as 'informants'). Informants may be constituents or (especially in the case of shadow ministers) persons living outside members' electorates. Informants may raise matters of concern with MPs as a last resort (for example, when other avenues have been exhausted, or because they believe the formal channels are not appropriate in the circumstances).

Informants often communicate sensitive (and, at times, controversial) information to MPs, in the expectation that their own confidentiality and legal situation will be protected. However, if the disclosure contains anything defamatory against another person, the informant could face defamation proceedings. Members who pursue matters in parliament are protected by parliamentary privilege, but informants may not be adequately protected. This could deter informants from approaching MPs, thus inhibiting the free flow of information to members and parliament.

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A number of measures could be adopted to enhance the protection for members' informants.¹ This article addresses two measures that could be implemented under current Queensland legislation: further clarifying the boundaries of parliamentary privilege under the *Parliament of Queensland Act 2001* (Qld) (to provide that immunity attaches to informants' communications with MPs under specific circumstances²); and strengthening the *Whistleblowers Protection Act 1994* (Qld) or the *Parliament of Queensland Act* to provide for protected public interest disclosures to be made to members of the Legislative Assembly on a wide range of matters.

Parliamentary privilege

A fundamental principle of parliamentary democracies is that members of parliament must be able effectively to discharge their parliamentary duties — including their advocacy and inquiry functions — without impediment. Members must be able to speak fearlessly in parliament about any matter. To assist them in this regard, MPs are afforded the privilege of freedom of speech, meaning that MPs can discuss any matter in parliament without being constrained by concerns about possible legal consequences, and the proceedings in parliament cannot be questioned or impeached by a court or tribunal, including in defamation proceedings.

Freedom of speech derives from Article 9 of the *Bill of Rights 1688*, and is incorporated in Queensland legislation by s 8 of the *Parliament of Queensland Act*, which states:

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.

Under s 9 of that Act, 'proceedings in the Assembly'³ 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.

The terms of s 9 of the Act largely mirror the provisions at the Commonwealth level of s 16 of the *Parliamentary Privileges Act 1987* (Cth).

¹ For example, parliamentary privilege could be extended to such communications, or a specific form of professional privilege could be enacted to protect the communications. See House of Representatives Privileges Committee, *Report of the inquiry into the status of the records and correspondence of members*, Commonwealth of Australia, Canberra, 2000, for a comprehensive discussion of a range of measures.

² The scope of immunity will be discussed in general terms only. See the judgments in *O'Chee v Rowley* (1997) 150 ALR 999; *Brown & Williamson Tobacco Corporation v Williams* (1995) 62 F 3d 408; and *United Transportation Union v Springfield Terminal Railway Co* (1990) 132 FRD 4, which discuss this issue more fully.

³ *Parliament of Queensland Act 2001*, at s 9(1).

While a member's statements in parliament are absolutely protected under parliamentary privilege as to the use to which the statements may be put in legal proceedings, the position regarding informants' communications with members is less certain. When immunity has been afforded to informants' communications under parliamentary privilege this has, to date, rested on the courts' interpretation of the term 'proceeding in parliament' and the scope of that term. 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.

The Queensland Court of Appeal considered the meaning of 'proceeding in parliament' in the case of *O'Chee v Rowley*.⁴ That court held that where a member acts on an informant's communication 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 *Parliamentary Privileges Act*,⁵ attracting parliamentary privilege. The Supreme Court of Queensland, in the case of *Rowley v Armstrong*,⁶ held that an informant's act of communicating information to a member of parliament is not regarded as participating in 'proceedings in Parliament',⁷ and does not automatically attract immunity from legal consequences. Statements contained in *Erskine May's Parliamentary Practice*,⁸ based largely on United Kingdom cases, appear to have been a consideration in the decision in the latter case.

McPherson JA, in *O'Chee v Rowley*, 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. McPherson JA stated:

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 of Congress 'to attract future confidential disclosures necessary for legislative purposes' (1995) 62 F 3d 408 at 417.⁹

⁴ (1997) 150 ALR 1999.

⁵ (1997) 150 ALR 199, at 209.

⁶ [2000] QSC 88.

⁷ [2000] QSC 88, at 11.

⁸ Sir Donald Limon and WR McKay (eds), *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, (May's Parliamentary Practice), 22nd edn, Butterworths, London, 1977, at 133. See [2000] QSC 88.

⁹ (1997) 150 ALR 199, at 214.

Qualified privilege

Some informants' communications with MPs may not attract parliamentary privilege but may be afforded qualified privilege, meaning that in certain circumstances¹⁰ the matter is immune from defamation proceedings so long as the communication is made without malice.¹¹ It has been argued that qualified privilege is appropriate in these instances.¹² A concern remains, however, that qualified privilege may not adequately protect certain categories of members' informants because qualified privilege can be defeated by evidence of malice. As noted by Evans:

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.¹³

Evans 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.¹⁴ If the informant were to provide information to an MP that contains anything defamatory about the former employer, the former employee (the whistleblower) risks an action for defamation against them.

The problem that arises for MPs' informants is well illustrated by reference to Evans' example. A former employee may very well be a disgruntled employee when they provide information about alleged wrongdoing to an MP. The informant may also, however, be motivated by the public interest. If the whistleblower's employment had been terminated in an atmosphere of enmity it would not be difficult to show evidence of malice in a defamation proceeding — whistleblowers are rarely impartial observers as they are often involved or affected by the matter.

Whistleblowers Protection Act 1994 (Qld)

Specific categories of whistleblowers (generally public officers, but also 'any person' in certain instances) who disclose specific types of information in the public interest to an 'appropriate entity' are afforded protection under Queensland's *Whistleblowers Protection Act*. Section 39 of the Act provides that a person 'is not liable, civilly, criminally or under an administrative process for making a public interest disclosure' within the provisions of the Act.

¹⁰ For example, the provider and the recipient must have an interest or duty in providing and receiving the communication.

¹¹ House of Representatives Privileges Committee, *Report of the inquiry into the status of the records and correspondence of members*, Commonwealth of Australia, Canberra, 2000, at 22.

¹² See, for example, H. Evans, 'Members' informants: any protection?' (1997) *The Table* 19.

¹³ Note 12, at 22.

¹⁴ Note 12.

At least two significant limitations have been identified in the *Whistleblowers Protection Act*, suggesting that the protection under the Act for members' informants may be inadequate. First, the Act is generally limited to protecting whistleblowers who are public officers. In reality, the range of matters about which non public officers may make a protected public interest disclosure under the Act is very limited. Secondly, members of the Legislative Assembly are not recognised under the Act as an 'appropriate entity' to which a protected public interest disclosure may be made. The *Whistleblowers Protection Act* sanctions public interest disclosures by members of the Legislative Assembly.¹⁵ The Act does not, however, provide adequate protection to some categories of persons who may provide MPs with the information upon which the public interest disclosure may be based. This inconsistency has the potential to impact adversely on members' informants, and on parliamentarians in the discharge of their functions.

The Queensland Parliament addressed this question in relation to certain offences relating to children and young people, by including strong whistleblower protection in the *Commission for Children and Young People Act 2000* (Qld). That Act provides that a person is not liable — civilly, criminally or under an administrative process — for disclosing to the commissioner information that would help the commissioner 'in assessing or investigating a complaint' in regard to children at risk.¹⁶ The protection afforded to informants under the *Commission for Children and Young People Act* contains no requirement 'that the person act in good faith or without negligence or recklessness'.¹⁷ Unlike informants who 'blow the whistle' to MPs, whistleblowers under the *Commission for Children and Young People Act* do not have to rely on the uncertainty of the immunity afforded under qualified privilege. In other words, the Queensland Parliament has, in effect, extended the category of protected disclosures that may be made under Queensland legislation by extending absolute protection to informants who blow the whistle to the commissioner about suspected child abuse. The explanatory notes to the *Commission for Children and Young People Bill 2000* stated:

Clause 162 provides complete immunity for whistleblowers who disclose information to the commissioner that would assist the commissioner in the assessment or investigation of a complaint. [emphasis added]

The conferral of immunity from prosecution or proceedings is considered reasonable, given the nature of the commission's work and the overriding need to safeguard the interests of vulnerable children. Clause 162 is a standard provision which accords with the protection afforded to whistleblowers under the *Whistleblowers Protection Act 1994*.¹⁸

¹⁵ Schedule 6, definition — 'public officer'.

¹⁶ Section 162(1) and 162(2).

¹⁷ Scrutiny of Legislation Committee, *Alert Digest No 9 of 2000*, Goprint, Brisbane, 2000, at 16.

¹⁸ Commission for Children and Young People Bill 2000, Explanatory Notes, at 8–9.

The Minister for Families, Youth and Community Care, in response to issues raised by Queensland's Scrutiny of Legislation Committee about the relevant provision, stated:

Many persons who are aware of abuses against children may be fearful of whistleblowing if their livelihood may, in any way, be threatened by a disclosure to the Commission. Information that is not given in good faith or is in breach of confidentiality provisions may, nevertheless, be vital in uncovering systemic abuse or individual cases where the interests and well being of a child or children have been significantly threatened or abused.¹⁹

Similar comments may also apply in regard to other categories of disclosures that are not currently protected under the *Whistleblowers Protection Act*.

In summary, protection under the *Commission for Children and Young People Act* extends to disclosures that are not made in good faith (that is, to disclosures made in circumstances where the person making the disclosure may be represented as being actuated by an element of malice). This provision therefore addresses one of the primary limitations of both qualified privilege and the *Whistleblowers Protection Act*.

Queensland's whistleblower legislation is to some extent inconsistent with whistleblower legislation in New South Wales. Unlike the Queensland Act, the *Protected Disclosures Act 1994* (NSW) provides that a public interest disclosure may be made to a member of parliament. Section 19 of the NSW Act provides that a disclosure by a public official to an MP is protected in the following circumstance:

- the public official must have already made substantially the same disclosure to an investigating authority;
- the public officer must have reasonable grounds for believing that the disclosure is substantially true;
- the allegation must be substantially true; and
- the public officer must have made a substantially similar disclosure to an appropriate entity and the investigating authority must have decided not to investigate the matter.

The inclusion of provisions in the *Whistleblowers Protection Act* similar to those contained in the *Commission for Children and Young People Act* and/or the *Protected Disclosures Act* would more adequately protect members' informants from possible defamation proceedings. Alternatively, the *Parliament of Queensland Act* could be amended, providing that no defamation action may be taken for publication of information from a member of the public to a member of Legislative Assembly, and for further republication by a member of the Assembly to a minister

¹⁹ Note 17, at 26.

responsible for a matter the subject of the information (but that the protection does not apply in respect of criminal offences).

Parliament of Queensland Act 2001

A second option by which to enhance the protection afforded to members' informants is to clarify further or extend the definition of 'proceedings in the Assembly' contained in the *Parliament of Queensland Act*, to refer explicitly to such exchanges with members. Currently, the Act provides the following examples of 'proceedings in the Assembly':

- a) giving evidence before the Assembly, a committee or an inquiry;
- b) evidence given before the Assembly, a committee or an inquiry;
- c) presenting or submitting a document to the Assembly, a committee or an inquiry;
- d) a document tabled in, or presented or submitted to, the Assembly, a committee or an inquiry;
- e) preparing a document for the purposes of, or incidental to, transacting business mentioned in paragraph (a) or (c);
- f) preparing, making or publishing a document (including a report) under the authority of the House or a committee; and
- g) a document (including a report) prepared, made or published under the authority of the House or a committee.²⁰

These examples could be supplemented to confirm that, where communications from informants form part of, or are directly used in the preparation of, the debates and proceedings of parliament by a member of the Legislative Assembly, those communications are a 'proceeding in the Assembly'.

While some would argue that this measure expands the boundaries of parliamentary privilege, the provision would, in fact, reinforce the Queensland Court of Appeal's decision in the case of *O'Chee v Rowley*.²¹ That court clarified the status of documents that came into the possession of a then senator, which were retained by the senator with a view to using them or the information they contained, for the purpose of transacting the business of the Senate. The court held that such documents, or the act of procuring, obtaining or retaining possession of the documents, were acts done for the purpose of, or incidental to the transacting of, the business of the House.

²⁰ Section 9(2).

²¹ (1997) 150 ALR 199. Some may argue that this measure is unnecessary because of the *O'Chee case*.

In the decision on this matter, Fitzgerald P referred to the definition of ‘proceeding in parliament’ contained in the *Parliamentary Privileges Act* stating:

Creating, preparing, bringing into existence or coming into possession of a document is an ‘act’ within the meaning of s.16(2) of the Parliamentary Privileges Act. An act ‘done . . . for the purposes of . . . the transacting of the business of’ the Senate is a ‘proceeding in Parliament’. So is an act ‘done . . . incidental to . . . the transacting of the business of’ the Senate. Article 9 of the Bill of Rights provides that ‘. . . proceedings in Parliament ought not to be impeached or questioned in any court . . .’ The literal result of a combination of the material portions of the prohibition in Article 9 of the Bill of Rights and s.16(2) of the Parliamentary Privileges Act is that, if his statements in his affidavit are accepted, [the senator’s] creation, preparation, bringing into existence or coming into possession of documents ‘for the purposes of or incidental to’ his speeches of 8 and 19 June 1995 cannot be ‘impeached or questioned’ in [the plaintiff’s] action.²²

A clarification of the examples in the *Parliament of Queensland Act* in the terms outlined above would also effectively clarify the ruling by a single judge of the Supreme Court of Queensland in the case of *Rowley v Armstrong*, which related to oral communications from an informant to an MP. As noted above, the judge in that case did not regard making a communication to a parliamentary representative by an informant as participating in ‘proceedings in parliament’.²³ The suggested clarification would also effectively remedy the limited construction contained in *Erskine May’s Parliamentary Practice*, referred to in the case of *Rowley v Armstrong*, as to the protection afforded to members’ informants.

Extending the boundaries?

The Senate Committee of Privileges considered the extent to which absolute privilege should attach to communications between informants and parliamentarians.²⁴ That committee adopted a wider view than the view taken by the Queensland Court of Appeal in *O’Chee v Rowley*. The committee observed that such a communication should be protected by parliamentary privilege:

at the time of its publication to the senator . . . on the understanding that the material is intended to be used for purposes of or incidental to the transaction of business of the House of the Parliament.²⁵

The Senate committee expressed the view that if the material was not so used, it should be returned to the person, who could be advised that the material no longer

²² (1997) 150 ALR 199, at 202.

²³ [2000] QSC 88.

²⁴ Committee of Privileges, *Possible Improper Action Against a Person*, 72nd Report, Senate Printing Unit, Canberra, June 1998.

²⁵ Note 24, at 11.

enjoyed privilege.²⁶ While this would overcome a number of interpretive difficulties that currently exist regarding s 16 of the *Parliamentary Privileges Act*, a further question to be clarified would be the status of material provided by an informant to an MP that is not to be used in the House, but which may be used by the member in correspondence to a minister.

Potential for abuse

Any possible measures by which to more adequately protect members' informants must consider the possibility of false information being provided to members of parliament (for example, for malicious reasons). Whilst anecdotal evidence suggests that this is not a widespread occurrence, it remains a matter of concern to members and to the wider community.

The House of Representatives Committee of Privileges, in its November 2000 report titled *Report of the inquiry into the status of the records and correspondence of members*, drew attention to the risk of misuse that may arise from any broadening of absolute privilege.²⁷ How to deal with false, mischievous and malicious information provided to MPs would therefore be a significant issue should any measure be adopted to extend the boundaries of parliamentary privilege.

Conclusion

The extent to which communications between informants and MPs are, or should be, protected from legal proceedings is — and in the short term seems likely to remain — contentious. Immunity for members' informants has not kept pace with the contemporary role of parliamentarians, and the perceived lack of adequate protection for informants has the potential to deter members of the wider community from providing information — in the public interest — to MPs about matters of significant community concern.

Protection afforded to certain categories of informants under the *Whistleblowers Protection Act* may be inadequate, because the Act is limited in its scope and application. When information provided to MPs forms part of the 'proceedings in parliament', parliamentary privilege attaches to the communication. Where parliamentary privilege does not apply, an informant may be protected by qualified privilege but this immunity can be negated by evidence of malice.

These shortcomings are significant deterrents for MPs' informants (particularly those who may be actuated by both the public interest, or by what some may regard as an 'inappropriate motive'. They require clarification to ensure that MPs' sources of information do not 'dry up' and inhibit MPs in the discharge of their

²⁶ Note 24, at 11.

²⁷ Note 11, at 38.

parliamentary functions. One option may be to amend the *Parliament of Queensland Act* to clarify that the definition of ‘proceedings in the Assembly’ includes communications upon which members act in connection with their parliamentary functions.

A second option may be to amend the *Whistleblowers Protection Act* to provide that public interest disclosures on a wide range of matters may be made to members of the Legislative Assembly. Alternatively, a new provision could be included in the *Parliament of Queensland Act* to provide that no defamation action may be taken for publication of information from a member of the public to a member of Legislative Assembly, or for further republication by a member of the Legislative Assembly to a minister responsible for a matter the subject of the information.

While the further statutory clarification of the definition of ‘proceedings in the Assembly’ could provide greater protection for members’ informants, this measure could be viewed in some quarters as an extension of the boundaries of parliamentary privilege, with attendant concerns about the potential for its abuse. An appropriate provision in the *Whistleblowers Protection Act* or the *Parliament of Queensland Act* providing for protected disclosures to be made to members of the Legislative Assembly may, therefore, offer the most straightforward resolution of this matter. ▲