

SELECT COMMITTEE
ON PRIVILEGES

Possible improper influence
of a Member
AUGUST 2009

Report

Committee membership

Meredith Hunter MLA (Chair)

Simon Corbell MLA

Brendan Smyth MLA

Secretary: Tom Duncan

Assistant Secretary: Janice Rafferty

Resolution of appointment

On 16 June 2009 the Assembly resolved—That:

- (1) pursuant to standing order 276, a Select Committee on Privileges be established to examine whether:
 - (a) a breach of privilege or contempt has been committed by Mr Mark Cormack, Chief Executive of ACT Health, in relation to a letter he sent to Mr Hanson on 25 May 2009; or
 - (b) the letter was an appropriate response in the circumstances of Mr Hanson's media release of 21 May 2009;
 - (2) the Committee shall report back to the Assembly on 18 August 2009; and
 - (3) the Committee shall be composed of:
 - (a) one member nominated by the Government;
 - (b) one member nominated by the Crossbench; and
 - (c) one member nominated by the Opposition;
- notified to the Speaker by 4 p.m. on Tuesday, 16 June 2009.

Findings

Finding No 1

Having regard to all the evidence before it, the Committee considers that Mr Cormack's letter did not breach Mr Hanson's privileges. The Committee further does not consider that a contempt in the terms outlined in standing order 278 has been committed.

Finding No 2

The Committee makes no finding in relation to whether the letter of Mr Cormack's was an appropriate response in the circumstances of Mr Hanson's press release.

Recommendation

Recommendation 1

That the Government clarify the relationship between public servants and non-Executive Members of the Legislative Assembly, with a view to issuing guidelines for any interaction that is not covered by existing guidelines.

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Introduction

Sources of the Legislative Assembly's Privileges

1 The powers and privileges of the ACT Legislative Assembly derive from the *Australian Capital Territory (Self Government) Act 1988* which states at section 24 that:

... the Assembly may make laws:

- (a) declaring the powers of the Assembly and of its members and committees, but so that the powers so declared do not exceed the powers for the time being of the House of Representatives ...
- (b) Until the Assembly makes a law with respect to its powers, the Assembly and its members and committees have the same powers as the powers for the time being of the House of Representatives ...

2 The Assembly has not made a law under this section. Thus the powers and immunities of the Assembly are the same as those of the House of Representatives with one exception – that, as a result of subsection 24 (4) of the Self Government Act, it has no power to imprison or fine a person who might be found to be in contempt of the Assembly or its committees.

3 The privileges of the House of Representatives derive in turn from those of the British House of Commons as at 1901 via section 49 of the Australian Constitution, which states:

The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

4 Decisions of the House of Representatives and the Senate on privilege matters are important sources on the law and practice of privilege and contempt.¹

5 A breach of privilege and a contempt of parliament, although often confused, are not the same thing. A breach of privilege occurs whenever any of the rights or immunities of the House and its Members are disregarded or attacked by any individual or authority. A contempt occurs whenever an offence is committed against the authority of the House or a committee or a Member, and may not always involve a breach of a specific privilege.²

Privilege

6 House of Representatives Practice sets out a useful description of the difference between a breach of privilege and a contempt where it explains:

It has been said that all breaches of privilege amount to contempt, contempt does not necessarily amount to a breach of privilege. In other words a breach of privilege (an infringement of one of the special rights or immunities of the house or a Member) is by its very nature a contempt (an act or omission which obstructs or impedes the House, a Member or an employee of the House or threatens or has a tendency to do so), but an action can constitute a contempt without breaching any particular right or immunity.³

Contempt

7 A legislature's power with regard to contempt is analogous to that of the courts and reflects the need of a legislature, or a court, "to ... protect themselves from acts which directly or indirectly impede them in the performance of their functions." Note that "the power [to punish contempts] does not depend on the acts judged and punished being violations of particular immunities".⁴

¹ ACT Legislative Assembly Select Committee on Privileges 2003. *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Ministers refusal to answer questions in committee hearings and distribution of ACT Health documents*, 3 November 2007, pp 3-4.

² Lovelock L and Evans J, *New South Wales Legislative Council Practice*, 2008, p 98.

³ I Harris (ed), *House of Representatives Practice*, 5th edition, 2005, pp 707-8.

⁴ Odgers', *Australia Senate Practice*, 10th edn, p 58.

8 The relationship between immunities and the power to punish contempts is described in Odgers' *Australian Senate Practice* as:

The power of the Houses in respect of contempts ... is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.⁵

9 Erskine May, the guide to British parliamentary practice, describes contempt as:

... any act or omission which obstructs or impedes ... (it) ... in the performance of its functions, or which obstructs or impedes any Member or officer ... in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results even though there is no precedent of the offence.⁶

10 Contempt of parliament is further defined in the *Parliamentary Privileges Act 1987* at section 4:

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 exercise by a House or a committee of its authority or functions, or with the free performance by a member of a member's duties as a member.

11 *House of Representatives Practice* goes on to say that this "provision should be taken into account at all stages in the consideration of possible contempts. It is important to recognise that the Act does not codify or enumerate acts or omissions that may be held to constitute contempts".⁷

⁵ Odgers', *Australian Senate Practice*, 10th edn, pp 30-31.

⁶ Erskine May, *Treatise on the Law, Privileges, Precedence and Usages of Parliament*, 22nd edn, p 108.

⁷ I Harris (ed), *House of Representatives Practice*, 5th edition 2005, p 706.

12 The Houses of the Commonwealth Parliament, while treating contempt seriously, have tended to exercise their powers “with great circumspection”. The Senate Privileges Committee has generally confined its investigations to “serious matters potentially involving significant obstruction of the Senate...” and “... now regards a culpable intention on the part of the person concerned as essential for the establishment of contempt.”⁸

Contempt – Matters constituting contempt

13 Standing order 277 sets out various matters that the Assembly considers to be a contempt. In relation to the matter currently before this committee, the two instances that the committee considers to be relevant ones are:

277. Without derogating from its power to determine that particular acts constitute a contempt, the Assembly declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Assembly as a contempt.

(a) Interference with the Assembly

A person shall not improperly interfere with the free exercise by the Assembly or a committee of its authority, or with the free performance by a Member of the Member’s duties as a Member.

(b) Improper influence of Member

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Member in the Member’s conduct as a Member or induce a Member to be absent from the Assembly or a committee.⁹

14 The Committee concludes from the above that in this case for an action to constitute a contempt it should include:

- (i) an *improper interference* with the free performance by a Member or the Member’s duties as a Member; and
- (ii) an *intention* by the person responsible for the action to improperly interfere with the free performance by of a Members’ duties.

⁸ Select Committee on Privileges, op cit, p 5.

⁹ Select Committee on Privileges, op cit, p 6.

15 It is important therefore to distinguish between the ordinary meaning of contempt and its use in a parliamentary or legal context. Contempt, in the ordinary sense of holding something in extremely low regard or finding it despicable, is not relevant here. In a parliamentary context contempt is as defined above. Thus a person may find an action contemptible in the ordinary sense without that action raising an issue of contempt in the parliamentary sense.¹⁰

Contempt – Criteria to be taken into account when dealing with matters of contempt

16 Standing Order 278 of the Assembly states:

The Assembly will take into account the following criteria when determining whether matters possibly involving contempt should be referred to a Select Committee on Privilege and whether a contempt has been committed, and requires the committee to take these criteria into account when inquiring into any matter referred to it:

- (a) the principle that the Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Assembly;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

(Inserted 6 March 2008)

¹⁰ Select Committee on Privileges, op cit, p 6.

Circumstances of the reference

17 On 12 June 2009 Mr Jeremy Hanson CSC MLA, wrote to the Speaker in accordance with Standing Order 276 alleging a possible breach of privilege and contempt of the Legislative Assembly. In his letter Mr Hanson informed the Speaker that he had received a letter from the Chief Executive of ACT Health on 25 May 2009 which referred to a press release issued by Mr Hanson which made certain instructions of him, and which Mr Hanson believed, had he complied with those instructions, would have in effect interfered with his duties as a Member of the Legislative Assembly.¹¹

18 Mr Hanson provided both a copy of his press release (see Attachment A) and the letter that Mr Cormack wrote in response to that press release (see Attachment B) which led to Mr Hanson making the claim of a breach of privilege. In Mr Cormack's letter, entitled "Your media release 21 May 2009 'Another Gallagher Cover-up'" a number of concerns are raised about the accuracy of the information contained within the release and possible interpretations to be drawn by readers, commentators and the general public arising from the release. Mr Cormack also categorically rejects any allegation that he or any ACT Health officers responsible for dealing with the FOI application (the subject of the press release) had participated in a "cover up" or "misuse of process".

19 Towards the end of the letter, Mr Cormack states:

In the light of the above I believe that it is appropriate that you withdraw this allegation, and this is best done by withdrawing the media release in its current form. I believe that it is also appropriate that you take appropriate steps to clarify your published statement.

While ever this matter remains unclarified by you, the reputation of the integrity of myself and that of the officers responsible for managing this FOI process has the potential to be unfairly called into question.

20 These appear to be the "instructions" that Mr Hanson has complained about in his letter to the Speaker.

¹¹ Letter from Mr Hanson CSC MLA to Shane Rattenbury MLA, Speaker, dated 12 June 2009.

21 Having considered the matter, the Speaker, in accordance with standing order 276, made a statement to the Assembly on 16 June 2009 in which he decided that he had agreed to give precedence to a motion for the matter to be referred to a Select Committee on Privileges. Mr Hanson moved a motion which, following an amendment, was agreed to.

Precedents

House of Representatives

22 There are no direct precedents where a senior public servant has had dealings with an Opposition MP. However, there are several cases where the House of Representatives has dealt with alleged contempts where possible improper influence of a Member has occurred. They are detailed below.

2004

23 The most recent case in relation to alleged threats to Members was in 2004. In that case, a Member (who at the time was the Leader of the Opposition) alleged that a journalist had made a threatening phone call in which she issued a number of threats that were an attempt to unreasonably influence his conduct as a member in that they were trying to force him to take action in relation to one of his parliamentary colleagues¹².

24 The Committee found that the actions of the journalist did not amount to an improper interference with either Member in the free performance of their duties, and that the conversations should be seen in the context of the robust exchange that occurs between media representatives and parliamentarians in an open, democratic society. However, the Committee cautioned that “there is a need for the media to be conscious in their dealings with Members of Parliament and that there not be any appearance that they may wish to influence Members by any means in the free performance of their duties as Members.”¹³

¹² House of Representatives Standing Committee on Privileges, *Report concerning the alleged threats to Mr Latham MP and Mr Murphy MP*, February 2005, p 1.

¹³ House of Representatives Standing Committee on Privileges, *Report concerning the alleged threats to Mr Latham MP and Mr Murphy MP*, February 2005, p 5.

1994

25 Another case that dealt with a possible improper influence of a Member was in 1994. In that matter, a Member was served with a writ seeking damages for libel arising out of a letter from him to a Minister. After the matter was referred to the Privileges Committee, the Committee reached the following conclusions:

- as a result of the writ being served on the Member, the Member felt intimidated and constrained in making further representations on behalf of his constituents;
- no evidence had been presented to the committee which would establish that the person had intended to interfere improperly with the free performance of the Members duties as a Member.

The Committee found that, having regard to all the circumstances, a finding of contempt should not be made.¹⁴

1990

26 In 1990 a Member received a letter from a firm of solicitors which the Member considered constituted interference with his duties as a Member of the House.

27 In considering the matter, the Speaker stated that the matter was a borderline case upon which the House would benefit from the advice of the Committee of Privileges (as it was then called). The Committee found that the letter did not constitute contempt and recommended that the House take no further action on the matter.¹⁵

Senate

28 There are similarly no instances of a senior public servant's actions being referred to a Senate Privileges Committee, although as most Members would be aware the Senate Privileges Committee is currently considering a matter involving the interaction between a senior Treasury officer and opposition Members.

¹⁴ I Harris (ed), *House of Representatives Practice*, 5th edition, p 867.

¹⁵ I Harris (ed), *House of Representatives Practice*, 5th edition, p 863.

29 There have been privilege matters referred to the Privileges Committee dealing with threats to Senators, with one of those matters listed below.

1994

30 In the Senate on 21 September 1994, a Senator alleged that, when he raised concerns about a certain development project in Queensland, he had been threatened by the principal of the development. The Committee concluded that the principal had prosecuted his campaigns vigorously but in doing so did not obstruct the Senator in the performance of his duties. The Committee did not find that a contempt had been committed.¹⁶

31 It should be noted that among the many decisions the Senate Committee of Privileges made, when undertaking inquiries in relation to possible contempts, was that it should not make a finding of contempt against any person unless the committee found a culpable intention – even though it was entitled to make a finding on any basis it chose.

New Zealand

32 McGee's *Parliamentary Practice in New Zealand* sets out a number of criteria in relation to the way that legislature treats interference with Members. It notes:

There is no contempt in respect of attempts to influence Members, even by bringing pressure to bear on them ... unless there is a threat to do something which is improper in itself or which is of such an extraordinary or exaggerated nature that it goes beyond an attempt to influence the Member and becomes an attempt to intimidate.¹⁷

United Kingdom House of Commons

33 May states:

To molest Members on account of their conduct in Parliament is also a contempt. Correspondence with Members of an insulting character in reference to their conduct in Parliament or reflecting on their conduct as Members, threatening a Member with the possibility of a trial at some

¹⁶ Senate Committee of Privileges, *Possible Threat to a Senator*, Parliamentary Paper No 44/1995.

¹⁷ D McGee, *Parliamentary Practice in New Zealand*, 3rd edn, 2005, p 652.

future time for a question asked in the House, calling for his arrest as an arch traitor, offering to contradict a Member from the gallery, or proposing to visit a pecuniary loss on him on account of conduct in Parliament have all been considered contempts. The Committee of Privileges has made the same judgment on those who incited the readers of a national newspaper to telephone a Member and complain of a question of which he had given notice. Analogous to molestation of Members on account of their behaviour in Parliament are speeches and writings reflecting upon their conduct as Members.

Written imputations, as affecting a Member of Parliament, may amount to contempt, without, perhaps, being libels at common law, but to constitute a contempt a libel upon a Member must concern the character or conduct of the Member in that capacity.¹⁸

Conduct of the inquiry

34 The committee met a total of seven times.

35 The committee wrote to Mr Hanson, CSC, MLA and Mr Cormack seeking submissions on the inquiry. Both Mr Hanson and Mr Cormack lodged a submission. The Committee then authorised those submissions for publication only to Mr Cormack and Mr Hanson for the purposes of enabling each of them to examine each others' submission and, if considered necessary, inviting them to lodge a further submission, which they both subsequently did.

36 Standing order 280(g), which the Assembly first adopted in March 2008, requires that as soon as practicable after the committee has determined findings to be included in the committee's report to the Assembly, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the committee, in writing and orally, on those findings. The Committee is required to take any such submissions into account before making its report to the Assembly.

¹⁸ Erskine May, *Treatise on the Law, Privileges, Precedence and Usages of Parliament*, 23rd edn, pp 144-5.

37 Accordingly the Committee gave a copy of the findings to Mr Cormack and Mr Hanson on 13 August 2009.

Matters under investigation

(a) Has a breach of privilege or contempt been committed by Mr Mark Cormack, Chief Executive of ACT Health, in relation to a letter he sent Mr Hanson on 25 May 2009?

38 In considering this matter, the Committee noted from Mr Hanson's submission to the Committee, that in relation to Mr Cormack's comment that Mr Hanson should consider withdrawing the press release and make a clarifying statement:

I was particularly concerned that Mr Cormack was making certain requests of me which, had I complied, would have interfered with my ability to question the Minister and my call for an explanation from her.¹⁹

39 And that:

...the suggestion that I withdraw my media release would obviously have prevented me from pursuing this matter fully and appropriately.²⁰

40 Mr Cormack in his submission stated that, in considering how to respond to the press release, the matters he took into account were, inter alia, that he felt that the public record needed to be corrected without undue delay due to the risk of loss of reputation for ACT Health, its officials and his role as Chief Executive; that he did not want the matter to be the subject of further political dispute or public debate; and that Mr Hanson had made an inadvertent mistake in his press release, perhaps due to his inexperience as a Member of the ACT Legislative Assembly and lack of familiarity with some aspects of the FOI processes.²¹

41 Mr Cormack further explained his actions by stating in his submission to the Committee that:

On that basis I decided I would write a letter to Mr Hanson clearly outlining my concerns; explaining how FOI is administered and processes

¹⁹ Submission of Mr Hanson, CSC, MLA 20 July 2009, p14.

²⁰ Submission of Mr Hanson, CSC, MLA, 20 July 2009, p 14.

²¹ Submission of Mr Cormack, 20 July 2009, pp 3-4.

available to applicants to have FOI decisions reviewed; clarifying my actions and that of ACT Health in the matter; explaining the adverse impact that the statements could have had on ACT Health and myself; offering an opinion on how the concerns could be remedied and inviting Mr Hanson to respond.²²

42 The Committee has considered Mr Hanson's concerns in light of the relevant statutory provisions and the relevant standing orders, and having regard to the precedents in other parliaments. In the view of the Committee the key question to be addressed is did the action of Mr Cormack in writing to Mr Hanson constitute a contempt in that it was intended or likely to amount to an improper interference with the free performance of Mr Hanson of his duties as a Member?

43 It needs to be recognised that Members do indeed perform functions, such as writing and issuing press releases, on behalf of constituents or to scrutinise the actions of the government. The Committee believes that the Assembly must be able and willing to act should it conclude that a Member has been intimidated or that the performance of his or her duties as a Member has been subject to improper interference, even if the issue does not concern the Member's participating in proceedings in parliament.²³

44 The Committee recognises that there are competing interests. Members must be able to perform their duties as Members, but constituents, public servants and others have the basic right to protect their reputation and, if necessary, have recourse to the courts of law.²⁴

45 In considering this issue, the committee was mindful of standing order 278 which stipulates, inter alia, that the Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its committees and Members.

46 In assessing whether alleged threats amounted to contempt, the threats would need to be regarded as improper interference in the free performance

²² Submission of Mr Cormack, 20 July 2009, p 4.

²³ House of Representatives Standing Committee of Privileges, *Report concerning a letter received by Mr Nugent, MP*, May 1992, p 8.

²⁴ House of Representatives Standing Committee of Privileges, *Report concerning a letter received by Mr Nugent, MP*, May 1992, p 8.

of a member's duties.²⁵ The committee has no evidence before it that suggests that Mr Hanson's free performance of his duties has been affected by the letter that was sent by Mr Cormack.

47 It is the Committee's view that there was no evidence that Mr Cormack in writing the letter to Mr Hanson had the intention to improperly interfere with Mr Hanson's duties as a Member.

Finding No 1

48 Having regard to all the evidence before it, the Committee considers that Mr Cormack's letter did not breach Mr Hanson's privileges. The Committee further does not consider that a contempt in the terms outlined in standing order 278 has been committed.

(b) Was the letter sent by Mr Cormack to Mr Hanson, CSC, MLA an appropriate response in the circumstances of Mr Hanson's press release of 21 May 2009?

49 In addition to whether there was an issue of privilege and contempt, the Assembly has also resolved that the committee examine whether the letter sent by Mr Cormack was an appropriate response in the circumstances of Mr Hanson's press release.

50 It is clear that Mr Hanson does not believe that the letter was appropriate. In Mr Hanson's submission he indicates that:

I was surprised in the extreme that he had written to me in response to a press release that had clearly called the Minister to account.²⁶

Later he states:

We will hold Ministers to account for their responsibilities. We will not directly contact you inappropriately as you should not contact us directly inappropriately.²⁷

51 The Committee is aware that the Government issues periodically a *Handbook for ACT Government Officials on Participation in Assembly and Other*

²⁵ House of Representatives Standing Committee of Privileges, *Report concerning the alleged threats to Mr Latham, MP and Mr Murphy, MP*, February 2005, p 4.

²⁶ Submission of Mr Hanson, CSC, MLA, 20 July 2009, p 13.

²⁷ Submission of Mr Hanson, CSC, MLA, 20 July 2009, p19.

Inquiries. That handbook applies primarily to officials required to prepare submissions and give oral evidence to ACT Legislative Assembly committees. It also recognises that there are certain other circumstances where officials may be required to interact with Members, such as the provision of briefings to Assembly Party committees or to individual Members, or such as staff of the Parliamentary Counsel's Office dealing with private Members' bills and Assembly amendments.²⁸ Significantly, section 3.1 of the handbook states that "These circumstances are generally separately dealt with in relevant procedural documents."²⁹

52 During the course of this inquiry there has been considerable media attention given to the interactions of a senior Commonwealth public servant and his dealings with several members of the Federal Opposition. The Committee's attention has been drawn to a recent circular issued by the Australian Public Service Commission (see Attachment C) entitled *Disclosure of official information*. The purpose of the circular is to remind Commonwealth agencies of the responsibilities and rights of APS employees in relation to the disclosure of official information particularly when dealing with non-Government members of the Parliament.

53 The circular notes that:

The APS Values include being apolitical and impartial, but this does not mean that the APS gives equal treatment to all sides of politics. It is not the role of the APS to serve the Opposition, which by convention means that APS employees should have little contact with Opposition or other non-Government parties as part of their duties.³⁰

54 The Committee also notes that the Secretary of the Department of Prime Minister and Cabinet recently gave a speech in which he stated:

The role of public servants is to assist governments make good decisions, not launch alternative policy proposals in the public domain. We do not,

²⁸ *Handbook for ACT Government Officials on Participation in Assembly and Other Inquiries*, Cabinet Office, Chief Minister's Department, June 2004, p 24.

²⁹ *Handbook for ACT Government Officials on Participation in Assembly and Other Inquiries*, Cabinet Office, Chief Minister's Department, June 2004, p 4.

³⁰ Australian Public Service Commission, Circular 2009/4: Disclosure of official information, dated July 2009, p 1.

therefore, advise the opposition, back-bench members of the Parliament or the media.³¹

55 It is clear to the Committee that Mr Hanson firmly believes there is a case to answer over the handling of the freedom of information request that was the subject of his press release, and he has devoted a substantial part of his two submissions to the Committee prosecuting his case. It is also clear to the Committee that Mr Cormack took great offence to any suggestion that he and his Department had lacked independence or were susceptible to improper influence by the Minister.

56 It is not within the terms of reference of the committee to examine or make findings in relation to how the freedom of information request was handled. It only has before it the question of whether the letter written by Mr Cormack was appropriate in the circumstances of Mr Hanson's press release.

57 The Committee understands the concern that must have been felt by Mr Cormack and his department in relation to what was, whether it was correct or not, a damning press release. It also understands that Mr Cormack felt there was need to correct what were perceived to be significant errors in the press release. The Committee was not able to resolve whether suggesting that the press release be withdrawn and a clarifying statement be made was the correct action in all of the circumstances.

58 The Committee considers that if it makes a finding that the letter was appropriate, it could have the effect of legitimising Mr Cormack's position in relation to the matter of the handling of the freedom of information request. Alternatively, if it makes a finding that the letter was not appropriate, it could have the effect of legitimising the claims made by Mr Hanson in relation to the handling of the freedom of information request. As it does not wish to take either of those courses of action, it makes the following finding.

³¹ *The Ozcar wreck: a lesson in gross incompetence* by Paddy Gourley, *The Canberra Times Public Sector Informant*, August 2009, p23.

Finding No 2

59 The Committee makes no finding in relation to whether the letter of Mr Cormack's was an appropriate response in the circumstances of Mr Hanson's press release.

Other findings and recommendations in relation to the inquiry

60 The Committee considers that, as a result of its findings and the evidence given in this inquiry, in the event that there is no existing policy, there would be benefit in clarifying the relationship between public servants and non-Executive Members of the Legislative Assembly.

61 This would help ensure that instances such as the one that is the subject of this inquiry does not occur again.

Recommendation No 1

That the Government clarify the relationship between public servants and non-Executive Members of the Legislative Assembly, with a view to issuing guidelines for any interaction that is not covered by existing guidelines.

Meredith Hunter MLA

Chair

August 2009

**Appendix A Media Release –
Mr Jeremy Hanson CSC MLA**

Jeremy Hanson, CSC, MLA

Member for Molonglo

Shadow Minister for Health; Police; Indigenous Affairs; Corrections

Media Release

Thursday 21 May 2009

ANOTHER GALLAGHER

COVER UP

The Minister for Health, Katy Gallagher, has to explain why documents relating to the winery being built next to the proposed Bush Healing Farm were censored to remove mention of the cellar door and winery, said Shadow Health Minister Jeremy Hanson.

The Minister had originally suggested that there were no plans to build a winery, cellar door and Bed and Breakfast on the site next to the Bush Healing Farm based on searches of Development Applications.

However, the Opposition has uncovered a document that shows the government was aware of these plans as early as July 2008, when the sale was completed in August of 2008. Worse, the document was censored by the government to try to avoid this embarrassing fact becoming public.

Under FOI, the government released a document dated 9 July 2008 and addressed to the Chief Minister. The identifying details of the person sending the document were properly blacked out. However, material details about the nature of the business were also censored.

The Opposition has now uncovered the uncensored version of this document and discovered that the words 'vineyard' and 'cellar door sales and a Bed and Breakfast establishment' were blacked out. The only rational explanation to remove these words was to cover up the government's embarrassment and there is no legitimate excuse for their removal.

'This shows yet another case of a shameful attempt to cover up the Minister's embarrassment by misuse of process,' said Jeremy.

Media contact: Adam Duke 0438 279 109 or Ian Hagan 0419 287817

Canberra liberals

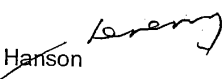
**Appendix B Media Release –
Mr Jeremy Hanson CSC MLA Response by Chief
Executive, ACT Health**



E-MAIL
25/5/09
Chief Executive
Level 3, 11 Moore Street, Canberra City ACT 2601
GPO Box 825 Canberra ACT 2601
Phone: (02) 6205 0825 Fax: (02) 6205 0830
Website: www.health.act.gov.au
ABN: 82 049 056 234

File No:

Mr Jeremy Hanson MLA
Shadow Minister for Health
ACT Legislative Assembly
Canberra ACT 2601

Dear Mr Hanson 

Your media release 21 May 2009 "Another Gallagher Cover-up"

I am writing following the issuing by your office and continued publication on the Canberra Liberals website of the above media release.

I wish to make you aware of a number of concerns that I have with the accuracy of the information contained within the release and possible interpretations to be drawn by readers, commentators and the general public arising from the release.

Firstly, the management of matters relating to requests under the Freedom of Information (FOI) Act for documents held by ACT Health rests with ACT Health. The Minister for Health has played no role in the response to any request for access to documents under the FOI ACT, nor did the Minister exercise any decision making capacity in relation to this or any other application. You may not have been aware of this, so I am informing you of this now.

Secondly, any criticism that you or your colleagues have with the handling of any matter dealt with by ACT Health under the FOI Act should be directed to ACT Health in the first instance. As you may be aware the Act has a number of provisions available to applicants to seek a review of any decision taken by an agency in relation to any application. In the matter that you refer to in your media release, ACT Health is not aware of any action that the applicant has taken to formally address any concerns with the handling of this matter by us, consistent with the provisions of the Act. Again, you may not be aware of these provisions, so I am informing you of these provisions now.

Thirdly, you have asserted in writing, published and encouraged the public utterance and broadcasting of the following claim, *"this shows yet another case of a shameful attempt to cover up the Minister's embarrassment by misuse of process"*. Given that the Minister has played no role in this FOI application, and that the FOI application process has been handled exclusively by ACT Health, it would be reasonable for a member of the public to assume that ACT Health is the object of your claims of "cover up" and "misuse of process." I am prepared to accept that you may not have intended this interpretation. Nevertheless the interpretation is open to be made by a reasonable person.

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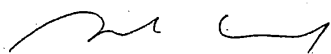
Fourthly, (and for the sake of completeness) I categorically reject as baseless and untrue any allegation that I or any of the ACT Health officers responsible for dealing with this FOI application have participated in a "cover up" or "misuse of process".

In the light of the above I believe that it is appropriate that you withdraw this allegation, and this is best done by withdrawing the media release in its current form. I believe that it is also appropriate that you take appropriate steps to clarify your published statement.

While ever this matter remains unclarified by you, the reputation of the integrity of myself and that of the officers responsible for managing this FOI process has the potential to be unfairly called into question.

I look forward to your response.

Yours sincerely



Mark Cormack
Chief Executive
25 May 2009

Appendix C

Australian Public Service Commission – Circular 2009/4: Disclosure of official information



Australian Government
Last updated: 3 July 2009

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AUSTRALIAN PUBLIC SERVICE COMMISSION

Circular 2009/4: Disclosure of official information

The purpose of this circular is to remind agencies of the responsibilities and rights of APS employees in relation to the disclosure of official information, particularly when dealing with non-Government members of the Parliament.

Dealing with Ministers and their advisers

2. When dealing with requests from Ministers, APS employees must be responsive to their requests for information and advice with material that is frank, honest, comprehensive, accurate and timely. Ministerial advisers are by convention standing in the place of the Minister, and the same standards of service should be provided to them.

Dealing with non-Government members of Parliament

3. APS employees, by virtue of the APS Values set out in section 10 of the *Public Service Act 1999* (the Act), have a duty and responsibility to serve the Government, to be responsive to its requirements and to be accountable for the way in which we help it achieve its goals.

4. The APS Values include being apolitical and impartial, but this does not mean that the APS gives equal treatment to all sides of politics. It is not the role of the APS to serve the Opposition, which by convention means that APS employees should have little contact with Opposition or other non-Government parties as part of their duties.

5. If a public servant receives a request from a non-Government MP for a briefing on a policy or programme, by convention (and subject to relevant agency policies) that request is forwarded to the Minister's office for advice on handling.

6. For any other information, MPs are treated the same as any individual or community group seeking information, that is:

- the request should be handled respectfully and courteously
- information may be disclosed providing it meets the requirements of Public Service Regulation 2.1 and other relevant Commonwealth legislation
- if there is any doubt about what can or cannot be released, then further guidance should be sought from someone in authority in the agency.

7. There are also specific conventions for briefing opposition parties before an election (see Guidance on caretaker conventions, published by the Department of the Prime Minister and Cabinet
http://www.pmc.gov.au/guidelines/docs/caretaker_conventions.pdf)

Parliamentary inquiries

8. A public servant's obligations to Parliament flow from section 57(2) of the Act. A Secretary must assist the Minister in providing factual information to Parliament in relation to the operation and administration of the agency. This duty is consistent with the APS Values and Code of Conduct, under which APS employees have an obligation to behave honestly and with integrity, to be apolitical, impartial and professional and to be accountable for their actions, within the framework of Ministerial responsibility to the Parliament.

9. The Department of the Prime Minister and Cabinet publishes guidelines for official witnesses appearing before Parliamentary committees which can be found at
http://www.pmc.gov.au/guidelines/docs/official_witnesses.pdf.

Participation in political activities

10. It is quite acceptable for public servants to participate in political activities, or be a member of a political party, as part of normal community affairs. However, engagement with parliamentary members, their staff or publicly promoting party or other views on certain issues may raise public perceptions of conflict of interest or partiality and needs to be considered carefully having regard to an employee's role and duties.

Whistleblowing compared with leaking

11. A leaker is not a whistleblower.

12. A whistleblower is an APS employee who reports a suspected breach of the Code of Conduct to an authorised person within the APS, which can include the Public Service Commissioner or the Merit Protection Commissioner (see section 16 of the Act). Whistleblowers maintain the integrity of the system by seeking to correct perceived wrongs through reporting to the proper authority.

13. Leaking, on the other hand, involves the unlawful release of official information and is a breach of the

<http://www.apsc.gov.au/circulars/circular094.htm>

30/07/2009

Code of Conduct. Leaking, whatever the motive, destroys the trust between Government and the public service and makes it harder to carry out our responsibilities. At its most serious, leaking information can damage Australia's national security or reputation and in extreme circumstances put the lives of Australian officials and others at risk.

Restrictions on the release of information

14. Detailed advice and guidance on the management of official information is contained in Chapter 3 of *APS Values and Code of Conduct in Practice: Guide to official conduct for APS employees and agency heads*, which is available at: <http://www.apsc.gov.au/values/conductguidelines5.htm>. This sets out the legislative and policy framework governing the disclosure of official information:

- The APS Values and Code of Conduct set out the standards of behaviour expected of employees generally.
- *Public Service Regulation 2.1*, which is part of the APS Code of Conduct, imposes a duty on APS employees not to disclose certain information without authority (i.e. information communicated in confidence or where disclosure could be prejudicial to the effective working of government). A detailed discussion of this regulation is available at: <http://www.apsc.gov.au/circulars/circular063.htm>.
- Section 70 of the *Crimes Act 1914* makes it an offence for an APS employee to publish or communicate any fact or document which comes to the employee's knowledge, or into the employee's possession, by virtue of being a Commonwealth officer, and which it is the employee's duty not to disclose.
- The release of official information is also covered in various ways by other Commonwealth legislation, including the *Privacy Act 1988*, the *Freedom of Information Act 1982* and the *Archives Act 1983*.
- Many agencies also have internal policies and directions governing the disclosure of official information that reflects their particular organisational and operational requirements relating to security and the protection of personal, client and commercial information.
- Finally, an employee has a duty of loyalty and fidelity under the common law.

Further information and advice

15. APS employees who have questions about the disclosure of official information in different circumstances and situations should in the first instance consult their agency's instructions and guidelines and, if necessary, take up the matter with their supervisors.

16. The Australian Public Service's Ethics Advisory Service can also provide advice to any APS employee on the legislative and policy framework governing the disclosure of official information and the issues that may need to be taken into account in deciding when it can or cannot be released. The Service can be contacted by phone on [02] 6202 3737 or by email at ethics@apsc.gov.au.

17. Other relevant information is at Attachment A.

Karin Fisher
Group Manager, Ethics
Australian Public Service Commission
July 2009

Attachment A

Other relevant information

APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads: Australian Public Service Commission, 2009 <http://www.apsc.gov.au/values/conductguidelines.htm>

Australian Public Service Commission Circular 2006/3: Amendment to the Public Service Regulations 1999, Regulation 2.1 Disclosure of Information <http://www.apsc.gov.au/circulars/circular063.htm>

Government Guidelines for Official Witnesses before Parliamentary Committee and Related Matters, Department of the Prime Minister and Cabinet, 1989
http://www.pmc.gov.au/guidelines/dccs/official_witnesses.pdf

Guidance on caretaker conventions, Department of the Prime Minister and Cabinet, 2007
http://www.pmc.gov.au/guidelines/dccs/caretaker_conventions.pdf

Supporting Ministers, Upholding the Values: a good practice guide, Australian Public Service Commission, 2006 <http://www.apsc.gov.au/publications06/supportingministers.htm>

Australian Public Service Commission Circular 2008/7: Code of Conduct for Ministerial Staff
<http://www.apsc.gov.au/circulars/circular067.htm>

Standards of Ministerial Ethics, Department of the Prime Minister and Cabinet
http://www.pmc.gov.au/guidelines/dccs/ministerial_ethics.pdf

Australian Public Service Commission A-Z index Privacy, legal & copyright Contact us
This page can be found at www.apsc.gov.au/circulars/circular094.htm