

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

**REPORT OF INQUIRY INTO GUIDELINES FOR ASSISTANCE TO
MEMBERS FOR LEGAL PROCEEDINGS**

Report No. 3 of the Standing Committee on Legal Affairs

March 1997

RESOLUTION OF APPOINTMENT

The following general purpose standing committees be established to inquire into and report on matters referred to them by the Assembly or matters that are considered by the committee to be of concern to the community ...

... a Standing Committee on Legal Affairs to examine matters related to administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, and consumer affairs.

Legislative Assembly for the A.C.T., *Minutes of Proceedings*, (1995), No. 1, 9 March 1995, p 9

TERMS OF REFERENCE

That the Standing Committee on Legal Affairs inquire into and report on the development of guidelines for the provision of assistance to Members in relation to legal proceedings.

Legislative Assembly for the A.C.T., *Minutes of Proceedings*, (1995-96), No. 35, 20 February 1996, p 254 as amended by No. 55, 20 June 1996, p 370

Committee Membership

Mr Paul Osborne, MLA (Chair)

Mr Harold Hird, MLA (Deputy Chair) (appointed 18 February 1997)

Mr Bill Wood, MLA (appointed 18 February 1997)

Mr Trevor Kaine, MLA (Deputy Chair) (discharged 18 February 1997)

Ms Rosemary Follett, MLA (discharged 12 December 1996)

Mr Andrew Whitecross (appointed 13 December 1996 - discharged 18 February 1997)

Secretary: Mr Russell Keith (to 3 May 1996)

Ms Beth Irvin (from 6 May 1996)

Research Officer: Mrs Kim Blackburn

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Summary of Recommendations

6.11. Recommendation 1.

The Committee recommends that the Government develop appropriate guidelines for the provision of legal assistance to Ministers and refer those guidelines to the Assembly for consideration.

6.12. Recommendation 2.

The Committee considers that the guidelines for Ministers should set out the basis on which the Minister(s) may be entitled to legal assistance. The guidelines should incorporate the following:

- that the matter under dispute occurred in the course of a Member's duty as a Minister, rather than because of private behaviour or personal considerations;
- that the forum for resolution of the dispute requires the parties to have legal representation; and
- that the question of public funding was decided and made public before legal representation is entered into.

6.14. Recommendation 3.

The Committee recommends that, in developing the guidelines, the Government take account of:

- this report;
- the reports of the Senate Legal and Constitutional Reference Committee's inquiry into the payment of a Minister's legal costs;
- guidelines of other Australian and Territory Governments; and
- the New Zealand Ministerial Guidelines.

6.23. Recommendation 4.

The Committee recommends that the Speaker, on behalf of the Assembly, issue drafting instructions for legislation to specifically provide for Members to be eligible to receive legal expenses for actions that arise out of their official duties as a Member, provided that the:

- matter under dispute occurred in the course of a Member's duty as a Member, rather than because of private behaviour or personal considerations;

- forum for resolution of the dispute requires the parties to have legal representation; and
- question of public funding was decided and made public before legal representation is entered into.

6.28. Recommendation 5.

The Committee recommends that the guidelines should require the Member (including a Minister) seeking financial assistance to provide an outline of the legal strategy (including any financial considerations) they wish to pursue to the person approving the expenditure.

6.33. Recommendation 6.

The Committee recommends that the legislation and guidelines clearly specify who is the “approving person” (or authority) in the case of requests by a Member (including a Minister) for legal assistance at public expense.

6.36. Recommendation 7.

On the question of indemnity for damages and costs awarded against a Member (or Minister) the Committee recommends that the legislation and guidelines take account of the New Zealand model. The issue of indemnity for damages and costs should be decided in advance except where the matter is unclear and in those cases the indemnity on costs and damages should be determined after the judgement is made.

6.38. Recommendation 8.

The Committee recommends that the legislation and guidelines require the “approving person” (or authority) to report to the Assembly on all instances of Members (including Ministers) receiving legal assistance at Territory expense. The report should include the type of financial assistance provided and the reasons why public funding was granted.

6.40. Recommendation 9.

The Committee recommends that the legislation and guidelines specify that any financial award to a Member (including a Minister) arising out a case funded by the Territory, should be paid to the Territory.

Chapter 1. Background to the Inquiry

Reference by Assembly on the Motion of the Attorney-General

1.1. On 20 February 1996, on the motion of the Attorney-General, Mr Humphries, MLA, the Assembly resolved:

That the Standing Committee on Legal Affairs inquire into and report on the development of guidelines for the provision of assistance to Members in relation to legal proceedings.¹

1.2. In introducing his motion Mr Humphries explained that the Government believed that it would be helpful to have formal guidelines in place which applied to both Ministers and Members.² He went on to explain that the guidelines would remove the “uncertainty of discretion on the part of the government” when deciding whether legal assistance should be granted to a Minister or Member.

1.3. Further, Mr Humphries’ said “[t]he need for those guidelines has been highlighted by recent events”. He went on to ask “the committee to consider those issues without reference to those recent events”.³

1.4. The “recent events” to which the Minister referred concerned the *Marshall v De Domenico and the ACT* case which was heard by Ms Robin Burnett (ACT Discrimination Commissioner). Ms Burnett delivered her decision on 29 December 1995. The Commissioner’s decision is currently being reviewed by the Administrative Appeals Tribunal.

Conduct of the Inquiry

1.5. The Committee supported Mr Humphries’ request that the Committee consider the issues without reference to the *Marshall v De Domenico and the ACT* case and accordingly limited the inquiry to the question of the development of appropriate guidelines for the granting of legal assistance to Members.

1.6. The Committee also took the view that the matter was a “parliamentary” matter rather than a public matter. For this reason, and in an attempt to limit the inquiry to the development of guidelines, the Committee did not advertise the inquiry or call for submissions. Instead the Committee wrote to the:

- Speaker, Mr Greg Cornwell, MLA;
- Attorney-General, Mr Gary Humphries, MLA;

¹ Legislative Assembly for the A.C.T., *Minutes of Proceedings*, (1995-96), No. 35, 20 February 1996, p 254 as amended by No. 55, 20 June 1996, p 370

² Mr Gary Humphries, MLA, *Hansard*, 20 February, p 76

³ *ibid*, p 77

- Speaker of the House of Representatives and President of the Senate;
- Speakers and Presidents of all State and Territory Parliaments; and
- Speaker of the New Zealand House of Representatives.

Acknowledgment

1.7. The Committee records its appreciation for the time taken, and the detail of the responses provided, by the Speaker of the A.C.T. Legislative Assembly, the A.C.T.'s Attorney-General and by the Parliaments of the Commonwealth, the States, the Northern Territory and New Zealand.

Layout of the Report

1.8. Chapter 2 of the report sets out the situation in the Territory and incorporates material contained in responses from the Speaker of the Legislative Assembly for the A.C.T. and from the A.C.T.'s Attorney-General.

1.9. Chapters 3, 4 and 5 summarise the procedures and practice concerning the provision of legal assistance to Members of Parliament of Australian and New Zealand legislatures. Details of the Senate Legal and Constitutional Reference Committee's inquiry into the Payment of a Minister's Legal Costs are also included in Chapter 3.

1.10. The final Chapter of the report outlines the view of the Committee following a review of all the preceding material. It contains nine recommendations.

Chapter 2. A.C.T. Situation

View of the Speaker of the Legislative Assembly

2.1. On 27 June 1996 the Chair of this Committee wrote to the Speaker requesting information about:

- the practice of the Assembly to date in relation to the provision of legal assistance to Members and the circumstances surrounding that assistance; and
- whether Members could risk disqualification should they receive financial assistance for legal expenses.

2.2. The Speaker responded on 23 October 1996 as follows.

In relation to the question of the possible risk of disqualification, legal advice has been received on the matter from the Legal Policy Section of the Attorney-General's Department and a copy of the advice is attached for the committee's consideration.

In relation to your first question, there are precedents of relevance, although I am advised that there has been no payment from Assembly funds of a Member's legal costs.

In early 1993 assistance was sought by a Member insofar as an officer of the Assembly was requested to give evidence in court concerning the status and accuracy of a proof transcript of proceedings of an estimates committee of the Assembly. On that occasion the provisions of standing order 264 were brought to the attention of the Member and the Speaker, on behalf of the Assembly, later took action to ensure that the court was aware of the provisions of the Parliamentary Privileges Act (Commonwealth) as it applied in the Territory in relation to the use of Assembly records in court proceedings.

In January 1995 a Member sought advice on whether legal costs could be met by the Assembly for work undertaken by a Canberra legal firm on the Member's behalf. The matter related to a matter before the Discrimination Commissioner and work had already been carried out. The advice received from the Government Solicitor's Office on that occasion was that they could provide no simple answer on the matter as they did not believe the Government had adopted a policy with respect to Members. It was added that although some guidance could be obtained by way of Treasury Directions, the matter was an important one of policy and perhaps should be decided by the Government itself rather than simply adopting an argument by analogy.

Later, the Member wrote to the then Speaker on the matter and in March of that year I wrote to the Chief Minister seeking her guidance as to whether an ex gratia payment could be made in the circumstances or any other guidance she could provide on the matter. The matter is still with the Government.

2.3. The Speaker's letter referred to a legal advice by the Attorney-General's Department. The essence of the advice is that:

[I]t appears likely that financial assistance for legal expenses would constitute an ‘allowance’ or ‘reward’ under section 14 of the Act [*Australian Capital Territory (Self-Government) Act 1988*] and be connected to services rendered in the Assembly. It is therefore likely that members would risk disqualification if they received financial assistance for legal expenses.

2.4. The Attorney-General Department’s advice drew attention to section 14 of the *Australian Capital Territory (Self-Government) Act 1988* which provides that:

(1) A member vacates office if the member:

...

(c) takes or agrees to take, directly or indirectly, any remuneration, allowance, honorarium or reward for services rendered in the Assembly, otherwise than under section 73.

(2) A person who has vacated an office of member may be re-elected.

(3) Paragraph 1(c) does not apply to a superannuation scheme.

2.5. “Section 73” refers to remuneration as determined by the Remuneration Tribunal.

2.6. The advice continued:

Subsection 14(1)(c) is intended to ensure that members receive a set amount of remuneration and allowances for their work, and do not receive any additional benefits by virtue of their position. It is designed to prevent members from receiving some form of ‘reward’ over and above what has been determined by the Remuneration Tribunal or is otherwise due to them under section 73.

The question which arises in the context of legal expenses is whether for the purposes of section 14(a)(c) these could be classified as ‘remuneration, allowance, honorarium or reward for services’. In my opinion it is clear that legal expenses do not constitute ‘remuneration’. Similarly, it is unlikely that receiving assistance to pay legal expenses would be classified as an honorarium. However, the position in respect to ‘allowance’ and ‘reward’ is not so clear.

2.7. The advice noted that two avenues might be open to the Assembly which would enable Members to receive legal assistance without breaching section 14:

- the Remuneration Tribunal could determine an allowance to be paid to Members for legal expenses. The opinion suggested that a Member could make a submission to the Tribunal; or
- the Assembly could enact separate legislation which specifically provides for Members to receive legal expenses.

2.8. The advice made two further points. The first point is that the Attorney-General’s Department is developing a discussion paper on a draft Code of Conduct for

consideration by MLAs. The second point is that the issue of financial assistance to Members is “an uncertain area of the law” and the advice suggested that Members should seek their own legal advice.

2.9. The Speaker also drew the Committee’s attention to the answer to an Assembly Question on Notice lodged in May 1994. The question asked about legal representation for a former Minister in relation to the VITAB Inquiry.

2.10. The answer was provided by the former Chief Minister who stated:

[I]ndependent legal advice, funded by the Territory, has been made available to ... ,the former Minister for Sport, on issues relating to the Inquiry. This was initially arranged through the Government Solicitor, but in view of the need for the Government Solicitor to give advice to the Department of the Environment, Land and Planning on matters involved in the Inquiry and on issues related to it, arrangements were made for an independent solicitor to take over responsibility for briefing counsel.

2.11. The answer noted that:

[T]here have been many precedents for Government providing legal assistance to Ministers and to public servants who are required to defend their official actions against legal claims or to appear at inquiries in relation to their conduct in their official capacity. Such assistance has been provided regardless of whether the person concerned has ceased to hold the office in question.

2.12. In relation to the costs of legal representation, the answer noted that:

[T]he Territory has agreed to meet the reasonable costs of providing legal advice to ... [the former Minister] in connection with the Inquiry to enable him to present his position.

View of the Attorney-General

2.13. On 27 June 1996 the Chair of this Committee wrote to the Attorney-General requesting information about:

- the practice of the Government to date in relation to the provision of legal assistance to Members and the circumstances surrounding that assistance; and
- whether Minister’s could risk disqualification should they receive financial assistance for legal expenses.

2.14. The Attorney-General responded on 17 September 1996 in the following manner.

I understand there has only been one occasion when the Government has provided financial assistance to a person in relation to their activities as a Minister. On 29 March 1994 an inquiry was directed to be held pursuant to section 5 of the *Inquiries Act 1991* regarding an agreement between ACTTAB and VITAB. The then Government determined that ... the [then] Minister for Sport at the relevant time, should

be provided with legal assistance. The Territory met the cost ... of obtaining legal advice from a firm of solicitors and senior counsel engaged by that firm.

The former Treasury Directions made provision for legal assistance to be provided to officers of the Territory in respect of litigation that arose from incidents occurring in the course of employment. Should any request for legal assistance be made by a Minister, it would be resolved by taking into account the kinds of considerations referred to in the Treasury Directions.

You also asked whether Ministers could risk disqualification should they receive financial assistance for legal expenses. I have attached an advice from my Department in relation to this issue which concludes that, as a general rule, Ministers will not risk disqualification for receiving financial assistance for legal expenses relating to the performance of Executive duties.

2.15. The advice of the Attorney-General's Department in relation to the last paragraph of the Minister's letter referred to the *Brown v Administrator of Norfolk Island* case, which drew a distinction between "services rendered in the Assembly" and "services rendered as part of the Executive".

2.16. Further, the advice to the Attorney-General stressed that the legal proceedings must arise out of the performance of the Minister's official capacity as a Minister.

2.17. The Department's advice to the Attorney-General concluded by noting that a pre-determined set of guidelines detailing when the Territory will provide assistance to Ministers in relation to legal proceedings would be helpful in removing some of the uncertainties in this area.

2.18. In relation to the reference to "former Treasury Directions" in paragraph 2 of the Attorney-General's response above, the Committee obtained the following information.

The Former Treasury Directions

2.19. The Attorney-General's letter noted that the former Treasury Directions applied, not specifically to Ministers, but to "officers of the Territory".

2.20. The former Directions outline delegations, financial arrangements and procedures to be followed involving litigation and include:

- claims against the Territory;
- settlement of claims;
- incidents involving officers;
- litigation involving Territory officers;
- payment of costs and damages;

- reimbursement of legal expenses and costs; and
- recovery of costs.⁴

2.21. In considering a request for legal assistance the Directions specify that the appropriate Administrative Head take into account:

- whether the officer or person was acting in the course of his or her employment at the relevant time;
- whether the officer or person was acting in a manner that merits initiation of proceedings under Part XI of the *Audit Act 1989* [loss of and damage to public property - Recovery provisions]; and
- whether it is in the interests of the Territory that the officer or person be given legal assistance.⁵

2.22. If the relevant Administrative Head, Under Treasurer and Attorney-General's Department agree that the Territory should meet the legal expenses of an officer the Directions stipulate that the Attorney-General's Department should determine whether the Department will conduct the defence/representation. If outside legal counsel is to be engaged the officer may choose their own legal counsel with the agreement of the Attorney-General's Department.

2.23. Where an officer initiates legal proceedings the Directions state that the Territory will not usually provide legal assistance. However, the Territory will normally meet costs and damages provided the claim arose:

- in circumstances in which the Territory is vicariously liable for the acts of the officer; or
- in circumstances in which the Territory would not be vicariously liable but:
 - the officer was exercising an independent discretion conferred upon him or her as the holder of an office and had acted reasonably and responsibly in all the circumstances; or
 - the officer acted reasonably and responsibly and the act giving rise to the claim was a reasonable means of performing his or her duties in the interest of the Territory.⁶

2.24. The Directions also provide that:

- the Territory will not pay any costs or damages awarded against an officer until after the case is finalised, including any appeals;
- as a general rule the Territory will not pay any costs or damages in situations where either malice or culpable negligence results in criminal punishment of the

⁴ ACT Treasury, *Treasury Manual (Audit Act, Regulations, Directions)*, section 18, paragraphs 18.16 to 18.35

⁵ *ibid*, paragraph 18.25

⁶ *ibid*, paragraph 18.29

officer requesting legal assistance. If payment has already been made recovery action may be initiated;

- if an officer requests reimbursement of any legal expenses or costs the request must include details of reasons for not advising the relevant authorities before the proceedings commenced. However, the Territory will not usually reimburse costs or damages where the officer sought independent legal advice without prior approval.

Litigation to Date

2.25. Since self-government in 1989, there has been only one instance of a Member receiving legal assistance at Territory expense. The one exception concerned the actions of a Member when a Minister. Details of this instance are provided earlier in this chapter.

2.26. However, a number of Members have been involved in litigation at their own expense.

Chapter 3. The Situation in the Commonwealth Parliament

3.1. The Chair of this Committee wrote to the Speaker of the House of Representatives and President of the Senate requesting information about guidelines or precedents in relation to the provision of legal assistance to Members.

3.2. The replies to the Chair's letters are summarised in the following paragraphs.

3.3. The inquiry by the Senate's Legal and Constitutional References Committee into the payment of a Minister's legal costs is also relevant to this Committee's inquiry. Details of that Committee's inquiry are also included in this Chapter.

House of Representatives

3.4. The then Speaker, The Honourable Steve Martin, MP, advised the Committee that the parliamentary departments do not provide assistance to Members for legal proceedings. However, an office holder (for example the Speaker) may be given assistance if the proceedings relate to his or her official parliamentary position. The assistance would be determined on the merits of the situation.

Senate

3.5. The Clerk, Mr Harry Evans, responded on behalf of the President. He noted that the Senate does not have guidelines for the provision of legal assistance to Senators nor has the Senate provided legal assistance to Senators involved in litigation.

3.6. Mr Evans observed that:

[I]f a Senator were to be involved in litigation in his or her capacity as a senator, the Senate might consider reimbursement of costs.

3.7. Mr Evans gave the example that if the chair of a committee was sued in his or her official capacity then "there would be a strong case for reimbursement of the Senator's costs".

3.8. Mr Evans also commented that the Senate Committee of Privileges has the power to:

recommend to the President the reimbursement of costs of representation of witnesses before the Committee.

...[The Committee] has made only one recommendation for the reimbursement of the legal costs of a witness, and that person was not a senator.

Senate Legal and Constitutional Reference Committee - Payment of a Minister's Legal Costs

3.9. On 28 August 1995 the Senate asked its Legal and Constitutional References Committee to inquire into and report on the payment of Dr Lawrence's (then Minister for Human Services and Health) legal costs. The terms of reference were:

That the following matters be referred to the Legal and Constitutional References Committee for inquiry and report, in respect of paragraphs (a) to (e) and (h), on or before 28 September 1995, and, in respect of paragraphs (f) and (g), on or before 26 October 1995:

- (a) what is the legal basis for the decision to pay Dr Lawrence's legal costs in challenging the legality of aspects of the Marks' Royal Commission;
- (b) what was the sequence of events leading to the Government's decision to pay such legal costs, in particular:
 - (i) who initiated the process leading to that decision and when and how was this done,
 - (ii) what official advice was sought and given about the proposal or any possible proposal to pay such costs, and
 - (iii) what advice or communications on the proposal or any possible proposal did the Government receive from what sources outside Government, including private lawyers or legal firms;
- (c) what advice, from within or outside Government, was given, and what Government decisions were taken, in relation to the legal standing Dr Lawrence or any other person might have in any proceedings challenging the legality of the Marks' Royal Commission and what bearing did this have on the decision to pay the legal costs from public funds;
- (d) what advice was given to Government, and what consideration was paid by Government, to the following:
 - (i) estimating the likely total financial liability of the Commonwealth arising from the Government's decision to pay legal costs,
 - (ii) whether any cap or limit should be placed on such expenditure, and
 - (iii) procedures to monitor the nature and growth of the Commonwealth's financial liability in the matter and the efficiency and effectiveness of the expenditure;
- (e) bearing in mind that Government was funding the legal challenges from public funds, what role did Government play in relation to any of the legal challenges to the Marks' Royal Commission, including in relation to the decisions to challenge, or to appeal against lost challenges, and in relation to the nature of the arguments to be put to the respective courts on behalf of Dr Lawrence or any other person;
- (f) **what guidelines and conditions should be put in place to ensure the legality and propriety of any use of public funds to pay the legal costs of Ministers and members of parliament; [emphasis added]**

- (g) **what is the appropriate level of reporting to parliament on the use of public funds to pay the legal costs of Ministers and members of parliament including the reasons for the decision to provide such funds; (emphasis added) and**
- (h) any other matter arising in the course of the inquiry which is relevant to the foregoing terms of reference, inquiry into which would facilitate reporting on those terms of reference.⁷

3.10. The Senate Committee reported to the Parliament in respect of paragraphs (a) to (e) and (h) in September 1995.

3.11. The Committee contacted the Senate to find out whether the Senate Legal and Constitutional Reference Committee had reported on the two terms of reference of most interest to this Committee (paragraphs (f) and (g) (bolded above). An officer from the Senate Committee said that the two outstanding terms of reference have not been reported on as of the time this report was finalised. The Senate Committee sought, and was granted, several extensions of time. When the 37th Parliament was prorogued the reference automatically lapsed. The newly constituted Committee of the 38th Parliament requested that the Committee inquire into and report on the two outstanding references. The Senate agreed to the request but did not specify a reporting date.

⁷ Senate Legal and Constitutional References Committee, *Payment of a Minister's Legal Costs*, Parliament of the Commonwealth of Australia, Canberra, September 1995, pp 1 and 2

Chapter 4. The Situation in the States and Northern Territory

4.1. The Chair of this Committee wrote to all State and the Northern Territory Parliaments requesting information about guidelines or precedents in relation to the provision of legal assistance to Members. The replies are summarised in this Chapter.

4.2. The Speaker of the Northern Territory Legislative Assembly passed the request on to the Northern Territory Attorney-General who also responded. The Northern Territory Attorney-General's response is also summarised in this Chapter.

New South Wales

Legislative Assembly

4.3. The Speaker, The Honourable John Murray, MP, informed the Committee that the NSW Legislative Assembly has no formal guidelines. Each situation is considered on its merits.

4.4. He stated that in instances involving issues of privilege the Clerk has obtained advice from the Crown Solicitor and/or independent advice in order to advise the Member or assist the Court.

4.5. The Speaker observed that most Members involved in recent legal proceedings have paid their costs because the cases did not involve issues of privilege. Members appearing before the Independent Commission Against Corruption also pay for their legal advice.

4.6. Further, the Speaker advised that the provision of legal assistance to Ministers is a matter for the Government. A recent case involved a former Minister for Police appearing before a Joint Select Committee on Police Administration being granted legal assistance.

Legislative Council

4.7. The President, The Honourable Max Willis, MLC, advised the Committee that the Legislative Council does not have guidelines, precedent, or discretionary provisions for the provision of legal assistance to Members. Furthermore, there are "no *documented* policies or guidelines available from the Crown Solicitor which set out such provisions".

4.8. The President noted that the Crown Solicitor's Office can advise the Premier, Ministers, Presiding Officers and Committees of Parliament "on matters which relate to government or public issues, but not on personal matters".

4.9. In addition, he advised that the Crown Solicitor can, with the Attorney-General's discretionary approval, defend Presiding Officers in actions connected with the exercise of their official functions (for example defamation cases). The Crown

Solicitor can also provide assistance to the Premier and Ministers when appearing before the Independent Commission Against Corruption. However, the Crown Solicitor would only provide legal advice in relation to public matters and if there is no conflict of interest.

Victoria

Legislative Assembly

4.10. The Speaker, The Honourable John Delzoppo, MP, provided the Committee with the following three examples of circumstances where Members may require legal advice. If a Member:

- has concerns about whether a situation involving “office of profit” could lead to his/her disqualification as a Member the Speaker advises the Member to seek legal advice which is at their own expense;
- needs legal assistance to maintain his/her electorate office and staff in accordance with legislative requirements (for example Occupational Health and Safety) the assistance can be charged against the Member’s electorate office budget. However, the Presiding Officer must give his prior approval to the expenditure of the funds and the Member must remain within his/her budget allocation; and
- needs legal representation for things said or done in the community as a Member of Parliament it is considered the Member’s personal responsibility and is not funded by the Parliament.

4.11. The Speaker commented that, in his official capacity, he sometimes obtains legal opinions. Those opinions are charged against the Assembly’s budget allocation.

Legislative Council

4.12. The President, The Honourable Bruce Chamberlain, MLC, advised the Committee that no guidelines existed for the provision of legal assistance to Members.

South Australia

House of Assembly

4.13. The Clerk, Mr Mitchell, informed the Committee that the South Australian House of Assembly does not have formal guidelines on the provision of legal assistance to Members.

4.14. The Clerk noted that each situation would be considered on its merits. However, it would be unlikely that:

assistance would be given unless it related to an act of an Officer of the House in their official capacity (Officer including Speaker, Chairs of Committees, etc) or the proceedings of the House.

4.15. He observed that there are many exclusions to “proceedings” such as if a Member was being sued because “of actions taken within his or her electorate office or in general electoral or political activities”.

4.16. He went to state that a Member is usually responsible for legal actions resulting from anything he/she says in the House. The House will only intercede to protect its right and privileges with any benefit “to the Member being incidental to that protection”.

4.17. The Committee understands that there have been cases where Members of the South Australian House of Assembly have been sued or have sued (usually defamation actions) where the House has not provided legal assistance. The assistance has not been given because the House has not had to protect its right and privileges.

Legislative Council

4.18. The Clerk, Mrs J.M. Davis, advised the Committee “that no provision exists in the Legislative Council for assistance to Members in relation to legal proceedings”.

Western Australia

Legislative Assembly

4.19. The Speaker, The Honourable James Clarko, MP, informed the Committee that the Legislative Assembly had “not provided legal assistance to Members and consequently does not have any guidelines or precedents”.

4.20. He noted that the Government provides assistance to Ministers if it relates to their ministerial position.

Legislative Council

4.21. The President, The Honourable Clive Griffiths, MLC, informed the Committee that:

[T]he Legislative Council does not have published guidelines ... and it is doubtful that the House, because of the *Financial Administration and Audit Act 1995*, has the power to issue directives of a binding nature.

4.22. The President stated that the Council’s budget does not include funds for legal expenses. A Member seeking financial assistance for legal expenses would need to write to him. His approval would depend on the availability of funds and restricted to actions where:

- (a) the Member is an actual defendant and sued in his/her official capacity, eg, President, Chair of a committee;
- (b) the action involves questions of law as to the existence or application of the powers, privileges, rights or immunities of the House;

- (c) the public interest requires that the issues arising under (b) be argued and determined;
- (d) the Member has no personal or pecuniary interest in the matter and has nothing to gain from a successful defence.

4.23. The President noted that in 1995 he was involved in proceedings in the High Court taken by Mr Easton “in relation to the conduct of a royal commission arising from the presentation of a petition from Mr Easton to the House in 1992”. He argued that his action satisfied the four criteria listed above.

Tasmania

House of Assembly

4.24. The Clerk, Mr P.T. McKay, advised the Committee that the Tasmanian House of Assembly did not have guidelines or precedents concerning the provision of legal assistance to Members.

4.25. Mr McKay also stated that:

[T]here have on occasion been situations where Ministers ... have been involved in legal proceedings outside their statutory obligations and costs of such proceedings have been met. However, I understand that there are no official guidelines for such payment.

Legislative Council

4.26. The President, The Honourable Reg Hope, MLC, informed the Committee that the Tasmanian Legislative Council does not have any guidelines or precedents for the provision of legal assistance to Members.

Queensland

Legislative Assembly

4.27. The Speaker, The Honourable Neil Turner, MLA, advised that:

legal assistance has only been provided when action has been taken which challenges the privileges of the House or its committees.

4.28. He used as an example a situation where members of a committee appeared before the Criminal Justice Commission. The legal expenses of the members were met by the Parliamentary Service.

4.29. The Speaker noted that the issue of whether legal assistance should be made available to Members for actions as a result of their duties as a Member of Parliament (the example used was if a Member conveyed “a letter from a constituent to a Government Department which then results in a threat of defamation”) is to be considered by the Members’ Ethics and Parliamentary Privileges Committee.

Northern Territory

Legislative Assembly

4.30. The Speaker, The Honourable Terry McCarthy, MLA, wrote that:

the Legislative Assembly for the Northern Territory has no formal or informal guidelines for the provision of assistance to Members in relation to legal proceedings.

4.31. The Speaker also mentioned that Ministers have received legal assistance in defamation cases “arising in the course of their duties”.

Attorney-General

4.32. The Attorney-General, The Honourable Steve Hatton, MLA, responded to the Committee’s letter at the request of the Speaker for the Legislative Assembly of the Northern Territory.

4.33. The Attorney-General advised the Committee that the Northern Territory Government had:

paid legal expenses for Ministers in defamation proceedings ... [but] there are no formal guidelines in the funding of litigation where Members are sued or are being sued for defamation beyond the protection of the public interest and the requirement that the action be connected to the exercise of their public duties.

4.34. The Attorney-General used defamation as an example throughout his letter because it is the most common type of legal action taken against Ministers in the Northern Territory. The Government is prepared to fund defamation litigation to protect the public interest but “not the vindication of the rights of the individual’s personal reputation”.

Chapter 5. The Situation in New Zealand

5.1. The Chair of this Committee also wrote to the Speaker of the New Zealand House of Representatives in similar terms to the letters to the Australian Parliaments. The Speaker replied on 5 August 1996 as follows.

5.2. The Speaker, The Honourable Peter Tapsell, MP, advised the Committee that the New Zealand House of Representatives “has not provided legal assistance to Members in legal proceedings”. However, the House had instructed counsel to appear as a friend of the court in the *Prebble v Television New Zealand* case. Mr Prebble was a Member of the House of Representatives and the House instructed counsel when “important issues of parliamentary privilege” were raised.

5.3. The Speaker also included a copy of the Cabinet guidelines entitled “Litigation Involving Ministers”. These guidelines cover the following areas:

- Minister as a party;
- preliminary steps;
- procedure in Cabinet;
- retaining of counsel;
- payment of costs or damages awarded; and
- procedure for payment of Ministers’ legal expenses.

Minister as a Party

5.4. The Guidelines recognise that Ministers do not have an automatic right of indemnity by the Crown. The indemnity is restricted to “actions taken against them for things done or decisions made in the course of their Ministerial duties”. The Guidelines noted that the “Crown normally gives such an indemnity to all its servants; and Ministers are servants of the Crown”.

5.5. Cabinet usually agrees in advance to pay for legal representation when a Minister is sued personally and it is unclear whether he/she should be indemnified. The indemnity on costs and damages is determined after the judgement is made.

Preliminary Steps

5.6. If a Minister is sued personally the Minister must discuss it with the Prime Minister and the Attorney-General. The Attorney-General, usually in consultation with the Solicitor-General, decides whether the action resulted from the Minister’s duties.

Procedure in Cabinet

5.7. The matter is then raised in Cabinet by the Minister. The Government can:

- a undertake the defence of the proceedings, ie treat it as an ordinary action against the Crown; or
- b meet the Minister's costs in retaining private counsel; or
- c leave the Minister to handle the case privately as a personal expense.

5.8. The Government usually provides legal assistance where the Minister has clearly acted as a Minister. However, if in doubt Cabinet usually recommends (b) or (c) above. If Cabinet recommends either (a) or (b) the Cabinet decision must state that the Attorney-General is "satisfied that the matter was part of the Minister's duties".

Retaining of Counsel

5.9. If the Government decides to defend the action the papers are sent to the Crown Law Office. If the Government agrees to meet the Minister's cost in retaining private counsel the Minister must consult the Attorney-General (who in turn usually consults with the Solicitor-General) before engaging private counsel. The Solicitor-General usually retains counsel and settles the financial arrangements.

Payment of Costs or Damages Awarded

5.10. If Cabinet did not agree to meet "an award of costs or damages" in advance the matter is reconsidered after the trial on the advice of the Attorney-General or the Solicitor-General.

5.11. If the action arose from actions by the Minister as part of his/her duty the Crown is usually responsible for an award of costs or damages (even if the Minister "conducts that duty in a wrong way"). However, in some instances (for example if malice has been established by the Court) the Crown may not be liable to pay the plaintiff's damages.

Procedure of Payment of Minister's Legal Expenses

5.12. The Crown Law Office is responsible for certifying any bills from private counsel engaged by a Minister before payment. If the matter has not been considered by Cabinet the Minister should send the account to the Attorney-General who usually refers the matter to Cabinet.

Minister as Plaintiff

5.13. If a Minister intends to commence proceedings as a plaintiff (for example to sue for defamation) he/she must first discuss the matter with the Prime Minister and Attorney-General (who usually consults with the Solicitor-General).

5.14. The Minister refers the matter to Cabinet. Cabinet can ask the Solicitor-General to investigate the matter.

5.15. After the Solicitor-General has reported to Cabinet, Cabinet then decides whether the Crown will meet the Minister's legal expenses.

5.16. If the Minister has costs and damages awarded to him/her, the funds are:

paid into the Crown Bank Account unless Cabinet otherwise directs (eg where the Crown has contributed only part of the Minister's costs).

Chapter 6. Conclusion

6.1. The Committee notes Australian and New Zealand Parliaments draw a distinction between the provision of legal assistance to Ministers and Members. The Committee agrees that this distinction is useful.

Provision of Legal Assistance to Ministers

6.2. Though the Committee did not specifically write to each Australian Government for information about its arrangements for providing legal assistance to Ministers, it received a considerable body of information in the responses from Australian and New Zealand Parliaments.

6.3. In particular, the A.C.T. Attorney-General drew the Committee's attention to two recent examples of former Ministers receiving legal assistance:

[Regarding] the payment of fees to the Hon. Carmen Lawrence, as [Commonwealth] Minister for Health, arising out of actions she had taken in her capacity as Premier of Western Australia, there was a decision made by the Australian Senate to provide her with something in the order of \$550,000 in public money to support her actions before that Royal Commission inquiry in Western Australia.

Similarly, there was a decision made, again by the Federal Parliament ... that the costs incurred by the Hon. Alan Griffiths, a former Minister in the Federal Labor Government, in respect of his proceedings arising out of what is colloquially called the sandwich shop affair, were also met by the Parliament and they amounted to almost half a million dollars.⁸

6.4. The Committee notes that the issue of providing assistance to Ministers is nearly always sensitive and may involve significant public expense. The Committee also notes that it is up to each Government to decide on its arrangements for legal assistance to its Ministers (or former Ministers).

6.5. The Committee was impressed with the New Zealand Ministerial Guidelines (outlined in Chapter 5) because they are comprehensive, clear and easy to follow.

6.6. The Committee is also aware that the Western Australian guidelines, which were tabled in the Western Australian Legislative Council in July 1990, are included in the submissions received by the Senate Legal and Constitutional Reference Committee's inquiry into the Payment of a Minister's Legal Costs.⁹

6.7. The Committee also received a copy of the *Guidelines for the Provision of Assistance to Commonwealth Government Ministers and Parliamentary Secretaries in*

⁸ Mr Gary Humphries, MLA, *Hansard*, 20 February 1996, 76

⁹ Senate Legal and Constitutional References Committee, *Payment of a Minister's Legal Costs, Submissions 1 - 17*, Parliament of the Commonwealth of Australia, Canberra, pp 223 to 232

Relation to the Defence of Legal Proceedings. The Committee understands that those guidelines were under review by the previous Government and have not been adopted by the new Coalition Government.

6.8. It is obvious to the Committee that the custom in most, if not all, Australian Parliaments is that the relevant Government prepares guidelines for the provision of legal assistance to Ministers, not a Committee of the relevant Parliament.

6.9. Nonetheless, the Committee appreciates that the A.C.T.'s Attorney-General specifically asked it to develop guidelines that "would apply equally to members and Ministers".¹⁰

6.10. In light of the above, the Committee makes the following recommendations.

6.11. Recommendation 1.

The Committee recommends that the Government develop appropriate guidelines for the provision of legal assistance to Ministers and refer those guidelines to the Assembly for consideration.

6.12. Recommendation 2.

The Committee considers that the guidelines for Ministers should set out the basis on which the Minister(s) may be entitled to legal assistance. The guidelines should incorporate the following:

- **that the matter under dispute occurred in the course of a Member's duty as a Minister, rather than because of private behaviour or personal considerations;**
- **that the forum for resolution of the dispute requires the parties to have legal representation; and**
- **that the question of public funding was decided and made public before legal representation is entered into.**

6.13. The Committee has referred in this report to a number of contemporary developments affecting guidelines for Ministers.

6.14. Recommendation 3.

The Committee recommends that, in developing the guidelines, the Government take account of:

- **this report;**

¹⁰ Mr Gary Humphries, MLA, op cit, 77

- **the reports of the Senate Legal and Constitutional Reference Committee's inquiry into the payment of a Minister's legal costs;**
- **guidelines of other Australian and Territory Governments; and**
- **the New Zealand Ministerial Guidelines.**

Provision of Legal Assistance to Members

6.15. The Committee can envisage circumstances where a Member may require financial assistance for legal expenses arising out of his/her duty as a Member. One possible instance might be the legal representation for matters arising out of a Member's duty as Chair or member of a parliamentary Committee.

6.16. The Committee is also keenly conscious of the following comment contained in the advice provided to the Speaker by the Attorney-General's Department:

[I]t is ... likely that Members would risk disqualification if they received financial assistance for legal expenses.¹¹

6.17. Chapter 2 of this report sets out the same Department's advice that two avenues may be open to the Assembly which would enable Members to receive legal assistance without risking disqualification. These avenues are:

- the Remuneration Tribunal could determine an allowance to be paid to Members for legal expenses; or
- the Assembly could enact separate legislation which specifically provides for Members to receive legal expenses.

6.18. However, the A.C.T. Remuneration Tribunal recently stated, in relation to a submission seeking an allowance for legal expenses incurred by Members of the Assembly in the course of their duties, that:

[T]he Tribunal concluded that it is inappropriate to determine a fixed allowance the need for which might vary from Member to Member depending on the circumstances in which a Member might find himself or herself. The Tribunal is most reluctant to establish a new allowance that is other than a fixed amount for expenses which are certain to be incurred. It will also be seeking further advice as to whether such an allowance is possible under the provisions of the *Remuneration Tribunal Act 1995*.

The Tribunal noted that it may be possible for the Assembly to deal with the matter and considers this would be the most appropriate course of action.¹²

¹¹ Constitutional and Law Reform Branch, Attorney-General's Department, *Legal Opinion*, attached to the Speakers letter, 23 October 1996

¹² ACT Remuneration Tribunal, *Statement No. 8, Members of the ACT Legislative Assembly*, 16 December 1996

6.19. The Committee considers it is inappropriate to ask the A.C.T. Remuneration Tribunal to determine an allowance to be paid to Members for legal expenses per se. The Committee considers the most suitable option is for the Assembly to enact separate legislation to specifically provide for Members to be eligible to receive legal expenses to meet the circumstances set out in the preceding paragraphs.

6.20. The Committee, in paragraph 6.12, drew attention to three circumstances that must exist if a Minister is to be considered for financial assistance in cases involving litigation. It seems to the Committee that these same circumstances could usefully be applied to Members of a legislature. That is, a Member might be eligible for legal assistance if the:

- matter under dispute occurred in the course of a Member's duty as a Member, rather than because of private behaviour or personal considerations;
- forum for resolution of the dispute requires the parties to have legal representation; and
- question of public funding was decided and made public before legal representation is entered into.

6.21. In essence, this would apply the same tests for a Member as apply to a Minister - but would recognise the distinction between Members and Ministers. **The Committee considers that the legislation can be drafted in such a way to limit the financial assistance to situations arising out of the Member's duty as a Member.**

6.22. Provided the points set out in paragraph 6.20 apply, this Committee believes that it may be appropriate for the Territory to fund the legal expenses of the Member concerned.

6.23. Recommendation 4.

The Committee recommends that the Speaker, on behalf of the Assembly, issue drafting instructions for legislation to specifically provide for Members to be eligible to receive legal expenses for actions that arise out of their official duties as a Member, provided that the:

- **matter under dispute occurred in the course of a Member's duty as a Member, rather than because of private behaviour or personal considerations;**
- **forum for resolution of the dispute requires the parties to have legal representation; and**
- **question of public funding was decided and made public before legal representation is entered into.**

6.24. Once legislation is in place, the Assembly would be in a position to consider the nature of detailed guidelines to apply in circumstances where a member seeks financial assistance at public expense. Among other matters, the guidelines should take account of the Guidelines for Ministers referred to in Recommendations 1, 2 and 3.

Further Considerations

6.25. The Committee considers that any Member (including a Minister) seeking financial assistance should clearly outline the legal strategy they wish to pursue. This information should be made available to the person approving the expenditure.

6.26. Further, the strategy should be monitored and any changes to the strategy should be considered by the person approving the expenditure before being implemented by the Member.

6.27. The Committee appreciates that it may not always be appropriate to make the legal strategy public. But the Committee considers it is essential that the person approving the expenditure understand exactly what type of legal strategy the Member intends to pursue.

6.28. Recommendation 5.

The Committee recommends that the guidelines should require the Member (including a Minister) seeking financial assistance to provide an outline of the legal strategy (including any financial considerations) they wish to pursue to the person approving the expenditure.

6.29. The Committee notes the difficulties in specifying exactly who the approving person should be. This is less a problem in the case of legal assistance to Ministers than it is in the case of legal assistance to Members.

6.30. In the former case, the Committee is attracted to the New Zealand model. The “approving person” in New Zealand, in the case of Ministers, includes the Prime Minister, Attorney-General, Solicitor-General and Cabinet.

6.31. In the case of Members who are not Ministers, it is clearly the case that the “approving person” should include the Speaker of the Assembly. It is likely that Members of the Assembly, and perhaps the Speaker himself (or herself) would wish the matter to go before the Standing Committee on Administration and Procedures. This would reflect that Committee’s role as the formal policy maker in decisions affecting the internal workings of the Assembly.

6.32. The Committee also appreciates that the Speaker may wish to formally seek the advice of the Attorney-General, who in turn may seek the advice of his Senior Law Officer.

6.33. Recommendation 6.

The Committee recommends that the legislation and guidelines clearly specify who is the “approving person” (or authority) in the case of requests by a Member (including a Minister) for legal assistance at public expense.

6.34. There are essentially two types of financial assistance which may be provided to Members (including Ministers), namely:

- financial assistance for legal representation; and
- damages and costs awarded against a Member (or Minister).

6.35. The Committee is attracted to the New Zealand model where the issue of indemnity on damages and costs is usually decided in advance. However, if the matter is unclear (for example it may be necessary to first determine whether the Minister acted for any corrupt or improper reasons) the indemnity on costs and damages is determined after the judgement is made.

6.36. Recommendation 7.

On the question of indemnity for damages and costs awarded against a Member (or Minister) the Committee recommends that the legislation and guidelines take account of the New Zealand model. The issue of indemnity for damages and costs should be decided in advance except where the matter is unclear and in those cases the indemnity on costs and damages should be determined after the judgement is made.

6.37. The Committee considers it is important that the provision of legal assistance to Members (including Ministers) should be appropriately reported to the Assembly and put on the public record. This should include the type of financial assistance provided (see paragraphs 6.34 and 6.35) and the reasons why public funding was granted.

6.38. Recommendation 8.

The Committee recommends that the legislation and guidelines require the “approving person” (or authority) to report to the Assembly on all instances of Members (including Ministers) receiving legal assistance at Territory expense. The report should include the type of financial assistance provided and the reasons why public funding was granted.

6.39. The Committee can imagine a circumstance in which a Member is awarded money as a result of litigation that has been funded by the Territory. This gives rise to questions about the propriety of the Member retaining such a financial award. It is the view of the Committee that it is entirely inappropriate for a Member (including a Minister) to retain any funds awarded as a result of the litigation funded by the Territory.

6.40. Recommendation 9.

The Committee recommends that the legislation and guidelines specify that any financial award to a Member (including a Minister) arising out of a case funded by the Territory, should be paid to the Territory.

6.41. The Committee notes that arguments can be advanced to extend eligibility for financial assistance to the staff of Members (including Ministers). The Committee considers that this issue warrants attention by the Government and the Assembly.

Final Comments

6.42. The Standing Committee on Legal Affairs hopes that the information contained in this Report will assist all Members of the Assembly (including Ministers) to address the complex issues surrounding the provision of legal assistance to Members.

6.43. The Standing Committee on Legal Affairs considers it might be useful for both the Government and the Speaker to refer the Ministerial Guidelines and legislation, once available, to this Committee for further consideration.

Mr Paul Osborne, MLA
Chair

13 March 1997