

PRESIDING OFFICERS AND PUBLIC CONTROVERSIES

PART I — The Presiding Officer as a defendant in opposition to the Executive

Introduction

A range of issues raised in connection with the court proceedings on the validity of the Legislative Council's reference directing the Ombudsman to investigate members of parliament are worthy of a detailed analysis. This part of the paper, however, will focus on the circumstance of a presiding officer being directed by his House to prosecute a court case in direct opposition to the Executive.

General information

The Office of the Victorian Ombudsman has been in existence since 1973, established and governed by the *Ombudsman Act 1973*. Circa 2012–13, the Act was subject to significant change as a result of the enactment of a new accountability and integrity regime, including the creation of the Independent Broad-based Anti-corruption Commission, new protected disclosure laws and other related provisions.

Section 16 of the Act, however, has remained intact from its commencement in 1973 until now:

16 Investigations referred by Parliament

(1) At any time—

- (a) the Legislative Council or a committee of the Legislative Council;
- (b) the Legislative Assembly or a committee of the Legislative Assembly; or
- (c) a joint committee of both Houses of Parliament—

may refer to the Ombudsman for investigation and report any matter, other than a matter concerning a judicial proceeding, which that House or committee considers should be investigated by the Ombudsman.

(2) Where a matter is referred to the Ombudsman pursuant to subsection (1), the Ombudsman shall, notwithstanding anything to the contrary in this Act, forthwith investigate that matter and report thereon.

Note

Section 25AB provides for the manner of reporting.

Background

On 2 September 2015, the *Herald Sun* reported that ALP insiders had leaked information alleging that, in breach of parliamentary rules, ALP members of parliament diverted part of their electorate office budgets intended to fund the employment of electorate officers to instead pay for campaign staff. The arrangement was reportedly a funding pool used to employ campaign organisers ahead of the 2014 Victorian state election.

On 25 November 2015, following several weeks of media coverage, the Legislative Council exercised its section 16 referral power with the following resolution, put forward by the leader of the Victorian Greens:

That, pursuant to section 16 of the *Ombudsman Act 1973*, this House refers the following matter to the Ombudsman for investigation and report:

- (1) allegations that ALP Members of the Victorian Parliament misused Members' staff budget entitlements, against the provisions of the Parliament of Victoria Members Guide, that is, "Electorate Officers are employees of the Parliament of Victoria, and are directly accountable to the Member in whose electorate office they work...These positions are provided to support the Member in their parliamentary and electorate duties. The Parliament does not fund positions to support the Member's political or party duties"; and
- (2) any other breach of applicable policies, laws or codes in relation to these allegations.

The motion passed on a division with government and four cross-bench members voting against the question.

On 28 January 2016, the Ombudsman filed an ex parte application to the Supreme Court seeking a declaration pursuant to section 27 of the *Ombudsman Act 1973* as to whether she had the jurisdiction to carry out an investigation pursuant to the Council's referral. In her affidavit, the Ombudsman referred to a letter from the Leader of the Government in the Council, and Special Minister of State, stating it was the Government's view that she did not have jurisdiction to investigate the matters raised in the referral.

The Ombudsman publicly stated that, in her view, there was genuine controversy as to whether she had the jurisdiction to investigate and, to avoid unnecessary public cost being incurred, her application was the most appropriate course of action to determine the matter. She also gave a clear indication that she would remain neutral throughout the proceeding.

The Attorney-General subsequently joined as a party to the proceeding on behalf of the Government to affirm the view that the Ombudsman did not have jurisdiction or power under section 16 to investigate and report on the matter referred.

President's role as a party to proceedings

The Council had a limited window in which to resolve what, if any, action should be taken in relation to the matter and, on 10 February 2016, passed a further resolution (with government members voting against) as follows:

That, further to the resolution of the Legislative Council on 25 November 2015 referring a matter to the Ombudsman for investigation pursuant to section 16 of the *Ombudsman Act 1973*, this House —

- (1) notes that the Ombudsman has made an application to the Supreme Court of Victoria pursuant to section 27 of the *Ombudsman Act 1973* seeking a determination as to her jurisdiction to investigate the matter referred to her by the Legislative Council;
- (2) affirms the Ombudsman's jurisdiction and power under section 16 of the *Ombudsman Act 1973* to investigate the matter referred to her by the Legislative Council;
- (3) directs the President to —
 - (a) make application to the Supreme Court for the Legislative Council of Victoria to be joined as a party to the section 27 proceedings in order to contend in those proceedings that the view set out in (2) is correct;
 - (b) act as the Legislative Council's representative in such proceedings in any manner he deems appropriate and in accordance with any direction from the House;
 - (c) for the purposes of (3)(b) this may include, but is not limited to —
 - (i) seeking legal advice;
 - (ii) engaging counsel; and
 - (iii) making submissions.

The motion that was ultimately brought into the House sought to achieve the following:

- An explicit and overarching statement of the Council’s view of the matter, that the Ombudsman did have jurisdiction and power to investigate the referred matter under section 16.
- A direction to the President to apply to join as a party to the proceeding in order to contend the view of the Council set out in the motion.
- Empowerment of the President to participate in the proceeding as he saw fit, including seeking legal advice and engaging counsel.

This construction was necessary to protect the President from allegations of partisanship on the matter and provided surety that only the stated view of the House would be argued. The matter referred to the Ombudsman was a highly contentious issue and, for the President to continue to have the confidence and co-operation of the House, he had to exercise, and be seen to exercise, a significant degree of impartiality.

There are several jurisdictional examples of presiding officers joining court action at their own discretion which might have provided some direction in the absence of an authorising resolution. However, the majority of these relate to questions of parliamentary privilege and Article 9 breaches and are not directly comparable to the politically contentious nature of the proceeding in this case. Ultimately, relevant precedents offered little comfort in the face of the Government’s strong opposing view, which would have resulted in any move by the President (himself an Opposition member) to join the proceeding without prior authorisation from the House being unavoidably seen as a political act on his part.

Because the March resolution did not contemplate action taken by the President in connection with any appeal, a further resolution was passed by the House on 12 October 2016 as a result of the Attorney-General seeking leave to appeal the decision of the original proceeding. The further motion noted the previous resolutions of the Council, reaffirmed the Council’s view and directed the President to respond to the appeal on behalf of the Council. Importantly, it also included an open-ended provision authorising the President to respond in the event of any subsequent appeals.

In complying with both the initial and subsequent directions of the Council, the President undertook to and provided regular progress updates over the course of the proceedings. This was done by way of a statement to the House with the dual aim of providing assurance that the President was acting in accordance with the terms of the resolutions and providing any relevant information that ought reasonably be conveyed back to the House in connection with the proceedings.

Court Proceedings and appeal

In essence, the arguments at court went to the issue of statutory construction. The Attorney-General submitted that the question was whether the Council had power to make the referral in the context of the expression “any matter” in section 16 being read with reference to the *Ombudsman Act 1973* as a whole and its interaction with the IBAC and Protected Disclosure Acts. When construed this way, he argued, section 16 confers no power on the Council to refer any matter that is not within the scope and limits of the Ombudsman’s functions in Part III and, therefore, the Ombudsman had no jurisdiction to investigate and report on the referred matter.

The President’s argument was consistent with the Council’s stated position, that the scope of the section 16 referral power is a broad and independent source of investigative power and is

an additional power expressly contemplated by Part III, but not constrained by the provisions of that Part.

The matter was heard by the Honourable Justice Cavanough in the Supreme Court on 9 and 10 May 2016, from which further written submissions were ordered. On 26 August 2016, Cavanough J handed down his decision that the Ombudsman had jurisdiction under s 16(2) of the *Ombudsman Act 1973* to conduct an investigation pursuant to the referral from the Legislative Council. In his finding Cavanough J stated that section 16 does more than merely supply a trigger for the exercise of functions identified elsewhere in the Act, rather, when activated by a parliamentary referral, it confers a function additional to the functions identified in Part III of the Act.

The Attorney-General sought leave to appeal the decision consequently rendering the Ombudsman and President first and second respondents, respectively. As noted above, the Council passed a further resolution directing the President to continue acting on behalf of the House in appeal proceedings.

On 9 December 2016, the Court of Appeal granted leave to appeal and then immediately dismissed the appeal, finding the Judge's construction of s 16(1) was correct.

Leave was again sought by the Attorney-General to appeal to the High Court, which was not granted.

Assembly's resolution asserting exclusive cognisance

After failing to achieve its desired outcome in court, the Government shifted its fight to the Legislative Assembly where, on 9 February 2017, it used its majority to assert exclusive cognisance in respect of the Council's referral with the following resolution:

That this House:

- (1) Notes the description of exclusive cognisance given in *Hatsell's Precedents and Proceedings of the House of Commons*, vol 3, p 67, that: 'the leading principle, which appears to pervade all the proceedings between the two Houses of Parliament is that there shall subsist a perfect equality with respect to each other, and that they shall be, in every respect, totally independent, one of the other';
- (2) Asserts the rights and privileges of the Legislative Assembly with respect to exclusive cognisance regarding members of the Legislative Assembly in relation to the matter referred to the Ombudsman by the Legislative Council on 25 November 2015, meaning that the Legislative Council's referral to the Ombudsman cannot be taken to apply to current or former members of the Legislative Assembly;
- (3) Directs the Speaker to convey the terms of this resolution in writing to the President of the Legislative Council and the Ombudsman accordingly.

The Assembly resolution throws up any number of issues relating to privilege and what constitutes parliamentary proceedings, the establishment and assertion of exclusive cognisance of one House against the other, and the independence of the Houses.

Had a body other than the Council, the police for example, instigated an investigation equivalent to the section 16 referral, is an issue also worthy of pursuit. *R v Chaytor*¹ found that if the existence of privilege and/or exclusive cognisance is established, it prevails over any extra-parliamentary action. However, *Chaytor* also established that it is likely a court would find no issue of exclusive cognisance is raised in investigating the use of electorate entitlements (as alleged) as it does not constitute parliamentary proceedings, either within the meaning of Article 9 privilege, nor within the broader principle of privilege and exclusive

¹ *R v Chaytor and others* [2010] UKSC 52

cognisance. In such an event, an extra-parliamentary body would potentially have the power to investigate matters intimately connected with the internal operations of parliament that a house of parliament, itself, could not.

It is important to note in relation to *Chaytor* that neither House of the UK Parliament made a claim of exclusive cognisance to prevent police investigation of charges against the members who were the subject of the proceedings. Rather, it was the members concerned who made such claims, which were rejected by the Court. Had either House made a claim of exclusive cognisance, however, the Court would have been faced with a more difficult decision.

Further, if one House of the UK Parliament had made a claim of exclusive cognisance in relation to any actions of the other House regarding the members concerned, the Court may well have found the dispute to be nonjusticiable.

But we will never know.

Caught in the middle

Analysis and discussion of the existence or otherwise of exclusive cognisance in this case and an exploration of the validity and extent of the Assembly's assertion is worthy of its own paper. However, the 'meat in the sandwich' dilemma faced by both the Ombudsman and, particularly, DPS staff is of interest here.

As things currently stand, the Assembly's resolution is the most recent formal action of either House in relation to the matter. In the absence of any further direction from the Council, the Ombudsman is now caught between the Council's referral, obliging her to investigate forthwith under section 16(2) on one hand, and the assertion of exclusive cognisance by the Assembly, excluding Assembly members from investigation, on the other. How does the Ombudsman determine which action to follow? The Assembly's claim is of exclusive cognisance against the Council and the Ombudsman is acting as a delegate of and on instruction from the Council. If she chooses to abide by the Assembly's claim, does the Ombudsman risk committing a contempt of the Council in taking direction from the other House without first seeking further direction from the Council?

By extension, this also leads to the risk of catching DPS staff between the disparate positions of the two Houses. Should the Ombudsman opt to conduct her investigation in accordance with the full terms of the Council's referral, DPS staff are put in the unenviable position of simultaneously having to cooperate with the investigation and abide by the Assembly's exclusive cognisance claim, without falling foul of either. Even where the Ombudsman conducts her investigation in obedience of the exclusive cognisance claim, the allegations regarding the use of electorate staff include pooling arrangements, a scenario likely to cover both Assembly and Council members. How and where do DPS staff draw a line between what is or is not subject to the exclusive cognisance claim in such a situation?

Should either the Ombudsman or the Assembly take issue with the conduct of DPS officers, the consequences for the staff either way are unwelcome and, taken to their most extreme conclusion, potentially constitute either committing a contempt of the Assembly or having criminal charges against them recommended by the Ombudsman.

Both the President and the Speaker have a certain responsibility for the welfare of parliamentary officers and this reasonably extends to shielding DPS staff from the consequences of being caught-up in disputes between the Houses. DPS staff (and the

Ombudsman) rely on the good will of both Houses to pursue each other in such disputes and not pursue the actions of staff, performed in good faith, as contempts against one House or the other.

We await the Ombudsman's report.

PART II – Role of the Parliament's Audit Committee – 'Private Committee, Public Controversy'

The second issue in this paper concerns the difficulties and lessons learned in relation to the recent operation of the Victorian Parliament's Audit (advisory) Committee. The difficulties faced by the committee arose from it being used as an investigator and reporter of allegations made in relation to the then Speaker's and Deputy Speaker's use of a parliamentary allowance. Despite being an internal, advisory committee to the presiding officers, political pressure resulted in the Audit Committee being forced to act as if it were a parliamentary committee with powers, immunities and investigative functions that it does not possess.

Second Residence Allowance controversy

In early 2017 the Speaker and Deputy Speaker of the Legislative Assembly in Victoria were both subject to allegations in the media that they were improperly claiming the second residence allowance. The allowance is provided by regulations governing parliamentary salaries and superannuation and was generally understood to be an allowance to assist Members from non-metropolitan areas with the costs of having to maintain accommodation in Melbourne, where Parliament House is situated. Information about allowances claimed by Members is not published in Victoria.

Speaker's comments

On 23 February 2017, following newspaper articles about the Speaker's use of the second residence allowance, the manager of opposition business asked the Speaker for an explanation. Later in the day the Speaker made a personal explanation to the House acknowledging that:

"I fully accept that my claims for allowances, whilst within the rules, do not meet community expectations. and I intend to make a full reimbursement of this allowance to the Parliament."

The manager of opposition business immediately pursued the matter and sought further public explanation by the Speaker, at which point the Speaker advised the House that he would refer the matter to the internal Audit Committee. The House did not sit again for two weeks.

When the House resumed two weeks later the Speaker resigned.

In the interim, newspaper articles made similar claims about the Deputy Speaker's use of the second residence allowance.

Premier's comments

The media and Opposition increased public pressure on the Government for both an investigation and repayment of the monies claimed by both the Speaker and Deputy Speaker.

In public interviews and in the proceedings of the Assembly, the Premier stated that these were matters for the Audit Committee. (*The Australian*, 26 February 2017 and *Parliamentary Debates (Hansard)*, 58th Parliament, 7 March 2017, pp. 474, 475, 477, 482).

Audit Committee's Status and Terms of Reference

The Parliament of Victoria has a number of internal committees that form its overall governance structure. Some are comprised of senior management within the Parliament and others involve Members and the Presiding Officers. Examples of the latter include the Security Management Board, the Audit Committee and the House Committee. Of all these committees only the joint House Committee has any statutory basis, being provided for by the *Parliamentary Committees Act 2003*. Neither of the other committees listed above have any basis in statute, standing orders or resolution of either House.

These Committees are easily distinguished from the investigative committees established in Victoria by either standing orders or statute. Such committees have powers and immunities and clearly understood functions of public inquiry, evidence gathering and reporting.

The Audit Committee determines and reviews its own terms of reference. The terms state that its purpose is to “assist the Presiding Officers in the discharge of their duties” with particular reference to an internal audit and business risk assessment program; assessment of corporate practices and compliances; and integrity of financial information.

Membership of the committee includes the Presiding Officers, department heads (clerks and Secretary) and two independent members who are not Members of Parliament.

The Committee has for years dealt with important systemic issues that could cause reputational harm to the Parliament, but not specific allegations already in the public domain. Its reports are not usually released outside of the committee.

The Audit Committee's approach

The Audit Committee found itself in an unusual position: on the one hand aware of a potential issue that it would ordinarily review with a systemic focus and out of the public eye; and on the other hand a very public and political expectation that it would now investigate matters of great public controversy.

The only example of any similarity was recent, with the Audit Committee having to examine matters surrounding the alleged misuse of electorate office staff by Members during the previous election campaign (the same subject matter covered in the first part of this paper). In that instance the Presiding Officers decided to circulate a summary of the Audit Committee's examination to party leaders.

In relation to this new controversy about allowances, the Audit Committee directed its contracted, internal auditors, PricewaterhouseCoopers (PwC) to undertake a three-phase investigation in relation to the second residence allowance in 2017–

1. Inquire into and report to the committee on the eligibility of the former Speaker and Deputy Speaker to claim the second residence allowance. This process included interviewing the Members, reviewing various documents, including leases, utilities bills, travel records, driver registration, electoral roll records and the like. (*Review of Members' Second Residence Allowance – Phase 1, Parliamentary Paper 281, Session 2014-17, 21 March 2017*)
2. Inquire into and report to the committee on the eligibility of all other Members claiming the second residence allowance. This process had the same approach to documentary evidence listed above for

phase 1. (*Review of Members' Second Residence Allowance – Phase 2, Parliamentary Paper 286, Session 2014-17, 2 May 2017*)

3. Inquire into and report to the committee on options to improve governance and disclosure of allowances. (*Review of Members' Second Residence Allowance – Phase 3, Parliamentary Paper 287, Session 2014-17, 2 May 2017*)

The nature of the very public, albeit unofficial referral of the matter to the Audit Committee inevitably led to a significant expectation and pressure for the Committee to report publicly. The Presiding Officers, in consultation with the Audit Committee, decided to Table, by leave, the three phase reports. The Reports were ordered to be published by the Houses and afforded absolute privilege, but this cannot hide the various dangers and shortcomings of the Audit Committee being made the investigator of political convenience.

The challenges, dangers and shortcomings of the Audit Committee's investigations and reports

Evidentiary requirements

The Audit Committee, through its internal auditors (PwC), investigated the eligibility of Members who were then claiming the allowance against evidentiary requirements that were not required by the Clerks under the existing law when activating the allowance for a Member. There is clear cause to argue that the existing law is lacking in rigour and will be amended in coming months. There is equally a legitimate interest for the Audit Committee to use different standards of documentary evidence to better understand if an allowance is being applied for the purpose it was created. But these interests in applying different standards of evidence for qualification are countered by the fact, in this instance, that any information the committee collected was more likely to end up in the public arena.

Basis, powers and immunities of the committee

As described above, the Audit Committee is a creature of the administration of Parliament. It is not established by standing orders or statute. The matters it deals with are overwhelmingly unconnected with 'parliamentary proceedings,' but are intrinsically administrative in nature, even if very serious because of the financial risk and reputational risk management involved.

In other words, the committee has no real powers and immunities of a parliamentary committee that attaches to parliamentary privilege. If a privileges committee or other committee established by standing orders, resolution of the House or statute had been referred the investigation it would enjoy all the powers and immunities required.

The Audit Committee and PwC had no power to compel information from Members or anyone else who may have been able to assist with information about the residential status of Members. If any Member or other person had refused requests for information the committee might have reported the fact in its phase 1 or phase 2 report, but it could only have reported a failure to meet a request rather than a summons or some other more binding direction.

Parliamentary committees have powers to protect witnesses and those under investigation. Any adverse actions taken by others against witnesses might be interference with parliamentary proceedings, a contempt of parliament.

A parliamentary committee with powers and immunities may refuse to divulge information to other parties, such as police or third parties with investigative functions. The fact that –

- the allegations were very public;
- that it was known that the Audit Committee was collecting information as part of an investigation; and
- that the Opposition was formally seeking a Police investigation -

exposed the committee to the risk that other investigative agencies would seek to compel the production of that information or that a House itself would order its own presiding officer to produce documents. This latter threat would have been a most unwelcome precedent in terms of the ongoing ability of presiding officers to administer the parliament in the interests of Members as elected representatives.

Public reporting

The limited status of the committee extends to the fact that it was not envisaged that the Audit Committee would report to the Houses. In the politically charged context of the allowances controversy the decision to table the Audit Committee's 3 phased reports at least had the benefit of the giving the committee some control over what information was made public. In the absence of such tabling, other outcomes, such as orders for production of documents imposed on a presiding officer would have led to far less discretion in deciding what information was made public.

Countering that benefit is the concern that having reported on this occasion there may be a heightened expectation that such a process will be followed again next time there is a matter of public controversy around matters of parliamentary administration. This would ultimately diminish the role and value of the internal audit committee and ultimately fail to guarantee that a further inquiry by a privileges committee or other committee with powers and immunities would not be undertaken anyway.

President's statement to the House

Following the tabling of the audit committee's reports, the President made the following statement to the House on 2 May 2017 –

The Audit Committee is an internal, administrative committee of the Parliamentary organisation. It should not be the role of the Audit Committee to publicly report as it has in recent weeks. I will explain why this is the case, but firstly I will point out that the only reason the Audit Committee conducted this particular type of investigation of second residence allowances and then reported publicly is because of the very public referrals of the matter to the committee in the first place.

The audit committee is an internal committee of the parliamentary organisation. Its role is to advise the Presiding Officers on matters of administration and risk management, to better administrate the parliamentary departments. It is not a committee set up by statute or standing orders. It therefore has no formal investigative powers, parliamentary privilege including immunities and no reporting framework.

This means that any formal and publicly reported investigation creates potential vulnerabilities for the committee and the people it seeks to investigate and report on. It similarly creates vulnerabilities for the contracted auditors, who conduct the operational inquiries on behalf of the committee, in order to create some independence of process from the Presiding Officers.

There are committees, such as privileges committees, which are set up with powers and reporting frameworks to investigate certain matters.

I strongly encourage Members to take these matters into consideration and to avoid misplacing pressure to publicly report on the Audit Committee.

Conclusion

In light of the issues canvassed in this paper, it is clear that the most appropriate committee to investigate the allegations about the Speaker and Deputy Speaker was the Privileges Committee of the Legislative Assembly. If Members better understand these issues they may make more informed public comments and decisions about where matters of public controversy should be investigated in future.