



PARLIAMENT OF VICTORIA

Legislative Council
Privileges Committee

Inquiry into matters relating to the misuse of electorate office staffing entitlements

Parliament of Victoria
Legislative Council Privileges Committee

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Committee functions

The Legislative Council Privileges Committee is established under Legislative Council Standing Orders Chapter 23 — Council Committees, and Sessional Orders.

The Committee's functions are to consider any matter regarding the privileges of the House referred to it by the Council.

Committee membership



Mr James Purcell MLC
Chair*
Western Victoria



Ms Nina Springle MLC
Deputy Chair*
South-Eastern Metropolitan



Hon. Philip Dalidakis MLC
Southern Metropolitan



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South-Eastern Metropolitan



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Eastern Metropolitan

* Chair and Deputy Chair were appointed by resolution of the House on Wednesday, 23 May 2018 and Tuesday, 5 June 2018 respectively. Full extract of proceedings is reproduced in Appendix 2.

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This report is available on the Committee's website.

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Terms of reference

Inquiry into matters relating to the misuse of electorate office staffing entitlements

On 28 March 2018, the Legislative Council agreed to the following motion:

That this House —

1. notes the Ombudsman’s report on the Investigation of a matter referred from the Legislative Council on 25 November 2015;
2. calls on the —
 - a. Premier, Ministers and Labor MPs named in the report to take full responsibility for their actions and stop blaming others and to apologise to parliament;
 - b. Premier to apologise to the Parliament for the misuse of the Electorate Office and Communication budgets by Labor MPs and for the Government frustrating the process by challenging the motion in the courts, using public money;
 - c. ALP to pay an additional 25 per cent of the total amount falsely charged to DPS and to fully repay costs that were incurred by taxpayers on its behalf in its court challenges to the investigation;
 - d. Government to implement all the recommendations in the report by Tuesday, 19 June 2018;
 - e. Government, in consultation with all parties and independent MPs, to strengthen the codes of conduct in relation to MPs and Ministers and to establish an independent Parliamentary Commissioner for Standards in Victoria;
3. requires the Privileges Committee to inquire into and report, in relation to those current and former Members of the Legislative Council named in paragraphs 45 to 50 of the Ombudsman’s report, on the following —
 - a. whether any Members are in contempt of Parliament in relation to the Code of Conduct in the *Members of Parliament (Register of Interests) Act 1978*;
 - b. whether any fine should be imposed and the amount to be imposed pursuant to section 9 of the *Members of Parliament (Register of Interests) Act 1978*;
 - c. whether the conduct of any current or former Members constitutes any other form of contempt of Parliament and if so, what sanction, if any, should be imposed;

and the Committee shall report no later than 19 June 2018.ⁱ

ⁱ The reporting date was extended to 23 August 2018 by resolution of the Legislative Council on 5 June 2018.

Chair's foreword

I am pleased to present this report of the Privileges Committee which examines matters relating to the misuse of electorate office entitlements.

This was a challenging inquiry in many respects. A Privileges Committee of this type has not previously convened in the history of the Legislative Council. There is no body of custom and practice to draw from, although the Committee was able to look to other Houses and Parliaments for precedents. The Committee's reporting timeframe was short and the Inquiry was delayed while procedural matters, including the election of chair and deputy chair, were resolved by the House.

In the course of the Inquiry, Victoria Police determined to reinvestigate matters following a complaint from a Member of the Opposition. The Police made a number of arrests, although all were then released without charge. There was almost daily speculation in the media and in the Parliament on the police investigation and the Inquiry.

However, the task set out in the Terms of Reference was straightforward. The Ombudsman found in her report on matters relating to the misuse of electorate office entitlements (tabled March 2018), that several past and present Members breached sections of the Members' Guide. Mr John Lenders, the architect of the scheme in question, was also found to have 'crossed the line' of what was acceptable under the Guide. The Committee was asked to determine whether a contempt of Parliament had been committed.

The Committee resolved that it would not attempt to reinvestigate a matter that took over a year to finalise and utilised the expertise of four full-time Ombudsman officers, a part-time QC, and the Ombudsman and Deputy Ombudsman themselves. Nevertheless, we did consider it necessary, within the time available and to the extent possible, to gather evidence for our Inquiry, which had a different focus to the Ombudsman and, I emphasise, a different focus to the police investigation.

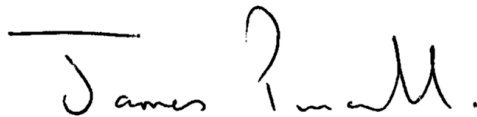
The Committee held almost all hearings in public rather than behind closed doors. I note this is unusual for Privileges Committees and that public hearings exposed witnesses to the glare of the media and difficult questioning. However, it was important the Inquiry was conducted transparently. Public hearings also gave witnesses the opportunity to respond to adverse comment in the Ombudsman's report.

In the end, the Committee has focused on the task set by the House and has made findings accordingly. We find that the conduct of the Members in question does not constitute a contempt of Parliament, even though in some cases the conduct was not up to the standard expected from Members of Parliament.

While it was not the task of the Inquiry to examine Parliament's broader integrity structures, the evidence we received confirms the observations of the Ombudsman that the Members' Guide and the rules around the employment of electorate officers need to be overhauled. Some of the recommendations of the Ombudsman have been implemented; the remaining should occur as swiftly as possible.

On behalf of the Committee I thank the secretariat, which at different times included Mr Keir Delaney, Assistant Clerk Committees, Ms Vivienne Bannan, Bills and Research Officer, Mr Matt Newington, Inquiry Officer, Ms Anique Owen, Research Assistant, Ms Christina Smith, Administrative Officer, and Ms Kirra Vanzetti, Chamber and Committee Officer. The Clerk, Mr Andrew Young and the Deputy Clerk, Ms Anne Sargent, provided procedural advice and assistance to the Committee.

Finally, I thank my fellow Committee Members for the bipartisan and cooperative manner in which the Inquiry was conducted.

A handwritten signature in black ink that reads "James Purcell". The signature is written in a cursive style with a horizontal line above the first few letters.

James Purcell MLC
Member for Western Victoria
Chair

Findings and recommendation

3 Contempt of Parliament

FINDING 1: All Members named in paragraphs 45 to 50 of the Ombudsman’s report, particularly those in leadership positions, should have sought more detail from Mr Lenders, clarified the terms of the arrangement with the Department of Parliamentary Services or the Presiding Officers and been more diligent in exercising their responsibilities when certifying the hours of work undertaken by their staff. 28

FINDING 2: With the exception of Mr Lenders, the Committee did not receive evidence that the Members named in paragraphs 45 to 50 of the Ombudsman’s report wilfully breached the code of conduct under the *Members of Parliament (Register of Interests) Act 1978*. Accordingly their actions do not constitute a contempt under that Act. 28

FINDING 3: Mr Lenders acted with deliberate disregard for the Members’ Guide and his actions were contrary to the standard expected of a Member of Parliament. In addition, his actions have adversely affected the reputation of the Parliament. 30

FINDING 4: On the balance of probabilities, the Committee finds that Mr Lenders acted with deliberate disregard for the Members’ code of conduct in establishing the scheme. However, the Committee does not have ‘proof’ to a High Civil Standard that his actions were ‘wilful’, and therefore is unable to find him to be in contempt of Parliament under the *Members of Parliament (Register of Interests) Act 1978*. 30

FINDING 5: There is no evidence to suggest that the Members or their actions, directly or indirectly, committed any breach of privilege or otherwise obstructed the House in undertaking its core functions. Therefore, their actions do not satisfy the criteria for general contempt of Parliament. 31

4 Members’ Guide and related matters

RECOMMENDATION 1: That the Ombudsman’s recommendations in relation to the Members’ Guide be put in place as soon as possible. 33

1.1 Background

On 28 March 2018, the Legislative Council agreed to a resolution to refer matters relating to misuse of electorate office staffing entitlements to the Privileges Committee. The motion to refer the Inquiry to the Committee was in response to findings contained in the Victorian Ombudsman's report *Investigation of a matter referred from the Legislative Council on 25 November 2015* (2018). The report is discussed further in Section 1.1.1 below.

The Committee was directed to inquire into conduct of current and former Members of the Legislative Council named in paragraphs 45 to 50 of the Ombudsman's report. Specifically, whether:

- Members are in contempt of Parliament in relation to the Code of Conduct in the *Members of Parliament (Register of Interests) Act 1978*
- any fine should be imposed pursuant to section 9 of the Act
- any other conduct of the Members constitutes any form of contempt of Parliament
- whether any sanctions should be imposed.

The full terms of reference are published in the preliminaries of this report.

1.1.1 Referral and report by Ombudsman

On 25 November 2015, the Legislative Council passed the following motion to refer allegations of misuse of ALP Members' staff budget entitlements during the 57th Parliament to the Ombudsman:

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.

On 1 December 2015 the Government advised the Ombudsman that in its view she did not have jurisdiction to investigate the matter. Consequently, the Ombudsman sought a determination in the Supreme Court of Victoria. Following the determination and dismissal of subsequent appeals, the Ombudsman was found to have jurisdiction to conduct the investigation and resumed in January 2017.¹

The Ombudsman tabled her final report on the investigation out of session on 21 March 2018. It was subsequently tabled in Parliament on the next sitting day, 27 March 2018.

1.1.2 Assertion of exclusive cognisance of Assembly regarding its Members

On 9 February 2017, the Victorian Legislative Assembly passed a motion asserting exclusive cognisance:

That this house:

- (1) notes the description of exclusive cognisance given in Hatsell's *Precedents of Proceedings in 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.

In her report, the Ombudsman stated that she did not seek to test her jurisdiction to investigate Members of the Legislative Assembly, stating:

I considered that enough public money had been spent on legal proceedings, and that it was possible to investigate the matter by focusing on Members of the Legislative Council.²

The Committee also received advice from the Clerk of the Legislative Council which explained the validity of the Legislative Assembly's assertion of exclusive cognisance in this matter.³ Regardless, the Committee's terms of reference relate to current and former Members of the Legislative Council only.

¹ A detailed account of court proceedings can be found in the Ombudsman's report.

² Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 8.

³ Andrew Young, Clerk of the Legislative Council, *Advice provided to Legislative Council Privileges Committee*, 8 August 2018.

1.1.3 Investigation by Victoria Police

In September 2015, during the Ombudsman’s investigation, Victoria Police received a complaint into publicly funded electorate officers used for political roles in the 2014 election campaign. Victoria Police then conducted initial inquiries and assessments on the complaint and gathered relevant materials. This included consulting with the Ombudsman’s office, the Department of Parliamentary Services, PricewaterhouseCoopers,⁴ electorate officers and other individuals.⁵

In 2016, Victoria Police sought legal advice on the available material and whether it was adequate to constitute a full investigation. Based on the legal advice it received, Victoria Police concluded that no criminal offences had been identified and therefore did not commence an investigation.⁶

At a hearing, Chief Commissioner Graham Ashton was asked what offences Victoria Police had considered in its 2015–16 assessment. He replied:

Possible offences included make false document, use false document, false accounting, conspiracy to cheat and defraud, and misconduct in public office under common law.⁷

He also noted that at the conclusion of her investigation, the Ombudsman did not refer any subsequent matters to Victoria Police:

On 8 March of 2018 the Ombudsman tabled her report in the matter, and at that stage the recommendations in the Ombudsman’s report did not refer any additional matters to the police to investigate based on her investigation.⁸

However, in April 2018, Victoria Police received a further complaint from Hon. Edward O’Donohue MLC relating to the matter and began a subsequent assessment. At a public hearing in July 2018, Chief Commissioner Ashton detailed Victoria Police’s assessment up until that date:

That letter of complaint asked me to re-examine the materials that we had to date in light of the Ombudsman’s report, so taking into account all of the material that the Ombudsman had gathered. Whilst I have read the Ombudsman’s report in the matter, I did feel it prudent that I did not have a knowledge of all of the investigative material that underpinned that obviously in my role, and therefore it certainly was prudent of me in discharging my functions that I ask that that further assessment occur, and I did that on 13 June 2018. That same day I wrote a letter to the Ombudsman — 13 June 2018 — and inquired as to whether the Ombudsman investigation uncovered any new evidence warranting further investigation, and I sent that to the Ombudsman.

On 21 June 2018 I received a response from the Ombudsman noting that the Ombudsman investigation obtained significantly more evidence than the police investigation, but that the core evidence remained the same ... I asked for crime

⁴ At the time, PricewaterhouseCoopers were conducting an internal audit on casual electorate officer employment, which was commissioned by the Department of Parliamentary Services.

⁵ Assistant Commissioner Stephen Fontana, Victoria Police, *Transcript of evidence*, 18 July 2018, p. 22.

⁶ Chief Commissioner Graham Ashton, Victoria Police, *Transcript of evidence*, 18 July 2018; *ibid.*, p. 19.

⁷ *Ibid.*, p. 23.

⁸ *Ibid.*, p. 19.

command to obtain the materials from the Ombudsman’s office, the underpinning investigative materials, in furtherance — so not just the report, which we had, but the investigative materials that underpinned her inquiry. We are in the process at the moment of settling correspondence to formally ask for that material, but we have certainly been in contact with the Ombudsman’s office outside of the formal correspondence process in relation to that to date, and I have asked that a full assessment be conducted of not only the Ombudsman report but any other materials that the Ombudsman may be able to provide to Victoria Police in relation to this matter, Operation Peach.

On 6 July 2018 as part of that assessment we obtained advice from Queen’s Counsel. On 29 June 2018 I met with the Ombudsman at the Ombudsman’s office in the city, and basically at that meeting we talked about the correspondence that we had exchanged and the fact that we were now continuing with this assessment, and that I would be writing to the Ombudsman shortly to request further materials that she may or may not have in relation to the matter.⁹

On 27 July 2018 the Committee received correspondence from the Chief Commissioner. The letter informed the Committee that Victoria Police were in possession of sufficient information to commence an investigation into the matters in the Ombudsman’s report. Chief Commissioner Ashton also indicated he would advise the Committee of ‘any significant developments, congruent issues or possible evidence risks as this investigation and your inquiry progresses’.¹⁰ At the time of preparing this report, the Committee had not had further contact from the Chief Commissioner.

The Committee considered whether to suspend the Inquiry given Victoria Police’s investigation. However after considering advice from the Clerk of the Legislative Council, and noting that the *sub judice* convention would be a relevant consideration if charges were to be laid, the Committee resolved to continue the Inquiry pending further developments. At the time the report was prepared, no further developments had been notified to the Committee.

While Victoria Police’s correspondence did not state what specific matters are being examined in its new investigation, its media release into the matter stated that the investigation was being conducted by the fraud and extortion squad. However, the Committee’s terms of reference relate specifically to matters of contempt of Parliament. As such, the Committee considers that there is no risk that any findings or recommendations of this report will influence the police investigation.

1.2 Scope of inquiry

The Committee’s task is not to reinvestigate the matters in the Ombudsman’s report.

Rather, the terms of reference direct the Committee to inquire into matters of contempt relating to current and former Legislative Council Members named in paragraphs 45 to 50 of the Ombudsman’s report (and listed in Table 1.1).

⁹ Chief Commissioner Graham Ashton, Victoria Police, *Transcript of evidence*, 18 July 2018, p. 20.

¹⁰ Chief Commissioner Graham Ashton, *Correspondence to the Committee*, 27 July 2018.

Table 1.1 Current and former Members of the Legislative Council named in paragraphs 45 to 50 of the Ombudsman’s report

Member	Status
Candy Broad	Former
Nazih Elasmr	Current
Gavin Jennings	Current
Shaun Leane	Current
John Lenders	Former
Margaret Lewis	Former
Jenny Mikakos	Current
Johan Scheffer	Former
Adem Somyurek	Current
Lee Tarlamis	Former
Brian Tee	Former
Gayle Tierney	Current
Matthew Viney	Former

Source: Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, pp. 14–16.

The Ombudsman found that the Members had breached the following sections of the Members’ Guide:

- Clause 8: requiring Members to certify that funds have been used for parliamentary or electorate purposes
- Clause 8: prohibiting transfers of Members’ electorate office and communication budget
- Clause 8.2.2: prohibiting the use of a retiring Member’s budget to communicate on behalf of a new candidate
- Clause 9: prohibiting the use of electorate officers for a Member’s ‘political or party duties’.¹¹

The report’s findings as they relate to the Members are discussed in detail in Chapter 2.

1.2.1 Powers and limitations of the Committee

Privileges Committees are established to consider whether the rights, privileges and immunities of a House of Parliament have been breached, or whether a contempt has occurred. These are serious matters and the Committee has made its findings and recommendations based on considerable deliberations.

¹¹ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, pp. 14–16.

This is the first time the Legislative Council Privileges Committee in its current form has convened (although Council Committees have dealt with matters of privilege in the past). The Committee has looked to the Legislative Assembly and other jurisdictions for guidance on practice and procedure.

In particular, the Committee has consulted the report of the Victorian Legislative Assembly Privileges Committee's investigation into a matter of contempt in 2014. The report contains relevant commentary and has informed the Committee's deliberations and findings.¹²

Although the Committee is able to make findings and recommend sanctions if warranted, it does not possess punitive powers. It is up to the Legislative Council to determine whether or not to ratify the Committee's recommendations, as only the House has the power to impose sanctions.

In correspondence to the Committee, Holding Redlich, legal counsel representing several of the former Members, contended that the Committee does not have the power to inquire into:

- conduct of former Members
- activities that occurred in a former parliament.

Holding Redlich stated:

We note that, if the Committee were to find that it could institute contempt proceedings against former members of Parliament, then a range of outcomes could occur. For instance, with the 'ebbs and flows' of political fortunes, Committees could make 'tit for tat' charges against individuals long retired from the Parliament.¹³

The Committee disagrees. Leaving aside the fact that the Legislative Council's history in investigating privilege and contempt matters is one of restraint and caution, rather than operating in a 'tit for tat' fashion, there are several recent examples of committees of privilege in other jurisdictions conducting inquiries in comparable circumstances.¹⁴ Former Members, or Members of previous Parliaments, are not immune from a Committee's investigation, or any subsequent sanction imposed by the House. Given not all privilege matters come to light at the time they occur, and given no other body has the power to

¹² Legislative Assembly Privileges Committee, *Inquiry in relation to recommendation 2 of the Ombudsman's report Whistleblowers Protection Act 2001: Investigation into allegations against Mr Geoff Shaw MP*, Parliament of Victoria, Melbourne, 2014.

¹³ Holding Redlich, *Correspondence to Legislative Council Privileges Committee*, received 13 July 2018, p. 2.

¹⁴ For example, see: Integrity, Ethics and Parliamentary Privileges Committee, *Matter of privilege referred by the Speaker on 13 November 2006 relating to the alleged failure by a former Member to register a payment received in the register of Members' interests*, Report no. 105, Queensland Parliament, Brisbane, 2010; Ethics Committee, *Matter of privilege referred by the Speaker on 7 June 2012 regarding the failure to pay a fine for contempt of Parliament*, Report no. 123, Queensland Parliament, Brisbane, 2012; House of Representatives Privileges and Members' Interests Committee, *Inquiry concerning the former Member for Dunkley in the 44th Parliament: possible contempts of the House and appropriate conduct of a Member*, Parliament of the Commonwealth of Australia, Canberra, 2018; House of Representatives Privileges and Members' Interests Committee, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, Parliament of the Commonwealth of Australia, Canberra, 2016; Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, *Final report*, Legislative Council, Parliament of Western Australia, Perth, 2007.

investigate matters of privilege, the argument that retrospective inquiries are outside the Committee's jurisdiction creates an immunity where none has been established.

1.2.2 Inquiry process

The Committee held nine public hearings over four days in Melbourne. A full list of witnesses is contained in Appendix 1.

The Committee's research identified that Privileges Committees generally do not hold hearings in public. However the Committee resolved to conduct public hearings for certain witnesses in the interest of transparency and to allow some of those named in the Ombudsman's report an opportunity to respond.

Of the Members named in the report, the Committee resolved to invite those current Members who were not interviewed or did not provide evidence during the Ombudsman's investigation. The Committee also invited Hon. Gavin Jennings MLC to provide evidence as it considered his testimony as current Leader of the Government in the Legislative Council would further assist deliberations.

Further, the Committee invited Mr John Lenders to provide evidence at a public hearing.

All witnesses who gave evidence before the Committee were offered the opportunity to have legal counsel present on the condition that counsel did not answer questions. This was provided in the interest of procedural fairness. Only Mr Lenders chose to be assisted by legal counsel when he appeared at a public hearing.

The Committee wrote to all former Legislative Council Members named in the Ombudsman's report inviting them to provide a written submission and, if they requested, attend a public hearing.

The Committee asked that the Members specifically address three questions:

1. Is there anything contained in the Ombudsman's Report to which you wish to respond?
2. Is there any information, additional to that contained in the Ombudsman's Report and within the scope of the Terms of Reference [...] that you would like to bring to the attention of the Committee?
3. The Committee has been asked to consider whether your conduct, as set out in paragraphs 45–50 of the Ombudsman's Report, amounts to a contempt of Parliament (s. 9) either in respect of the code of the conduct (s. 3) in the *Members of Parliament (Register of Interests) Act 1978*, or a contempt of Parliament more generally. If you believe that your conduct does not amount to a contempt, please provide reasons why.

The following former Members declined the invitation to appear at a hearing through legal counsel and chose to provide written responses to the Committee:

- Ms Candy Broad
- Ms Margaret Lewis
- Mr Johan Scheffer
- Mr Lee Tarlamis.

In addition, the Committee wrote to a number of individuals who were named in the Ombudsman's report to give evidence at a public hearing, including field organisers and staff of the ALP campaign team. Of these, the Committee received responses from Mr Stephen Donnelly and Mr Sebastian Henderson but was unable to contact a number of other individuals.

Mr Donnelly provided written responses to questions from the Committee in lieu of appearing at a hearing. Mr Henderson, through legal counsel, declined an invitation to appear at hearing to answer questions, but offered to provide a written statement to the Committee. The Committee submitted questions to Mr Henderson to answer in writing, however no response was forthcoming.

The Committee also invited Mr Jadon Mintern to provide evidence at a hearing, however the invitation was declined.

The Committee has published the written responses from the former Members and Mr Donnelly on its website.

On 6 June 2018 the Committee received a briefing from the Ombudsman on her investigation and the findings and recommendations of the report. The Ombudsman also provided a series of documents from the report's investigation which informed the Committee's deliberations. The Ombudsman later attended a public hearing on 18 July 2018 to place some comments on record and to answer further questions about the investigation and report.

The Committee also received evidence from Chief Commissioner Graham Ashton and Assistant Commissioner Stephen Fontana, Victoria Police, on 18 July 2018. Their testimony discussed Victoria Police's:

- assessments into the two complaints about publically funded electorate officers in political roles (discussed previously in section 1.1.3)
- involvement and interaction with the Ombudsman during her investigation.

The Committee conducted a closed hearing with Mr Jake Finnigan, who was employed as a field organiser during that time.

The Committee received a briefing from Mr Peter Lochert, Secretary of the Department of Parliamentary Services on 18 July 2018. Mr Lochert also appeared at a public hearing on 6 August 2018. In addition, the Committee also received evidence from Hon. Bruce Atkinson MLC, President of the Legislative Council on 6 August 2018.

2.1 Overview of scheme

A key issue investigated by the Ombudsman was the legitimacy of the pay arrangement of a staff pooling scheme for ALP field organisers. This was the basis of the Ombudsman's report and central to the Committee's investigation of possible contempt of Parliament.

Under the arrangement at least 18 field organisers¹⁵ were recruited with their employment status split between being paid for three days as an ALP employee and two days as a casual electorate officer employed by the Parliament of Victoria. This was also referred to as the '60:40 split'.

In her report, the Ombudsman used the term 'field organiser' to refer to people employed under the scheme. The Committee has chosen to adopt the same term in this report.

As highlighted in the Ombudsman's report, the core issue with this arrangement was the absence of demarcation between the two roles. In her report, the Ombudsman found that field organisers employed as part of the arrangement were surprised upon hearing of the arrangement.¹⁶

The Ombudsman noted evidence that field organisers:

- were not provided with electorate officer training
- in some instances, were managed by regional field directors instead of their nominating Member
- were instructed not to publicly disclose their working arrangements.¹⁷

The full arrangements and chronology of the scheme is described in detail in the Ombudsman's report.

The Ombudsman found in her report that Mr John Lenders, the then Leader of the Opposition in the Legislative Council and a former Victorian Treasurer, conceived the scheme. In giving evidence to the Committee, the Ombudsman reiterated this view:

15 The report also found that around 25 to 30 field organisers attended a training session at an ALP premises in the first week of March 2014. See p. 9.

16 Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, pp. 87–88.

17 *Ibid.*, p. 88.

I concluded that the scheme was the brainchild of Mr Lenders, and I expressed the view that he carried the greatest share of responsibility for breaches of the guide. His personal stature would have been instrumental in giving credibility to the arrangement ...¹⁸

The Committee heard that former and current Members of Parliament trusted Mr Lenders, who had a credible reputation as a party leader. As a result, they took his advice on face value, largely without question or seeking advice from the Department of Parliamentary Services or Presiding Officers.¹⁹ This is consistent with the Ombudsman's finding. In his evidence to the Committee Mr Lenders also acknowledged the role he played where he referred to designing the operation and seeking buy-in from colleagues.²⁰

In assessing the legitimacy of the scheme, the Ombudsman in her report stated:

The legitimacy of the 60:40 split depended on those involved being clearly instructed to perform Electorate Officer duties on the dates they were paid out of parliamentary funds. For at least 18 Field Organiser who were paid as casual Electorate Officers, this separation of role did not happen in practice.²¹

The Ombudsman's report also found that in some instances ALP field organisers did not receive direction from their nominating Member on the duties required of an electorate officer.

The Committee heard evidence to support this. In some instances the nominating Member did not have any direct involvement or knowledge of the type of work being undertaken by the field organiser in their capacity as electorate officer.²² This was particularly evident in instances where the field organiser was working from another Member's electorate office.

2.2 Ombudsman report findings

As outlined in the terms of reference, paragraphs 45 to 50 of the Ombudsman's report found that 13 current and former Members of the Legislative Council breached the Members' Guide. Further, paragraphs 45 to 50 detail the four breaches that occurred under Clause 8 and 9, each of which are outlined in sections 2.2.1 to 2.2.4 below.

The Ombudsman acknowledged in her report that there were 'gaps' in the evidence made available to the investigation. At a public hearing, the Ombudsman expanded on this, stating:

¹⁸ Deborah Glass OBE, Victorian Ombudsman, Ombudsman Victoria, *Transcript of evidence*, 18 July 2018, p. 3.

¹⁹ Nazih Elasmr MLC, *Transcript of evidence*, 19 July 2018, p. 10; Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 9; Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 3; Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 8.

²⁰ John Lenders, *Transcript of evidence*, 19 July 2018, p. 9.

²¹ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 10.

²² Nazih Elasmr MLC, *Transcript of evidence*, 19 July 2018, p. 8; Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 12; Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 7.

There are certainly gaps in the report, and the gaps relate to information about members of the Assembly. The gaps are probably not as great as they might have been, because we received initial information from Victoria Police. When Victoria Police received information, there was no such constraint at the time around which house of Parliament might investigate which other house of Parliament, and they received information about both houses of Parliament, which usefully provided us with the context of, as far as we could glean, the broader picture, so we did have a fair amount initially in relation to timesheets and other documents from the police material.

If I had been solely reliant on receiving information from the Department of Parliamentary Services, I would have been seriously hamstrung, because in view of the assertion of exclusive cognisance they declined to provide any information in relation to any member of the Assembly ...

The difficulty there is you do not know what you do not know. We certainly thought about this long and hard in our review of the evidence, and I am reasonably confident that, while there are gaps, they are probably not huge gaps. We had enough evidence from the timesheets and material to be able to fill out a lot of the gaps we might otherwise have experienced.²³

2.2.1 **Clause 8: Members to certify that funds have been used for parliamentary or electorate purposes**

Clause 8 of the Members' Guide requires Members to certify that funds have been used for parliamentary or electorate purposes. Members of Parliament have a personal responsibility to certify timesheets to authorise payments to their electorate officers, ensuring the details are correct.²⁴

According to the Ombudsman's report, a member of Mr Lenders' staff provided field organisers with pre-filled timesheets at an initial training session. These pre-filled timesheets recorded that the field organisers worked as electorate officers from 9 am to 5 pm each Wednesday and Thursday. The 'reason for payment' was 'additional capacity required for electorate duties'.²⁵

The Committee heard evidence of the same nature during this Inquiry. Members also provided evidence that timesheets were pre-completed and were signed off in good faith that the staff member undertook the hours of work, despite not having direct oversight.²⁶ Hon. Jenny Mikakos MLC told the Committee:

To the best of my recollection I signed precompleted timesheets prospectively in the expectation the hours would be worked under the direction of another member of Parliament in my electorate.²⁷

²³ Deborah Glass OBE, Victorian Ombudsman, Ombudsman Victoria, *Transcript of evidence*, 18 July 2018, pp. 8–9.

²⁴ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 15.

²⁵ *Ibid.*, p. 9.

²⁶ Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 11; Nazih Elasmal MLC, *Transcript of evidence*, 19 July 2018, p. 6.

²⁷ Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 11.

The Ombudsman conceded in her report that inaccurate time recording is accepted practice across many industries, however ‘this does not absolve the Members of Parliament of their personal responsibilities in relation to the stewardship of public funds, in signing time-sheets to authorise payments’.²⁸

This was supported by evidence provided to the Committee by witnesses at hearings. In particular, Mr Peter Lochert, Secretary of the Department of Parliamentary Services, acknowledged that Members are increasingly more mobile and away from their electorate offices which can impact the direct oversight of their staff. However, Mr Lochert emphasised the lack of visibility for the Department of Parliamentary Services is different to that of a Member as the Member still has the ultimate responsibility of certifying timesheets.²⁹

2.2.2 **Clause 8: prohibits transfers of electorate office and communication budget**

Clause 8 of the Members’ Guide provides that the electorate office and communication budget may not be transferred, as a whole or in part, between Members.

The Ombudsman found that the breach occurred where field organisers were assigned to districts where the ALP candidate was a current Member of Parliament, but not the Member signing their timesheets. In these situations, the field organiser’s work was in part paid for from another Member’s electorate office and communication budget.³⁰

Members reaffirmed to the Committee they believed this arrangement was an extension to the pooling arrangements that were already in existence within the ALP.³¹ The Ombudsman also informed the Committee this was consistent with evidence she had received:

... there had been pooling arrangements in place for decades and a number of those MPs had participated in those arrangements. They were familiar with the concept, and the assumption that they were simply signing up to an extension of that was not unreasonable. It was wrong, but not unreasonable.³²

In his evidence to the Committee, Mr Lenders disputed the Ombudsman’s finding that he had twice ignored directions from the Department of Parliamentary Services.³³ Mr Lenders contended that he entered into discussions with the Department of Parliamentary Services and ‘workshopped’ how to employ casual electorate officers.³⁴ However Mr Lochert disputed this, stating:

²⁸ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 15.

²⁹ Peter Lochert, Secretary, Department of Parliamentary Services, Parliament of Victoria, *Transcript of evidence*, 6 August 2018, pp. 6–7.

³⁰ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 15.

³¹ Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 2; Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 9.

³² Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 6.

³³ John Lenders, *Transcript of evidence*, 19 July 2018, p. 2.

³⁴ *Ibid.*

I do not recall a specific meeting with Mr Lenders. It does not mean that it did not happen. But I would suggest that if there had been a workshop, then I probably would have a better chance of remembering it.³⁵

When questioned about Mr Lenders' testimony that he workshopped the scheme with the Department and acted on the basis of the advice, Mr Lochert stated 'I would not agree with that'.³⁶

When asked about further discussions with the Department of Parliamentary Services relating to the pay arrangements, Mr Lenders indicated that he did not provide all the details of the arrangements when seeking advice. Mr Lenders said:

I went to Parliamentary Services. I was not going to tell them exactly what these electorate officers were going to do, because as soon as you say, you get a debate over can you do things.³⁷

Further, Mr Lenders said he continued to believe the arrangement was accepted by the Department because the bills continued to be paid:

... when the bills are paid again and again, you just operate on the assumption it is like anything else with Parliamentary Services. They have checked it, they are okay with it.³⁸

In response to Mr Lenders' evidence, Mr Lochert stated that the Department of Parliamentary Services relies on the Member's certification for staff payment:

We would pay, and we always do pay, electorate officer casual salaries on the basis of the certification of the members. If we find that there is something that we may want to question, we would call the member and ask for clarification. But we do not pass judgement on that simply because we do not have visibility into what is happening in the electorate office.³⁹

In the Committee's view, as a former State Treasurer and party leader Mr Lenders would have been well aware of the significance of certifying financial documents.

2.2.3

Clause 8: prohibits the use of a retiring Member's budget to communicate on behalf of a new candidate

The Ombudsman found that between March and November 2014 seven retiring Members authorised payments in circumstances where those field organisers employed as electorate officers were performing duties on behalf of new candidates, despite the Members' Guide prohibiting this.

³⁵ Peter Lochert, Secretary, Department of Parliamentary Services, Parliament of Victoria, *Transcript of evidence*, 6 August 2018, p. 11.

³⁶ *Ibid.*, p. 12.

³⁷ John Lenders, *Transcript of evidence*, 19 July 2018, p. 9.

³⁸ *Ibid.*, p. 10.

³⁹ Peter Lochert, Secretary, Department of Parliamentary Services, Parliament of Victoria, *Transcript of evidence*, 6 August 2018, p. 13.

As has been detailed above, the Committee heard evidence to support this finding on the basis that some Members have acknowledged they did not have direct oversight of their nominated staff, nor gave direction as to the type of duties to be undertaken in their electorate officer capacity.

2.2.4 Clause 9: prohibits use of electorate officers for ‘political or party’ duties

Clause 9 of the Members’ Guide prohibits use of electorate officers for the Member’s ‘political or party duties’. The Ombudsman found that 13 Legislative Council Members:

... breached this provision by employing ... Field Organisers as casual Electorate Officers, whose time-sheets indicated they were performing Electorate Officer duties when they were in fact engaging in political or party activities on those dates.⁴⁰

The Ombudsman’s report detailed the ambiguity of the term ‘party political’, which was explored further during the course of this Inquiry.

The Committee notes that whilst there may be varying interpretations of the phrase and its application to the work of electorate officers, some Members have acknowledged the ‘grey area’ would require more due diligence to ensure a clear delineation of duties was possible.⁴¹

Evidence received in hearings shared the view that the interpretation of ‘party political’ work is unclear in the Members’ Guide.⁴² Some Members considered the definition may need to be reviewed to make it clear to Members how this rule is applied.⁴³

2.3 Inquiry evidence

Throughout the Inquiry, the Committee did not hear evidence that substantially contradicted the findings of the Ombudsman’s report.

The Committee did not seek to reinvestigate the matters considered by the Ombudsman in her investigation. However, it did endeavour to clarify or enlarge the understanding of some matters. These included the division of work undertaken by field organisers, the advice relied on by Members, including the role of Mr Lenders, and the direction provided by the Department of Parliamentary Services.

⁴⁰ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 14.

⁴¹ Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 7; Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 17.

⁴² Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 8.

⁴³ Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 10; Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 8; Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 8.

2.3.1 Division of work undertaken by field organisers

As detailed in section 2.2.4, Clause 9 of the Members' Guide prohibits use of electorate officers for the Member's 'political or party duties'. In relation to this, the Ombudsman's report stated that:

Mr Lenders indicated that he recognised that a delineation between Field Organiser and Electorate Office work was required to ensure the legitimacy of these employment arrangements. However, the available evidence indicates that, for almost all Field Organisers, no practical delineation was maintained and their day-to-day activities were directed by their Regional Field Directors.⁴⁴

In line with this, Mr Lenders told the Committee he had emphasised the need for division of work between field organiser and electorate officer duties:

I arrived at this division of work on a basis that the people who were employed would spend 40 per cent of their time doing electorate officer work. When I introduced this arrangement to participating members of Parliament I emphasised the need for this division. Whilst it may not have ultimately been universally applied by members in practice, this division is how I envisaged that it would work.⁴⁵

The Committee heard that a similar 60:40 arrangement may be acceptable if there was a clear division in the work that was undertaken by the field organisers and that undertaken in the capacity as an electorate officer.⁴⁶

When asked at a hearing how the 60:40 arrangement morphed into something else, Mr Lenders conceded to the Committee he should have paid more attention to the long-term arrangements. He said:

As the later periods went on, I should have paid more attention. But I think in response to your question, 'How?', in a sense if you look at the first phase of the whole campaign, the work of electorate officers was collecting data and information; the proselytising was the fourth phase effectively and the intermediate phases slowly started going there. When the process started, it was quite a long way before you get to the bit where you are actually going out and asking people to vote this way for this reason. I guess this is saying: how did it morph? Part of it was because at the start there was not a lot of proselytising going on.⁴⁷

However, as indicated by Members, there were no discussions about the delineation of the roles or an expectation that field organisers would be undertaking electorate office work for their nominating member.⁴⁸ Some Members further indicated they did not have direct involvement in the recruitment or supervision of the field organisers.⁴⁹

⁴⁴ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 73.

⁴⁵ John Lenders, *Transcript of evidence*, 19 July 2018, p. 3.

⁴⁶ Hon. Bruce Atkinson MLC, President, Legislative Council of Victoria, *Transcript of evidence*, 6 August 2018, p. 5.

⁴⁷ John Lenders, *Transcript of evidence*, 19 July 2018, p. 2.

⁴⁸ Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 10; Nazih Elasmr MLC, *Transcript of evidence*, 19 July 2018, p. 3.

⁴⁹ Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 2.

The Ombudsman has acknowledged the inherent political nature of an electorate officer's work. However, at a public hearing she told the Committee that in her view the work undertaken by the field organisers was party-related:

Although you can characterise virtually everything electorate officers do as political in some manner or form, what the field organisers were doing was party — the campaigning aspect of this. And that for me is a much further step. That is not actually reflected in the way the guide itself is drafted, and that is part of where the landscape is unhelpful and one of the reasons that I recommended the guide itself needs a good look.⁵⁰

Similarly Hon. Bruce Atkinson MLC, President of the Legislative Council, explained his interpretation of 'political activities':

... there are some grey areas, and I accept that. The concept of organising a fundraising function, for instance, or maybe a public meeting is perhaps a grey area, and some members have allowed meetings within their office of party branches and suchlike. You have to sort of think, 'Well, are they there as party branches or are they there partly as a support for members, partly as members of the community advising and so on?'. So there are some grey areas, but there is no doubt that when it comes to paying somebody as a campaign worker, and that is only the work that they do, then there is no grey. It is explicit.⁵¹

Mr Lochert acknowledged that the terms 'party political', 'political' and 'parliamentary' could be better clarified in the Members' Guide. However he noted the difficulty in delineation, stating this is not a problem unique to the Victorian Parliament:

There is, as I acknowledged to the Ombudsman and we all know, an intrinsically political element to the work of MPs and therefore electorate officers. Electorate officers are in fact exempted from equal employment opportunity legislation, so they can be appointed on the basis of their political affiliation. Having said that, I do not think there is one Westminster jurisdiction that has — for that matter some of the others either — been particularly successful at getting an ironclad definition of what is or is not political versus party political or electioneering. Some do better than others.⁵²

Mr Lochert considered any adopted definition of the terms would require 'wide acceptance and recognition'.⁵³

2.3.2 Other Members' diligence

The Ombudsman found that the Members who participated in the scheme did so in good faith based on the advice of Mr Lenders, who had a high reputation as a party leader and former Treasurer. Consistent with this finding, the Committee heard that Members relied upon the advice of Mr Lenders and

⁵⁰ Deborah Glass OBE, Victorian Ombudsman, Ombudsman Victoria, *Transcript of evidence*, 18 July 2018, p. 11.

⁵¹ Hon. Bruce Atkinson MLC, President, Legislative Council of Victoria, *Transcript of evidence*, 6 August 2018, p. 8.

⁵² Peter Lochert, Secretary, Department of Parliamentary Services, Parliament of Victoria, *Transcript of evidence*, 6 August 2018, p. 7.

⁵³ *Ibid.*

trusted his assurances that the scheme had been approved by the Department of Parliamentary Services and was permissible.⁵⁴ As such, they trusted his assurances and did not seek further guidance on the arrangement.

However in the evidence provided to the Committee it was clear that there were varying degrees of diligence from Members participating in the scheme to ensure they understood what was going on. Regardless of the extent of their involvement, this is neither an excuse for their actions nor does it reflect the expectations of accountability or responsibility of a Member of Parliament.

Hon. Adem Somyurek MLC also noted in his evidence that the arrangements were an ‘unusual request’ and that there were no discussions explaining what work would be undertaken by the field organisers employed as electorate officers.⁵⁵ He also stated that on several occasions he sought additional assurance in writing from Mr Lenders, however this was not received. Despite this, he remained involved in the arrangement.⁵⁶

In his evidence to the Committee, Mr Nazih Elasmr MLC stated that he initially thought the arrangement was an extension of the ALP’s staff pooling scheme. However once he met the employee assigned to his office, his understanding was that the individual would be working for the electorate, in the office of Hon. Richard Wynne MP.⁵⁷

Mr Elasmr also stated that he met with the person he employed when he commenced employment at his electorate office:

I said, ‘Make sure every two weeks you come to my office. Because if you do not come to my office, I will not process the payment sheet’. So regularly he used to come to my office and he assured me or the staff manager that he was working in the Richmond office for my electorate. Did I see him every two weeks? No. Did I see him once? No, I saw him more, but sometimes, as you understand, Parliament is sitting or you have another commitment, so staff deal with the issue.⁵⁸

Ms Mikakos conceded that she had signed precompleted timesheets on the expectation that:

- the field organiser’s hours would be under the direction of another Member of Parliament within her electorate
- the work undertaken would comply with the requirements of the Members’ Guide.⁵⁹

However she reiterated her statement made to the Ombudsman that she:

⁵⁴ Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 9.

⁵⁵ Hon. Adem Somyurek MLC, *Transcript of evidence*, 19 July 2018, p. 3; 6; 10.

⁵⁶ *Ibid.*

⁵⁷ Nazih Elasmr MLC, *Transcript of evidence*, 19 July 2018, p. 3.

⁵⁸ *Ibid.*, p. 2.

⁵⁹ Hon. Jenny Mikakos MLC, *Transcript of evidence*, 19 July 2018, p. 11.

... understood that this arrangement was a legitimate use of ... electorate officer and communications budget being an extension of the existing longstanding pooling arrangements.⁶⁰

In his evidence at a public hearing, Mr Gavin Jennings MLC told the Committee that he contacted the Department of Parliamentary Services to discuss the process for authorising timesheets for casual employees:

The reason why I took additional advice on the time sheet matter was because that was an unusual practice for me. I had not completed timesheets, and I actually wanted to know what custom and practice was, given circumstances where there is a delegated responsibility in my office which applies every single week of my political life because of my obligations that I cannot attest that somebody arrives at some certain time of the day and leaves at another time of the day because I am not there.⁶¹

Mr Jennings also told the Committee that he did not seek any advice on the acceptability of the scheme under parliamentary guidelines beyond what Mr Lenders told him. However he conceded that he was ultimately responsible for his own actions:

I do not actually want to abrogate my responsibility for this. I am responsible for my actions, and I take responsibility for that. I relied on that advice. I trusted him, and indeed I would continue to trust him, that he operated with goodwill and good intent on the basis of what he believed to be the case, and I accepted it. I will take the consequences of my actions operating on that advice.⁶²

2.3.3 Discrepancy in timesheets

In her report, the Ombudsman noted that the estimated dollar value of the field organiser's hours certified as electorate officer work in Mr Jennings' office was based on 'incomplete timesheets being provided to the investigation'.⁶³ Further, the report noted the field organiser in Mr Jennings' office was authorised for 32 days' worth of work.⁶⁴

In a public hearing, Mr Jennings was questioned about the incomplete timesheets, to which he replied 'At no stage was I asked to provide them'. However, Mr Jennings confirmed that his field organiser worked from March to October 2014.⁶⁵

60 Ibid., p. 2.

61 Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 8.

62 Ibid., p. 8.

63 Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 65.

64 Ibid., p. 63.

65 Hon. Gavin Jennings MLC, *Transcript of evidence*, 25 July 2018, p. 10.

Mr Lochert provided details on the field organiser's payment, in response to a question taken on notice at a public hearing. The response stated that the field organiser was paid for 68 days' work as an electorate officer between 3 March and 29 November 2014, a discrepancy of 36 days compared to the Ombudsman's report.⁶⁶

Mr Lochert also confirmed that the Department of Parliamentary services would have copies of timesheets for all payments made to casual staff.⁶⁷

⁶⁶ Peter Lochert, Secretary, Department of Parliamentary Services, *Response to questions taken on notice at public hearing, 6 August 2018*, received 10 August 2018, p. 1.

⁶⁷ Peter Lochert, Secretary, Department of Parliamentary Services, Parliament of Victoria, *Transcript of evidence, 6 August 2018*, p. 6.

3

Contempt of Parliament

The Ombudsman’s report found that the 13 former and current Members of the Legislative Council breached clauses of the Members’ Guide. The Inquiry’s terms of reference required the Committee to examine whether these actions constitute a contempt of Parliament through a breach of the code of conduct under the *Members of Parliament (Register of Interests) Act 1978*, or any contempt otherwise.

A breach of the code of conduct is not necessarily a contempt of Parliament—there are several steps that must be satisfied for a contempt. Similarly, a lack of a finding of a contempt does not indicate that an individual’s actions were not wrong nor absolve them from any wrongdoing.

3.1 Overview of contempt

Broadly speaking, contempt is any action which obstructs or intends to obstruct the House, its Members or officers from carrying out their core duties. *Erskine May* defines contempt as follows:

... any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of [their] duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no present of the offence.⁶⁸

When determining whether an action can be considered a contempt, it must first be understood what the core functions of the Houses, its Members and Committees are. In simple terms, the core functions are:

- for Members to fulfil their role as an elected representative free of interference or persecution
- to fulfil the Parliament’s role of holding government to account for its administration.

In Victoria, unlike the Commonwealth for instance, there is no specific Act detailing parliamentary privilege. However, section 19 of the *Constitution Act 1975* details the inherent powers and immunities held by both Houses of Parliament to be those ‘held[,] enjoyed and exercised by the House of Commons ... and by committees and members thereof’ as at 21 July 1855.⁶⁹

The overarching concept of parliamentary privilege encapsulates the specific powers and immunities possessed by Parliament, as an institution. Some of which include:

⁶⁸ Malcolm Jack (ed.). *Erskine May: Parliamentary practice*, LexisNexis, London, United Kingdom, 24th edn, 2011, p. 251.

⁶⁹ *Constitution Act 1975 (Vic)*, 8750 of 1975, s. 19(1).

- the absolute right to freedom of speech which is entrenched through Article 9 of the Bill of Rights 1689. The freedom of speech in Parliament is intended to ensure that parliamentarians are able to raise matters before the House without concern that those actions may be subject to later scrutiny or legal persecution.
- the power to conduct inquiries, call witnesses and order documents, as provided by section 19A of the *Constitution Act 1975*.
- the power to make rules and regulate proceedings, in accordance with section 43 of the *Constitution Act 1975*.

If one of the above powers and immunities were breached, it may be considered a technical contempt due to impeding the House from performing its role in a system of representative and responsible government. However, it would ultimately be for the House to determine the breach a contempt of Parliament as the House is the regulator of its proceedings.

Advice provided by the Clerk of the Legislative Council to the Committee clarified the Committee's ability to determine a general contempt of Parliament in the absence of specific legislation:

Any jurisdiction, such as Victoria, which has a constitutionally legislated provision of parliamentary privilege, but which does not have a further Act, which specifically codifies or sets the parameters of that privilege, leaves it open for a House to find any behaviour to be a contempt.⁷⁰

This is consistent with the view held in *Erskine May* which notes that power to punish contempt is discretionary as it is impossible to list every action that may be considered a contempt.⁷¹

Nevertheless, the House will seek to punish contempts only where no other course of action is appropriate. As *McGee* states:

In deciding whether or not to intervene, the House must bear in mind the purpose of parliamentary privilege. The power to punish for contempt is not a power to punish for its own sake. It may justifiably be used only where it is necessary to vindicate the authority of the House when confronted by some obstruction or impediment to the transaction of its business. A potential contempt will not be pursued if there is no need to protect the functioning or authority of the House.⁷²

⁷⁰ Andrew Young, Clerk of the Legislative Council, *Advice provided to Legislative Council Privileges Committee*, 8 August 2018.

⁷¹ Malcolm Jack (ed.), *Erskine May: Parliamentary practice*, LexisNexis, London, United Kingdom, 2011, 24th edn, p. 251.

⁷² Mary Harris and David Wilson (eds), *McGee: parliamentary practice in New Zealand*, Oratia Books, Wellington, 2017, p. 764.

3.1.1 Standard of proof: High Civil Standard

In its investigations, the Committee considered what standard of proof should be required in establishing whether a contempt of Parliament has been committed.

The Committee examined the Victorian Legislative Assembly Privileges Committee's previous investigation into a Members' misuse of a parliamentary vehicle.⁷³ In its investigations, the Assembly Privileges Committee sought legal advice from law firm Lander and Rogers, which were published in appendices to the final report.⁷⁴

In Lander and Rogers' advice, it noted that common law requires an allegation of contempt of court to be assessed under the Criminal Standard, which requires proof beyond reasonable doubt.

However Lander and Rogers also highlighted that privileges committees in other jurisdictions of Australia and New Zealand have assessed allegations of contempts of Parliament against a 'High Civil Standard'. The High Civil Standard is assessed 'on the balance of probabilities, but, given the seriousness of the allegations ... requiring proof of a very high order'.⁷⁵

The Legislative Assembly Privileges Committee decided to follow the approach recommended by Lander and Rogers in its final report.⁷⁶ The Committee is persuaded that, while it is open to it to use whatever standard of proof it considers appropriate, the standard followed by the Assembly committee provides a useful basis to assess the matter under consideration.

3.2 Code of conduct under the *Members of Parliament (Register of Interests) Act 1978*

Section 3 of the *Members of Parliament (Register of Interests) Act 1978* sets out the code of conduct for Members.

⁷³ Legislative Assembly Privileges Committee, *Inquiry in relation to recommendation 2 of the Ombudsman's report Whistleblowers Protection Act 2001: Investigation into allegations against Mr Geoff Shaw MP*, Parliament of Victoria, Melbourne, 2014.

⁷⁴ *Ibid.*, Appendices 6, 8.

⁷⁵ *Ibid.*, Appendix 8.

⁷⁶ *Ibid.*, p. 17.

3 Code of conduct for Members

- (1) It is hereby declared that a Member of the Parliament is bound by the following code of conduct—
- (a) Members shall—
- (i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;
 - (ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament;
- (b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty;
- (c) a Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member;
- (d) a Member shall make full disclosure to the Parliament of—
- (i) any direct pecuniary interest that he has;
 - (ii) the name of any trade or professional organization of which he is a member which has an interest;
 - (iii) any other material interest whether of a pecuniary nature or not that he has— in or in relation to any matter upon which he speaks in the Parliament;
- (e) a Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests;
- (f) a Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties.

Determining a contempt of Parliament under the Act is a two-step process:

1. establishing that an individual Member's actions have breached the Act in some way
2. establishing that the breach has met the threshold for contempt (discussed below).

3.2.1 Have the Members' actions breached the code of conduct?

The Committee assessed the actions of all Members' named in the report against each of the provisions of the code of conduct.

The Committee reached the view that, having considered the code of conduct, the only question to be determined was whether the actions of the current and former Members could be said to be such as to bring discredit upon the Parliament (section 3(1)(a)(ii)).

3(1)(a)(ii) Members shall ensure that their conduct as Members must not be such as to bring discredit upon the Parliament

Regardless of whether their actions were intentional, reckless or whether the breach was caused directly or indirectly, it is up to the Member to ensure their conduct does not bring discredit upon Parliament. In the Committee's view, the Members' conduct in participating in the scheme has brought discredit on the Parliament.

This was previously addressed in the Legislative Assembly Privileges Committee's report in 2014, which found:

... the requirement imposed on members under the Act is to ensure that their prime responsibility to the performance of their public duty is not subordinated by involvement in conflicting private interests and that their conduct must not be such as to bring discredit upon the Parliament.⁷⁷

In noting this, the Committee highlights the difficulty in considering what constitutes 'discredit' under the *Members of Parliament (Register of Interests) Act 1978*. The term is not defined in the Act, and the Legislative Assembly Privileges Committee's report does not provide in depth commentary.

In a legal context, discredit means to destroy or impair the credibility or reputation of a person or thing. Most commonly, it is prosecuted in court where the credibility of a witness or a piece of evidence is challenged.

When determining the relevant meaning of 'discredit' in matters where discreditable conduct has been alleged, Courts have commonly referenced the Macquarie Dictionary meaning of the term:

Discredit

Verb 1. to injure the credit or reputation on. 2. to show to be undeserving of credit or belief; destroy confidence in ... - *Noun* 3. loss or lack of belief, of confidence; ... 4. loss or lack or repute or esteem; disrepute. 5. something that damages a good reputation. Discreditable *adj* such as to bring discredit; disgraceful.

Given this, the Committee is of the view the outcome of the scheme may have affected the reputation of Parliament. Accordingly, the Committee considered whether a breach of this section constitutes a contempt under the Act. This is discussed further in section 3.2.2 below.

The Committee does not consider that any other parts of the code have been breached. In addition, many are not relevant to the actions detailed in the Ombudsman's report. The following sections outline the Committee's rationale for these findings.

⁷⁷ Ibid., p. 13.

3(1)(a)(i) Members shall accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests

The Committee considers that there is no evidence in the Ombudsman’s report to suggest the Members’ private interests ‘endangered or subordinated’ their prime responsibility as Members of Parliament. Nor did the Committee receive any further evidence to suggest this.

3(1)(b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty

The Committee found no evidence in the Ombudsman’s report or otherwise to suggest this occurred.

3(1)(c) a Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member

The Committee found no evidence in the Ombudsman’s report or otherwise to suggest this occurred.

3(1)(d) a Member shall make full disclosure to the Parliament of—

- (i) any direct pecuniary interest that he has;
- (ii) the name of any trade or professional organization of which he is a member which has an interest;
- (iii) any other material interest whether of a pecuniary nature or not that he has— in or in relation to any matter upon which he speaks in the Parliament;

The matters the Committee is inquiring into do not concern disclosure of Members’ interests.

3(1)(e) a Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests

3(1)(f) a Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties

At the time the actions occurred, the Members were in Opposition and none were Ministers.

3.2.2 Threshold for contempt: ‘wilful’ actions

For any of the Members’ actions to constitute a contempt of Parliament under the *Members of Parliament (Register of Interests) Act 1978*, the actions must be ‘wilful’. This is provided in section 9:

9 Failure to comply with Act

Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding \$2000 as it determines.

The evidence provided to the Committee indicated that with the exception of Mr Lenders (whose conduct is discussed below), all other current and former Members did not ‘wilfully’ breach the code of conduct through their actions. This is consistent with the findings of the Ombudsman’s report.

The Ombudsman’s report found that despite the staffing arrangement contravening the Members’ Guide:

... Members had been assured by Mr Lenders that this was a legitimate use of their staffing entitlements, and they believed they were contributing to a DPS-approved pooling arrangement.⁷⁸

Ms Glass reaffirmed this at a public hearing. When asked if Members named in the report had wilfully breached the Members’ Guide, Ms Glass responded:

I have no evidence that they did. I make a clear distinction between the evidence in relation to Mr Lenders, who I describe as the brainchild of the scheme, and the other MPs named in the report, so I do not use the word ‘artifice’ specifically in relation to those MPs. I do think there is a distinction between the construction of the scheme and those who signed up to it. But I have to be clear. I am making those judgements on the evidence available to me. I have no evidence that any of those MPs set out to deceive.⁷⁹

The Committee notes the Ombudsman’s findings that, aside from Mr Lenders, those Members did not intentionally breach the code of conduct as they relied on Mr Lenders’ assurances that the scheme was within the rules of the Members’ Guide. The Members who appeared at the Committee’s hearings all reiterated this, whilst under oath.

⁷⁸ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 14.

⁷⁹ Deborah Glass OBE, Victorian Ombudsman, Ombudsman Victoria, *Transcript of evidence*, 18 July 2018, p. 6.

The Committee did not receive evidence these Members' actions constituted a 'wilful' breach of the *Members of Parliament (Register of Interests) 1978*. Taking into account the requirement of a High Civil Standard, the Committee accordingly does not make a finding of contempt against these Members under section 9 of the Act.

FINDING 1: All Members named in paragraphs 45 to 50 of the Ombudsman's report, particularly those in leadership positions, should have sought more detail from Mr Lenders, clarified the terms of the arrangement with the Department of Parliamentary Services or the Presiding Officers and been more diligent in exercising their responsibilities when certifying the hours of work undertaken by their staff.

FINDING 2: With the exception of Mr Lenders, the Committee did not receive evidence that the Members named in paragraphs 45 to 50 of the Ombudsman's report wilfully breached the code of conduct under the *Members of Parliament (Register of Interests) Act 1978*. Accordingly their actions do not constitute a contempt under that Act.

Consistent with the Ombudsman's report, the Committee believes that Mr Lenders' actions should be considered separately to the remaining Members.

In the report, the Ombudsman described Mr Lenders as the 'principal architect' of the scheme and considers that he carried the greatest share of responsibility for breaching the Members' Guide.

There is undoubtedly a blurred line between permissible and impermissible uses of parliamentary funds, and what is or is not political activity prohibited by the Guide. But in seeking to maximise the use of resources available to the Party, Mr Lenders crossed the line.⁸⁰

As discussed in Chapter 2, Mr Lenders disputes some of the findings of the Ombudsman's report. However the Committee did not receive any compelling evidence to refute the findings. In addition, the Committee notes evidence from other participants in the Ombudsman's investigation detailing Mr Lenders' involvement in:

- initial field organiser training
- pre-filled timesheets which were issued to field organisers
- lack of training or guidance provided on the duties and responsibilities of an electorate officer.⁸¹

In the Committee's view Mr Lenders deliberately pushed the boundaries of what was permissible and impermissible under the Members' Guide. The Committee notes Mr Lenders' evidence where he acknowledged that he 'should have paid more attention' to the scheme'.⁸² However in the Committee's view, as the architect of the scheme Mr Lenders is responsible for the outcome, regardless of his original intention.

⁸⁰ Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, p. 4.

⁸¹ *Ibid.*, p. 9.

⁸² John Lenders, *Transcript of evidence*, 19 July 2018, p. 9.

In considering whether a contempt has occurred in relation to the *Members of Parliament (Register of Interests) Act 1978*, the Committee notes that there are differing opinions as to whether the Act applies to former Members. Correspondence from Holding Redlich, legal counsel acting for a number of Members, argued:

It is plain that the Committee cannot examine whether the Code has been contravened by [the former Member] because [he or she] has ceased to be a Member of Parliament. Section 2 of the Act defines a ‘member’ in the following terms:

Member means a person *who is for the time being—*

(a) a Member of the Legislative Assembly; or

(b) a Member of the Legislative Council.

[emphasis added]

Further, section 9 of the Act establishes a power to impose a fine on Members in certain circumstances:

Any wilful contravention of any of the requirements of this Act by any person shall be a contempt of the Parliament and may be dealt with accordingly and in addition to any other punishment that may be awarded by either House of the Parliament for a contempt of the House of which the Member is a Member the House may impose a fine upon the Member of such amount not exceeding \$2000 as it determines.

[emphasis added]

In each case, sections 2 and 9 of the Act describe membership of a House of Parliament in the present tense. Both of these sections make it clear that the Act only applies to current Members of Parliament, and consequently, the Committee cannot inquire into whether former Members of Parliament have contravened any of the Act’s provisions.⁸³

The Committee sought a view on the Act and on the question of the applicability of the code of conduct and section 9 to former Members from the Clerk of the Legislative Council (see Appendix 3). The Clerk noted that the question the Committee was considering has not been tested in the courts, nor has it been dealt with in previous Privileges Committee inquiries. The Clerk further noted certain clauses in the Act and extrinsic materials (such as the Minister’s second reading speech) could support a view that the Act is intended to apply to current Members only.

However, in summary, the Clerk stated that in his view:

A finding of contempt under the Act is not limited to a current Member. If the person is not a current Member, such contempt ‘may be dealt with accordingly’. That is, the House may punish the person as it sees fit, in accordance with its general power to punish pursuant to section 19 of the Constitution Act.

⁸³ Holding Redlich, *Correspondence to Legislative Council Privileges Committee*, received 13 July 2018, p. 2.

Section 9 may be read further as meaning that if the person who committed the contempt is still a Member at the time of the finding, the Member may be fined pursuant to section 9. Section 10 then applies to a current Member fined pursuant to section 9.

In my view –

1. It is open to find someone in contempt pursuant to section 9 of the Act notwithstanding they are no longer a Member; but
2. It is likely that such a person should not be fined pursuant to section 9, but should be punished according to the House's general powers to punish for a contempt, if the House believes a punishment is warranted.⁸⁴

Ultimately, the matter is one for the House to consider as it sees fit and, potentially, for the courts to adjudicate.

The Committee has proceeded on the basis that the code of conduct does apply to Mr Lenders and other former Members. The Committee considers that his conduct has brought 'discredit upon the Parliament'. The question for the Committee is then whether Mr Lenders' conduct can be found to be 'wilful' to the High Civil Standard.

The Committee regards Mr Lenders' actions as contrary to the standards expected by a Member of Parliament and believes that his actions have adversely impacted on the reputation of the Parliament.

FINDING 3: Mr Lenders acted with deliberate disregard for the Members' Guide and his actions were contrary to the standard expected of a Member of Parliament. In addition, his actions have adversely affected the reputation of the Parliament.

At the time of undertaking his actions as described in this report, Mr Lenders was a Member of the Legislative Council of Victoria. Based on the advice provided by the Clerk of the Legislative Council, the Committee is of the view that a former Member can be found in contempt of Parliament under the *Members of Parliament (Register of Interests) Act 1978* in relation to their conduct as a Member.

FINDING 4: On the balance of probabilities, the Committee finds that Mr Lenders acted with deliberate disregard for the Members' code of conduct in establishing the scheme. However, the Committee does not have 'proof' to a High Civil Standard that his actions were 'wilful', and therefore is unable to find him to be in contempt of Parliament under the *Members of Parliament (Register of Interests) Act 1978*.

3.3 Other contempt of Parliament

The Committee considered whether the actions of the 13 current and former Members could be considered as a general contempt of Parliament.

⁸⁴ See Appendix 3.

In determining whether a general contempt had occurred, the Committee considered whether the actions:

- were a breach of parliamentary privilege
- obstructed the House, a committee, Member or officer in undertaking their functions.

FINDING 5: There is no evidence to suggest that the Members or their actions, directly or indirectly, committed any breach of privilege or otherwise obstructed the House in undertaking its core functions. Therefore, their actions do not satisfy the criteria for general contempt of Parliament.

4 Members' Guide and related matters

4.1 Recommendations in the Ombudsman's report

The Ombudsman made recommendations for improving the Members' Guide, electorate officer training and related matters. The Committee considers that recommendation 1 (shown in Box 4.1 below) should be implemented as a priority.

BOX 4.1: Recommendation 1 of the Ombudsman's report

Revise the limitation in the Members' Guide on Electorate Office duties to:

- remove the prohibition on political activity but emphasise the prohibition on party-specific activity
- provide guidance and example to Members about the types of activities which electorate officers may not be directed to perform
- include a statement about the effect of section 30(4) of the *Parliamentary Administration Act 2005*.

Source: Victorian Ombudsman, *Investigation of a matter referred from the Legislative Council on 25 November 2015*, Ombudsman Victoria, Melbourne, 2018, pp. 169-171.

RECOMMENDATION 1: That the Ombudsman's recommendations in relation to the Members' Guide be put in place as soon as possible.

**Adopted by the Legislative Council Privileges Committee
Committee room, Parliament of Victoria, East Melbourne
20 August 2018**

Appendix 1

List of hearings and briefings

A1.1 Public hearings

Wednesday 18 July 2018—Legislative Council Committee Room, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Ms Deborah Glass OBE	Ombudsman	Victorian Ombudsman
Mr Robert Hocking	Assistant Ombudsman	
Mr Graham Ashton AM APM	Chief Commissioner	Victoria Police
Mr Stephen Fontana	Assistant Commissioner	

Thursday 19 July 2018—Legislative Council Committee Room, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Mr John Lenders		
Mr Nazih Elasmr MLC		
Hon. Adem Somyurek MLC		
Hon. Jenny Mikakos MLC		

Wednesday 25 July 2018—Legislative Council Committee Room, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Hon. Gavin Jennings MLC		

Monday 6 August 2018—Legislative Council Committee Room, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Mr Peter Lochert	Secretary, Department of Parliamentary Services	Parliament of Victoria
Hon. Bruce Atkinson MLC	President	Legislative Council of Victoria

A1.2 Closed hearing

Friday 20 July 2018—Legislative Council Committee Room, Parliament House, Spring Street, East Melbourne⁸⁵

Name	Position	Organisation
Mr Jake Finnigan		

A1.3 Committee briefings

Wednesday 6 June 2018—Knight Kerr Room, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Ms Deborah Glass OBE	Ombudsman	Victorian Ombudsman
Mr Robert Hocking	Assistant Ombudsman	

Wednesday 8 August 2018—Meeting Room 2, Parliament House, Spring Street, East Melbourne

Name	Position	Organisation
Mr Andrew Young	Clerk of the Legislative Council	Parliament of Victoria

⁸⁵ The Committee resolved not to publish the transcript of this hearing.

Appendix 2

Appointment of Chair and Deputy Chair by resolution of the Legislative Council

Extracts from Minutes of the Proceedings:

Wednesday, 23 May 2018

14 PRIVILEGES COMMITTEE — CHAIR — Ms Pennicuik moved, That this House appoints Ms Springle to be the Chair of the Privileges Committee and a member from a minority group or independent member to be the Deputy Chair of the Privileges Committee.

Debate ensued.

Mr Rich-Phillips moved, as an amendment, That the words “Ms Springle” be omitted with the view of inserting in their place “Mr Purcell”.

Debate ensued.

Question — That the amendment moved by Mr Rich-Phillips be agreed to — put.

The Council divided — The President in the Chair.

Ayes 20	Noes 19
Mr Atkinson; Ms Bath; Mr Bourman; Dr Carling-Jenkins; Ms Crozier; Mr Dalla-Riva; Mr Davis; Mr Finn; Ms Fitzherbert; Ms Lovell; Mr Morris; Mr O'Donohue; Mr Ondarchie; Mr O'Sullivan; Mrs Peulich; Mr Purcell; Mr Ramsay; Mr Rich-Phillips; Ms Wooldridge; Mr Young.	Mr Dalidakis; Ms Dunn; Mr Eideh; Mr Elasmr; Mr Gepp; Mr Jennings; Mr Leane; Mr Melhem; Ms Mikakos; Mr Mulino; Ms Pennicuik; Ms Pulford; Dr Ratnam; Ms Shing; Mr Somyurek; Ms Springle; Ms Symes; Ms Tierney; Ms Truong.
(Tellers: Ms Crozier and Mr Young)	(Tellers: Ms Dunn and Ms Symes)

Question agreed to.

Question — That the motion, as amended, be agreed to — put and agreed to.

Tuesday, 5 June 2018

7 PRIVILEGES COMMITTEE — MEMBERSHIP AND REPORTING DATE —
Mr Purcell moved, by leave, That —

- (1) pursuant to Standing Order 7.07, the Order of the Council of 23 May 2018 relating to the chairing arrangements for the Privileges Committee be rescinded to the extent necessary so as to provide that Ms Springle is elected Deputy Chair of the Committee; and
- (2) the Resolution of the Council of 28 March 2018 requiring the Privileges Committee to inquire into and report by 19 June 2018 on the use of electorate office staffing entitlements, be amended so as to now require the Committee to present its final report by 23 August 2018.

Question — put and agreed to.

Appendix 3

Clerk's memo: *Members of Parliament (Register of Interests) Act 1978*

A3

Application of Part III of the Act to persons other than current Members

Memo

To: Privileges Committee
From: Clerk of the Legislative Council

17 August 2018

The Committee has requested that I provide it with a view relating to the *Members of Parliament (Register of Interests) Act 1978*. Specifically, the Committee asks for a view on whether the code of conduct in the Act should be read as applying to former Members of the Legislative Council.

I note the Committee's task is to determine whether any Members are in contempt of Parliament in relation to the Code of Conduct and if so whether any fine (and what amount) should be imposed pursuant to section 9 of that Act.

In my view the answer in brief is –

1. The Code of conduct applies to a Member only while they are a Member of either House, but the Code (section 3) is found in Part I of the Act and does not include provisions relating to contempt and punishment;
2. Section 9 – Failure to comply with Act – is not part of the Code of conduct, but is found in Part III of the Act which relates to breaches of the entire Act, which includes the Code of conduct; and
3. Therefore an interpretation of Part III only is required to determine its application to someone no longer a Member; but
4. On balance section 9 in Part III may be best read as being two distinct rules –
 - 4.1. Any person may be found in contempt pursuant to section 9 for a 'wilful contravention of any of the requirements of this Act'; and
 - 4.2. If the person is a current Member at the time of the finding, they may be fined by the House pursuant to section 9 (read together with section 10), or if the person is no longer a current Member at the time of the finding,

they may be punished in accordance with the House's general power to punish for a contempt pursuant to section 19 of the *Constitution Act 1975* - Privileges powers etc. of Council and Assembly.

Reasoning

The limiting interpretation of the application of the Act

To the best of my knowledge, there has only been one formal complaint concerning the code of conduct previously and that is the matter considered by the Legislative Assembly Privileges Committee in their May 2014 report.¹ However, Mr Geoff Shaw, the subject of that report, was a current Member of the Assembly at the time the Committee was reporting to the House, so there is no commentary on this particular question.

Further, the Victorian Act has not been tested in the Courts.

On a reading of the Act, and a consideration of extrinsic materials, there are elements that would support a view that the entirety of the Act is intended to apply to current Members of Parliament only. For example, the Committee will have noted that section 10 of the Act states:

In default of the payment of any fine imposed on a Member under section 9 [the section the Committee is considering] to the Consolidated Fund within the time ordered by the House the seat of the Member shall become vacant.²

This suggests that the Act only contemplates a current Member being fined pursuant to section 9, not a former Member.

In his second reading speech on the Bill, which became the Act, Sir Rupert Hamer, stated in the Legislative Assembly:

The philosophy underlying this Bill is not new. It has been long accepted that any member with a direct pecuniary interest in relation to any matter that is to be debated in this Parliament should disclose that interest to the Parliament. What is new, is that it is proposed that a member should disclose his interests, whether or not they are relevant to any matter currently before the Parliament, so that the world will know in advance if he has any interest which might in the eyes of some constitute a possible conflict of interest between his private affairs and his public duty.³

This suggests (but only to the extent that a Minister's second reading speech can be read to assist in interpreting legislation) the focus of the Act and its code of conduct is the conduct of current Members (and particularly in regards to their pecuniary interests). Correspondingly, I note most of the provisions of the code go to standards of conduct relating to pecuniary interests and conflicts of interest. I

1 Legislative Assembly Privileges Committee, *Inquiry in relation to recommendation 2 of the Ombudsman's report Whistleblowers Protection Act 2001: Investigation into allegations against Mr Geoff Shaw MP*, Parliament of Victoria, Melbourne, 2014.

2 *Members of Parliament (Register of Interests Act) 1978* (Vic), 9223 of 1978, s. 10.

3 *Hansard*, vol. 341, 21 November 1978, p. 6025.

also note that the Committee report from the recommendations of which the code of conduct emanated, a report of the Qualifications Joint Select Committee,⁴ has that focus.

The interpretation of the application of the Act by looking at the Act as three Parts

The Act has no wording explicitly limiting its application to current Members only. I note that section 9 contemplates the House imposing another type of punishment for contempt on a person. Section 10, which has to be read with, at least part of, section 9 appears to be relevant to a current Member only.

The definition of “Member” in the Act is given as a person who is **for the time being** (a) a Member of the Legislative Assembly or (b) a Member of the Legislative Council. Here one would have to read in words to either expressly limit or provide for a former Member. Further, consideration would need to be given whether “for the time being” is taken in the present context (i.e. status as at 2018) or when the alleged behaviour originally took place.

During the *Glass v President of the Legislative Council & Anor* proceedings of 2016, the matter of statutory construction became central to the proper interpretation of the *Ombudsman Act 1975*. I cite this case not because of its intersection with the Committee’s Inquiry, but rather as a recent case where statutory construction was a central issue.

Justice Cavanaugh found that s 16 of the *Ombudsman Act 1975* confers an additional function to the Ombudsman, separate to that identified in other parts of the Act.

The Attorney-General’s fundamental submission originally was that ‘[t]he subject matter of a valid referral must be limited by the functions and jurisdiction of the Ombudsman found in Part III of the Act’.⁵ Justice Cavanaugh considered that even though Part III of the Act is headed ‘Functions and Jurisdiction of the Ombudsman’, s 13AA(1)(d) of the Act, which appears within Part III itself, expressly recognises that functions of the Ombudsman additional to those specified in Part III might be found outside that Part, and even in other Acts.⁶

In his ruling, Justice Cavanaugh provided the following guidance in relation to the construction and interpretation of the Act (the underlining is my emphasis):

- The Act contains no express limitation on the phrase ‘any matter’ in s 16 except for the reference (in s 16 itself) to a matter relating to a judicial proceeding; and it can be contended that the Act does not imply any other restriction on the scope of a referral under s 16. This construction requires the phrase ‘any matter’ to be read literally, with no qualification based on other provisions of the Act, especially since those provisions which might otherwise appear to be in conflict with this approach

⁴ Qualifications Joint Select Committee Report — D 14 1973–74, p. 5.

⁵ *Glass v President of the Legislative Council & Anor* [2016] VSC 507 (26 August 2016), paragraph 212.

⁶ *Glass v President of the Legislative Council & Anor* [2016] VSC 507 (26 August 2016), paragraph 212.

are in an entirely separate Part. This view is supported, so the argument goes, by the plain intention of the Parliament in enacting s 16 to provide a separate source of jurisdiction for the Ombudsman.⁷

- In my view, to construe s. 16 in that way [in the limited way suggested by the Attorney-General] would, in truth, involve reading in words of limitation. Moreover, the construction would involve an insertion that is 'too big, or too much at variance with the language in fact used by the legislature'.⁸
- It would have been a very simple thing for the Parliament expressly to have confined s 16 in the way now suggested.⁹

In summary –

Every section of an Act is a form of separate enactment, notwithstanding that sections have increased meanings and understanding when read with other section of an Act;

Further, the division or structure of an Act into Parts may provide some answers to interpretation;

Generally speaking, if the Parliament was intending to limit the application of an Act, it would do so with express words, not with a reading down of a power or jurisdiction found in any section or Part requiring creative implication or guesswork;

These principles may be relevant in understanding the logic of how the *Members of Parliament (Register of Interests) Act 1978* has been structured.

The application of Part III of the Act

The *Members of Parliament (Register of Interests) Act 1978* consists of three Parts:

- Part I – Code of Conduct
- Part II – Register of Interests
- Part III – General

Definitions are in section 2, which precedes Part I. *Member* is defined in section 2, which applies to the whole Act. There are definitions found in Part II – Register of Interests – which are applied to Part II.

Findings of contempt and punishments in the Act are found in a separate Part III, which is titled 'General', and therefore apply to a breach of the Code and the Register of Interests. Part III consists of -

Section 9, being a power to find a 'contempt of Parliament' for any 'wilful contravention' and in this event, the option to 'impose a fine' 'not exceeding \$2000.' But the contravention of the Act may be 'by any person'. It is not limited

7 Glass v President of the Legislative Council & Anor [2016] VSC 507 (26 August 2016), paragraph 50.

8 Glass v President of the Legislative Council & Anor [2016] VSC 507 (26 August 2016), paragraph 217.

9 Glass v President of the Legislative Council & Anor [2016] VSC 507 (26 August 2016), paragraph 224.

to Members nor is it limited to current Members. In the definition of the Act, a 'Member' is a person, but a 'person' is not limited to being a Member. This is because a person, who is not a Member, is capable of contravening the Act, for example, section 8 – 'Restrictions on publication'.

Section 10, as mentioned above, provides that if a 'Member' defaults on a fine imposed under section 9 'the seat of the Member shall become vacant.'

Section 11 provides the regulation making power.

A finding of contempt under the Act is not limited to a current Member. If the person is not a current Member, such contempt 'may be dealt with accordingly'. That is, the House may punish the person as it sees fit, in accordance with its general power to punish pursuant to section 19 of the *Constitution Act 1975*.

Section 9 may be read further as meaning that if the person who committed the contempt is still a Member at the time of the finding, the Member may be fined pursuant to section 9. Section 10 then applies to a current Member fined pursuant to section 9.

In my view –

1. It is open to find someone in contempt pursuant to section 9 of the Act notwithstanding they are no longer a Member; but
2. It is likely that such a person should not be fined pursuant to section 9, but should be punished according to the House's general powers to punish for a contempt, if the House believes a punishment is warranted.

Andrew Young
Clerk of the Legislative Council

Extract of proceedings

Legislative Council Standing Order 23.27(5) requires the Committee to include in its report all divisions on a question relating to the adoption of the draft report.

All members have a deliberative vote.

The Committee divided on the following questions during consideration of this report. Questions agreed to without division are not recorded in these extracts.

Committee meeting 17 – 20 August 2018

Mr Rich-Phillips moved, That:

In Section 1.2.2 after the third paragraph – insert:

The Committee heard evidence that concerns relating to the scheme had been raised with the Hon. Daniel Andrews MP then Leader of the Opposition. The Committee considered a resolution to invite Mr Andrews to give evidence as to his knowledge of the scheme, and concerns raised with him by members named in the report, however that resolution was not supported by a majority of the Committee.

Question put.

The Committee divided.

Ayes 3	Noes 5
Mr O'Sullivan	Mr Dalidakis
Mr Rich-Phillips	Mr Mulino
Ms Wooldridge	Mr Purcell
	Ms Springle
	Ms Symes

Question negatived.

Mr Rich-Phillips moved, That:

In Section 2.3.2 after the fifth paragraph – insert:

The notion that the scheme was established with a delineation between party paid field officer work and taxpayer paid electorate work was contradicted by evidence received by the Committee. One field organiser who resigned on 27 March 2014, the third month of the scheme, wrote in his resignation –

I will not be fully abandoning the Bellarine campaign. I will be happy to help as a volunteer where I can, but as for co-ordinating the whole thing, I can't do it. Perhaps if John Eren needs an actual EO (as he alluded to in our meeting last week) I will be able to slot into that, and thus, still be working in the area. Being an EO will be less stressful than being a Field Organiser.

It is clear from this that the field organiser knew that the work they were undertaking was not electorate office work, and implicit that the Member of Parliament who employed them also knew that they were not employed for electorate office work.

Question put.

The Committee divided.

Ayes 3	Noes 5
Mr O'Sullivan	Mr Dalidakis
Mr Rich-Phillips	Mr Mulino
Ms Wooldridge	Mr Purcell
	Ms Springle
	Ms Symes

Question negatived.

Committee meeting 18 – 20 August 2018

Ms Springle moved, That Chapter 1 as amended stand part of the report.

Question put.

The Committee divided.

Ayes 5	Noes 3
Mr Dalidakis	Mr O'Sullivan
Mr Mulino	Mr Rich-Phillips
Mr Purcell	Ms Wooldridge
Ms Springle	
Ms Symes	

Question agreed to.

Ms Springle moved, That Chapter 2 as amended stand part of the report.

Question put.

The Committee divided.

Ayes 5	Noes 3
Mr Dalidakis	Mr O'Sullivan
Mr Mulino	Mr Rich-Phillips
Mr Purcell	Ms Wooldridge
Ms Springle	
Ms Symes	

Question agreed to.

Committee meeting 19 – 20 August 2018

Mr Rich-Phillips moved, That Finding 4 be omitted and be replaced with:

On the balance of probabilities, the Committee finds that Mr Lenders acted wilfully in establishing the scheme and therefore is in contempt of Parliament under section 3(1) (a)(ii) of the Act.

The Committee divided.

Ayes 3	Noes 5
Mr O'Sullivan	Mr Dalidakis
Mr Rich-Phillips	Mr Mulino
Ms Wooldridge	Mr Purcell
	Ms Springle
	Ms Symes

Question negated.

Ms Springle moved, That Chapter 3 as amended stand part of the report.

Question put.

The Committee divided.

Ayes 5	Noes 3
Mr Dalidakis	Mr O'Sullivan
Mr Mulino	Mr Rich-Phillips
Mr Purcell	Ms Wooldridge
Ms Springle	
Ms Symes	

Question agreed to.

Mr Mulino moved, That the Draft Final Report (Chapters 1 to 4 including Findings 1 to 5, Recommendation 1 and Appendices 1 to 3), be adopted as the Report of the Committee.

Question put.

The Committee divided.

Ayes 5	Noes 3
Mr Dalidakis	Mr O'Sullivan
Mr Mulino	Mr Rich-Phillips
Mr Purcell	Ms Wooldridge
Ms Springle	
Ms Symes	

Question agreed to.

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Minority Report – Legislative Council Privileges Inquiry into Matters Relating to the Misuse of Electorate Office Staffing Entitlements

Key Facts

- The Committee's investigation was constrained by the inquiry's terms of reference and the Privileges Committee's functions under Standing Orders.
- A Select Committee of the Legislative Council would have been a more appropriate forum to gather the full range of evidence.
- The Code of Conduct for Members of Parliament relates predominately to matters of avoiding and managing conflicts of Interest, rather than misuse of public funds. As such it was largely irrelevant to this inquiry.
- The lack of a contempt finding against Members of Parliament involved in the scheme does not indicate that there was no wrong doing.
- Victoria Police's Fraud and Extortion Squad investigation is now the appropriate path forward.
- The Hon. Daniel Andrews was aware of the Red Shirts scheme and had concerns about the scheme raised with him by at least one Member of Parliament.
- Many of the participants were highly experienced Labor Members of Parliament and should have known the scheme was wrong.
- A number of Labor Members of Parliament have subsequently derived a personal benefit from the Red Shirts scheme, through appointment as Ministers and Parliamentary Secretaries.

Inquiry Background

On the 28 March 2018 the Liberal Nationals Coalition proposed a motion in the Legislative Council to appoint a Select Committee to inquire into the misuse of electorate office staffing entitlements by certain current and former Labor MPs identified in the Ombudsman's report, including obtaining and considering evidence that was withheld from the Ombudsman.

The Select Committee was proposed in order to fill gaps in the evidence that had been made available to the Ombudsman to allow the Parliament to have a complete picture of the circumstances surrounding the 'Red Shirt Rorts' which involved the misuse of electorate office staffing entitlements to engage people to work as Labor Party campaign 'field organisers.'

The motion was opposed by the Labor, Greens and Reason parties and defeated on a division.

On the same day, the Greens, with Labor support, proposed to refer the matter to the Privileges Committee to investigate whether the Labor MPs implicated in the Red Shirts Rorts breached the Code of Conduct for Members of Parliament or were in contempt of Parliament. That resolution was adopted by the Council without division.

Limitations of the Terms of Reference and the Privileges Committee

In debate on the Privileges Committee reference, the Liberal Nationals Coalition argued that the Privileges Committee was not the appropriate body to consider the matter.

This was based on the fact that Legislative Council Standing Order 23.09 provides that the Privileges Committee function is to investigate matters relating to the 'privileges of the House.'

Advice provided to the Committee by the Clerk indicated, in essence, that the 'privileges of the House' are those privileges that allow Members or Committees to:

- fulfil their role as an elected representative – that is the basis of representative parliamentary government; and,
- fulfil the parliament's role of holding government to account for its administration, that is the basis of responsible parliamentary government.

A contempt of Parliament is in turn, behaviour that interferes with or impedes a Member or Committee in carrying out those duties.

In this context, the use or misuse of electorate office staffing entitlements does not relate to 'privileges of the House', and accordingly does not engage a general question of contempt of Parliament.

Likewise, the requirement for the Privileges Committee to consider the matter in the context of the Code of Conduct for Members of Parliament contained in the *Members of Parliament (Register of Interests) Act 1978* (the Act) ignored the reality that the Code of Conduct relates largely to the issue of avoiding and reporting conflicts of interest, and not to the use of public resources entrusted to Members.

Only Section 3(1)(a)(ii) of the Act appears to have some relevance in this situation. That Section requires that Members ensure that their conduct as Members must be such as to not bring the Parliament into disrepute. Section 9 of the Act provides that any wilful contravention of the Act shall be a contempt of Parliament. These provisions however are subjective and require a high standard of proof to satisfy. While the Committee found that the Hon. John Lenders had through his actions brought discredit on the Parliament, a majority of the Committee would not agree that Mr Lenders actions were wilful and thus amounted to a contempt of Parliament.

It was evident to Liberal Nationals Coalition at the time the inquiry was established that the scope of the terms of reference and referral to the Privileges Committee was largely not relevant to the circumstances of the Red Shirt Rorts and thus not an appropriate way to investigate the matter.

As the findings in the majority report demonstrate, that has proved to be the case.

It is likely that the limitations of the Privileges Committee referral were also evident to the Labor Party at the time it supported the referral in preference to the establishment of a Select Committee.

Government Failure to comply with Council Resolution

The resolution adopted by the Council to refer the matter to the Privileges Committee also called on –

- the Premier, Ministers and Labor MPs named in the report to take full responsibility for their actions and stop blaming others and to apologise to Parliament;
- the Premier to apologise to the Parliament for the misuse of the electorate office and communication budgets by Labor MPs and for the government frustrating the process by challenging the motion in the courts, using public money; and,
- the ALP to pay an additional 25 per cent of the total amount falsely charged to DPS and to fully repay costs that were incurred by taxpayers on its behalf in its court challenges to the investigation.

It is notable that despite the Labor Government supporting the resolution, none of those actions have occurred.

Lack of Contempt is not Lack of Wrong Doing

The Committee found that the circumstances surrounding the Red Shirt Rorts did not, on the relevant criteria, amount to a contempt of Parliament. This however arises because the criteria for contempt are narrow and technical and essentially do not extend to matters relating to the use of electorate office entitlements. This does not mean that there was no wrong doing surrounding the Red Shirts Rorts.

The Ombudsman in the Foreword to her report stated:

“the arrangement to employ field organisers as electorate officers was an artifice to secure partial payment for the campaign out of parliamentary funds, and was wrong.”

In evidence before the Committee, the Chief Commissioner of Victoria Police indicated that Victoria Police had undertaken an assessment of the scheme in 2015-16 in the context of a number of criminal offences, including –

- make false document;
- use false document;
- false accounting;
- conspiracy to cheat and defraud; and,

- misconduct in public office under common law.

Victoria Police advised the Committee that having not proceeded beyond that assessment, it was now reassessing the matter in light of the release of the Ombudsman's report. Victoria Police announced on 27 July 2018, that its Fraud and Extortion Squad would undertake a full investigation.

Evidence received by the Ombudsman suggested that the scheme was originally established with a delineation between the work that field organisers were doing for the Labor Party and the work they did while employed as electorate officers, and that this had simply become blurred over time.

The notion that the scheme was established with a delineation between party paid field organiser work and taxpayer paid electorate office work was however contradicted by evidence received by the Committee.

One field organiser who resigned on 27 March 2014, the third month of the scheme, wrote in their resignation email of that date –

"I will not be fully abandoning the Bellarine campaign. I will be happy to help as a volunteer where I can, but as for co-ordinating the whole thing, I can't do it. Perhaps if John Eren needs an actual casual EO (as he alluded to in our meeting last week) I will be able to slot into that, and thus, still be working in the area. Being an EO will be less stressful than being a Field Organiser."

It is clear from this that the field organiser knew that the work they were undertaking was not electorate officer work, and implicit that the Member of Parliament who employed them also knew that they were not employed for electorate officer work.

Immediately before the release of the Ombudsman's report, the Labor Party repaid \$388,000 to the Parliament, being the value of days identified as charged against electorate office budgets for field organisers. The report however identified that there were gaps in the timesheet data available to the Ombudsman suggesting that not all days charged against electorate office entitlements were able to be identified. For example while the Ombudsman identified that 32 days of work for one field organiser was authorised from the electorate office budget of the Hon. Gavin Jennings MLC, she noted that this information was incomplete. Subsequent evidence to the Committee confirmed that field organiser had in fact been paid for a total of 68 days.

Shared Responsibility

The Ombudsman's report found that the principal architect of the Red Shirts Rorts scheme was the Hon. John Lenders who at the time was the Leader of the Opposition in the Legislative Council.

Evidence received by the Ombudsman and also the Committee suggested that Members of Parliament participated in the scheme, almost without question, because it was advanced by Mr Lenders who was a senior highly experienced member of the parliamentary Labor Party.

The Hon. Adem Somyurek MLC indicated in his evidence that he sought written confirmation from Mr Lenders about the acceptability of the scheme, and also raised his concerns with the Hon. Daniel Andrews MP then Leader of the Opposition.

Mr Lenders in a Statutory Declaration made on 4 December 2017 and provided to the Ombudsman stated at paragraph 30 *“I can add, however, that a casual electorate officer was allocated to work in Mr Andrews’ electorate.”*

The Committee considered a resolution to invite Mr Andrews to give evidence as to his knowledge and involvement in the scheme, given the concerns raised with him by Mr Somyurek, and the information disclosed in Mr Lenders’ Statutory Declaration. That resolution was not supported by a majority of the Committee.

Mr Somyurek’s decision to repeatedly request written advice from Mr Lenders about the acceptability of the scheme and also to raise concerns with his party leader Mr Andrews highlights that not all members accepted the scheme on face value from Mr Lenders.

At the time the scheme was instigated in early 2014 the members of the Council who participated ranged in experience and seniority from that equal to Mr Lenders to those with very limited experience.

Member	Parliamentary Experience	Ministerial Experience
John Lenders	14 years	9 years
Gavin Jennings	14 years	8 years
Candy Broad	14 years	7 years
Jenny Mikakos	14 years	
Matt Viney	14 years	
Adem Somyurek	11 years	
Gayle Tierney	7 years	
Brian Tee	7 years	
Shaun Leane	7 years	
Nazih Elasmr	7 years	
Lee Tarlamis	3 years	
Marg Lewis	5 months	

The Hon. Jenny Mikakos MLC who with 14 years parliamentary service was one of the most experienced participants nonetheless admitted to pre-signing time sheets as part of the scheme. In evidence Ms Mikakos said,

“To the best of my recollection I signed precompleted time sheets prospectively in the expectation the hours would be worked under the direction of another member of Parliament in my electorate.”

While a number of members indicated that the standing and experience of Mr Lenders led them to participate in the scheme, this is not a robust excuse for those members who themselves had substantial experience and ought to have known that the scheme was wrong.

Personal Benefit

The Ombudsman in her report expressed the view that the Labor Party was the principal beneficiary of the funds diverted for the scheme and that the individual Members of Parliament who participated derived 'no personal benefit.' This however relies on a narrow interpretation of personal benefit.

The Labor Party formed government after the 2014 election with a three seat majority; its three most marginal seats were all won with margins of less than one percent, and all had had field organisers working in them. The extent to which field organiser activity had a positive electoral impact for the Labor Party is unknown. What is however clear is that electorate office staffing entitlements were wrongly diverted to bolster Labor Party campaign resources in very marginal seats, which if the Labor Party had not won, it would not have formed government.

By virtue of forming government a number of members who participated in the scheme subsequently benefited from being appointed as Ministers and Parliamentary Secretaries. Ministers serving a full term receive additional salary and allowances of approximately \$500,000 each while Parliamentary Secretaries receive approximately an additional \$100,000 each.

Of the Council members who participated in the scheme, four subsequently held ministerial office, Mr Jennings, Ms Mikakos, Mr Somyurek, and Ms Tierney, while Mr Leane was appointed as a Parliamentary Secretary.

Conclusion

Notwithstanding their irrelevance to matters of parliamentary privilege and contempt of Parliament, the establishment of the Red Shirts Rorts scheme, described by the Ombudsman as an artifice, was wrong.

The Red Shirts Rorts scheme did not arise from a misunderstanding of what was an appropriate use of electorate office entitlements, rather it was a deliberate scheme to divert public funds to Labor Party campaign activities.

While Mr Lenders may have designed the scheme, other Members of Parliament of equal experience were willing participants when they should have known the scheme was wrong.

To the extent the scheme assisted the Labor Party to win government, many members who participated subsequently benefited personally in being appointed as Ministers and Parliamentary Secretaries.

The Hon. Gordon Rich-Phillips MLC

The Hon. Mary Wooldridge MLC

Luke O'Sullivan MLC

Minority report

Nina Springle MLC

Member for South-East Metropolitan

Deputy Chair

While this Inquiry predominantly focused on the conduct of Members in question and their possible breaches of the Code of Conduct in the *Members of Parliament (Register of Interests) Act 1978*, what also emerged through analyse of the Ombudsman's report, and supported by the testimony and documentation collated, was the profoundly opaque nature of the Department of Parliamentary Services (DPS) and the operational 'grey areas' which exist as a result.

It is my view that these grey areas were an enabler of the 'red shirts' scheme, further complicated by unclear lines of responsibility and political implications of how to progress desperately need systems reform. What has resulted is a murky operational environment that has offered some parties access to beneficial staffing arrangements i.e. the official ALP polling arrangement (see transcript of Peter Lochert, Secretary of DPS), but locking others out of that same access. So not only has this resulted in the exploitation of the 'grey areas' as per the 'red shirts scheme', but a profoundly inequitable system, which benefits some parties over others. Aside from the findings pertaining to individual Members, what this inquiry has clearly highlighted is the plethora of reasons why this system needs urgent reform.

The Committee's endorsement of Recommendation 1 of the Ombudsman's Report is indeed welcome. However, while deemed by the Committee to be outside the scope of the Terms of Reference, the implementation of some of the other recommendations must be implemented with the utmost urgency. Without systemic reform of this nature, the potential for similar exploitations of the rules remains a very real risk.

Those recommendations are as follows;

2. Review section 30(4) of the *Parliamentary Administration Act 2005*.
4. Adopt the recommendation of the Hazell Review to create a separate allowances and entitlements handbook, publically available and kept up to date.
5. The Department of Parliamentary Services review current pooling arrangements and purpose guidance for the consideration of the Presiding Officers.
6. Establish clear investigative capacity and pathways to refer alleged misuses of parliamentary resources for examination by an independent agency as appropriate, with information available on Parliament's website.

In relation to Recommendation 3 of the Ombudsman's report, outlining the training and guidance for the proposed Parliamentary Integrity Adviser, the establishment of an independent Parliamentary Commissioner for Standards is a more suitable structural response. As opposed to simply offering advice, a Commissioner for Standards would have the powers to conduct investigations, enforce the standards set out by the Parliament and refer individuals to appropriate authorities within or outside the parliament in the event of breaches of the Code.

In addition, the passing of the Victorian Independent Remuneration Tribunal and Improving Parliamentary Standards Bill 2017 should be expedited.

