Members of Parliament:
law and ethics

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Introduction

The duty of confidentiality owed by members of parliament derives primarily from the common law. Unlike other public officers, there is no general duty or obligation of secrecy imposed by statute on members. At least two reasons account for this: members are usually not privy to sensitive government information (except in a ministerial capacity) and they have immunity under art 9 freedom of speech. Yet members are often privy to highly sensitive information provided by constituents, colleagues and others seeking their assistance, especially through their ministerial contacts. In these circumstances, they may become subject to the common law duty of confidentiality.

This chapter explores the legal and ethical obligations of members in relation to confidential information. Their position both under the general law and the privilege of freedom of speech is considered. These obligations focus on two situations: the unauthorised disclosure of information and the misuse of information. The conclusion is reached that members should observe their general law duty whether they are acting within or outside their privilege of freedom of speech. Significantly, the scope of that duty is not as wide in relation to government information as it is with personal information, given the fundamental right of the people to be informed of the operations of government.

Types and sources of confidential information

In the course of performing their parliamentary and extra-parliamentary functions, a member of parliament will receive information of a confidential nature. Such information is likely to fall within one or more of the following four broad categories.

1. Personal information. Constituents, other persons, businesses and organisations may give information in seeking the member’s assistance to make representations to a minister, a government department or other authority, or simply to obtain the member’s advice. It may also be given in the member’s ‘whistle blowing’ role.

2. Government information. A member may be advised of certain government
information by ministers or public servants. At times this information may be provided in response to inquiries or representations made by a member on behalf of others.

3. Parliamentary information. This may include evidence given to and the deliberations of parliamentary committees, as well as party room discussions and communications between members.

4. Unauthorised information. Information may be acquired by a member as a result of another person's unauthorised or unlawful disclosure.

Nature and scope of member's duty of confidentiality

The common law provides the primary basis for the duty of confidentiality owed by members of parliament outside the scope of their freedom of speech. In addition, a number of specific rules have been adopted by Australian Houses to restrain members from revealing certain information; in particular, the sub judice convention and the rules in relation to parliamentary committees. These rules are usually found in standing orders, although some can now be found in codes of conduct and in statute. Unlike the common law duty of confidentiality, these parliamentary rules apply irrespective of the freedom of speech.

An attempt is made here to explore the common law duty of confidentiality owed by members in relation to the various categories of information identified above. Then consideration is given to the duties of members when acting within their freedom of speech.

The common law duty of confidentiality

The general duty of confidentiality at common law has been expressed as follows:

A person who receives or acquires information in confidence cannot use or disclose that information for any purpose other than that for which it was received or acquired without the consent of the person or body from whom or on whose behalf it was received or acquired, unless that use or disclosure (a) is authorised or required by law; or (b) is justified in the public interest.

In applying this common law duty of confidentiality, it is necessary to distinguish between those situations which fall within the immunity of art 9 freedom of speech and those which do not. Members are not liable at law for any disclosure or misuse of confidential information which occurs within the scope of that freedom, but they remain liable otherwise. While the boundaries of art 9 immunity were explored in

1 In some cases, statutory obligations of confidentiality are imposed on members of parliamentary committees: see for example s 70 of the Independent Commission Against Corruption Act 1988 (NSW); s 132(3) and (4) of the Criminal Justice Act 1989 (Qld).

2 P Finn, Integrity In Government Project Interim Report I: Official Information Australian National University Canberra, p 120.
Chapter 6, it is convenient to outline them briefly again in this context.

Members are immune from the general law in respect of anything they do or say in the course of parliamentary debates, speeches and proceedings. It is the last of these which provides an extension of members' immunity to activities which, although they occur outside the House, are intimately connected to the internal proceedings of the House: communications between members and possibly even between a member and a minister in relation to matters arising in the House. Although communications between a member and a constituent have been regarded as not protected, judicial support exists for their inclusion when they are acted up on by the member with a view to being raised in the House.\(^3\)

The following categories attempt to identify (1) those activities which are included in 'proceedings in Parliament'; (2) those activities which are not included; and (3) those activities for which the position is unclear.

(a) Included:
   (i) tabling of motions and amendments to motions or bills;
   (ii) tabling, asking and answering of Questions to ministers and other members;
   (iii) formal proceedings of standing and select committees; and
   (iv) strangers giving evidence to select committees or petitioning the House.

(b) Not included (subject to (c) below):
   any activity of a member not relating to parliamentary duties whether performed in the House during the course of parliamentary proceedings or within the precincts of the House or outside.

(c) Position unclear:
   any activity of a member relating to parliamentary duties occurring within the precincts of the House or outside the House.\(^4\)

A wide statutory definition of 'proceedings in Parliament' is provided in s 16(2) of the Parliamentary Privileges Act 1987 (Cth) which declares for the avoidance of doubt that for the purposes of art 9 of the Bill of Rights 1689:

'proceedings of Parliament' means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes —

(a) the giving of evidence before a House or a committee, and evidence so given;

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3 O'Chee v Rowley (1997) 150 ALR 199 (Qld Court of Appeal).
4 See Commonwealth Joint Select Committee on Parliamentary Privilege Report (7 June 1984), PP 87/1984, p 41 and following.
(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

Personal information

Personal information is often given to members in confidence. Accordingly, they are only allowed to disclose or use that confidential information if: (1) authorised; (2) required by law; or (3) it is in the public interest. At times, the member will be authorised to disclose this information for certain purposes, for example, when making representations on behalf of constituents or other persons.

The difficult exemption to determine is whether the disclosure or use was justified in the public interest. To satisfy this test, the public interest in disclosure or use must outweigh the individual's right to privacy or the commercial value of the confidential information. It is a difficult onus to fulfil, given the possibility of injury being inflicted or loss being suffered by any unauthorised disclosure. However, at least two grounds have been identified as warranting the disclosure or use of confidential information in the public interest:

(1) the confidential information relates to serious wrongdoing which it is in the public interest to disclose; or

(2) disclosure of the confidential information will avert apprehended harm to the public or members thereof.

These grounds of public interest appear sufficient to cover those circumstances in which a member may need to disclose confidential information without authorisation. In order to justify disclosure in the public interest, it is also important to ensure that disclosure is made to those having the appropriate interest to receive it: 'An emerging theme in the case law is that, if disclosure is justified at all, it must be to a proper authority having an interest in receiving the information.' If a member is in doubt as to whether disclosure is justified in the public interest, other courses of action may be available.

- The factual situation may be revealed without disclosing the identity of the parties involved.

6 P Finn, above note 1, p 47.
7 P Finn, above note 1, p 148.
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- The appropriate minister may be persuaded to deal with the issue if it concerns a matter within the minister's portfolio. (The need to ensure the extension of parliamentary privilege to communications between a member and a minister is canvassed in Chapter 6.)
- If appropriate complaint procedures within government administration are in place, a member should utilise these procedures rather than make a public disclosure.
- The member could disclose the information in the House under parliamentary privilege.

Members are most likely to adopt this last option because it resolves any concern they may have about whether disclosure is in the public interest. Nevertheless, it would seem that the guidelines provided by the common law for determining whether disclosure of personal information is in the public interest should be adopted by members even when exercising this privilege.

Government information

Most government information acquired by members will not be confidential. However, information obtained from ministers or public officials in response to inquiries made on behalf of constituents and others may be given in circumstances where its disclosure is limited to the member. In those cases, a prima facie duty of confidentiality arises.

The issue then is to what extent the public interest exemption applies to confidential governmental information. Some assistance may be gained from the common law position in relation to public officials and government generated information. The principle here is that '[u]nless disclosure is likely to injure the public interest, it will not be protected'. 8 This principle reflects contemporary concern for more accountable and open government. It also contrasts sharply with the approach outlined above in relation to personal information, where the public interest factor is used to justify an exception to confidentiality; in the case of government generated information, it is used to justify protection of confidentiality.

In what circumstances is the unauthorised disclosure of confidential governmental information likely to injure the public interest? In Commonwealth of Australia v John Fairfax & Sons Ltd, Mason J provided this guide:

If... it appears that disclosure will be inimical to the public interest because national security; relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finally balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality [emphasis added]. 9

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9 At 51-2.
That case concerned the publication of classified documents relating to Australia's foreign and defence policy, publication of which was not regarded by Mason J as likely to injure the public interest. While it is relatively easy to imagine cases of disclosure which would be prejudicial to national security or to Australia's foreign relations, how serious must the situation be for it to be prejudicial 'to the ordinary business of government'? This justification for disclosure poses a particular dilemma given a member's significant role (especially those from the non-government side) in monitoring and questioning government policy and action. Obviously, government embarrassment is insufficient to deny disclosure by a member in the public interest. Where the threshold lies is particularly difficult to say, especially with members of parliament. It certainly is drawn at a point which allows maximum freedom of disclosure to a member without undermining the institutional structure of government and its capacity to function as such — clearly, the law here must yield to the nature of the political process.

Of assistance in identifying potential situations where disclosure of confidential governmental information may not be in the public interest are the categories of government documents exempted from disclosure by the Freedom of Information Act 1982 (Cth) and similar State and Territory legislation. Apart from documents relating to defence, national security and international relations, the Act exempts, inter alia, cabinet and Executive Council documents, certain internal working papers, and documents relating to the enforcement and administration of the law, the economy and the financial and property interests of the Commonwealth. If a member obtains confidential information within any of these categories, it would be prudent to consider carefully the public interest factor justifying disclosure.

Parliamentary information

There appears to be little scope for the application of the common law duty of confidentiality in relation to parliamentary information. Members of parliamentary committees are required by standing orders of every Australian House not to divulge any evidence given or documents presented to parliamentary committees. These rules are considered further below.

As for the confidential deliberations of party room discussions, any unauthorised disclosure will most likely be dealt with by the party itself. This is also likely to be the case with any unauthorised disclosure of confidential communications between members. Therefore it seems unnecessary to consider the public interest exemption in these circumstances.

Unauthorised information

In relation to unauthorised information where a member receives information from a person who has imparted this information in breach of confidence, once the
member knows or has reason to know of that breach, the member becomes subject to the same duty of confidentiality at common law. This principle is of particular importance given the frequency with which members receive confidential information from undisclosed sources. However, if the information has become public no duty of confidentiality arises with the member.

The basis upon which the public interest exemption might apply to the disclosure of unauthorised information depends on the nature of the confidential information itself. If it relates to the private and personal interests of an individual, disclosure is less likely to be justified on public interest grounds than if the disclosure is of government information.

Judicial discretion

Even in a case where a member, acting outside the protection of parliamentary privilege, threatens to breach or does breach the common law duty of confidentiality, the court may refuse to grant discretionary relief by way of an injunction, especially if it might operate within the precincts of parliament or affect the performance of parliamentary duties by the member. In such cases, the court may be concerned not to interfere with the power of a House to control its own members or to intrude on the authority of the presiding officer who controls the physical operations and arrangements of each House.

This was the approach taken by Kennedy J in relation to the 'Zircon Affair' which involved an attempt by certain members of the House of Commons to screen a film in one of the meeting rooms of the House. The BBC had agreed not to screen the film which, according to the British Government, posed a threat to national security for revealing details of a secret defence project, codenamed 'Zircon', and the High Court had granted an injunction preventing one of the directors of the film, Mr Duncan Campbell, from revealing directly or indirectly any details of the Zircon project. Accordingly, the Attorney-General sought an injunction to prevent the members concerned from screening the film in the House of Commons. Kennedy J was not prepared to grant discretionary relief by way of an injunction in this case for fear that such an order would infringe 'the spirit' of the privilege of freedom of speech and of the privilege of the House to control its own members. Indeed, subsequently, with some reluctance, the Speaker after being advised by the Attorney-General on Privy Counsellor terms of the threat to national security posed by the film, issued an order prohibiting the screening of the film. This order was later adjudged by the Committee of Privileges to be proper, being within the authority of the Speaker to control that area of the Parliament allocated for use by the House of Commons.

10 See A G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545.
11 See A G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545.
This case indicates that a court may well be reluctant to grant discretionary relief to prevent the disclosure of confidential information by members within the precincts of parliament. However, there would appear to be no reason why relief ought not to be granted if the disclosure were to occur outside the precincts of parliament, unless, perhaps, it interfered with the member's performance of parliamentary duties.

Standing orders and parliamentary practice

Consistent with the importance placed on the privilege of freedom of speech by parliament itself, no general duty of confidentiality on the part of members while debating or engaging in parliamentary proceedings is recognised by the practices, rules or procedures of parliament. Nevertheless, there are certain parliamentary rules of limited scope which purport to restrict the disclosure of information by members both within and outside the House. A breach of these rules is not actionable at law but constitutes contempt of the relevant House.

The following rules or customs, originally derived from those of the House of Commons of the United Kingdom, are adhered to by the Australian Houses.

Committee proceedings

The standing orders of most Houses of Parliament in Australia impose an obligation of secrecy not to publish or disclose evidence given or documents presented to a committee and not yet reported to the House. According to Erskine May, this obligation of secrecy was a custom of parliament from the middle of the 17th century until in 1837 it became a resolution of the House of Commons:

... according to the undoubted privileges of this House, and for the due protection of the public interest, the evidence taken by any select committee of this House and the documents presented to such committee and which have not been reported to the House ought not to be published by any Member of such Committee, or by any other person.\(^{13}\)

This resolution has been adopted with modifications by the standing orders of the Australian Houses for both select and standing committees.\(^ {14}\) Usually the committee

\(^{13}\) D Limon and W McKay (eds), Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament (22nd ed) Butterworths Sydney 1997, p 118; CJ (1837) 282; Pañ De (1837) 38, cl70-171.

may authorise disclosure. In those instances where evidence is given in public hearings, no secrecy attaches to it unless this is ordered by the committee.

Where evidence is given or documents presented to a Senate committee and not published, then unless the Senate otherwise orders, the Continuing Orders of the Senate permit anyone to examine and copy that evidence or documentation if it has been in the custody of the Senate for 10 years, or for 30 years in the case of in camera evidence or documents presented on a confidential or restricted basis. In relation to the Commonwealth Houses, further protection is afforded by s 13 of the Parliamentary Privileges Act 1987 (Cth) which prohibits anyone, unless authorised by the House or committee, from publishing or disclosing documents or evidence given to a House or committee and directed by them to be treated as given in camera. Penalties in the nature of a fine or imprisonment for up to six months are prescribed. Unauthorised disclosure of committee proceedings constitutes a breach of privilege whether this occurs within or outside parliamentary privilege. The privilege of freedom of speech only protects members from being questioned by the Courts and by other outside bodies. They remain, however, subject to the jurisdiction of their own House.

The sub judice convention

The most significant restriction on members' freedom of speech is the sub judice convention which prevents references being made in motions, debates or questions to matters currently before the courts or awaiting adjudication in both criminal and civil matters. The rationale of the convention is to ensure that the judicial process is not undermined by parliamentary proceedings:

Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented or tested.

The basis and scope of this convention in Australia are still guided by resolutions of the House of Commons of 23 July 1963 and 28 June 1972. The convention prevents references being made to both criminal and civil proceedings unless its application is waived at the discretion of the Chair. However, the latter resolution permits the lifting of the convention in relation to civil proceedings in so far as such matters relate to a ministerial decision which cannot be challenged in court except

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15 See Resolution of 6 September 1984, J 1086.
17 1999 UK Report of the Joint Committee on Parliamentary Privilege at para 192. The Report noted at para 190 that the convention accommodates Parliament's right to legislate on any matter even if this affects judicial proceedings. In Australia, see for example Bachrach Pty Ltd v Queensland (1998) 195 CLR 547.
18 CJ (1962-63), 297.
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on grounds of misdirection or bad faith, or concern issues of national importance such as the national economy, public order or the essentials of life' provided that 'the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings'.

In Australia, the *sub judice* convention was at the centre of the highly controversial affair over the 'Westpac Letters' in 1991. These confidential letters to Westpac from its solicitors concerned the bank's liability to its customers for losses suffered by them in accepting foreign currency loans between 1984 and 1987. It would appear that these letters and other confidential bank documents were unlawfully obtained and distributed from European sources. Senator Paul McLean sought to table copies of these letters in the Senate on 12 February 1991. The President of the Senate, Senator Kerry Sibraa, ruled that the matter was *sub judice* in view of pending court proceedings brought by Westpac to restrain the disclosure of those letters in the press. Before making his ruling, the President indicated in a letter addressed to Senator McLean, the discretionary nature of the *sub judice* convention:

> It is apparent that any decision I make on this matter will rest on an assessment of whether the public interest in the matter and the Senate’s freedom to debate it should outweigh the possible prejudice to the legal proceedings.

The President applied the convention in this case for two reasons:

In the present case I believe that judgment should be exercised in favour of non-disclosure for the following two reasons. The very subject matter of the case immediately before the courts, and in respect of which the *sub judice* claim is made, is the question as to whether the documents involved should be suppressed. To disclose the documents now would ipso facto abort that case. No clearer example of real and present danger to current legal proceedings could be imagined. Indeed, it is not merely a matter of the present proceedings being prejudiced, but rather a particular litigant's rights being denied absolutely.

While the subject matter of the documents may raise public interest issues, as Senator McLean strongly argues, there is equally a very clear public interest in judicial proceedings being able, and being seen to be able, to be brought to conclusion without being aborted by the Senate. From this point of view, it is not pertinent that a different situation may be thought to apply in practice once the present proceedings are complete.

Not only were there current legal proceedings between Westpac and various media organisations to prevent the disclosure of the letters, other legal proceedings were contemplated against Westpac by former customers for losses incurred as a result of

20 See D Limon and W R McKay (eds), above note 12, pp 383-384.
21 Senate Debates (Senate) Vol S 143 at 357.
22 At 356.
accepting foreign currency loans. The disclosure of the contents of those letters in the Senate may have removed any legal professional privilege they might otherwise have enjoyed.\(^\text{23}\) This consequence was not directly recognised by the President of the Senate but the issue of legal professional privilege was one of two other factors the President took into account:

There are two other matters to which I have given consideration. Firstly, it is arguable also that the claim of legal professional privilege which has been made in court in relation to these documents itself raises a public interest question, namely, that the Senate should not lend itself to a breach of this privilege being perpetrated. This, in my judgment, is a matter to be given some consideration, but should not be regarded as decisive.

Secondly, it is also arguable that other proceedings current or pending could be prejudiced or at least 'coloured' by the public disclosure of the material in question, even though such material would presumably not be admissible, on legal professional privilege grounds, in those proceedings. On balance, however, this is not a matter, I believe, that needs to be addressed at this stage. It can be considered if and when the matter arises again following the conclusion of the present court proceedings relating to the suppression of the documents.

For the reasons I have spelt out I rule, accordingly, on sub judice grounds that the contents of the two documents in question should not be revealed to the Senate.\(^\text{24}\)

The sequel to this drama occurred on 20 February 1991 in the South Australian Legislative Council, when Mr Ian Gilfillan MLC read into Hansard substantial parts of the Westpac letters. A summary of these letters was published the following day in The Canberra Times.

The 1999 Report of the UK Joint Committee on Parliamentary Privilege recommended a new resolution for the sub judice convention which improves on the present rules by confirming their application to the proceedings of select committees and defining as precisely as possible the period during which the convention must be observed. In relation to criminal proceedings, this begins when a person is charged and ends when a verdict is given and sentence imposed. With civil proceedings, it begins when the matter is set down for trial until judgment or discontinuance.\(^\text{25}\)

Codes of conduct

An obligation in respect of confidential information is included in the codes of

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\(^\text{23}\) Public disclosure of the contents of the privileged letters probably cancels their privileged status: \textit{A v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545} at 596.

\(^\text{24}\) Senate Debates (Senate) Vol S 143 at 356-7.

conduct adopted by both Houses of the NSW and Victorian Parliaments, as well as by the Tasmanian House of Assembly (see Appendices 5 and 6).

In the only statutory code of conduct, s 3(1)(b) of the Members of Parliament (Register of Interests) Act 1978 (Vic) requires:

Members shall not advance their private interests by use of confidential information gained in the performance of their public duty.

Infringement of this obligation constitutes contempt of parliament and in addition to any penalty which either House may impose, a fine of up to $2000 may be imposed by the member's House, non-payment of which renders the member's seat vacant.26 While potentially broad in scope in banning the use of confidential information, it is limited to where the members' interests are advanced by the disclosure.

The same restriction arises under cl 5 of the NSW codes and under SO 2A of the Tasmanian House of Assembly, both of which refer to disclosure for a 'private benefit'. This requirement should not be interpreted to indicate that the disclosure or use of confidential information for other than personal benefit is acceptable — these code provisions are merely focusing on the most serious case in respect of which it is very unlikely that there would be any lawful justification for disclosure or use. Indeed, only the NSW provisions require the information to be used 'knowingly and improperly'. In cases where no personal benefit is obtained, the disclosure or use may be justified on the common law grounds discussed earlier. Otherwise, disclosure or use of confidential information for any purpose is unlawful and unethical whether it confers a benefit or disadvantage on the member.

Statute

No member of parliament in Australia is subject to the range of criminal and disciplinary offences applicable to public officials for breach of confidentiality. Statutory penalties are prescribed, however, under the Parliamentary Privileges Act 1987 (Cth) for the unauthorised disclosure of information submitted as in camera evidence to either House of the Commonwealth Parliament or to one of their committees.27 Similarly, under the Victorian Code of Conduct, any member who advances his or her interests by using confidential information is guilty of contempt of parliament and is liable, in addition to any other penalty, to a fine of up to $2000.28

Misuse of information

The second limb of the common law duty of confidentiality prohibits members from misusing confidential information. The misuse of confidential information

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26 Sections 9 and 10 Members of Parliament (Register of Interests) Act 1978 (Vic).
27 Section 13: $5000 and imprisonment for 6 months; $25,000 for a corporation.
28 Section 9 Members of Parliament (Register of Interests) Act 1978 (Vic).
need not involve its disclosure to anyone — as exemplified by insider share trading — nor does it necessarily require an intention to use that information for anyone’s benefit.

There is a related legal obligation which derives from the status of a member as a public officer which prevents any information obtained in the course of their public duties from being used for their personal benefit. Although the information need not be confidential, the focus is on whether the member obtains a private benefit. The basis of this obligation is the fiduciary duty of loyalty and fidelity which has been described in these terms:

Officials and employees may not use their position, or knowledge or opportunity obtained by reason of it:

(a) to their own or to a third party’s possible advantage; or
(b) to the possible disadvantage of any person or body (including the authority under which the office or employment is held)

where that use is likely to injure the public interest.²⁹

An obligation similar at least to the first of these legal obligations is found in the codes of conduct in NSW and Tasmania.

Clause 5 of the NSW Codes provides:

Members must not knowingly and improperly use official information which is not in the public domain, or information obtained in confidence in the course of their parliamentary duties, for the private benefit of themselves or others.

Standing Order 2A of the Tasmanian House of Assembly provides that a member:

must not take personal advantage of or private benefit from information that is obtained in the course of or as a result of their official duties or positions and that is not in the public domain.

Both require members not to use for a private benefit any information obtained in the course of their parliamentary duties which is not in the public domain. The Victorian Code provision is expressly confined to ‘confidential information gained in the performance of their public duty’.³⁰

These code provisions appear to be deficient in the following respects:

• none seem to apply to information obtained other than in the member’s capacity as a member;


³⁰ Section 3(1)(b) Members of Parliament (Register of Interests) Act 1978 (Vic).
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- apart from the NSW provision, it is unclear whether they cover a situation where a benefit is sought for others;
- they do not appear to cover the misuse of official information even if it is not confidential; and
- they do not extend to misuse occasioning any prejudice to other parties which is covered by the fiduciary duty of loyalty outlined above.

Accordingly, it would seem desirable to prescribe twin standards dealing with the disclosure of confidential information and the misuse of official information.

The Bowen Committee in its Report on Public Duty and Private Interest\(^{31}\) recommended both disciplinary and criminal provisions against the misuse of official information. For inclusion in a code of conduct for members of parliament (as well as for other public officials), it recommended that:

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\text{[a]n officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person.}^{32}
\]

A provision which combines that recommended by the Bowen Report with the points raised earlier, might provide:

A member of Parliament shall not make improper use of information obtained in the course of performing the member’s official functions:

1. to gain, directly or indirectly, an advantage for oneself, for any other person or body; or
2. to prejudice any person or body.\(^{33}\)

Criminal liability for misuse

There are no criminal offences which directly render members liable for obtaining any pecuniary gain from the misuse of confidential or non-confidential information obtained by way of their official position. There is the possibility, though, that members in non-Criminal Code jurisdictions may be liable in these circumstances to the common law offence of official misconduct, in particular, one species of that offence known as fraud in office.\(^{34}\) Essentially, it would be necessary to prove that the member wilfully misused the confidential information under colour of his or her office.

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32 At para 4.9.
33 Adapted from the Information Misuse Rule proposed by P D Finn, above note 1, p 1.
Both the Bowen Report\(^{35}\) and the Gibbs Committee\(^{36}\) recommended the adoption of a criminal offence but, as Professor Finn (as he then was) pointed out, both specific recommendations were flawed.\(^{37}\) The recommendation of the Bowen Report proscribed all misuse of official information without restricting it to cases where either private gain was derived or some prejudice incurred. The Gibbs Committee restricted its recommended offence to the ‘unauthorised disclosure of official information for private gain’ and therefore exempted the misuse of official information for private gain.

Members of parliament ought to be subject to criminal prosecution for misusing confidential information for pecuniary gain, irrespective of whether this occurs within or outside the scope of parliamentary privilege. This is just as serious an abuse of their public office as any criminal offence of corruption or bribery.

**Freedom of speech and confidentiality**

It is evident from Chapter 6 that the privilege of freedom of speech provides members with an immunity from all legal proceedings (whether criminal or civil) in respect of any thing they say or do in the course of the debates, speeches or proceedings of their House. Accordingly, no legal action can be taken against a member for breach of a duty of confidentiality, either by way of unauthorised disclosure or misuse of information, which occurs within the scope of the art 9 privilege. It is readily apparent how a breach of a duty of confidentiality could arise within the scope of the privilege by way of a disclosure of confidential information in the debates or speeches of a House. Less easy to imagine is how a breach of this duty could occur within the scope of the privilege by way of the *misuse* of confidential information for the benefit of a member or another.

Although members are immune from legal liability in these circumstances, there is, as *Erskine May* notes, a clear duty on every member ‘to refrain from any course of action prejudicial to the privilege’.\(^{38}\) If a member wishes to disclose, under parliamentary privilege, information which the member believes is of a confidential nature, the member should first consider the scope of the common law duty of confidentiality. Disclosure will be authorised at common law, as noted earlier, if it is authorised by the person from whom it was acquired, authorised or required by law, or justified in the public interest. These are the standards which should guide members in their handling of confidential information at all times, whether within or outside parliament. Members should satisfy themselves as to whether they are justified in disclosing the confidential information in the manner they propose.

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35 Bowen Report at paras §9-4.10.
37 P Finn, above note 1, p 209.
38 D Limon and W A McKay (eds), above note 12, p 84.
The privilege of freedom of speech, if exercised in this way, provides members with the advantage of immunity from legal challenge if it is later revealed that their judgment was erroneous. It is not a privilege to say and do what one likes within the debates and proceedings of parliament. Members must act reasonably and responsibly in exercising this privilege, for, as we have seen, the rationale for the privilege is to enable them to effectively perform their functions of review and representation and hence serve the public interest. Provided the privilege is exercised honestly and reasonably by members, they should be free to say and do what they feel needs to be said in the public interest, without fear of legal challenge by the executive or by any other person or group. To remove this immunity could seriously undermine the capacity of members to exercise their parliamentary functions.

What role should parliament play here? It would appear that its role is restricted to taking disciplinary action against a member who abuses the privilege by disclosing information which the member knows is confidential and when there was no reasonable ground for considering the disclosure to be in the public interest or otherwise authorised. As for the misuse of information to advance a member's interests, this is unlikely to occur within the scope of the privilege, but if it did arise, the member's House should take severe action against a member.

**Conclusion — recommended standards of confidentiality**

**Disclosure outside parliamentary privilege**

A member of parliament, when acting outside the scope of the privilege of freedom of speech, should not disclose information imparted to the member in confidence or which is otherwise of a confidential nature unless:

1. the disclosure is required or authorised by law;
2. the disclosure is authorised or consented to by the person from whom or on whose behalf it was received; or
3. (i) subject to (ii) below, the public interest requires disclosure of the information provided that the information is disclosed only in so far as it is necessary to serve the public interest;
   (ii) where the information relates to the private, personal or proprietary interests of any person, group or body in the community, disclosure of this information will usually only be in the public interest if:
   (a) the information relates to serious wrongdoing which it is in the public interest to disclose; or
   (b) the disclosure will avert apprehended harm to the public or members thereof.

**Disclosure within parliamentary privilege**

A member of parliament when acting within the scope of the privilege of freedom
of speech should carefully consider when disclosing information imparted to the member in confidence (or which is otherwise of a confidential nature), whether the disclosure of that information and the manner in which it is disclosed are in the public interest. (The principles provided in the section above should be taken into account by the member before deciding to disclose confidential information under parliamentary privilege.)

**Misuse of official information**

A member of parliament shall not make improper\textsuperscript{39} use of information obtained in the course of performing the member's official functions:

1. to gain, directly or indirectly, an advantage for him or herself, or for any other person or body; or
2. to prejudice any other person or body.

\textsuperscript{39} This requires the nature of the political process to be considered in deciding whether the use is improper. Political benefits will often need to be accommodated and distinguished from other personal benefits.
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