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Memorandum by the Clerk of the House

INQUIRY CONCERNING RECORDS AND CORRESPONDENCE HELD BY MEMBERS OF THE HOUSE

Memorandum by the Clerk of the House of Representatives

THE REFERENCE

On 31 March the House referred to the Committee of Privileges the following matter:

> The question of the status of records and correspondence held by Members of the House of Representatives, with particular reference to
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> (1) the adequacy of the present position;
>
> (2) the question of whether additional protection could be extended to Members in respect of their records and correspondence; if so, whether those records and that correspondence should be subject to additional protection, and, if so, what the form and nature of such protection should be.

TASK BEFORE THE COMMITTEE

The inquiry presents an important opportunity for the Committee to consider and give advice on the issue of the legal status of records and correspondence held by Members of the House. The issues that arise in this inquiry have been a source of difficulty and some confusion for Members and possibly for some in the wider community. I understand the principal concern is whether Members of the House are in a position to preserve the confidentiality of communications with their constituents when faced with orders compelling production of correspondence and records. Other issues also could arise in relation to possible defamatory material in the records of Members. The Committee's findings and report will therefore be of value not only to Members, but also to the wider community, including those constituents who rely on Members to present their views and to take up their concerns.

To assist the Committee in its task, in this memorandum I propose to:

> outline my view of the present position generally in relation to records and correspondence held by Members—the kinds of questions that have confronted Members, whether or not privilege attaches to records and correspondence, and the nature and purpose of any privilege,
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> consider whether it is possible to extend additional protection, and, if so, whether such an extension is necessary or desirable,

as well as to:

> provide some options that the Committee may wish to explore further, for instance what legislation, or less formal means, may be useful in clarifying and improving the situation.

THE PRESENT POSITION

On a number of occasions in recent years Members have been required to provide records for use in connection with court, or other proceedings. The records sought by subpoena have concerned electorate office matters of some sort (for example, records of representations by Members to government). On other occasions, before court proceedings have begun, search warrants have been executed with the objective of obtaining evidence in connection with suspected or alleged criminal activity.

The privilege of freedom of speech

As Members are aware, the privilege of freedom of speech is regarded by many as the most important of the privileges enjoyed by the House of Representatives and its committees and Members. The privilege derives from Article 9 of the *Bill of Rights 1688*:

> That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament.

Article 9 applies in respect of the Commonwealth Parliament by virtue of section 49 of the Constitution, which provides:

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

Substantial updating and clarification of these powers, privileges and immunities is given in the *Parliamentary Privileges Act 1987* (the Privileges Act). The Privileges Act retains the application of Article 9 and does not purport to be a complete statement of the law of parliamentary privilege but it does provide substantial elaboration and clarification, among other things in regard to what amounts to 'proceedings in Parliament'.

Nature of the privilege - threshold issues

The term 'proceedings in Parliament' has particular importance here because my understanding is that unless records held by Members are regarded as forming part of 'proceedings in Parliament', they do not enjoy any special legal status in terms of the law of parliamentary privilege. It is equally important to note the nature of the protection that is provided in respect of proceedings in Parliament: it is a prohibition against certain actions, essentially actions that would impeach or question proceedings in Parliament, rather than a protection against disclosure.

The result is not that records or evidence relating to parliamentary proceedings may not be disclosed or produced in courts or other tribunals (although there are some subsidiary issues in that regard), but rather that there are strict limits on the use that can be made of them in a court or tribunal. Briefly, there is no prohibition on the parliamentary record being used in a court or tribunal to support matters of pure fact, for example that a Member was present, or that a bill was passed. However, evidence and statements made in a court or tribunal in respect of proceedings in Parliament may not question the truth or motive of any part of those proceedings or draw interferences or conclusions from them.

For the Committee's present purposes, section 16 of the Privileges Act—Parliamentary privilege in court proceedings—is most relevant. Subsection 16 (2) provides that 'proceedings in Parliament' means:

All words spoken and acts done in the course of, or for purposes of or incidental to, the transaction 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;
(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.

The scope of the definition, in particular the term 'incidental', has not been determined. However, in the 1997 case of *O'Chee* v *Rowley*[1] the Supreme Court of Queensland held that if documents came into the possession of a senator who retained them with a view to using them, or the information contained in them, for Senate questions or debate, then the procuring, obtaining or retaining of possession were acts done for the purposes of or incidental to the transacting of business of that House pursuant to subsection 16 (2).

Production of documents

Many laws allow for individuals and entities to be required to produce certain records, including to authorities and government departments, for the purposes of the relevant Act. In addition, rules of Court provide for a process of discovery in litigation. This allows for parties in litigation to make available to each other (through the Court) all relevant documents before the matter is heard. The process helps to ensure not only that documents are made available and each party knows the case he or she must meet, but that the issues for trial are narrowed and the case is decided on its merits. I am not aware of legislation that contains any exemptions to requirements to produce or identify records to specifically recognise or allow for the situation of records held by Members.

I note that the terms of subpoenas brought to our attention by Members have varied. In some cases the attendance of the Member, as well as the production of records in question, has been sought. If the date nominated for attendance in court falls within the periods of immunity from attendance specified in section 14 of the Privileges Act (sitting days and five days before and after such days, and the same for committee sitting days) we have often written to the court authorities, drawing attention to the immunity and asking that the Member be excused. In other cases, only records have been sought, perhaps to be delivered or provided by the 'proper officer'.

Execution of search warrants

As indicated above, an issue which is related to the disclosure of documents and which may arise during the course of this inquiry is the execution of search warrants. An associated concern for Members has been the protection of sensitive or confidential material which was not the subject of the search warrant but which was likely to be uncovered during a search.

[1] (1997) 150 ALR 198.

My understanding is that there is no immunity under the law of parliamentary privilege that would exempt Members' electorate offices from the execution of search warrants. In its 1995 report concerning the execution of a search warrant on the electorate office of the (then) Member for Stirling, the Committee accepted this position. Nevertheless a Member may wish to argue that particular records sought should not be seized or removed by reason of their association with proceedings in Parliament. Even if that association were made out, though, the nature of the privilege relates to the use that can be made of the records, rather than protection from disclosure (although a Members could mount an argument against seizure of 'privileged material'). In any case, I am not aware of a situation in which a Member of the House faced with a search warrant has argued that material sought was connected with proceedings in Parliament. This is also the case in respect of the occasions of which I am aware on which a search warrant has been executed in Parliament House. An important difference between Parliament House and electorate offices is however that the permission of the Speaker (or where relevant the President) is sought before a search warrant is executed in Parliament House.

Possible contempt of the House

Depending of course on the circumstances, documents held in electorate offices could fall within the category of 'proceedings in Parliament' if they were prepared for purposes of or incidental to the transacting of the business of the House or a Committee but, if the records are not connected to proceedings in parliament, they enjoy no special legal status under parliamentary law. Nevertheless when Members have sought advice about the production of electorate office records in response to subpoena for production, my Department has advised that, even though there may be no connection with proceedings in Parliament, it is open to them to raise the issue as a possible contempt of the House. Such a claim could also be made in respect of the execution of a search warrant. In each case section 4 of the Privileges Act is relevant:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

If a Member wished to complain to the House he or she would need to raise the matter and be able to argue that service of the subpoena or execution of the warrant, as the case may be, amounted or was intended or likely to amount to an improper interference with the free performance of his or her duties as a Member.

Qualified privilege at common law issues

If the concern was not to preserve confidentiality of the documents and records being sought, but to defend an action for defamation, then the common law defence of qualified privilege may arise. The defendant would need to establish that the publication of the information or document took place on an occasion of qualified privilege—that is, that the person who made the defamatory statement had an interest or duty to make it to the person to whom it is made, and the person who received it has a corresponding interest or duty to receive it. To defeat this defence, the plaintiff would need to provide that the defendant was actuated by malice.[2] Further consideration of this defence, as it relates to the inquiry, would require the reciprocal duties of Members and constituents to be assessed.

[2] Gillooly, Michael, *The Law of Defamation in Australia and New Zealand*, 1998, pp. 169-173.

Freedom of information and privacy

The Freedom of Information Act does not apply to parliamentary records, or to records held by Members, being limited to records held by Government. Copies of Members' representations, etc, which are held by Government departments could be sought, possibly, under freedom of information legislation. One of the grounds on which a department may decline to provide a record is where its disclosure could be a contempt—but it is difficult to see this applying to copies of Members' representations held by departments. I also understand that the Privacy Act does not apply to Members of Parliament.
Whatever the legal position, there is little doubt that protecting the confidentiality of communications with their constituents is regarded by Members as an important obligation. Members may recall that one of the principles of the draft Framework of Ethical Principles for Members and Senators[3] prepared by the Working Group on a Code of Conduct focused on privacy:

> Members and Senators must have due regard for the rights and obligations of all Australians. They must respect the privacy of others and avoid unjustifiable or illegal discrimination. They must safeguard information obtained in confidence in the course of their duties and exercise responsibly their rights and privileges as Members and Senators.

Summary of present situation

The present position is that records and correspondence held by Members and which do not concern 'proceedings in Parliament' do not enjoy any special legal status in terms of parliamentary law (although they are not subject to the Freedom of Information Act or the authority of the Federal Privacy Commissioner). Further, the definition of 'proceedings in Parliament' is a broad one making it difficult in some cases at least to clearly distinguish between the records of Members which are 'proceedings in Parliament' and those which are not.

The adequacy or otherwise of this situation is a matter for judgment. I am aware some Members feel that all their records concerning constituents should be given specific legal protection, in the interests of parliamentarians fulfilling their duties as fully as possible, without fear of adverse consequences for their constituents such as can occur where the relevant records are disclosed. Others would argue that while these concerns are legitimate, they are outweighed by the public interest in ensuring that, as far as possible, courts have access to all material relevant to the cases before them.

Certainly, the key features of the present arrangements regarding the use that can be made of correspondence and records of Members are not well known. The Committee will provide a great service to Members, their staff, and the community as a whole, if it can provide an authoritative statement of the position.

[3] The paper was presented by the Speaker (and the President) on 21 June 1995. It has no formal status but the principles listed were intended to provide a framework of reference for Members and Senators in their duties.

WHETHER ADDITIONAL PROTECTION COULD BE EXTENDED

The next issue for consideration is whether additional protection could be provided to cover Members in respect of their records and correspondence, or arising out of their receipt or use of these records and correspondence. I am advised by the Australian Government Solicitor (AGS) that Parliament could legislate to extend protection to the records and correspondence of Members of Parliament, notwithstanding the need to avoid infringing the judicial function or the principle of free communication on matters of government and politics (copy of advice attached).

The AGS advises that the law could extend only to documents created or obtained by Members in the course of their duties as Members. However, it may also be able to protect Members from legal proceedings (including under State or Territory laws) for things said by them in the documents, or arising out of their receipt or use of the documents. It could also provide that such documents could not be used in proceedings in a court or tribunal. It would be necessary to ensure that the purpose of any such law would be to enable Members to better discharge their functions, and be reasonably adapted to achieve this.

WHETHER ADDITIONAL PROTECTION SHOULD BE EXTENDED

Clearly, a balance needs to be struck between the interests of Members and their constituents in the free flow of information and advice, the interests of the community in ensuring that the courts have available to them all relevant material and information in their attempts to administer justice.

Some Members may believe that an adequate balance has already been struck in that privilege attaches to those records of Members that fall within the definition of 'proceedings in Parliament' and should not be extended further. Others may feel that the possibility that information received by Members may be disclosed at some future time must have an adverse effect on the willingness of some constituents to approach Members and seek their assistance in respect of some sensitive or confidential matters. It is not possible to gauge with precision just what the practical effect of the present arrangements are.

Position in the United Kingdom

In the United Kingdom, concerns have also been raised about correspondence and other communications undertaken on behalf of constituents by members of the House of Commons, although this has been in the context of possible defamation action rather than the issue of disclosure. The Joint Committee on Parliamentary Privilege in its recent report addressed these when it considered the possibility of extending parliamentary privilege to cover such correspondence. However, the Committee recommended against the extension of absolute privilege afforded by Article 9 to proceedings in Parliament so as to include communications between Members and ministers. It noted that, in principle, the protection provided by Article 9 of the Bill of Rights is so exceptional that it should:

> ... remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege. Members are not in the position that, lacking the absolute immunity given by article 9, they are bereft of all legal

protection. In the ordinary course a member enjoys qualified privilege at law in respect of his constituency correspondence.... So long as the member handles a complaint in an appropriate way, he is not at risk of being held liable for any defamatory statements in the correspondence. Qualified privilege means a member has a good defence to defamation proceedings so long as he acted without malice, that is, without some dishonest or improper motive.[4]

THE NATURE OF ANY ADDITIONAL PROTECTION

If the Committee wished to recommend that protection be provided to communications between Members and constituents possibly between Members and others there are a variety of options for consideration.

Possible legislative change

The Privileges Act could be amended to extend absolute privilege to the records and correspondence of Members in relation to their activities as Members. As well as protecting Members from legal action for anything said by them in the documents, this would also ensure that the documents were not able to be used in any proceedings in a court or tribunal including a State court or tribunal. Any extension of the coverage of absolute privilege would be likely to attract criticism, even if it were explained as ensuring that Members were better able to perform their functions as members of parliament.

Another option would be to introduce legislation to deal specifically with Members' records which were not connected to proceedings in Parliament. Such changes could be made by amendment to the Privileges Act or to the Evidence Act. They might be specifically directed to allow application to be made by Members to ensure confidentiality is preserved in relation to certain communications. Alternatively, there might be more stringent requirements before an order can be made against a Member for production. This 'evidence' option may be preferred because it could provide a more certain and refined result.

Legal professional privilege—common law and legislation

Some Members may wish to deal with the issue of confidentiality of records and correspondence by conferring upon Members a privilege akin to legal professional privilege. At common law, the principle of legal professional privilege provides that a person may preserve the confidentiality of statements and other materials which have been made or brought into existence for the sole purpose of seeking or obtaining legal advice from a legal practitioner, or for use in existing or contemplated legal proceedings.[5]
While legal professional privilege serves to preserve confidentiality between a legal practitioner and client in certain circumstances, the broader aim is to ensure openness between legal practitioners and clients, for the proper conduct of litigation in our legal system. It is also relevant to note that professional training of solicitors is extensive, with formal requirements to be met before a person is admitted to practise. There are different schemes in place to monitor compliance with their professional duties on an ongoing basis: scrutiny by law societies and professional conduct boards, as well codes of professional ethics and legal practitioners' legislation.

[4] Report of the Joint Committee on Parliamentary Privilege, March 1999, paragraphs 110-112.
[5] See *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, Cairns, B.C., *Australian Civil Procedure*, 3 ed., 1992, pp. 334-335 and McNicol, S., *Law of Privilege*, 1992, p. 44.

In short, while certain communications between legal adviser and client attract the protection of legal professional privilege, the legal adviser's professional relationship with clients is subject to formal restrictions and obligations.

Some legislative guidance on the bounds of legal professional privilege may be found in the *Evidence Act 1995* (Cth), which applies to proceedings in a federal court or an ACT court. In general terms, section 118 of that Act provides that evidence is not to be adduced if, on objection by a client, the court finds that adducing it would result in disclosure of a confidential communication between the client and a lawyer, for the dominant purpose of the lawyer providing legal advice to the client. I also note that the Evidence Act recognises the confidentiality of religious confessions, but that claims by media personnel that they should not have to disclose their sources have not been accepted.

Protected confidences

Certain elements of the NSW *Evidence Act 1995* may be of interest to Members. Section 126B of that Act allows a court to direct evidence not be adduced if the court finds that adducing it would disclose a protected confidence, or contents of a document recording a protected confidence. The Court may make such a direction on its own initiative, or on application by the protected confider or confidant (whether or not a party). Section 126A defines 'protected confidence' as a communication made in confidence to another in the course of a relationship in which the confidant was acting in a professional capacity and was under an express or implied obligation not to disclose its contents. Before a direction is made it must be established that it is likely that harm would or might be caused to a protected confider if the evidence is adduced, and the nature and extent of the harm outweighs the desirability of the evidence being given. (A copy of the provision is attached)

Guidelines

Aside from any legislative protection, the Committee may wish to examine ways in which uncertainty over the protections which are offered under the law can be avoided. These might include, for example, production of guidelines for the handling of compulsory disclosure orders, execution of civil and criminal process, and handling of Members' correspondence with constituents (for example, seeking immediate instructions in respect of confidentiality and indicating where the information or complaint is likely to be referred). I am aware that following the Committee of Privileges report on the execution of a search warrant on the office of a former member for Stirling, draft guidelines were developed to apply to such situations. These guidelines sought to balance the interests of the Houses and their Members and those involved in the administration of justice, however agreement was not reached on the detail. However, I am led to believe that they may be being applied in draft form. A copy is attached.

What records and correspondence should receive additional protection?

Whatever means is chosen to provide any additional protection, I do not think that Members would wish all correspondence between their office and others to be privileged. Aside from the wish to ensure that courts are fully informed, Members are well aware of the public interest in accountability and openness. Members would also be conscious of the perception that such wide privilege would have considerable potential to cover up wrongdoing. It may be that Members would wish to limit protection to records and correspondence that are confidential and to statements that are made without malice or improper motive.

Once the preferred means of protection is decided, more detailed examination will be necessary of the circumstances in which documents would be protected, taking into consideration such matters as the purpose for which the documents were created (for example, for advice by the Member), and are required (for example civil or criminal process), expectations of confidentiality of the author(s), the place where the documents are stored, the purpose for which access is sought, as well as broader issues of consent and waiver.
Some guidance as to the relevance of the nature of documents held by Members is provided by the National Archives of Australia (Archives). While the Archives' focus is naturally on the provisions of the *Archives Act 1983*, its distinction between Members' private records and Commonwealth records may be of assistance to the Committee in its consideration of the kinds of documents to be considered, and the protection, if any, to be afforded them. Archives advise that records created or received by members in their official capacity are prima facie their personal property, rather than Commonwealth records. Private records include personal (domestic or family-related), party records, Parliamentary records including speeches as a Member, Members' copies of correspondence with Ministers, reference material and electorate records, including correspondence with constituents. Commonwealth records would include records received and created by Members in an official capacity as an appointee to a Commonwealth council or committee. Records received by Members in their capacity as a presiding officer or member of a Parliamentary committee may be records of the Senate or the House. Another aspect the committee may wish to consider is whether any new or special issues arise as a result of the diversity of forms in which records are now created and held.

CONCLUSION

This reference brings some difficult issues before the committee. As we understand it, the present situation is that many of the records held by Members enjoy no special status in terms of parliamentary law. That situation is a cause of some dissatisfaction. It is considered that the Parliament would have the power to make a law to extend protection to the electorate office type of records held by Members. Another alternative would be to have guidelines introduced to deal with requests to use such records.

Whether further protection should be extended, and if so what form this extension should take, is a matter for judgment, bearing in mind the competing public interest issues involved in the matter of communication between Members and their constituents on the one hand and, on the other, the important issues involved in the administration of justice.

I will be happy to provide any additional assistance the committee may require.

I C HARRIS
7 June 1999