

The reference

- 1.1 A matter of concern to Members has been the legal status of records and correspondence held by them as Members of the House of Representatives. With this concern and the issues involved in mind, on 31 March 1999 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:

- (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.

Conduct of the inquiry

- 1.2 The terms of reference for the inquiry were advertised on 9 April 1999. All Members were invited to make submissions to the inquiry. Letters were also sent to those with a particular interest in the inquiry inviting them to respond. Twelve submissions were received to the inquiry and they are listed at appendix A. In addition to the submissions, a comprehensive memorandum was received from the Clerk of the House and a copy of the memorandum is at appendix B.
- 1.3 To encourage discussion and a focus on the matters raised by the inquiry, the Committee produced an issues paper. The paper provided the basis for discussion at a private roundtable meeting which was convened on 26 June 2000. All Members were invited to the roundtable discussion as were

all those who made submissions to the inquiry and selected academic experts in the field. A list of those who attended the roundtable is at appendix C.

Definitions

1.4 In its submission, the Attorney-General's Department defined 'correspondence' as 'all mail and no-voice electronic communications received by Members' and extending to 'all documents sent to Members and to Members' copies of correspondence they have sent.'¹ Members 'records' were taken by the Attorney-General's Department:

...to refer to material recording events or transactions in the course of a Member's activities as a Member. The term would thus include financial records, records of appointments, notes of conversations, etc.²

1.5 The Committee accepts these definitions. It also has interpreted the reference as relating to the records and correspondence of members in their capacity as private Members and not in relation to the official records of Executive Government which Members may hold (the official records of Ministers and Parliamentary Secretaries). The particular focus of the Committee's inquiry will be on Members' correspondence and records as they relate to Members' interaction with constituents. This is the area that has been of most concern to Members.

Nature of records and correspondence held by Members

1.6 The kinds of records and correspondence held by Members are diverse. In its submission, National Archives noted that it had legal advice from the Attorney-General's Department that records created and received by Members in their official capacity are prima facie their personal property and are not Commonwealth records. Examples of Members' private records include:

- personal (ie, domestic or family-related) records: for example, correspondence, photographs, other family records, legal and financial records;
- party records relating to the Member's participation in the activities of the political party to which they belong;
- parliamentary related records including speeches in the Parliament;

1 Attorney-General's Department Submission, p.1.

2 Ibid.

- copies of correspondence with Ministers;
- reference material; and
- electorate records (including correspondence with constituents).³

Commonwealth records held by Members could 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; and
- records received or created by Ministers in their official capacity.⁴

Concerns raised by Members

1.7 The primary concern of members in relation to their records and correspondence, as expressed in submissions and at the roundtable discussion on 26 June 2000, was with protection of the confidentiality of their dealings with constituents. Members were concerned that if their dealings with constituents were not confidential, constituents would not wish to raise matters with Members in a frank and open way. This was identified clearly in the submission from Hon Warren Truss MP:

I have no doubt most constituents who contact their Member of Parliament expect their communications to be confidential. In addition, Members need to feel free to be able to fully and frankly represent their constituents without the constraints which could be imposed by concerns that any documentation may later be placed on the public record through court proceedings.⁵

1.8 While he wished to have some clarification, and greater protection for such communications, Mr Truss considered that it would not be reasonable to provide privilege for all communication involving a Member.⁶

1.9 In addition to possible disclosure through court proceedings, Members were concerned that representations made on behalf of a constituent to a Minister, once those representations were passed to a department for

3 Submission from National Archives of Australia.

4 Submission from National Archives of Australia.

5 Submission from Hon Warren Truss MP, p.1.

6 Ibid, p.2.

investigation and response, could be made public as a result of a freedom of information (FOI) request. As a result of these concerns, one member indicated that he always assumed with any of his correspondence, that there was the possibility it may appear in the media.

- 1.10 A lesser concern of Members, but nevertheless a real issue for them, was the possibility of defamation action being taken against them for statements made in their correspondence passing on the concerns of constituents.
- 1.11 There have been two matters involving the correspondence of Members that have been examined by the Committee in recent years.⁷ In each case, the matter of privilege that was raised was not that the correspondence of Members was part of 'proceedings in Parliament' and hence not subject to any impeachment or questioning outside of Parliament, but that the action taken against the Members constituted an improper interference in the Members' performance of their duties as Members.
- 1.12 In the case of Mr Nugent the Committee found that the circumstances were such as to impair his independence in the performance of his duties. However, in the case of Mr Sciacca, the Committee concluded that Mr Sciacca had not been subject to improper interference in the performance of his duties as a Member. In any such case, unless a Member can demonstrate that their correspondence falls within the definition of 'proceedings in Parliament' and is covered by absolute privilege, it will depend on the circumstances of each individual case as to whether the threat of defamation action amounts to a contempt. Such circumstances are likely to be unusual. As the Committee noted in its report on Mr Sciacca's case:

Members will rightly point to the fact that in letters to Ministers they will often be seeking to protect or further the interests of constituents but, on the other hand, citizens are entitled to argue that the law and procedures of Parliament should not be such that where a particular action on the part of a Member is not covered by absolute privilege the House does not use its powers of contempt so as to achieve a de facto extension of absolute privilege by acting against any citizen who challenges a Member in such matters.⁸

- 1.13 Submissions and the roundtable discussion also indicated that Members are not always clear about the status of their records and correspondence
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7 House Committee of Privileges, 'Report Concerning a letter received by Mr Nugent MP', PP 118, 1992 and 'Report Concerning Writ of Summons served on Mr Sciacca, MP', PP 78, 1994.

8 PP 78, 1994, p.7.

and the implications for them of taking particular approaches to the handling of their records and correspondence. Two Members who made submissions (Mr Andren, MP and Mr Billson, MP) wished to have clarification of the current status of the protection given to their records and correspondence rather than seeking an extension of protection. The Clerk of the House also noted that the key features of the present arrangements regarding the legal protection of the records and correspondence held by Members are not well known. The Clerk considered 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'.⁹

1.14 The issues which arise for Members in relation to the current status of their records and correspondence can be summarised as follows:

- there is a concern about the confidentiality of Members' dealings with constituents being breached by orders for the production of documents in court proceedings;
- there is a concern about the confidentiality of Members' dealings with constituents being breached by having representations to Ministers on behalf of constituents being made public through FOI requests;
- there is a lesser concern about possible action for defamation being taken as a result of statements made in correspondence; and
- there is a lack of clarity of understanding by Members of the legal status of their records and correspondence.

1.15 The concern which Members have about their relationships with constituents is a very real one. While caring for the needs, and representing the interests, of constituents have always been central to the duties of a Member, the importance of these duties has grown in recent years as constituents increasingly look to their local Member for assistance in dealing with the legal and administrative complexities of modern life. There is no doubt that the assurance constituents might have that they can speak openly and freely to their local Member is important in ensuring they continue to approach their Member for assistance. The greater the assistance and guidance that Members can have in handling the representations of their constituents, the better placed Members will be to handle any issues which might arise.

Outline of the report

1.16 In addressing the terms of reference, the Committee will:

⁹ Clerk of the House of Representatives, Memorandum, p.5.

- outline the present position generally in relation to the legal status of the records and correspondence held by Members (Chapter 2);
- comment on the adequacy of the current position given the concern which Members have about this area (Chapter 2);
- indicate whether additional protection can be extended to these records evaluate the options to provide additional protection (Chapter 3); and
- consider whether additional protection should be extended or, if not, what other options should be pursued (Chapter 4).