Report of the inquiry into the status of the records and correspondence of members

House of Representatives
Standing Committee of Privileges

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Contents

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Terms of reference

On 31 March 1999 the House referred to the committee 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.

List of recommendations

1. The Committee recommends that there should be no additional protection, beyond that provided by the current law, given to the records and correspondence of Members.

2. The Committee recommends that, at the discretion of the Speaker, the House may intervene to assert the protection of parliamentary privilege in court proceedings in which the records and correspondence of Members may reasonably be argued to fall within the definition of 'proceedings in Parliament' as contained in subsection 16(2) of the *Parliamentary Privileges Act 1987*.

3. The Committee recommends that a memorandum of understanding (MOU) be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by the Commonwealth law enforcement agencies on Members, the employed staff of Members and Members' Parliament House and electorate offices. Such an MOU would not be intended to create any immunity or change to the existing law, but enable ground rules to be agreed to assist Members when dealing with these situations.

4. The Committee recommends that memoranda of understanding be concluded between the Presiding Officers and State and Territory Attorneys-General on the execution of search warrants by Commonwealth State and Territory police and other State and Territory law enforcement agencies on the electorate offices of Members. The Commonwealth Attorney-General should place this matter on the agenda of the Standing Committee of Attorneys-General as the coordinating body to obtain agreement for memoranda.

5. The Committee recommends that to assist members in dealing with issues that arise in relation to their records and correspondence there should be:

    - the development of a set of guidelines available to Members to assist them to consider the status of their records and correspondence and provide guidance to them as to how their records and

correspondence should be handled. The Committee will develop and issue draft guidelines for discussion;

- inclusion in the seminars for new Members and their staff of information about the status of Members' records and advice on how to handle such records; and
- the briefing of existing Members and their staff on the status of Members' records and advice on how to handle such records.

1

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

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).

2

The present position

2.1 In this chapter the Committee describes the nature and extent of the protection afforded by parliamentary privilege, as well as giving an overview of relevant common law and legislative provisions.

Nature of privilege

2.2 The term *privilege* means an immunity from the ordinary operation of the law. The immunity can operate in either of two ways:

- to defeat a legal action in certain circumstances; or
- as a bar to the adducing of evidence in an action.[10]

2.3 While privilege is often referred to as belonging to the person who claims it, it is acknowledged that 'Privilege attaches not to content, but to occasion or form. … Nor does privilege belong to the speaker, although it is frequently referred to as an attribute of the person who avails himself of the defence.'[11]

2.4 In its discussion of the operation of privilege and immunities generally, the Attorney-General's Department summarised as follows:

> Privilege, whether absolute or qualified, may operate to defeat a legal action in certain circumstances. Parliamentary privilege, for example, provides absolute immunity from action for Members of Parliament in respect of defamatory statements made in the course of parliamentary proceedings. Qualified privilege, which has a

10 Attorney-General's Department Submission, p.2.

11 Fleming, J, *The Law of Torts*, 9 ed., 1998, pp.614-615; Fleming refers to *Minter v Priest* [1930] AC 558 at 571-572.

> more limited operation, may be raised as a defence in an action for defamation. In addition, in the law of evidence, a privilege is a right to prevent information or documents being disclosed pursuant to compulsory process or documents being admitted in evidence in proceedings.[12]

2.5 The Attorney-General's Department distinguished between the privilege that can apply in terms of the law of defamation and that which applies in the law of evidence. It referred again to the way that parliamentary privilege can operate both in respect of legal actions and in respect of evidence: 'Parliamentary privilege may … operate as a bar to a legal proceeding being brought and as a restriction on the information or material that can be obtained by a court, and on what evidence may be admitted.'[13]

2.6 It is useful to bear in mind when considering the issues raised during the inquiry, the nature and special purpose of parliamentary privilege:

> Parliamentary privilege relates to the special rights and immunities which belong to the Parliament, its Members and others, which are considered essential for the operation of the Parliament. These rights and immunities allow the Parliament to meet and carry out its proper constitutional role, for Members to discharge their responsibilities to their constituents and for others properly involved in the parliamentary processes to carry out their duties and responsibilities without obstruction or fear of prosecution.
>
> Privileges are not the prerogative of Members in their personal capacities… "[T]hey are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent."[14]

The privilege of freedom of speech

2.7 The major privilege or immunity that may offer a measure of protection to the records and correspondence held by Members is the parliamentary privilege known as the 'freedom of speech' privilege. This immunity is declared in Article 9 of the *Bill of Rights 1688*:

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12 Attorney-General's Department Submission, p.2.

13 Attorney-General's Department Submission, pp.2-3.

14 Barlin, LM, *House of Representatives Practice*, 3 ed., 1997, p.680.

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

2.8 Article 9 still applies—by virtue of section 49 of the Constitution. That section 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.

2.9 The continued status of Article 9 and freedom of speech in Parliament is made clear by subsection 16(1) of the *Parliamentary Privileges Act 1988* (Privileges Act):

> For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth….

'Proceedings in Parliament'

2.10 The 'freedom of speech' privilege has particular importance because it gives to 'proceedings in Parliament' a special status in terms of the law. The Privileges Act does not purport to be a complete statement of the law, but it does provide substantial elaboration and clarification of what amounts to 'proceedings in Parliament' (subsection 16(2)) and the special immunity that attaches to such 'proceedings in Parliament' (subsection 16(3)).

2.11 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 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;
>
> (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.

2.12 The definition is broad: it refers to 'proceedings in Parliament' as including words and acts done 'incidental to' the transaction of the business of a House or of a committee. The application of the definition to the records and correspondence of Members is discussed below.

The protection offered

2.13 The protection to be given to 'proceedings in Parliament' is defined in subsection 16(3) of the Privileges Act:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

2.14 The effect of subsection 16(3) is not that parliamentary proceedings may not be disclosed or produced in courts or other tribunals (they can be used in limited circumstances, for example to establish matters of fact). However, they may not be used to question the truth or motive of any part of the proceedings, or the persons involved in the proceedings, nor to draw inferences or conclusions from the proceedings. As the Clerk of the House noted in his memorandum to the Committee:

> 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.[15]

2.15 The broad effect of section 16 of the Privileges Act is that:

- Members, witnesses who present evidence to committees, and others who take part in parliamentary proceedings are immune from civil or criminal action and examination in court in relation to the proceedings; and
- proceedings in parliament are immune from impeachment or question in courts and tribunals.[16]

Do the records and correspondence of members amount to 'proceedings in Parliament'?

2.16 Unless the records and correspondence held by Members fall within the scope of 'proceedings in Parliament' they would not enjoy the special legal status offered by parliamentary privilege. There has been considerable debate about whether the records and correspondence of Members fall, or should fall, within the definition of 'proceedings in Parliament' such that they attract parliamentary privilege.

2.17 In determining whether documents have the status of 'proceedings in Parliament', the question to be answered has been outlined as: has an act been done [by a member or his or her agent] in relation to the records or correspondence 'in the course of, or for purposes of or incidental to' the transacting of the business of a House [or a committee]?[17]

2.18 If the answer is yes—that necessary connection is established—then a second question arises: does the use proposed to be made of the records or correspondence amount to impeaching or questioning those 'proceedings in Parliament'? There does not appear to be a clear view of the meaning of 'impeach', although some possible meanings include 'hinder, challenge and censure'.[18]

15 Memorandum by the Clerk of the House of Representatives, p.2.

16 Attorney-General's Department Submission, p.5.

17 To paraphrase McPherson JA in *O'Chee v Rowley* (1997) 150 ALR 199 at 209: Was the 'creating, preparing or bringing those documents into existence' an act 'done for purposes of or incidental to the transacting of Senate business'? See also the Attorney-General's Department submission, p.5.

18 Joint Select Committee on Parliamentary Privilege (UK), *First Repor*t March 1999, paragraph 36.

2.19 The provisions of subsection 16(3) of the Privileges Act provide guidance as to the circumstances in which 'proceedings in Parliament' should not be tendered to, or used in evidence in, a court or tribunal. These threshold questions are considered in more detail below.

2.20 As 'proceedings in Parliament' is defined in the Privileges Act, its scope is one for statutory interpretation by the courts. The case of *O'Chee v Rowley*[19] is relevant; it concerned the production in a court of documents in the possession of then Senator O'Chee. These documents included communications from constituents and letters exchanged between the Senator and another MP. The documents were sought in relation to a defamation action by a Cairns fisherman following statements that Senator O'Chee had made in a radio interview. Senator O'Chee had addressed the issue of long line fishing in two speeches in the Senate and claimed he had used the documents in making his remarks (although he did not table them). He claimed the documents were 'proceedings in Parliament' and hence were covered by parliamentary privilege.

2.21 The Court of Appeal in Queensland held that if documents came into the possession of a member of Parliament who retained them with a view to using them, or the information contained in them, for questions or debate in a House of Parliament, then the procuring, obtaining or retaining of possession were acts done for the purpose of, or incidental to the transacting of the business of that House pursuant to subsection 16(2) of the Privileges Act.

2.22 In other words, if the records and correspondence in the possession of parliamentarians are used (in some way) for the purpose of transacting the business of a House or a committee, parliamentary privilege would attach.[20] The secondary issue of whether the use proposed, in this instance an order for production, amounts to impeaching or questioning is discussed below, in the section on resisting an order for production.

2.23 While it is clear that some of the records and correspondence of Members would attract parliamentary privilege, much of the material, including most electorate correspondence, would fall outside the definition of 'proceedings in Parliament'. The boundary between those records and correspondence that are 'proceedings in Parliament' and those that are not is not always clear. Further consideration of this area by the courts would offer greater clarification although, at the boundary, there will always be uncertainty. While further interpretation by the courts may widen the existing boundary to embrace more of the electorate records of Members, a statutory extension would be necessary to cover these records generally.

19 (1997) 150 ALR 199.

20 (1997) 150 ALR 199.

2.24 When assessing the protection afforded in respect of the records and correspondence of members it will also be necessary to consider the common law. The common law defence of qualified privilege may operate as a defence against actions for defamation in some circumstances. Qualified privilege is discussed in more detail below.

Disclosure and production of documents

Subpoena for production

2.25 From time to time Members have been served with subpoenae to produce to a court those records the Member holds that are relevant to a matter before the court. On occasion Members have been required to appear before the court with the relevant records. A subpoena to obtain documentary evidence for a trial is an order of the court and may be issued at the request of a party to proceedings in respect of documents held by a person who is not willing to produce them voluntarily.

2.26 The usual procedure is that a witness served with a subpoena produces the required documents to the court. The court then decides the use to be made of the documents, that is, whether or not to allow the parties to inspect them. Finally the court must decide whether the documents are admissible in evidence when a party seeks to tender them.[21] The most appropriate time to make a claim that the documents arise from a privileged occasion (and so seek an order that the documents need not be produced) would be the first date set for the documents to be produced to the court. McNicol notes: 'Because the power to subpoena is ultimately concerned with making sure that all relevant information is made available at the trial in order to facilitate the proper administration of justice, the final arbiter of whether attendance or production should be coerced is the court itself in the exercise of its discretion'.[22]

Discovery process

2.27 Another cause for concern in the context of Members' records arises from the fact that federal and state courts and some tribunals can compel the disclosure and production of documents during the course of litigation. Rules of court provide for a process of discovery in litigation. This process (which occurs at an earlier time in litigation than the issue of a subpoena

21 Cairns, BC, *Australian Civil Procedure*, 3 ed., 1992, pp.457-458.

22 McNicol, SB, *Law of Privilege*, 1992, p.15.

to give evidence or produce documents) allows for parties to question each other and to disclose and make available to each other (through the Court and subject to claims of privilege) all relevant documents—before the matter is heard. This helps to ensure that the parties are on a (relatively) equal footing and each knows the case he or she must meet, but also that the issues for trial are narrowed and the case is decided on its merits.

2.28 The discovery process involves the parties to litigation exchanging lists in which documents that are relevant to the issues of the case are identified; the documents are then made available for inspection—provided any claims of privilege are not made out. The lists must disclose documents that the party possesses and also those that have been disposed of or are held by agents. The parties must each disclose all documents in the party's possession, custody, or power that relate to a matter in question in the action. Sometimes the documents need not be in the custody of the party making the list.[23] It can be seen from this that, while a Member may not be a party to an action, documents held by the Member may be subject to the discovery process. In this way they may be required to be disclosed, produced, and admitted into evidence.

2.29 There is a public interest, as well as an interest by the individual parties, in having all relevant material made available to a court, such that a case is decided on its merits, rather than on technicalities, or by surprise. It has also been noted that:

> There is no rule of law which allows a witness in court proceedings to refuse to give evidence or disclose information merely because the evidence or information was supplied to the witness in confidence. However, in certain circumstances a witness can claim privilege; and this means that information which is otherwise relevant to the issues to be tried and which the witness would otherwise be under an obligation to disclose, may be withheld from the court or administrative tribunal.[24]

2.30 Nonetheless, a Member may wish to resist an order to produce records or correspondence, particularly where such records or correspondence were obtained or prepared in confidence or they have the necessary connection with proceedings in Parliament.

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23 Cairns, BC, *Australian Civil Procedure*, 3 ed., 1992, p.319.

24 McNicol, SB, *Law of Privilege*, 1992, p.1, in a discussion of the policies behind (general) notions of privilege.

Resisting an order to produce documents

2.31 While Members may wish to resist a subpoena to produce documents, generally speaking they would expect at least to respond to the court and, if appropriate, object to the order on the grounds of privilege. In common with other groups in society, Members are generally subject to the law:

> If there is an action being brought as a criminal action or a civil action and the records held by any of that array of people [accountant, social welfare worker, doctor, priest…] are subpoenaed, then they will have to be produced. The member of parliament is in exactly the same position as that array of other professional persons. The question that then has to be addressed is whether the member of parliament has some special position that distinguishes members of parliament from that full array of other what might be termed confessional or advice points. …
>
> You have to accept that people will assume that everything that they are saying may be confidential between you, the recipient, and them, but that does not stop the ordinary processes of the law from working.[25]

2.32 Technically, to defeat an order to produce documents, a Member would need to satisfy the court that:

- the documents fell within the definition of 'proceedings in Parliament' and so were not to be subject to impeachment or question; and
- the order to produce the documents amounted to such an impeaching or questioning.

2.33 It is also possible that a court may not allow a party to press for compliance with an order if objections have been raised by a Member.

'Proceedings in Parliament'

2.34 As indicated above, the case of *O'Chee v Rowley*[26] in the Queensland Court of Appeal provides some guidance on the status of Members' records and correspondence that are subject to an order for production. In that case it was considered that 'proceedings in Parliament' includes all acts done for purposes of or incidental to the transacting of any business of a House, including bringing documents into existence with such purposes, or, collecting or assembling, or coming into possession of them, for those

25 Professor Dennis Pearce, Transcript of Evidence, 26 June 2000, p.14.

26 (1997) 150 ALR 199.

purposes.[27] The privilege under subsection 16(2) is attracted 'when, but only when, a member of parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business.'[28]

2.35 This last statement by McPherson JA in the *O'Chee* case was referred to with apparent approval by Jones J of the Supreme Court of Queensland in *Rowley v Armstrong*.[29] However, Jones J in the latter case did not ask whether an act had been done with respect to the relevant documents, but declared that an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in Parliament'. This conclusion was made at only a preliminary stage in proceedings but because of its possibly serious implications it has been the subject of critical attention by the Clerk of the Senate in the Senate Committee of Privileges' 92nd Report at Appendix A.

'Impeaching or questioning'

2.36 Whether an order for production amounts to 'impeaching or questioning' was not settled by the *O'Chee* case but some clarification is provided by the discussion. In that case it was argued that parliamentary privilege is a testimonial privilege and that an order for disclosure of documents is a direct substitute for a question at trial asking what information was the basis of the Senator's statements and parliamentary speeches.[30] While this argument did not appear to be persuasive, it would nevertheless appear it may not be necessary to show that the proposed use is so directly 'questioning'. McPherson JA asked whether compulsory production for inspection of the Senator's documents would 'hinder, impede or impair an act or acts done for purposes of or incidental to the transacting of Senate business; or detrimentally or prejudicially affect or impair it.'[31]

2.37 McPherson JA interpreted 'impeaching or questioning' broadly and concluded that to order the Senator to produce in court documents that fell within 'proceedings in Parliament' would be to 'hinder or impede the doing of such acts for those purposes'. He stated that if the order had not already 'hindered or impeded the transacting of this matter of Senate business, it is predictable that in future it will do so with respect either to

27 (1997) 150 ALR 199.

28 *O'Chee v Rowley* (1997) 150 ALR 199 at 212 (McPherson JA).

29 [2000] QSC 88

30 *O'Chee v Rowley* (1997) 150 ALR 199 at 203.

31 (1997) 150 ALR 199 at 211.

this or to some other matter of business being, or about to be, transacted in a House of the Parliament.'[32]

2.38 If Members were able to show that records sought in an order did form part of 'proceedings in Parliament', they might submit to a court that the only purpose of the order for discovery or production of documents would be contrary to the immunity provided by the law. Or they may cooperate with the court by disclosing and or delivering up documents such as records or correspondence to the court but then contest the use that can be made of them. For instance, they may request that documents remain in possession of the court and certain matters be kept confidential. In this way it may be possible to retain some degree of confidentiality for documents, if that is the major concern.

2.39 Although not strictly relevant for the purposes of this inquiry it should be noted there are situations where records that do comprise 'proceedings in Parliament' may be admitted into court as evidence, although the use that may be made of the records is limited. The Privileges Act, in subsection 16(5), makes specific reference to the consideration by courts of records of parliamentary proceedings in respect of the Parliament's intention in relation to interpretation of legislation, questions arising under section 57 of the Constitution—disagreements between the Houses, and prosecutions relating to proceedings in Parliament.

2.40 The use of records of proceedings in Parliament for purposes other than questioning or impeaching may still involve formal considerations. *Odgers' Australian Senate Practice* notes that immunity of parliamentary proceedings from scrutiny by courts was supported by a practice of not allowing the records of proceedings to be referred to in court without approval of the House concerned. The practice was abolished by the Senate in 1988 because the courts have 'usually been scrupulous to observe the law and to refrain from questioning parliamentary proceedings'.[33] However, the practice for the House of Representatives is that leave should be sought for reference to be made in court to parliamentary records, although it has been suggested that the granting of leave is not required as a matter of law.[34]

Contempt

2.41 Members are not without other and potentially powerful recourse in these matters. Aside from claiming that parliamentary privilege provides immunity from an order to produce documents, a Member may object to

32 (1997) 150 ALR 199 at 215.

33 Evans, H, *Odgers' Australian Senate Practice*, 9 ed., 1999, p.34.

34 Barlin, LM, *House of Representatives Practice*, 3 ed., 1997, p.688.

or seek to resist an order for production on the grounds that the action proposed in respect of the order amounts to contempt. That is, the Member would claim the actions or elements of them fall within the definition of section 4 of the Privileges Act which sets out the nature of conduct that constitutes an offence against a House. However, it would be necessary to show that the seeking or pressing of the order was intended or likely to amount to an improper interference with the free performance by a Member of the Member's duties as a Member.

2.42 A precedent that has relevance is the conclusion of this Committee in its 1995 *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP*. While the report related to the execution of a search warrant rather than an order to produce documents, the arguments are relevant. The Committee found (at paragraph 30) that disruption was caused to the work of Mr Cameron's electorate office by the execution of a search warrant. Although the actions did amount to interference in the free performance by Mr Cameron of his duties as a Member, the interference was not regarded as improper interference for the purposes of section 4 of the Privileges Act. The Clerk's memorandum to the Committee on that occasion contains useful discussions of the meaning of improper interference and free performance of a Member's duties.[35] Later in this chapter the Committee considers the execution of search warrants generally.

2.43 This consideration illustrates the possibility that an otherwise legal action can still be held to be a contempt—an offence against a House. This Committee and the Senate Committee of Privileges have each acknowledged this possibility. Examples could include the initiation of an action for defamation or the execution of a search warrant. Such actions are legal and proper in themselves. Under Parliamentary law, however, if it is found that there is another element (for example an attempt to intimidate or to interfere improperly with the performance of a House or a committee's function or with the performance of a Member's duties) persons responsible may be found guilty of contempt.

Exemption

2.44 The Committee notes that some temporary and limited protection in respect of attendance in court is provided in section 14 of the Privileges Act which confers on Members an immunity from a requirement to attend at a court within five days of a sitting by the House or meeting of a committee of which the Member is a member. This is relevant where a Member is required to attend court and present documents.

35 See pages 5 and 6 of Attachment F to the 1995 report.

Execution of search warrants

2.45 Search warrants—usually issued by a magistrate or judge—authorise a search of persons and premises for items connected with an offence. Seizure of relevant items would also be authorised by the warrant.[36] As the Clerk of the House has indicated in his memorandum to the Committee, there is no immunity under the law of parliamentary privilege to exempt Members' electorate offices from the execution of search warrants.

2.46 While Members would not wish to obstruct the investigation of criminal matters, and would be aware that parliamentary privilege could not be used in this way, it is possible that Members may possess some sensitive or confidential information that they would wish to protect from inappropriate disclosure and seizure. They may also wish to protect copies of records and correspondence they create as a result of receiving information in confidence. This situation may arise, for example, if the warrant is expressed to cover a very broad range of documents or items.

2.47 It is possible for Members to argue to a court that any particular records being sought should not be disclosed or seized because of their association with 'proceedings in Parliament'. However, as the Committee has noted, even if that association could be made out, the nature of the privilege relied upon in essence concerns the use that can be made of the records, rather than providing an outright immunity from disclosure or seizure. The relevant question then is: does the use proposed amount to impeaching or questioning? The first opportunity to make this argument would likely be in an application for an injunction against the officers who have seized the material.

2.48 Another course open to a Member is to raise the execution of the warrant as a matter falling within section 4 of the Privileges Act (improper interference…) and to argue that it amounted to a contempt, as Mr Cameron did. Even then, for practical reasons, the complaint is likely to be made after the execution of the warrant rather than in an attempt to avoid it.

2.49 It may be useful to consider again the Committee's recommendation in its report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP. This was that the House request the Speaker to initiate discussions with the Minister for Justice with a view to reaching an understanding with the Australian Federal Police in respect of the execution of search warrants. This was not to create any immunity or

36 Section 3E of the *Crimes Act 1914*, for example, sets out the conditions for issue of a search warrant.

change to statutory provisions, but to enable ground rules to be agreed in the interests of the proper operation of electorate offices and the assistance and services provided to constituents (paragraph 31). Such an agreement has not been reached, and it should also be noted that, for practical purposes, execution of search warrants at Members' electorate offices might involve State police. Further discussion of the execution of search warrants in Members' Parliament House and electorate offices is contained in Chapter 4 of this report.

2.50 With respect to whether the issue of a search warrant can raise a question of parliamentary privilege, and the appropriate venue for arguing the applicability of a search warrant to members' records—the courts or the parliament—the Committee received evidence from Professor Lindell. He referred to a recent case involving a search warrant issued in respect of a Senator's records. In the case of *Crane v Gething*, Mr Justice French referred to claims of parliamentary privilege in respect of a number of documents seized during execution of a search warrant on a Senator's parliamentary and electorate offices:

> … it does not fall to this Court to determine the exercise of parliamentary privilege here. Indeed it does not seem to me that the relevant privilege, if it exists, arises under s 16 at all. The documents in question have been seized pursuant to a search warrant issued under s3E of the *Crimes Act 1914*. The issue of the warrants, albeit done in each case by an issuing officer who was a magistrate, was an administrative and not a judicial act…[37]

2.51 His Honour went on to state that the issue of a search warrant differs fundamentally from the issue of a subpoena or a court order for production and inspection of documents or the requirement that a person answer questions:

> Those are coercive processes of a court. The court can be asked, in connection with those processes, to determine questions of parliamentary privilege that may arise… The issue of a search warrant is an executive act in aid of an executive investigation. The investigation may lead to the initiation of criminal proceedings. … The issue of a search warrant itself does not commence any judicial proceeding.[38]

2.52 In the *Crane* case the court noted the Senator had claimed parliamentary privilege over all seized documents when the warrant was executed. In that case the procedure followed by the executing officers was set out in guidelines agreed between the Australian Federal Police and the Law

37 *Crane v Gething* [2000] FCA 45.

38 *Crane v Gething* [2000] FCA 45.

Council of Australia in respect of execution of warrants on a lawyer's premises where a claim of legal professional privilege is made.

2.53 The Clerk of the Senate, Mr Evans, noted that the Senate made a submission to the Court in the *Crane* case, 'to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected'.[39]

2.54 Professor Lindell has commented on the *Crane* case:

> The judge thought that because the process of issuing the search warrant in regard to these records was an administrative act, or an executive act, somehow or other it did not raise problems of parliamentary privilege. … The second point which I think is a little doubtful is that if there is a parliamentary privilege matter raised by the wrongful issue of these search warrants, it was a matter solely for the parliament and not for the court to deal with. … That too I have some difficulty with, and I think it does require some very close examination because it tends to suggest that the activity of issuing that search warrant, which was very wide-ranging indeed, could reach into all sorts of documents, even those that were needed for transacting the business of the House.[40]

2.55 The issues arising here are a matter for further consideration (although the Committee notes the *Crane* decision was made by a single judge), particularly whether matters of parliamentary privilege arising from the issue of search warrants should be a matter only for the Parliament. The practical implications may be considerable. For example, a claim of privilege that could only be raised in the Parliament might not be able to be pursued for some time and perhaps then may be prepared inadequately or be pointless to pursue. While parliamentary privilege may not be expected to provide protection from seizure of documents pursuant to a search warrant, a claim of contempt might possibly be made out after such seizure (see paragraphs 2.17-2.18 etc for a discussion of threshold issues). In the final chapter the Committee raises some practical measures that would go some way towards avoiding difficulties.

39 Submission from the Clerk of the Senate, p.3.

40 Professor Geoffrey Lindell, Transcript of Evidence, 26 June 2000, p.23.

Protection against defamation action

2.56 If a Member was concerned that information in documents or records being sought to be disclosed or produced may result in a defamation action against the person who has supplied information, or the Member, then it may be possible to raise the common law defence of qualified privilege.[41] That is, the Member could claim that the occasion or circumstances regarding communication of the information are protected by qualified privilege.

2.57 Qualified privilege is not related to parliamentary privilege, but arises from the public interest in allowing people to communicate 'frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect.'[42]

2.58 To raise the defence of qualified privilege to a defamation action, the defendant must show that the person who made the defamatory statement had an interest or legal, moral or social duty to make it to the receiver, and the person who received it has a corresponding interest or duty to receive it. Such a claim would be defeated if the plaintiff could prove that the defendant made the communication with malice or lack of good faith.[43] The test for the duty is: 'would the great mass of people of ordinary intelligence and moral principle have considered it their duty to make or receive … the communication complained of?'[44] The duty must actually exist; it is not sufficient that the defendant honestly and reasonably believes it exists.[45]

2.59 There is no exhaustive list of occasions on which qualified privilege arises as a defence. The Attorney-General's Department notes there have been no reported cases in Australia in which a Member's records and correspondence were considered to be protected by qualified privilege.[46] However, the English High Court found that a Member who has received a letter from a constituent seeking assistance in advising a Minister of improper conduct by a public official has sufficient interest in the subject-matter of the complaint to make the occasion of publication a privileged one.[47]

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41 The Attorney-General's Department submission at p.7 notes there are statutory provisions in some states: s.22 *Defamation Act 1974* (NSW); s.16 *Defamation Act 1889* (Qld); and s.16 *Defamation Act 1957* (Tas).

42 *Horrocks v Lowe* [1975] AC 135 at 149, cited in the Attorney-General's Department submission, p.7.

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

44 Gillooly, p.171.

45 Gillooly, p.172.

46 Attorney-General's Department Submission, p. 8.

47 Attorney-General's Department Submission, p.8, citing *R v Rule* [1937] 2 KB 375 at 380.

2.60 In the Australian case of *Lange v ABC*[48] the High Court may have extended the range of information giving rise to claims of qualified privilege in a manner that has relevance for this inquiry. The Court stated that '…each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it.'[49]

Communications by high officers of State

2.61 Discussion of the relevant common law defences would not be complete without mention of the privilege applying when statements are made by high officers of government in their official capacity. These statements are absolutely privileged from actions in defamation. However, it is not at all clear that this privilege may apply to the records and correspondence of Members because the communications so protected have usually between Ministers and the Crown and from one Minister to another.[50] The Committee accepts that Members should not seek to rely on any such protection in respect of their records.

Freedom of information and privacy

Freedom of Information Act 1982

2.62 As the Clerk has indicated in his memorandum to the Committee, application of the *Freedom of Information Act 1982* (FOI Act) is limited to records held by government. It is directed to providing a general right of access to information held by Ministers, government departments and public authorities, and does not apply to parliamentary records, or to records held by Members.

2.63 However, Ministers' offices and government agencies would hold copies of Members' representations in respect of the agency on behalf of constituents (some of which may contain sensitive information) and these may be sought for release under freedom of information legislation. The Attorney-General's Department referred the Committee to an exemption to the FOI Act that would have particular relevance, that is, the exemption

48 (1997) 189 CLR 520, cited in Attorney-General's Department submission at p.8.

49 (1997) 189 CLR 520 at 571.

50 Gillooly, p.156.

in respect of personal information.[51] Professor Pearce noted that there is no obligation to produce a document that reveals a person's personal affairs.[52]

2.64 Under the FOI Act, a document is exempt if its disclosure would involve the unreasonable disclosure of personal information about any person (subsection 41(1)). 'Personal information' is defined in subsection 4(1) as:

> information or an opinion … whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

2.65 In its Guidelines for Consultation Prior to Any Release of Documents Containing Personal Information[53] the Attorney-General's Department notes that 'personal information' should be interpreted broadly. The Department suggests that agencies interpret the consultation provisions broadly, in order not to deprive an individual of an opportunity to make a case for refusing access to information that may be 'personal information'.

2.66 In discussing section 27A of the FOI Act (this sets out the procedure before an agency may release documents or parts of documents containing personal information) the Department states that a decision to grant access should not be made unless, where it is reasonably practicable, the agency or Minister has given the person a reasonable opportunity to contend that the document is exempt so far it contains personal information. Also, it should appear to the decision maker that the person whom the information concerns might reasonably wish to contend the document is exempt under section 41.

2.67 The decision as to whether or not disclosure is unreasonable depends on the balance of privacy interests of the third party and the public interest that may favour disclosure, including the general public interest in access to government-held information.[54] However, it is for the agency to decide

51 Attorney-General's Department, Transcript of Evidence, 26 June 2000, p.21.

52 Professor D Pearce, Transcript of Evidence, 26 June 2000, p.14.

53 Attachment A to the Attorney-General's Department's 'New FOI Memorandum No. 94, Amendments Since the Freedom of Information Amendment Act 1991'.

54 Attachment A to the Attorney-General's Department's 'New FOI Memorandum No. 94, Amendments Since the Freedom of Information Amendment Act 1991', p.II.

whether disclosure would be unreasonable or not. 'The third party does not have a veto over disclosure'.[55]

2.68 Subsection 46(c) of the FOI Act provides that a document is exempt if public disclosure would infringe the privileges of the Parliament.

Privacy Act 1988

2.69 The *Privacy Act 1988* does not apply to Members (other than in their role as Ministers). The Information Privacy Principles in this Act apply to Commonwealth agencies and ACT Government departments. The Principles relate to collecting, storing, using and disclosing personal information. While the Act is not expressed to apply to them, Members would be well aware that they have an important obligation to protect the privacy of constituents and preserve the confidentiality of information obtained in confidence.[56]

Public interest immunity

2.70 Public interest immunity (an evidentiary privilege formerly referred to as Crown privilege) may prevent the production of documents and admission of certain evidence in proceedings. This rule, based on the notion that harm should not be caused to the nation or the public service by the disclosure of certain documents or information, excludes evidence from a court or body if its disclosure would 'be prejudicial or injurious to public or state interest'.[57] The court in each case weighs the public interest in not disclosing the material against the public interest in the administration of justice. Recognised categories of public interest include defence, law enforcement and the proper working of government.[58]

2.71 An objection to admitting evidence on the grounds of public interest may be raised by a party to proceedings, the court or the Crown, although it is for the Court to determine whether a document will be produced or withheld in the public interest. In each case the Court will undertake a

55 Attachment A to the Attorney-General's Department's 'New FOI Memorandum No. 94, Amendments Since the Freedom of Information Amendment Act 1991', p.II.

56 See for instance the draft *Framework of Ethical Principles for Members and Senators* prepared by the Working Group on a Code of Conduct and presented by the Speaker and the President on 21 June 1995.

57 McNicol, SB, *Law of Privilege*, 1992, p.375.

58 Attorney-General's Department Submission, p.10.

balancing exercise, determining whether the public interest is served better by disclosure or non-disclosure.[59]

2.72 As well as the common law, legislation provides for the exclusion of evidence in some circumstances. Section 130 of the *Evidence Act 1995* provides that if the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, then the court may direct that it not be adduced as evidence.

2.73 'Matters of state' includes matters such as those that:

> (a) prejudice the security, defence or international relations of Australia; or …
>
> (e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or State; or
>
> (f) prejudice the proper functioning of the government of the Commonwealth or a State.[60]

2.74 Matters that the court may take into account (in subsection 130(5)) include:

> (a) the importance of the information or document in the proceeding; …
>
> (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
>
> (d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication.

2.75 Both the common law and legislative provision make clear that there are substantial requirements to making out a successful claim of public interest immunity. Again, the Committee accepts that Members could not make assumptions about any protection on this ground for their ordinary records.

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59 McNicol, SB, *Law of Privilege*, 1992, pp.386, 390; McNicol quotes Stephen J in *Sankey v Whitlam* (1978) 53 ALJR 11 at 29.

60 Subsection 130(4) of the *Evidence Act*.

Summary of present position

2.76 In summary, the present position is that records and correspondence held by Members and which do not concern 'proceedings in Parliament' do not enjoy any special 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). The ambit of 'proceedings in Parliament' has not been defined sufficiently to distinguish clearly in every possible circumstance between the records of Members that are 'proceedings in Parliament' and those that are not. However, it is clear that much of the records and correspondence held by Members, including constituency records, would not fall into the category of 'proceedings in Parliament' and, consequently, would not enjoy the special protection of parliamentary privilege.

2.77 As the Committee has noted, there are two issues to be addressed when considering the protection to be afforded by parliamentary privilege to members' records and correspondence. The first is whether the documents have the status of 'proceedings in Parliament'. If that requirement is satisfied, then the second requirement is to establish that the use proposed (for instance, disclosure and production to a court, admission into evidence, or disclosure to third parties) amounts to impeaching or questioning those proceedings in Parliament.

2.78 The Committee notes that a member may also claim that the action proposed in respect of his or her documents amounts to a contempt – an offence against a House. The Member would need to show that the actions (or elements of them) fall within section 4 of the Privileges Act.

2.79 Some records and correspondence held by Members may gain some protection through the common law, as discussed earlier. The protection of qualified privilege would provide a defence against a defamation action, but it would not avoid an order for the production and inspection of documents, an issue that has been of major concern to Members and, no doubt, to their constituents.

2.80 The matters outlined at paragraphs 2.76-2.79 summarise the legal position. The particular concerns of Members have been canvassed broadly in Chapter 1 and the options for additional protection are canvassed in Chapter 3.

3

Options and their implications

3.1 Although it appears that the main area of concern to Members is to protect the confidentiality of their communications with constituents and Ministers, in this chapter the Committee will consider broadly the options that may be available to protect records from disclosure, production and use in evidence. It will canvass also the nature and implications of such mechanisms for protection.

3.2 To evaluate the measures that it may be necessary and reasonable to resort to in protecting Members' records and correspondence from disclosure or admission in evidence, it is useful to assess the harm that Members are seeking to avoid. In the short term the harm to be avoided might be an inability to maintain the confidentiality of constituents or a breach of privacy. In the longer term the harm to be avoided may be an obstacle to the free flow of information to Members from constituents. Such an obstacle could be seen in some cases to obstruct Members in discharging their responsibilities.

3.3 The Committee is conscious that in all considerations of the protection to be provided by parliamentary privilege, the guiding principle must be whether the protection proposed is necessary for the effective functioning of Parliament.[61]

Power to extend protection

3.4 According to advice from the Australian Government Solicitor's office, Parliament could pass laws to extend protection to Members' records and

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61 See Barlin, LM, *House of Representatives Practice*, 3 ed., 1997, p.680, in a discussion of the meaning and necessity of privilege: 'Parliamentary privilege relates to the special rights and immunities which belong to the Parliament, its Members and others, which are considered essential for the operation of the Parliament.'

correspondence—provided that the protection extended to documents created or obtained by Members in the course of their duties as Members and enabled Members to better discharge their functions and that it be reasonably adapted to achieve this purpose.[62] Care would need to be taken with respect to possible infringement on freedom of speech and also on judicial power (breaching principles of the separation of powers).[63]

3.5 The office further advised that it should be possible to extend the immunity of Members to include immunity from proceedings in respect of their records or correspondence, although a law preventing the use of such records in judicial proceedings would impinge on the operation of courts exercising judicial proceedings. However, if the law prevented certain documents being evidence, it need not require the courts to act in a manner inconsistent with the nature of judicial power.[64]

3.6 Advice from the Australian Government Solicitor and the Attorney-General's Department submission included some options for consideration by the Committee. It is clear that any extension of privilege involves issues of some legal complexity, as well as broader public policy issues, such as the need to balance the public interest in enabling members to better discharge their functions with the public interest in enabling judicial and tribunal proceedings to be as fair as possible.

Options for additional protection

3.7 Some options for consideration include:

- amendment to the Privileges Act, extending privilege to Members in regard to their records and correspondence and including provision to ensure that subsections 16 (2), (3) and (4) cover the documents concerned;
- amendments to evidence legislation. For example, this might be directed specifically to allow application to be made by Members to seek to preserve confidentiality in relation to certain communications. Or, legislation may provide for more stringent requirements before an order can be made against a Member for production. An extreme statutory response to protect such records and correspondence might be to ensure that documentary evidence relating to a Member's

62 Advice from the Australian Government Solicitor, 7 May 1999, p.5. (see attachment to appendix B)

63 Advice from the Australian Government Solicitor, 7 May 1999, pp.3-6.

64 Advice from the Australian Government Solicitor, 7 May 1999, p.4.

parliamentary duties could not be required to be produced or tendered in a court; and

- extension of an equivalent to legal professional privilege to the records of Members.

3.8 The options and their possible implications are considered in some further detail below.

Parliamentary Privileges Act

3.9 The first, and apparently most straightforward, option would be to extend the definition of 'proceedings in Parliament' in section 16 of the Privileges Act specifically to include the records and correspondence of Members. While this would appear to achieve the objective which some Members seek, it has significant implications. An extended definition of 'proceedings in Parliament' would provide absolute privilege from 'impeaching or questioning' in respect of those documents. That would result in a powerful protection for a wide range of documents. However, the Committee is mindful that because of uncertainty about what legal processes amount to 'impeaching or questioning' (as discussed in chapter 2) there can be no certainty that such a significant extension would in fact protect documents from disclosure under compulsory process.

3.10 The Committee is also mindful that not only would such a protection be extremely wide, and therefore difficult to justify, it would also be unwieldy. The privilege defined in section 16 of the Privileges Act does not belong to an individual Member, and cannot be waived by the Member. It follows that an extension of a privilege of this nature would not belong to the individual Member. The difficulty arises that the immunity enjoyed in respect of 'proceedings in Parliament' and the laws on the use of records etc concerning parliamentary proceedings is part of the law of the Commonwealth and 'cannot be waived or suspended by either House acting on its own.'[65]

3.11 The unwieldy nature of this protection is clear. For example, if a Member was being investigated for an alleged illegal act, the Member could use this protection to prevent possible vital evidence being brought forward. It would not be possible for a House to waive the privilege.

3.12 The Attorney-General's Department was also mindful of the consequences of such a powerful protection. It noted that it was not safe to assume that a privilege covering records and correspondence would always be beneficial

65 Barlin, LM, *House of Representatives Practice*, 3 ed., 1997, p.688.

to Members.[66] It distinguished between evidentiary privilege (a person's right to prevent material being produced under compulsory process or to prevent admission of evidence in proceedings) and evidentiary prohibition (preventing material being produced or evidence admitted, except in specific circumstances).[67]

3.13 The Department stated that the privilege provided by section 16 is in fact a prohibition and that any extension would also operate as a prohibition and could not be waived by a Member.[68] This could have perverse consequences in that the privilege would prevent anyone, including a Member, being able to use the Member's records in proceedings, for example to defend a claim against him or her. Members could not use notes of meetings to rebut an allegation about what was said to or by them. An evidentiary prohibition on Members' records and correspondence could in some circumstances place Members in a vulnerable position.[69]

3.14 However, the Department raised the possibility of creating a privilege that did not amount to an evidentiary prohibition but was strictly a privilege. As such it could belong to a person and that person could waive it.[70]

3.15 The Department stated that analogy with existing privileges (these are 'owned' by the person whose interests are protected) would suggest a new privilege would belong to the person communicating with a Member. However, this also would place Members in a vulnerable position.[71] If the new privilege were conferred on Members, the Member could decide whether to invoke, or to waive the privilege. Against the advantage of apparent flexibility is the fact that Members may be lobbied over whether or not to invoke the prohibition and thus may have responsibility for influencing the outcome of proceedings in which they have no interest. A further consideration is that the Department could find no rationale for creating such a privilege.[72] Later in this chapter the Committee considers the claims that have been made for protecting communications within special professional relationships.

3.16 In short the Committee notes that an extension of 'proceedings in Parliament' as defined in the Privileges Act would raise difficulties in respect of the nature of the protection provided. Absolute privilege, a very

66 Attorney-General's Department Submission, p.14.
67 Attorney-General's Department Submission, pp.2-3 and 11.
68 Attorney-General's Department Submission, p.11.
69 Attorney-General's Department Submission, p.14.
70 Attorney-General's Department Submission, pp.14-15.
71 Attorney-General's Department Submission, p.15.
72 Attorney-General's Department Submission, p.15.

powerful protection, would be extended to cover a greatly increased number of situations. The Committee is not aware of any comparable Parliament where proceedings have been given such a broad definition. On the other hand, such an increase in protection could make Members vulnerable in other ways. The Committee is conscious of the potential impact of such an extension in terms of the responsibilities of Members and also on the rights of other members of the community. It also is mindful that such an extension would not necessarily protect records and correspondence from disclosure. Waiver of the protection is another area in which the Committee notes difficulties would be expected to arise.

Evidence legislation

3.17 If privilege were extended specifically to protect Members' records and correspondence from production and / or use in court, the Committee also considered whether that could be by way of evidence legislation (presumably covering not only the Commonwealth but also the States and Territories, for ease of use and clarity).[73] As noted above, one possibility is to include in evidence legislation a provision that applies specifically to Members of Parliament. This might outline Members' right to apply to the court to seek that documents or records (with a connection to their parliamentary duties) be protected from disclosure, production, or admission into evidence.

3.18 As noted in paragraph 3.4, legislation to extend protection would need to enable Members to better discharge their functions and to cover documents obtained or created in the course of their duties. When making a claim for protection there would need to be a certain level of disclosure of the documents held by the Member so that the connection to his or parliamentary duties could be made out. The Committee notes that if the major concern for Members and their constituents is to preserve confidentiality in their communications, then this option may not be satisfactory.

3.19 Consideration might be given also to providing in evidence legislation that court orders to produce documents in the possession or control of Members may be made only by a judge. The United Kingdom Joint Select Committee on Parliamentary Privilege recommended recently that a subpoena should not be issued against a Member without the consent of a judge.[74] While this may inhibit the number or breadth of orders made in

73 The Commonwealth *Evidence Act 1995* applies, generally, to proceedings in federal and ACT courts.

74 Joint Select Committee on Parliamentary Privilege (UK), *First Report*, 1999, recommendation 32.

respect of the documents of Members, it offers no certainty that documents would not be required to be disclosed, produced, or used in evidence.

3.20 As discussed in chapter 2, a section of the *Evidence Act 1995* (Cth) that could, at least in theory, offer some protection in terms of Members' records and correspondence is section 130. This provides for public interest immunity to be claimed in order to avoid disclosure of material. While the categories of public interest are said not to be closed, generally public interest immunity relates to the proper working of government, security, international relations and law enforcement. It is difficult therefore to see how members' records and correspondence might be argued to fall within the protection of public interest immunity.[75]

3.21 The Committee is conscious that there may be some appeal in protecting Members' records and correspondence from disclosure or certain uses by way of evidence legislation but it also notes there may be logistical problems in achieving this. This is because Members' records could be in issue in proceedings under Federal, State or Territory laws. Creating complementary Commonwealth and State / Territory legislation—for some purposes it may be preferable to have State and Territory legislation, rather than relying on the Commonwealth's provision to override State and Territory legislation that is inconsistent—and fragmenting legislative coverage of Members' privileges may be significant disincentives. The Committee notes that seeking to have inclusion of provisions in State and Territory evidence legislation may cause this issue to be considered also in respect of the records and correspondence of State and Territory members of Parliament.

Courts' restrictions on disclosure and use of evidence

3.22 As the Attorney-General's Department noted, rejection of a public interest claim in respect of material does not necessarily mean the court will permit the material to be disclosed generally to the parties or the public. A court has an inherent jurisdiction to decline to allow inspection by the parties if it considers the evidentiary potential does not outweigh the confidentiality of the material.[76]

3.23 This is a matter that is relevant to any assessment of the need to provide additional legislative protection to documents that are sought as evidence. McNicol refers to the measures a court could take to limit disclosure in the interests of justice where a witness is compelled to supply confidential information and where there can be no claim of privilege or a claim to be

75 Attorney-General's Department Submission, p.10.

76 Attorney-General's Department Submission, p.10.

privileged from disclosing the information fails. She states that the confidential nature of a communication can be reconciled with the conflicting policy under the law that requires disclosure by virtue of three main methods.[77]

3.24 These methods are outlined as follows:

- the court might have a special discretion not to insist on evidence being given if, for example, the witness would be embarrassed or his or her code of ethics violated;
- the court has inherent power to impose restrictions on the use to be made of the information. The court may order that the evidence be produced on a limited basis or that proceedings be heard in camera; and
- disclosure may be protected by an incident of the court process. For instance, a party to whom documents are produced on discovery should not use them for any collateral or ulterior purpose without the consent of the person giving discovery.[78]

3.25 While these restrictions may well satisfy a Member's wish to preserve a degree of confidentiality in some cases, the Committee recognises that this will not always be the case.

Legal professional privilege

3.26 At common law, legal professional privilege allows a person to preserve the confidentiality of statements and other materials that 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.[79] Section 118 of the *Evidence Act 1995* (Cth), provides a useful outline of the bounds of the privilege. 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.

3.27 While legal professional privilege serves to preserve confidentiality between a legal practitioner and client in certain circumstances, its broader public policy aim is to ensure openness between legal practitioners and clients, for the proper conduct of litigation in our legal system.

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77 McNicol, SB, *Law of Privilege,* p.37.

78 McNicol, SB, *Law of Privilege,* pp.37-42.

79 See *Grant v Downs* (1976) 135 CLR 674, *Baker v Campbell* (1983) 153 CLR 52, Cairns, BC, *Australian Civil Procedure*, 3 ed., 1992, pp.334-335 and McNicol, S, *Law of Privilege,* 1992, p.44.

3.28 The nature of this privilege may have appeal to Members who wish to preserve their constituents' confidential communications. However, it is important to note that while the legal adviser claims the privilege, this is done on behalf of the client. The holder of this privilege is the client, for whose benefit the privilege exists, and who may choose to waive the privilege.[80] The Committee also notes that while certain communications between legal adviser and client attract the protection of legal professional privilege, a legal adviser's training and professional relationships with clients are circumscribed in a formal and ongoing way by the courts and the law societies.

3.29 In addition the Committee is conscious that evidence suggested that an equivalent of legal professional privilege was not an appropriate vehicle for protecting Members' records and correspondence.[81]

Protected confidences

3.30 Certain professional confidences are protected from disclosure in New South Wales by section 126B of the *Evidence Act 1995*. This 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.

3.31 The Committee notes similar kinds of circumstances may sometimes apply to Members in their communications with constituents, although in many cases information would be provided with the intention that it would be disclosed to another or others for the purpose of resolving some complaint. Under the legislation, 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.

3.32 Again, it appears to the Committee that a protection of this kind has its limitations. In making out any such claim a Member would need to sacrifice confidentiality to some extent. However, it may provide a greater measure of protection for Members' records and correspondence than is

80 McNicol, S, *Law of Privilege*, 1992, p.21.

81 Mr I Tunstall, Transcript of Evidence, 26 June 2000, pp.11-12.

presently available, and without the disadvantages of extending the definition of 'proceedings in Parliament'.

Implications of options and of extending the privilege available to Members

3.33 The detrimental impact that the present framework has on the free flow of communications between constituents and Members has not been measured. This is discussed further in the following chapter but is raised here for the purpose of noting that any extension of protection should be made with caution.

3.34 All the options that have been canvassed above have limitations. These limitations might be that protection is given from legal proceedings in a wide range of situations, but there is no clear protection from disclosure, or partial disclosure. Not only would the additional protection seem unreasonably wide to some in the community, it could also open up other areas of vulnerability for Members in their work. In some cases the protection could only be available after enactment of a complex legislative framework that may have further impractical aspects in terms of implementation.

3.35 The requirement for a level of protection that is appropriate to meet the need, and the necessity to choose between a general provision that applies constantly, or something that can be used to deal with individual cases, was made clear to the Committee:

> It needs you to have the freedom to have people come to you and express things in confidence, obviously understanding what that confidentiality means. It is not something that gives a right to an individual that their correspondence, in particular, will always be kept out of the public eye. It is possible, like professional privilege, that documents raised in that context be brought to the public eye eventually in the process. That depends on the circumstances, but it is something to keep in mind…. [T]he issue is either trying to get a general provision which applies all the time, or deal with specific cases—and I am a person who tends to go towards the specific cases rather than penalising everybody… [82]

3.36 The Attorney-General's Department had made a similar point in terms of the width of protection: 'A privilege should be no broader than is necessary to achieve its policy objectives. This may be achieved by a

82 Mr I Tunstall, Transcript of Evidence, 26 June 2000, p.12.

balancing test in individual cases, as with public interest immunity claims under section 130 of the *Evidence Act 1995* and under the common law, or by the careful delineation of the privilege itself.'[83] The purpose and effect of privilege is considered further in the final chapter.

3.37 In considering the level of protection that might be offered it is also important to consider the possibility that protection is not only a considerable responsibility but also is open to abuse. As the Attorney-General's Department noted, 'It is a privilege in the real sense and the exercise of the privilege is very much dependent on the sense of responsibility and good faith that the people who hold the privilege, that is, the parliamentarians, choose to exercise.'[84]

3.38 The (then) Law Reform Commission in its report *Unfair Publication: Defamation and Privacy* referred to a considerable number of submissions alleging parliamentarians had made serious charges with little or no factual justification against a person who had no right of correction or reply. Some proposed that the absolute privilege afforded to 'proceedings in Parliament' be removed, or that it not be available when malice or lack of justification had been proved. The Commission did not recommend that parliamentary privilege be curtailed, and noted the 'overwhelming majority of parliamentarians are conscious of the fact that the absolute privilege of parliamentary proceedings carries with it a heavy responsibility to check material and avoid unnecessary personal attacks upon people unable to reply in the Parliament itself. Nonetheless abuses do occur, with serious damage to individuals.'[85] The Committee acknowledges that, by definition, any broadening of the area of absolute privilege would carry with it the greater risk of misuse.

What is to be protected and what is the rationale for protection?

3.39 As noted earlier, any additional legislative protection would need to be linked clearly 'to the records and correspondence of members of Parliament as members of Parliament, … have the purpose of enabling

83 Attorney-General's Department Submission, p.13.

84 Attorney-General's Department, Transcript of Evidence, 26 June 2000, p.28.

85 Law Reform Commission Report No. 11, *Unfair Publication: Defamation and Privacy*, 1979, p.71. In 1997 the House resolved that, in some circumstances, a submission to the Speaker by a person claiming to be adversely affected after being referred to in the House may result in the Speaker referring the submission to the Committee of Privileges.

members of the Parliament to better discharge their functions, and … be reasonably adapted to achieve this purpose.'[86]

3.40 In some cases a connection between the Member's records and correspondence and 'proceedings in Parliament', will be seen readily, for example, the records or correspondence may be the basis of a question or debate in Parliament. In other cases that connection may not be detected easily. An example of this kind would be a document created by a constituent and, perhaps, attached to a copy of the Member's correspondence to a government agency.

3.41 If the view is taken that even records and correspondence not connected clearly to proceedings in Parliament, but somehow removed from 'core proceedings', should receive protection, then the rationale for protection is more difficult to align with the rationale for parliamentary privilege. In these circumstances it could be argued that the focus and rationale is not (directly at least) to promote the effective working of the Parliament but on promoting the relationship between a Member and his or her constituents, and protecting the free flow of communications between them.

3.42 The difficulty that arises in justifying an additional protection based on the needs of a particular relationship is that claims for a special professional privilege like legal professional privilege to be extended to other relationships, for example, accountants and clients, have not been accepted.[87] In *McGuinness v Attorney-General (Vic),* Dixon J, in considering a claim that a newspaper editor could not be compelled to disclose his source, noted the claims for protection that have been made as a result of a professional relationship and the wish to honour an undertaking of confidentiality, stated:

> Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client….an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.[88]

3.43 The Australian Law Reform Commission has concluded that no new special categories of privilege should be created. Instead, the Commission proposed that all claims to withhold confidential communications should

86 Advice from the Australian Government Solicitor, 7 May 1999, p.5.

87 McNicol, SB, *Law of Privilege,* 1992, p.5.

88 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102-103.

be dealt with by courts as a matter of discretion. This approach allows for flexibility and assessment of the individual merits of each case.[89]

Overview of options and their implications

3.44 There is no doubt many Members feel that their relationship with constituents is a special one, deserving of special consideration by the law. This is particularly the case when Members are provided with information that is confidential. While sometimes that communication is made with the intention that the Member disclose the information to another, that will not always be the case, and Members in these circumstances may well feel a duty to preserve the confidence as best they can. Members are conscious also that to fulfil their responsibilities fearlessly they will need to be certain, from time to time, that their activities are immune from legal action.

3.45 A question considered by the Committee is: if that special relationship and need is to be recognised with a protection that is not available to other groups and individuals in society, and in fact may deny the rights of some others in society, can the relationship be recognised and at what cost? The Committee's consideration of this issue is contained in the final chapter.

89 McNicol, SB, *Law of Privilege*, 1992, p.5.

4

Should additional protection be extended?

The need to balance interests

4.1 The Committee does not hesitate to acknowledge the genuine concerns of Members who would wish to have the certainty and the protection that would come from an extension of parliamentary privilege. It recognises that Members in some circumstances feel constrained in their representational duties in particular and that, should privilege be extended, they could proceed with greater confidence and directness in some matters.

4.2 The Committee is aware that Members would not seek to have protection for the full range of their records and correspondence and that indeed such a protection could hardly be justified. Equally Members would not seek to have an extension that might either cloak wrongdoing or be seen to provide the opportunity for wrongdoing.

4.3 In the matters discussed, the first and most direct impact of an extension of the protection would be to reduce the ability of courts to obtain all relevant material to help in their determination of matters. A second but closely related impact would be on the ability of parties to legal proceedings to obtain relevant or potentially relevant material. The balance between these competing considerations is not struck easily.

4.4 The Committee also notes that the ability of Members to take action themselves on the grounds of contempt is significant. The ability of the House to punish for contempt—in these matters constituted by improper interference in the free performance by Members of their duties as Members—is very significant. It means that Members are not without the

ability to act in circumstances where there has, for example, been impropriety on the part of those using the processes of the law against them or their constituents.

4.5 The discussion in the previous chapter of the options which could be considered for extending additional protection to the records and correspondence of members shows that any proposal for extension raises wider implications without necessarily dealing adequately with the concerns which members have about the status of their records and correspondence. In this chapter the Committee considers whether additional protection should be extended and other ways of dealing with Members concerns about their records and correspondence.

4.6 As has been noted, there are several important interests at the centre of privilege. These include the interests of Members and their constituents in the free flow of information and advice; the interests of the courts in having available to them all relevant material and information in their attempts to administer justice; and the interests of ordinary Australians in being able to pursue legal action on an equal footing with others, particularly when protecting their good name.

4.7 In *Prebble v Television New Zealand*, the major issues that need to be balanced were defined as follows:

- the need to ensure that the legislature can exercise its power freely on behalf of its electors, with access to all relevant information (this was considered to be the first priority);
- the need to protect freedom of speech generally; and
- the interests of justice in ensuring that all relevant evidence is available to the courts.[90]

Effect on communications to Members

4.8 It is necessary to assess whether the possibility of disclosure or use in legal proceedings has an appreciable, inhibiting effect on communications between Members and constituents. As was indicated earlier, a number of Members have a perception that disclosure will inhibit communication. Members are not often faced with subpoenae to produce records that comprise or include confidential communications with constituents, and it is not clear how conscious Members or constituents are of the possibility of communications being disclosed this way. However, the Committee considers the possibility may be sufficiently remote as to have little or no

90 [1995] 1 AC 321 at 327.

effect on most communications. If there is an inhibiting effect, then the question for the Committee is whether the law of parliamentary privilege is an appropriate vehicle for addressing a problem which arises from the wish to preserve some confidential communications. Parliamentary privilege, with the significant rights and immunities it bestows on Members, is founded on preservation of the freedom of speech, not the suppression of confidential information. It is not a protection from disclosure, but a protection from the use which may be made of material covered by the privilege.

Extension of privilege to the records of Members

4.9 As noted earlier, the Attorney-General's Department has stated that a privilege should be no wider than is necessary to achieve its proper objective. Justifications for evidentiary privilege are to promote the administration of justice as a whole, despite an adverse effect in particular cases, and to place another interest over the public interest in the administration of justice.

4.10 The Department urges caution when facing arguments seeking privilege to protect confidential communications made outside the context of litigation or legal rights.[91] The existence of an evidentiary privilege may determine whether a person is convicted or imprisoned and it may result in conviction of innocent or acquittal of guilty persons. Such a privilege may also affect civil proceedings with implications for welfare and health of children, financial loss, and loss of reputation, for example.[92] On the other hand, the Department notes that disclosure of material in a court proceeding does not mean that it will become widely known—for example the court may hear a matter in camera or make a suppression or non-publication order.[93]

4.11 While recognising the concerns that Members have about ensuring that their relationship with their constituents is sufficiently protected to enable a free flow of information, the options for extending greater protection raise significant difficulties. The protection afforded by privilege already is very powerful and, as we have seen from assessing the definition of 'proceedings in Parliament', very wide. Any extension would need to reflect an overwhelming and pressing concern about the adequacy of the current position. The Committee has not been presented with evidence

91 Attorney-General's Department Submission, p.12.

92 Attorney-General's Department Submission, pp.13-14.

93 Attorney-General's Department Submission, p.13.

about an overwhelming concern that would support a broad extension of the coverage of privilege.

Correspondence between Members and Ministers

4.12 If there is not justification for a broad extension of privilege to cover all the records of Members, is there a basis for treating the correspondence between Members and Ministers as a special case where additional protection is warranted? The correspondence between a Member and a Minister is special in the sense that issues raised with a Minister in correspondence are ones that otherwise could have been raised by means of a question with or without notice, and consequently have enjoyed absolute privilege. With the increasing number and complexity of matters that are being raised with Members, it is not possible for Members to raise all the issues in the House or by means of written questions. Is it reasonable that such matters raised in the House should enjoy absolute privilege, but those matters raised in correspondence enjoy only a common law qualified privilege?

4.13 In the Exposure Report of the Joint Select Committee on Parliamentary Privilege, the Joint Committee was of the view that privilege should attach to the correspondence between Members and Ministers and it recommended that for the purposes of the law of defamation, 'proceedings in Parliament' should include:

> All things said, done or written between Members and Ministers of the Crown for the purpose of enabling any Member or Minister of the Crown to carry out functions as such, provided that the publication thereof be no wider than is reasonably necessary for that purpose.[94]

4.14 However, in its final report the Joint Committee did not proceed with the recommendation and offered the following reasons for reconsidering:

- to provide an absolute immunity in these cases could protect a Member who, actuated by malice, deliberately made a defamatory attack on another person;
- there was a community view that, unless for the most compelling reasons, further specific protections or privileges should not be granted to Members of Parliament; and

94 See Joint Select Committee on Parliamentary Privilege, Final Report, PP 219/1984 p.46

- the general consideration that laws specifically providing for absoute immunity with regard to what is said about the reputation of others should be strictly confined.[95]

United Kingdom position

4.15 The issue of privilege attaching to the records and correspondence of Members was considered recently by the United Kingdom Joint Committee on Parliamentary Privilege. In relation to the communication between members and ministers, the United Kingdom Committee recommended against the extension of absolute privilege afforded by Article 9 to proceedings in Parliament. The Committee noted:

> Article 9 provides an altogether exceptional degree of protection… In principle this exceptional protection 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.[96]

Conclusion

4.16 While accepting the special nature of the correspondence generated between Members and Ministers, the Committee is not persuaded that special additional protection should be provided for such correspondence. The Committee is mindful of the persuasive reasons offered by the Joint Select Committee on Parliamentary Privilege in 1984 and the Joint Committee on Parliamentary Privilege in the United Kingdom for not extending protection in this area. In addition to the protection of qualified privilege, Members could also raise the issue of possible improper interference with their duties as a Member in relation to any action that may be taken against them as a result of their correspondence with Ministers. Members have sufficient protection in this area to prevent them from being constrained in communicating fully with Ministers.

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95 Joint Select Committee on Parliamentary Privilege, Final Report, PP 219/1984, pp.46-47.

96 Report of the Joint Committee on Parliamentary Privilege, First report March 1999, paragraph 110.

Recommendation 1

4.17 **The Committee recommends that there should be no additional protection, beyond that provided by the current law, given to the records and correspondence of Members.**

Scope of definition of 'proceedings in Parliament'

4.18 An important reason for the Committee's caution in supporting an extension of the coverage of parliamentary privilege generally to the records and correspondence of members is that the coverage is already wide, and, so far as the records and correspondence of Members is concerned, undefined. Subsection 16 (2) of the Parliamentary Privileges Act provides that not only are words spoken and acts done in the course of conducting the business of a House or of a committee regarded as proceedings in Parliament, but also words spoken and acts done 'for purposes of or incidental to' the transacting of that business are proceedings in Parliament. In any individual case involving the records and correspondence of a Member there could be an issue of establishing the extent to which the records and correspondence relate to the transacting of the business of a House or a committee. The extent to which records and correspondence would fall within the definition of proceedings in Parliament and hence enjoy the protection of parliamentary privilege is a matter for statutory interpretation.

4.19 As was noted in Chapter 2, the boundary of 'proceedings in Parliament' as it relates to the record and correspondence of Members has been open only to very limited statutory interpretation. The Clerk of the Senate indicated to the Committee that rather than recommend a legislative extension of the protection of parliamentary privilege there should be intervention in relevant judicial proceedings 'to ensure appropriate interpretations in cases which arise'.[97]

4.20 The Clerk of the Senate advised the Committee that he would recommend the Houses not seek to legislate to clarify and establish protection of relevant acts and protection of documents from disclosure, but should seek to ensure there was appropriate interpretations in cases, if necessary by intervention in relevant judicial proceedings. He anticipated that this was the likely course to be taken in future by the Senate and its Privileges Committee.[98]

97 Submission from Mr H Evans, Clerk of the Senate, dated 9 August 2000, p.5.

98 Submission from Mr H Evans, Clerk of the Senate, dated 9 August 2000, p.5.

4.21 Later the Clerk of the Senate advised that the Senate had adopted the recommendation of the 94th report of the Senate Committee of Privileges, that the Senate authorise the President, if required, to engage counsel as *amicus curiae* [friend of the court] if either the action for defamation against Mr O'Chee, or Mr Armstrong, were set down for trial.[99]

4.22 The Committee notes that while such action may have the disadvantage of taking place after the event, that is, after documents have been produced and/or disclosed to an extent, the option provides an opportunity for the interests of the Member and Parliament to be raised in Court, in appropriate circumstances, and in the long term for the nature of the protection to be clarified.

4.23 The Committee supports the approach taken by the Senate.

Recommendation 2

4.24 **The Committee recommends that, at the discretion of the Speaker, the House may intervene to assert the protection of parliamentary privilege in court proceedings in which the records and correspondence of Members may reasonably be argued to fall within the definition of 'proceedings in Parliament' as contained in subsection 16(2) of the *Parliamentary Privileges Act 1987*.**

Execution of search warrants

4.25 An area of particular concern to Members has been the execution of search warrants on their offices. The nature of the concerns of Members about the execution of search warrants was outlined in Chapter 2.

4.26 It also was noted in Chapter 2 that a draft set of guidelines had been developed for the execution of search warrants by the Australian Federal Police on the electorate offices of members of Parliament. The guidelines have not yet been endorsed formally by the Minister for Justice and the Presiding Officers. However, they do form a very good basis for giving Members some certainty about the process that would be followed in such cases.

4.27 The draft guidelines (copy attached to the Clerk's memorandum) give appropriate coverage to those areas that are of concern to Members such as:

- prior advice of execution of the warrant, where appropriate;

99 Submission from Mr H Evans, Clerk of the Senate, dated 5 September 2000, p.1.

- the possible seizure of privileged records;
- the treatment of confidential material; and
- the impact on Members to perform their duties as Members.

The draft guidelines also need to cover the Commonwealth law enforcement agencies and recognise the role of the employed staff of Members.

Recommendation 3

4.28 **The Committee recommends that a memorandum of understanding (MOU) be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by the Commonwealth law enforcement agencies on Members, the employed staff of Members and Members' Parliament House and electorate offices. Such an MOU would not be intended to create any immunity or change to the existing law, but enable ground rules to be agreed to assist Members when dealing with these situations.**

4.29 As the execution of search warrants on Member's electorate offices often could involve State or Territory police, it will be important that similar memoranda of understanding are developed to apply to the execution of search warrants on Members' electorate offices by State and Territory police. The development of such memoranda could be concluded through the Standing Committee of Attorneys-General.

Recommendation 4

The Committee recommends that memoranda of understanding be concluded between the Presiding Officers and State and Territory Attorneys-General on the execution of search warrants by Commonwealth State and Territory police and other State and Territory law enforcement agencies on the electorate offices of Members. The Commonwealth Attorney-General should place this matter on the agenda of the Standing Committee of Attorneys-General as the coordinating body to obtain agreement for memoranda.

The development of guidelines

4.30 As noted in Chapter 1, Members often are not well informed about the status of their records and correspondence and how they should deal with

them. A number of Members suggested that guidelines be developed and information be provided to assist Members in working within the current law. As has been emphasised in this report the law in this area is complex and any guidance that can be provided to Members will be helpful.

4.31 It is suggested that guidelines could cover:

- a brief statement of the current law as it affects the records of Members including the applicability of parliamentary privilege and qualified privilege;
- the nature of documents held by Members;
- the effect of the purpose for which documents were created or supplied and the question of who created or supplied them;
- the responsibility of Members in relation to material supplied to them;
- the confidentiality of documents and the responsibility of Members;
- the reason for access and associated procedures for handling

  Freedom of Information requests;
- search warrants; and
- orders for production issued by either a court or a tribunal.

Recommendation 5

4.32 **The Committee recommends that to assist members in dealing with issues that arise in relation to their records and correspondence there should be:**

- **the development of a set of guidelines available to Members to assist them to consider the status of their records and correspondence and provide guidance to them as to how their records and correspondence should be handled. The Committee will develop and issue draft guidelines for discussion;**
- **inclusion in the seminars for new Members and their staff of information about the status of Members' records and advice on how to handle such records; and**
- **the briefing of existing Members and their staff on the status of Members' records and advice on how to handle such records.**

A

List of Submissions

No	*Date*	*Person / Organisation*
1	20 April 1999	Rt Hon Ian Sinclair
2	22 April 1999	Dr Alan Bundy Director Bob Hawke Prime Ministerial Library
3	30 April 1999	Mr Peter Andren MP
4	03 May 1999	Mr Russell D Grove Clerk of the Legislative Assembly of NSW
5	11 May 1999	Mr Ian Tunstall
6	12 May 1999	National Archives of Australia
7	13 May 1999	Mr Mark A Dreyfus
8	20 May 1999	Hon Warren Truss MP
9	27 May 1999	Mr John Evans Clerk of the Legislative Council of NSW
10	22 May 1999	Mr Bruce Billson MP
11	10 August 1999	Attorney General's Department
12	9 August 2000	Mr Harry Evans Clerk of the Senate

B

Memorandum by the Clerk of the House

C

List of attendance at the roundtable discussion

- Mrs F Bailey MP, Member for McEwan
- Hon A Cadman MP, Member for Mitchell
- Mr D Hawker MP, Member for Wannon
- Ms K Hull MP, Member for Riverina
- Mr A Morris MP, Member for Newcastle
- Hon A Ronaldson MP, Member for Ballarat
- Mr I C Harris, Clerk of the House of Representatives
- Ms Helen Elizabeth Daniels, Assistant Secretary, Information Law Branch, Attorney General's Department
- Ms Carolyn May Adams, Principal Legal Officer, Parliamentary Privilege, Attorney General's Department
- Mr Michael Dominic McGrath, Senior Legal Officer, Legal Procedure Section, Administrative and Procedural Justice Branch, Civil Justice Division, Attorney General's Department
- Mr Russell David Grove, Clerk of the NSW Legislative Assembly

- Ms Maggie Shapley, Director, Publishing and Personal Records, National Archives of Australia
- Professor Geoffrey John Lindell, Law School, University of Melbourne
- Professor Dennis Charles Pearce, Law School, Australian National University
- Mr Ian Charles Tunstall, Private Citizen