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.