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.