
The Parliament of the Commonwealth of Australia

Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members

House of Representatives
Committee of Privileges

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Membership of the Committee

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Deputy Chair Hon Leo McLeay MP

Members Hon Bruce Baird MP

Mr Phil Barresi MP (Representative of Leader of the House)

Mr Bruce Billson MP

Hon Bronwyn Bishop MP

Hon Laurie Brereton MP

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1.1 This report provides the following documents to members for their information:

- Procedures for the conduct of proceedings of the House of Representatives Committee of Privileges;
- Some privilege cases and commentary relevant to the operation of the *Parliamentary Privileges Act 1987* (the Privileges Act); and
- Draft guidelines for members on the status and handling of their records and correspondence.

Procedures for the conduct of proceedings of the House of Representatives Committee of Privileges

1.2 The Committee considers it is useful if witnesses and others who may be involved with the Committee are made aware of the procedures under which they can expect the Committee to operate. The Committee has developed procedures which are at Appendix A.

Some privilege cases and commentary relevant to the operation of the *Parliamentary Privileges Act 1987* (the Privileges Act)

1.3 In considering the possibility of conducting an inquiry into the operation of the Privileges Act, the Committee prepared a paper which commented both on the operation of provisions of the Act and on areas that may be relevant to the law of privilege that are not covered by the Act. The paper examined cases of the Senate and the House Committees of Privileges and also relevant court cases. The Committee considered that the paper, while

not a comprehensive review of privilege or the Privileges Act, was a useful reference to make available to members. A copy of the paper is at Appendix B.

Draft guidelines for members on the status and handling of their records and correspondence

- 1.4 In November 2000 the Committee presented its *Report of the inquiry into the status of the records and correspondence of Members* to the House.
- 1.5 Members receive information and documents regularly from constituents who seek members' assistance in raising issues with Ministers, departments and authorities. Much information is provided to members in the expectation that if the member does pass the information or document on then it will be to a very limited audience and only for the purpose of responding to the constituent's request for assistance. The Committee's inquiry into the records of members had been prompted by concern about the extent to which members could protect the confidentiality of their communications with and on behalf of constituents. Were these communications subject to court orders for production, to search warrants, or to requests for access under freedom of information legislation? Aside from the question of protecting information that was provided in confidence, members were concerned that disclosure of the information might result in defamation action against the member or the constituent.
- 1.6 One of the Committee's recommendations was that it would produce draft guidelines to assist members to consider the status of their records and correspondence and provide guidance on the handling of these documents.¹ Draft guidelines have been prepared by the Committee of Privileges to implement that recommendation to promote an understanding of the implications of parliamentary privilege for the records and correspondence of members.² A copy of the guidelines is at Appendix C.

HON ALEX SOMLYAY MP
Chair

November 2002

¹ House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, November 2000, p.49. See <http://www.aph.gov.au/house/committee/priv/reports/irm/contents.htm>

² These guidelines refer to the correspondence and records of members as private members.



Appendix A

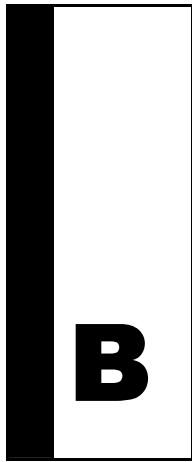
Procedures for the conduct of proceedings of the House Committee of Privileges

In considering any matter referred to it which may involve, or give rise to any allegation of, a contempt, the Committee of Privileges will observe the procedures set out below. In addition, the Committee will follow the general procedures for interaction with witnesses as proposed by the House Committee on Procedure.¹

- (1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the committee and relevant to the committee's inquiry, against the person, or evidence which reflects adversely on the person, and of the particulars of any evidence which has been given in respect of the person.
- (2) The committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
 - (a) making written submissions to the committee;
 - (b) giving evidence before the committee; and
 - (c) having other relevant evidence placed before the committee.
- (3) A person appearing before the committee may be accompanied by an adviser, and shall be given all reasonable opportunity to consult the adviser during that appearance.

¹ House of Representatives Standing Committee on Procedure, *It's your House: Community involvement in the procedures and practices of the House of Representatives and its committees*, 1999, Appendix C.

- (4) A witness shall not be required to answer in public session any question where the committee has reason to believe that the answer may incriminate the witness.
- (5) Witnesses shall be heard by the committee on oath or affirmation.
- (6) As soon as practicable after the committee has determined findings to be included in the committee's report to the House, and prior to the presentation of the report, a person adversely affected by those findings shall be acquainted with the findings and be given a reasonable opportunity to respond by written submission or appearance before the committee.
- (7) The committee may agree to the reimbursement of reasonable travel costs of witnesses appearing before the committee.
- (8) Before appearing before the committee a witness will be given a copy of these procedures.



Appendix B

Some privilege cases and commentary relevant to the operation of the *Parliamentary Privileges Act 1987* (the Privileges Act)

The operation of existing sections of Privileges Act

Section 4 – What constitutes a contempt

Service of writs for defamation against persons involved in a statutory declaration read to the House by a Member

The Member who read the statutory declaration to the House informed the House Committee of Privileges that the statutory declaration had been made solely for use in Parliament and that the testimony of the persons making the declaration was vitally important to the performance of his work as a Member. The Committee stated that the question of whether the action of preparing and publishing the statutory declaration was a proceeding in Parliament was for the court to decide. The Committee concluded that the initiation of actions such as those complained of were proper and legal actions and no evidence given to the Committee convinced it that there was any intention to impede or obstruct the Member in his work as a Member or that improper interference had occurred. The Committee stated that the privilege of freedom of speech should be used judiciously where the reputation or welfare of persons may be an issue, and Members should make all reasonable inquiries as to the truth of allegations. Members would be judged according to their actions.¹

¹ House of Representatives Committee of Privileges (HCP) Report concerning actions initiated against Mr A Cross and Mr R Ellems, December 1994.

Disruption to Member's electorate office in execution of search warrant

The House Committee of Privileges considered whether a contempt was committed in the execution of a search warrant on a Member's electorate office. The Committee found that the action by the Australian Federal Police had caused disruption to the work of the office, impeded the ability of constituents to communicate with the Member, had a prejudicial effect on the willingness of some persons to communicate with the Member, and amounted to interference with the free performance of the Member's duties. There was no evidence that there was any *intention* to infringe the law concerning the protection of Parliament and no evidence that the interference should be regarded as improper. Therefore the Committee concluded that the action was not improper interference for the purposes of s.4 of the Privileges Act and that no contempt had been committed.²

Section 7 – Penalties

Both Houses have the power to declare an act to be a contempt and to punish such an act. The rationale is that the Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions in a similar way to the power of the courts to punish contempts of court. Section 7 of the Privileges Act authorises the imposition of fines up to \$5000 for individuals and \$25 000 for corporations, or imprisonment for up to six months. A decision to impose a penalty of imprisonment may be subject to review by a court. The court may determine whether the conduct or action in question, particulars of which must be set out in the warrant committing the person, was capable of constituting an offence.

Lesser punishments such as admonition, reprimand or suspension of a member are also available under the normal powers and processes of the House. The Senate has imposed a penalty for contempt (reprimand before the Senate) only once in 1971. The House of Representatives has once imposed imprisonment for contempt (Browne/Fitzpatrick, 1955). The Privileges Act specifically removed the power of the Houses to expel a member (s.8). The Senate Committee of Privileges published a comprehensive information paper on penalties for contempt in 2000. The paper makes no recommendations.³

Section 12 – Protection of witnesses

Alleged intimidation of Corporal Craig Smith

The Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade reported that Corporal Smith claimed that he had been

2 HCP Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP, October 1995.

3 Senate Committee of Privileges (SCP) 95th report, September 2000.

harassed and threatened following his involvement in the committee's inquiry into the conduct of military justice. The House Committee of Privileges investigated the matter and concluded that the harassment was serious and could reasonably be concluded as relating to Corporal Smith's evidence to the Defence Subcommittee. However, the person or persons responsible for the harassment could not be identified and so the Committee was unable to find that a breach of privilege had been proved against any person. The Committee suggested that if it received information that the matter was ongoing it might seek further evidence and report to the House again. The Committee recommended that the attention of the Director General Personnel – Army and the equivalent officers in the Navy and Air Force be drawn to the circumstances of the case and that these officers do all within their power to accommodate any request for a service transfer by Corporal Smith.⁴

Alleged intimidation of Mr Wayne Seivers

An article published in a newspaper reported that a person who had provided information to the Joint Standing Committee on Foreign Affairs, Defence and Trade could face disciplinary action by the Australian Federal Police. The Speaker referred to the importance of the protection of witnesses but said that given the statement by the Australian Federal Police that issues being pursued with the witness did not relate to his involvement with the committee he was not convinced that improper interference had occurred. The Speaker stated that, because of the seriousness of the case if further evidence came to light he would be prepared to reconsider the matter. Some months later the matter was raised again. The Speaker stated at that time that while the protection of committee witnesses was most important, as far as he could see no new information concerning any issue of privilege had been presented. If the committee wished to present further information he would consider it.⁵

Senate cases

The Senate Committee of Privileges has reported on 19 cases of possible intimidation since 1988. Of these it made six findings of contempt. The Senate privilege resolutions require that when its Committee of Privileges has determined findings to be included in a report, a person affected by those findings shall be acquainted with the findings before the report is presented to the Senate. In at least one case this action resulted in proposed disciplinary action against a person who had been a witness being withdrawn.⁶

4 HCP Report concerning the alleged threats or intimidation against a witness before the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, May 2001.

5 Votes and Proceedings, 15 February, 15 March, 3 and 5 October 2000.

6 SCP 107th report: Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002, pp. 43 – 52.

Section 13 – Unauthorised disclosure of in camera evidence

This section prohibits the disclosure of any in camera evidence unless it has been authorised for publication by a House or a committee. Premature disclosure of ordinary evidence is covered by standing order 346.

Time magazine article appearing to disclose confidential information given to committee

An article dealing with matters under consideration by the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade appeared to reveal confidential information. The committee reported to the House that substantial interference in its work had occurred but it had not been able to ascertain the source of the disclosure. The matter was referred to the House Committee of Privileges which found that a person or persons with access to the proof transcript of in camera evidence had inadvertently or deliberately disclosed the information but could not identify the person(s) responsible. The Committee also found there had been unauthorised disclosure of a copy of the proof transcript to an officer in the Department of Defence and expressed concern about the circumstances surrounding the retrieval of this transcript. The Committee was unable to make recommendations in relation to the particular matter complained of but recommended certain procedures be adopted for the handling of in camera transcripts. Action was subsequently taken by the Clerk of the House in relation to handling of in camera material, conduct of staff appearing before parliamentary committees and the terms and conditions of staff seconded from outside the parliamentary service to assist committees.⁷

Unauthorised disclosure of in camera submissions

The Senate Committee of Privileges has reported on two significant cases of disclosure of in camera submissions to parliamentary committees. In the first case a submission from a police officer to the Joint Committee on the National Crime Authority was tabled in a State Parliament. The committee found it constituted a serious contempt but was unable to establish the source of the disclosure. It recommended that should the source subsequently be identified the matter should again be referred to the committee with a view to a possible prosecution for an offence under s. 13 of the Act. The second matter involved an in camera submission to the Joint Committee on Corporations and Securities which was revealed in a newspaper article. The source of the disclosure was not able to be identified. The Committee recommended that the publishers be formally reprimanded by the Senate and that, if found, the discloser of the information be

7 HCP Report concerning possible unauthorised disclosure of in camera evidence to the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, June 2001.

subject to a fine or prosecution under the Act. It cautioned committees against too readily according in camera status to documents or evidence.⁸

Subsection 16 (2) – What constitutes proceedings in Parliament

Circulation of petitions

The Senate Committee of Privileges concluded that the circulation for collection of signatures of a petition containing defamatory material was not covered by privilege. Persons with specific grievances could themselves petition the Senate and their petitions, if in order, could be presented and thus would be covered by privilege. The committee considered it inappropriate that privilege, whether absolute or qualified, should extend to the malicious circulation of defamatory material purportedly to collect signatures for a petition.⁹

Action in relation to report tabled in Parliament

Action was taken in the ACT Supreme Court by public servants claiming that they were denied procedural fairness in the preparation of a report presented to the ACT Legislative Assembly.

The report had been prepared for the Government under the Inquiries Act which provides that such a report *may* be tabled in the Assembly by the Chief Minister or otherwise made public by the Chief Minister. If it is made public by the Chief Minister before tabling in the Assembly, the report attracts the same privileges and immunities as if it had been tabled. Counsel for the Speaker intervened in the case to claim that the report was a proceeding in Parliament for the purposes of s.16(2) of the Parliamentary Privileges Act (which applies in the Territory).

Counsel for the Speaker, in arguing that privilege applied, claimed that the Assembly had played a pivotal role in calling on and directing the government to establish the Board of Inquiry, and that during the course of the inquiry Members had questioned the Government about the matter, extracts from the interim report were tabled and a consistently high level of interest was taken by the Assembly in the final outcome.

The judge ruled that, whilst it was possible that the copy of the report of the Board of Inquiry proposed to be tendered by counsel representing one of the four public servants was produced for purposes of or incidental to the transaction of business of the Assembly, the judge found that there was no evidence to that effect. He

8 SCP 54th report, 1995 and 99th report, 2001 reported in SCP 107th report: Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002, pp. 40 and 42.

9 SCP 11th report, 1988, reported in SCP 107th report; Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002, p.27.

ruled that privilege had not been established and the copy of the report could be admitted in evidence.¹⁰

Protection of Members records

The issue of the status of the records and correspondence of Members was investigated by the House Committee of Privileges which recommended that there be no change to the current provisions of the law but that various other actions be taken to ensure that Members and others were fully informed about what protection if any might apply and that investigations affecting Members records are carried out appropriately. One of the recommendations was that a memorandum of understanding be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by Commonwealth law enforcement officers to assist Members when dealing with these situations. The Senate had made a similar recommendation in 1998. No agreement is yet in place but the Australian Federal Police have voluntarily instituted procedures for dealing with Members' records which are seized under a search warrant. Some further developments in relation to search warrants appear below. The report of the committee reviews relevant cases including **HCP Report concerning a letter received by Mr Nugent MP** and **HCP Report concerning writ of summons served on Mr Sciacca MP, Rowley v O'Chee and Crane v Gething**. Details of these cases are fully described in the report of the committee.¹¹

Search warrants: Crane v Gething

A number of documents were seized from Senator Crane's electorate and parliamentary offices under a search warrant issued in respect of a criminal matter. Senator Crane claimed parliamentary privilege in relation to some of the documents. Justice French found that the issuing of the search warrants was an administrative not a judicial act. He noted that 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 but the issue of the search warrant itself did not commence any judicial proceeding. He also stated that it did not fall to the court to deal with any question of parliamentary privilege in these circumstances. Commentators have questioned the judgment especially in relation to the court's responsibility to consider issues of privilege in relation to the seizure of documents. It has also been suggested that even if the issue of search warrants is an administrative act, the protection created by article 9 of the Bill of Rights refers to 'any place out of Parliament' and is not confined to judicial proceedings.¹² The

10 ACTSC 28, 10 April 2002; *Privilege and the Supreme Court*, Paper presented to 33rd Conference of Australian and Pacific Presiding Officers and Clerks by Mr Wayne Berry MLA, Speaker, ACT Legislative Assembly, July 2002.

11 HCP Report of the inquiry into the status of the records and correspondence of Members, November 2000.

12 FCA 45, 18 February 2000.

decision of French J was affirmed on appeal to the Full Court without discussion of these criticisms.¹³

Search warrants: Senator Harris

The Queensland Police seized under search warrant documents from Senator Harris' Queensland electorate office which the Senator claimed were subject to parliamentary privilege. The matter was raised with the President of the Senate during the period of prorogation for an election and the Clerk of the Senate wrote to the Queensland Police to alert them to possible issues of parliamentary privilege. The Senate Committee of Privileges considered the matter in the new Parliament. The committee concluded that the Queensland Police had fulfilled its obligations in respect of parliamentary privilege impeccably and that the committee had no role to play until Senator Harris took up the offer of the Queensland Police to inspect the records and make a specific claim of privilege in relation to identified material. The committee recommended that the establishment of guidelines between the Presiding Officers and the Australian Federal Police be developed and the guidelines apply to the police forces of the states and the Northern Territory.¹⁴

Subsection 16 (3) – Use of parliamentary proceedings in legal proceedings

Defamation action in relation to 'effective' repetition of words spoken in Parliament

A New Zealand Court of Appeal ruled a Member liable to action for defamation in a case where the Member had stated outside the House that he 'did not resile from what he said in Parliament'. It was ruled that he 'effectively' repeated the parliamentary statement in its entirety. It was therefore in order for the court to consider the words of the statement made in Parliament to decide the defamation action. The court drew a distinction between effectively repeating the statement and merely 'acknowledging' that the statement had been made. The judgment includes considerable discussion on whether s.16(3) of the Australian Parliamentary Privileges Act merely restates Article 9 of the Bill of Rights in modern language or whether it represents a different legal byway. This decision is subject to further appeal in the Privy Council.¹⁵

13 FCA 762, 2 June 2000.

14 SCP 105th report: Execution of search warrants in Senators' offices—Senator Harris, June 2002.

15 *Jennings v Buchanan* CA106/01, 23 May 2002; *Members of Parliament and Defamation: an update*, Paper presented to 33rd Conference of Australian and Pacific Presiding Officers and Clerks by David McGee QC, Clerk of the House of Representatives New Zealand, July 2002.

Laurance v Katter

Writs for defamation were served against persons involved in a statutory declaration read to the House by Mr Katter. After making the statements in the House Mr Katter had referred to the matter on radio and television stating 'I am not alleging anything except for the statements I have made inside Parliament.' He also referred to the documentary evidence he had which he said was available to (the interviewer) but did not repeat the substance of the statements. It was argued that the statements could not support an action for defamation unless they could be understood in the context of the statements in the House. The Court of Appeal of the Supreme Court of Queensland considered the application of s.16(3) of the Privileges Act and differing views were expressed on the interpretation and scope of the provisions of that sub-section. The Court held by a majority that s.16(3) did not prevent Mr Laurance from relying on statements Mr Katter had made in the House in an action for defamation in connection with the statements allegedly made later in the course of the interview. The decision was appealed to the High court but the case was settled before it was decided.¹⁶ This effectively leaves unsettled the issues which divided the Court.

Although the constitutional validity of s.16(3) was upheld, at least on the construction of the sub-section favoured by the majority, the case also contains a discussion of whether the provisions of s.49 of the Commonwealth Constitution are limited by the implied freedom of political communication and also the constitutional prohibitions which prevent the Parliament from interfering with the way the courts exercise their judicial powers (as to which see also the note of *Rann v Olsen* below).

Other recent issues arising in relation to privilege that are not codified in the Privileges Act**Waiver of privilege**

The cases cited above in relation to s.16(3) are also relevant to consideration of the issue of possible waiver of parliamentary privilege in certain circumstances.

Section 13 of the Defamation Act (UK)

This section allows individual members of the United Kingdom Parliament (and other participants in parliamentary proceedings eg witnesses) to waive parliamentary privilege so as to permit admission of evidence of parliamentary proceedings in actions for defamation. This provision was enacted primarily to deal with a problem arising from a particular case. (It has been suggested by some commentators that the section was enacted in haste and it has attracted some

¹⁶ *Laurance v Katter* QCA 471, 22 November 1996.

criticism.) In that case a newspaper had published statements alleging that a Member (Mr Hamilton) had received cash in return for asking questions in the House of Commons. The statements suggested that Mr Hamilton had engaged in corrupt conduct and he initiated an action for defamation against the newspaper. The newspaper was granted a stay of proceedings on the ground that it could not defend the action without adducing evidence of Mr Hamilton's conduct in the House which would be contrary to Article 9 of the Bill of Rights. Mr Hamilton was dissatisfied because he was unable to clear his name.

The amendment of the Defamation Act that followed this case provides that where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, the person may waive for the purposes of those proceedings, so far as concerns him or her, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament. The power of waiver is given to individuals (including Members, witnesses and petitioners) rather than to the Houses of Parliament. It is exercisable only in relation to the reception of evidence in defamation proceedings. The waiver by one person does not affect the operation of privilege in relation to another person. Protection from legal liability for words spoken or things done in Parliament is not affected.¹⁷

The provision in s.13 of the Defamation Act has since been reviewed by a Joint Committee on Parliamentary Privilege. The Committee recommended that the provision be repealed and replaced with a new provision under which the House (rather than an individual) could make a general waiver of article 9 in an appropriate case (not necessarily a defamation action). It could not do so if the waiver would expose the member or other person concerned to any risk of legal liability.¹⁸

Special Commissions of Inquiry in NSW

In NSW, Special Commissions are a special type of statutory Royal Commission appointed by the Governor. In 1997 the NSW Parliament enacted provisions to allow for a Special Commission to ascertain the truth of accusations made under parliamentary privilege. Under the provisions each of the Houses of Parliament was empowered to authorise, by a resolution of two thirds of its members, inquiry by special commission into a matter relating to parliamentary proceedings within or before the House or one of its committees. If a House waived privilege in this way an individual Member could still assert privilege in respect of what he or she

17 *Waiver of Parliamentary Privilege*, Enid Campbell, Legislative Studies, vol 15, No.1, Spring 2000.

18 *Joint Committee on Parliamentary Privilege* (UK), Report, 9 April 1999, HL 43/HC 214 (1998-99).

had said or done in the course of parliamentary proceedings. The legislation was used in the matter of accusations made by Mrs Franca Arena in the Legislative Council. Mrs Arena unsuccessfully challenged the constitutionality of the legislation.¹⁹

Implied freedom of political communication/separation of judicial powers under Chapter III of the Constitution

In a series of decisions in the early 90s (including *Theopahanous v Herald and Weekly Times* and *Stephens v Western Australian Newspapers Ltd*) the High Court recognised an implied guarantee of political communication. This was based on Constitutional provisions establishing a system of responsible government which requires that electors are able to exercise a free and informed choice.

Lange v the ABC

In 1997 the High Court affirmed that the constitutional implication of freedom of political communication does not establish in Australia a general or personal right of free speech but acts as an inhibitor on governmental or parliamentary efforts to limit what may be said on political matters. The implied freedom is not absolute but limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The court held that the implied constitutional freedom of political communication applies to both the common law and statute law. It held that the implied freedom will not invalidate a law enacted to satisfy some legitimate end if the law satisfies two conditions. First the object of the law must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Second the law must be reasonably appropriate and adapted to achieving that legitimate object or end. There is a strong possibility the Privileges Act would be seen as satisfying those conditions.

The court determined that defamation law in NSW does not infringe the implied constitutional freedom. The court stated that the Australian people have an interest in receiving and discussing information on government and political matters that affect them. It further considered that the reputations of those defamed by widespread publications would be adequately protected by requiring the publisher to prove reasonableness of conduct provided that publication was not actuated by malice. In effect the court entrenched the common law action of qualified privilege in the Constitution.²⁰

19 *Waiver of Parliamentary Privilege*, Enid Campbell, Legislative Studies, vol 15, No.1, Spring 2000.

20 *Lange v the Australian Broadcasting Corporation* 1997, 189 CLR 520; *Lange v ABC: Still Dancing in the Streets?*, Department of the Parliamentary Library, Research Note 3 1997-98.

Rann v Olsen

In this case (both parties being Members of the South Australian Parliament), Mr Olsen, in answering questions from the media, claimed that Mr Rann had lied to a Commonwealth parliamentary committee in saying that he (Olsen) had leaked confidential information to the then opposition party. The South Australian Supreme Court held that subsection 16(3) of the Privileges Act would prevent Mr Olsen from supporting his plea that his statement was true ie that Mr Rann lied to the committee. By a majority the court decided that this restriction was not such as to render the trial unfair so as to justify a stay of action.

The Court also rejected submissions to the effect that the Privileges Act was invalid because it impermissibly infringed the implied constitutional guarantee of freedom of political communication. Doyle CJ (with whom the other judges agreed on this aspect of the case) held that most often s. 16 would act to enhance the freedom of speech by protecting Members and witnesses from legal action for their statements made in Parliament. In this case s. 16 inhibited the freedom of political communication by making it more difficult for Mr Rann to succeed in a claim under the law of defamation, preventing him from relying on the truth of his evidence to the committee. The judge claimed this was a burden on conduct or speech critical of those involved in the processes of Parliament. He commented that 'Just as the protection of those who speak in the course of proceedings in Parliament is important, so is the freedom of speech of those who speak about or comment on what happens in Parliament'. However his conclusion was that the potential infringement of political communication could only occur in limited circumstances and the law was not invalid. Doyle CJ also commented that 'the Court must allow Parliament to make the decision about the extent to which it should exclude the Courts from considering and passing judgment upon matters that occur in proceedings in Parliament'.

The court upheld the constitutional power of the Parliament to widen and narrow the existing privileges and immunities enjoyed by members of Parliament in pursuance of s.s.49 and 51(xxxvi) of the Constitution and that s.16 of the Privileges Act should be seen as a valid exercise of this power. The court rejected arguments suggesting that the restrictions on evidence that could be adduced in a case by reason of s.16 were constitutionally invalid as an impermissible interference with the exercise of judicial power contrary to Chapter III of the Constitution.²¹ Despite this case and also *Laurance v Katter* discussed above, doubts remain on the extent to which the provisions of s.49 of the Commonwealth Constitution are limited by the implied freedom of political communication and also the constitutional prohibitions which prevent the Parliament from interfering with the way the courts exercise their judicial powers.

21 *Rann v Olsen* SASC 83, 12 April 2000.

Resolution of conflicts between power to call for documents and claims for refusal (eg public interest immunity, commercial in confidence)

The issue of enforcing orders to produce documents has arisen mostly in the Senate although it can also arise in the context of committees. Usually orders for the production of documents have eventually been complied with or appropriate reasons given. The question of what sanctions might be imposed by a House on the Government or other body not complying with such an order has not been determined. In November 2000 the Senate included in an order for documents a provision that should the documents not be produced, the responsible Senate Minister would be obliged to make a statement to the Senate and a debate could then take place. The documents were produced and the provision was not tested.

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill

A private Senator's bill was introduced in 1994 proposing that the Federal Court act as an independent arbitrator should the executive government refuse a Senate demand for material. The Senate Committee of Privileges reporting on specific instances of failure to comply with Senate orders for the production of documents concluded that removing the responsibility to make such determinations from the Senate to the courts was inappropriate. The committee suggested the ultimate power lay within the Senate and it was for the Senate to assert that power. It also suggested that it might be possible for an independent arbiter, such as a retired judge or a person such as the Auditor-General, to examine material on behalf of the Senate.²²

Obligations on Members in exercising privileges especially freedom of speech

Members of the House have on a number of occasions raised as a matter of privilege, allegations made by a Member against a person which were subsequently proved to be false. One of the more serious examples is set out below (It was not referred to the House Committee of Privileges). It should be noted that since these incidents the House has instituted a procedure whereby citizens can apply to have a response incorporated in the records of the House if they are aggrieved by remarks made about them in the House. The House has not yet acceded to any such application. The Committee of Privileges has itself reminded Members of the need to exercise judgment in making allegations against individuals in the House.²³

22 SCP 107th report: Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002, p.28.

23 HCP report concerning actions initiated against Mr A Cross and Mr R Ellems, December 1994, see discussion of case in relation to s.4 of the Privileges Act above.

Allegations of criminal activity made against a person based on documents proved to be forgeries

The Speaker referred to the fact that in the United Kingdom House of Commons the action of a Member found to have deliberately misled the House had been held to be a contempt. In this case the Speaker stated that on information available to him there was no evidence to

support a conclusion that a prima facie case of contempt had been made out and the matter was not further pursued. The Speaker reminded Members that the privilege of the House came with responsibilities to act diligently and commended Members to a draft code of conduct which had been tabled in the House.²⁴

Claim that Member involved in conspiracy to misuse forms of House

This matter related to the same allegations (against a prominent lawyer and member of the Jewish community) referred to above and was made after further information was revealed suggesting that the Member concerned (by then a former Member) may have conspired with others prior to making the allegations in the House. The Speaker responded by again referring to the need for Members to take responsibility for their actions in the House. He regretted that the Member concerned had not withdrawn his allegations and apologised to the House when they were found to be false and suggested that the standing of the House suffers when abuse occurs.²⁵

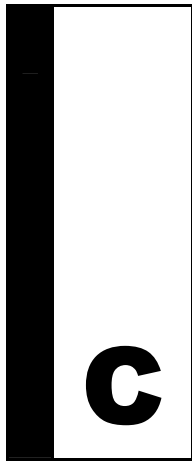
Further Source Material

G Carney, *Members of Parliament: law and ethics* (2000 Prospect Publishing)

- Generally: Ch 6 “Freedom of speech” p 207ff
- Scope of freedom created by Article 9 of the Bill of Rights 1689 as expanded by s.16 of the Privileges Act at pp 207-219
- Effect of freedom of speech: admissibility of evidence concerning parliamentary proceedings at pp 220-232
- Effect of freedom of speech in defamation proceedings at pp 232-238
- Privileges Act and the implied freedom of political communication at pp 238-241

24 House of Representatives Debates 27 September 1995.

25 House of Representatives Debates 28 June 1996.



Appendix C

Draft Guidelines for members on the status and handling of their records and correspondence

Purpose of guidelines

- 1.1 These guidelines are issued by the Committee of Privileges to assist Members in relation to issues that arise concerning the handling of their records and correspondence.
- 1.2 The guidelines have no legal standing and are not intended to substitute for assistance from the Clerk or for legal advice. They are intended as background information for members. If members are in any doubt about action that may be taken in respect of documents or information in their possession they are encouraged to seek legal advice or assistance from the Clerk. In some circumstances it may be necessary and appropriate for the Speaker to be informed about potential privilege matters concerning members' records and correspondence.

Documents held by members

- 1.3 Members hold a diverse range of records and correspondence in their capacity as private members. These may be in paper and/or electronic form. They might include personal records; party records; parliamentary-related records (including copies of speeches made in parliament and evidence given to parliamentary committees); reference material; copies of correspondence with Ministers; and electorate records (including copies of correspondence with constituents).

Responsibilities of Members

- 1.4 Parliamentary privilege refers to the special rights and immunities which belong to the Houses, their committees, and their members, which are considered essential for the proper operation of the Parliament. They are not the prerogative of members in their personal capacities and are intended to allow members to discharge their responsibilities to constituents without obstruction or fear of prosecution.¹
- 1.5 There may be a number of important interests to be considered when an issue of parliamentary privilege arises, and the interests may not sit easily with each other. Members, in seeking to represent their constituents, have a strong interest in protecting the free flow of information between them and their constituents. However, there is a public interest in the courts having available all relevant material and information as they administer justice.

Court orders to produce documents and or to appear

- 1.6 In the course of litigation, a court may issue orders for parties to litigation to identify and make available for inspection documents that are relevant to the issues of the case. While a member may not be a party to such litigation, documents held by the member may be subject to this process and be required to be disclosed, and possibly later produced to the court, and admitted into evidence. Members may be served with a subpoena to produce documents that are relevant to a matter before the court, and possibly for the member to appear at the same time. Members are generally subject to the law in this area.

Responding to an order

- 1.7 The major privilege that may offer some protection from the use of members' records and correspondence in court proceedings is the parliamentary privilege known as the 'freedom of speech' privilege. The freedom of speech privilege is contained in Article 9 of the Bill of Rights 1688 which states:

1 *House of Representatives Practice*, 4th ed., 2001, p.687

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.²

- 1.8 Unless the records and correspondence fall within the scope of ‘proceedings in Parliament’ they would not enjoy the special legal status provided by parliamentary privilege. This privilege protects ‘proceedings in Parliament’ absolutely from being impeached or questioned in a court or other tribunal having the power to examine witnesses under oath such as Royal Commissions and commissions of inquiry.³ The *Parliamentary Privileges Act 1987* (the Privileges Act), in subsection 16(2), provides clarification of what amounts to ‘proceedings in Parliament’:

... 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 ... and, ..., includes: ...

(c) the preparation of a document for purposes of or incidental to the transacting of any such business...

- 1.9 If members wish to resist an order to produce documents, they should respond to the court or tribunal and, if appropriate, object to the order on the grounds of parliamentary privilege. The most appropriate time to claim formally that the documents arise from a privileged occasion, and so seek an order from the court or tribunal that the documents need not be produced, would be the first date set for the documents to be disclosed or produced to the court or tribunal. However, at any stage before then the member may wish to approach the court or tribunal or the solicitor for the party on whose behalf the order has been issued and seek to discuss the difficulties that the order raises. If members are faced with such orders, they are encouraged to contact the Clerk of the House and the Speaker and make them aware of the situation. If there is an issue of parliamentary privilege, the Speaker may wish to intervene to assert the protection of parliamentary privilege.

2 *House of Representatives Practice*, 4th ed., p. 691.

3 *House of Representatives Practice*, 4th ed., pp. 692-694 and see *Parliamentary Privileges Act 1987* section 3 for definition of tribunal.

Test for 'proceedings in parliament'

- 1.10 In determining whether documents fall within 'proceedings in Parliament', and so are entitled to immunity from impeachment or question in courts or tribunals, there are two questions to be considered:
- has an act been done (in this instance by a member or someone acting on his or her behalf) 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 committee? Broadly speaking, if the records and correspondence in the possession of the member are used in some way to transact the business of a House or a committee, then parliamentary privilege would likely attach; and
 - if the answer to the first question is 'yes', then a second question arises: does the use that is proposed to be made of the records amount to 'impeaching' or 'questioning' those proceedings in Parliament? A member may have some difficulty in persuading a court or tribunal that an order which simply required that documents be disclosed or produced to a court or tribunal amounted to impeaching or questioning.⁴
- 1.11 In summary, then, to claim immunity from an order to produce documents, a member would need to satisfy a court that:
- the documents fell within the definition of 'proceedings in Parliament' and so were not subject to impeachment or question; and
 - the order to produce the documents amounted to such an impeaching or questioning.
- 1.12 While some records and correspondence of members would be seen by a court or tribunal to attract the protection of parliamentary privilege, for example, when they have been the subject of debate or a question, it is clear that much of it, including most electorate correspondence and the correspondence by members to Ministers and their departments, would not. The matter is one for interpretation by the courts or tribunals.
- 1.13 To provide guidance to members, the case of *O'Chee v Rowley* is relevant. The case 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
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⁴ For a discussion of the reasoning behind these questions see the report by the House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, November 2000, paragraphs 2.16-2.23.

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.

1.14 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.⁵

1.15 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. In relation to the earliest point when privilege might attach to the records it is worth quoting from the judgement of McPherson J in the *O'Chee* case:

The privilege is not attracted to a document by s 16(2) until at earliest the parliamentary member or his or her agent does some act with respect to it for purposes of transacting business in the House. Junk mail does not, merely by its being delivered, attract privilege of parliament. That being so, the question again is whether it can properly be said that creating, preparing or bringing these documents into existence were "acts" done for purposes of or incidental to the transacting of Senate business.... One would expect that a senator, who was planning to ask a question or speak on a particular topic in the House, would set about collecting such documentary information as could be obtained in order to inform himself or herself sufficiently on that subject.⁶

The secondary issue of whether the use proposed amounted to impeaching or questioning is a separate matter that would also need to be satisfied.

1.16 However in *Rowley v Armstrong*, Jones J, despite referring to the judgement of McPherson J in the *O'Chee* case concluded that:

...an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in

5 (1997) 150 ALR 199.

6 (1997) 150 ALR 199 at 209.

Parliament' and therefore the provisions of the *Parliamentary Privileges Act* do not apply.⁷

This conclusion has been the subject of critical comment by the Senate Committee of Privileges based on advice from the Clerk of the Senate.⁸

Temporary immunity provided in the Privileges Act

- 1.17 Section 14 of the Privileges Act provides that a member shall not be required to attend before a court or tribunal or be arrested or detained in a civil cause on a day on which the House meets or a day on which a committee of which the member is a member meets, or within five days before or after the House or the committee meets.

Search warrants

- 1.18 From time to time members' electorate or Parliament House offices may be subject to execution of a search warrant by police. A concern of members has been that such searches may result in the uncovering and/or seizure of documents that are confidential. There is no immunity under the law of parliamentary privilege that would exempt members' electorate offices from the execution of search warrants.
- 1.19 Members may wish to seek to protect sensitive or confidential information from inappropriate disclosure or seizure. A member could argue to a court that records should not be seized or removed because of their association with 'proceedings in parliament' and that the seizure or removal amounts to impeaching or questioning those 'proceedings in parliament'.⁹ The difficulty that arises is a practical one: the first opportunity to argue the issue of privilege would likely be in an application for an injunction against the officers who seized the material. A member might also argue that the execution of the warrant falls within section 4 of the Privileges Act and amounts to a contempt of the Parliament.¹⁰ Again, this claim is not likely to be made until the warrant has been executed.

7 (2000) QSC 88.

8 Senate Committee of Privileges, 92nd report.

9 See paragraphs 1.9 and 1.14 above.

10 See paragraphs 1.23 and 1.24 below.

- 1.20 Search warrants may also be issued in respect of members' Parliament House offices. In this case the Speaker's permission would be sought before a search warrant would be executed in Parliament House. This would provide an opportunity for members to seek advice and raise concerns about the documents liable to be seized or disclosed during a search.
- 1.21 The Committee of Privileges has recommended that a memorandum of understanding be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by Commonwealth law enforcement agencies on members, members' staff and members' Parliament House and electorate offices. The memorandum would enable ground rules to be agreed that would assist members when these situations arise.
- 1.22 There is a draft of guidelines for the execution of search warrants by the Australian Federal Police on the electorate offices (and Parliament House offices with prior consultation of the Presiding Officers) of members of Parliament (see attachment 1 for copy of draft guidelines). While these guidelines do not have official status, they provide the basis on which members might expect search warrants to be executed. The guidelines also do not apply formally to State and Territory police. However, in the recent execution of a search warrant on the office of a Senator, the procedures of the Queensland Police were essentially in accord with the guidelines. Both the House and Senate Committees of Privileges have recommended that guidelines should cover State and Territory police.

Contempt

- 1.23 The Houses have the power to punish for contempt. In some circumstances a member might seek to resist an order for production of documents on the grounds that the action proposed in the order amounts to contempt of the parliament. That is, the member would claim that 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.¹¹ However, it would be necessary to show that

11 Section 4: Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

the seeking of the order or pressing for compliance with the order amounted to or was intended or likely to amount to an improper interference with the free performance by the member of the member's duties as a member.¹²

- 1.24 In 1995 the House Committee of Privileges considered whether a contempt was committed in the execution of a search warrant on a member's electorate office. The Committee found that the action by the Australian Federal Police had caused disruption to the work of the office, impeded the ability of constituents to communicate with the member, had a prejudicial effect on the willingness of some persons to communicate with the member, and amounted to interference with the free performance of the member's duties. However, there was no evidence that there was any intention to infringe the law concerning the protection of parliament and no evidence that the interference should be regarded as improper. Therefore the Committee concluded that the action was not a contempt as it did not meet the requirement of section 4 of the Privileges Act of amounting to an improper interference.
- 1.25 If a member considers that a constituent has been the subject of intimidation, punishment or harassment as a result of making representations to the member, this could be raised as a possible matter of contempt. The action would, of course, have to amount to an improper interference with the member in his or her duties as a member.
- 1.26 Standing Orders 95, 96 and 97A refer to the means by which a matter of privilege such as the suggestion that certain action is a contempt may be raised.¹³

Freedom of information requests

- 1.27 While the application of the *Freedom of Information Act 1982* is limited to records held by government, it is relevant to the work of members. Ministers' offices and government agencies would hold copies of representations by members on behalf of constituents and these may be sought for release under freedom of information legislation. A document may be exempt from disclosure if it would involve the unreasonable disclosure of personal information about any person.¹⁴ However, the decision as to whether disclosure is unreasonable is one for the agency,

12 For a discussion of contempt, see *House of Representatives Practice*, 4th ed., p. 706.

13 See *House of Representatives Practice*, 4th ed., p. 723.

14 See subsection 14(1), and a definition of 'personal information' in subsection 4(1).

and depends on the balance of privacy interests of the third party and the public interest in disclosure. The decision of an agency also is subject to review by the Administrative Appeals Tribunal.

Handling of correspondence and information

Guidance for handling of correspondence and information

- 1.28 Members will have their own systems for handling correspondence and documents, and their own styles of drafting correspondence. However, allegations made by constituents or information and documents provided may be flawed or inaccurate and when allegations or information are passed on by the member for advice or comment to other offices, it carries the risk of damaging reputations, sometimes undeservedly. There is also the possibility that once documents and allegations have been passed on by a member they will be disclosed to other persons than the one to which the member has directed them.
- 1.29 There are some simple precautions about which members may wish to remind themselves and to consider including in their office routine:
- ensure that they understand clearly any allegations made to them and check with the person making the allegation, and, where possible, independently, the accuracy of allegations before passing them on;
 - rather than adopt statements or allegations by constituents as facts, members may prefer to note in their correspondence when they refer to allegations: 'I have been told that....';
 - clarify with constituents the purpose for which the information has been provided to them, for example, so that it can be passed to a Minister, department, or authority, for comment and action. If the information is to be passed on, it should be made clear to the constituent that its confidentiality cannot be guaranteed;
 - record the advice that has been given to constituents in this regard and their response to that advice;
 - ensure that documents containing confidential information are marked, handled and stored appropriately; and
 - be aware that the correspondence they draft in response to receipt of sensitive information and allegations may become public at a later stage.

Limited protection against defamation action: qualified privilege

1.30 If a member is concerned that information in documents that are to be disclosed may result in a defamation action against the member or the person who supplied the information, then the common law defence of qualified privilege may be claimed. This privilege is not related to parliamentary privilege. To raise this defence the defendant would need to show that the person who made the defamatory statement had an interest or legal, moral, or social duty to make it to the receiver of the information, and the person who received it had a corresponding interest or duty to receive it. The claim would be defeated if the plaintiff could provide that the communication was made maliciously or without good faith¹⁵ for example, if it involved some dishonest purpose or improper motive. While there are no reported cases in Australia in which a member's records and correspondence were considered to be protected by qualified privilege, the English High court found that a member who had received a letter from a constituent seeking assistance in advising a Minister of improper conduct by a public official had sufficient interest in the subject matter of the complaint to make the occasion of publication a privileged one.¹⁶

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

16 *R. v. Rule* (1937) 2KB 375.

Draft Guidelines for execution of search warrants by the AFP on the electorate offices of Members of Parliament (issued 9/9/96)

Background

1. These guidelines apply to the execution of search warrants by the AFP on the electorate office of a member of either House of the Commonwealth Parliament (called here 'a member'). They apply subject to the overriding principle that the integrity of the AFP investigation not be compromised. Where the member or a member of his/her staff is a suspect in relation to the relevant alleged offence, the extent to which the guidelines could apply might be significantly reduced.
2. The guidelines are also appropriate to searches within Parliament House as referred to in paragraph 14. However, they are not designed to apply to searches by the AFP of offices of members of State or Territory Parliaments. In such cases the AFP should act with appropriate caution and restraint and seek legal advice if necessary.
3. While the guidelines are not expressed to cover residences or other offices used by a member, paragraph 6 would apply to any search involving members. Where in the course of any search paragraphs 9(a) and 11(b) become applicable, the AFP should proceed as indicated in the relevant sub-paragraphs.

Preliminary

4. When a search warrant is executed upon the electorate office of a member of Parliament one or more of the following issues could arise:
 - a) the execution of the search warrant might amount to an offence against a House, for example because its effect is to obstruct performance of the member's duties as a member;
 - b) the disclosure of something seized in reliance on the warrant, or exposed to the police in the course of search, might amount to an offence against a House;
 - c) a thing otherwise seizable under the warrant might not be seizable because it is not admissible by a court in that it attracts parliamentary privilege – a related issue being the possibility of a statutory offence of unauthorised disclosure; or
 - d) the execution of the search warrant might involve seizure or exposure to the police in the course of search, or subsequent disclosure, of confidential material that does not attract parliamentary privilege, and without entailing an offence against a House or any other offence.

Guidelines

5. The AFP should consult the Office of the Commonwealth Director of Public Prosecutions before seeking or executing a search warrant on the electorate office of a member of Parliament. The purpose of this requirement is to help avoid unnecessary warrant action and to ensure that the proposed search and seizure is securely based.
6. It should be noted that material of the kind referred to in s16(3) of the *Parliamentary Privileges Act 1987* is not liable to seizure under warrant. If it is possible that material sought may be within that category, the AFP should consult the relevant Presiding Officer or the chair of the relevant committee.
7. Where possible and providing the integrity of the investigation is not compromised:
 - a) the search warrant should not be executed on a parliamentary sitting day and should be executed at a time when the member, or a senior member of his/her staff, will be present;
 - b) unless inappropriate, contact should be made with the member, or a member of his/her staff, prior to the execution of the warrant to agree on a time for the execution; and
 - c) the member, or the member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before execution of the warrant commences.

Claims of privilege

8. In paragraph 9 'claim of privilege' means a claim that proposed action in purported reliance on a search warrant should not take place because it would amount to an offence against a House or because the warrant does not authorise seizure of a thing that attracts privilege.
9. The purpose of the guidelines in this paragraph is to suspend police action until there has been some consideration by or on behalf of Parliament of the claim. While in due course a court might also need to rule on the matter, that aspect can be left to later proceedings, or if necessary to a person affected seeking injunctive relief.
 - a) if the member (or a person acting on his/her behalf) identifies anything to be seized where a claim of privilege is likely to be raised the following procedures should be followed:
 - b) the member (or representative), if raising a claim of privilege, should be asked to indicate the basis for the claim;

- c) the item should be secured to the satisfaction of the executing officer and the member (or representative). The member should have reasonable opportunity to take copies of any document or other record secured in this way. A schedule of the items so secured should be prepared and agreed by the parties;
- d) the things so secured should be delivered into the safekeeping of a third party as agreed between the parties (eg warrant issuing officer or officer of the Parliament) pending resolution of the claim of privilege; and
- e) the claim of privilege should be referred by the member for, or otherwise brought to, the attention of the Presiding Officer of the relevant House for the purpose of obtaining an indication either:
 - i. that there is no apparent basis for a privilege claim (in which event the item should be released to the AFP); or
 - ii. that the matter should be further considered by the relevant House;
- f) the procedure mentioned in (e) does not prevent the member or any other person from pursuing the claim of privilege in any other way. However the intention is to provide only a reasonable opportunity for the claim to be pursued and to allow release of the item to the AFP if the claim is not pursued;
- g) the AFP will notify the Attorney-General (in his/her capacity as First Law Officer and Minister responsible for the AFP) in any case where the possibility of a claim of privilege is raised under (a) above.

Confidential material

- 10. With respect to confidential material, paragraphs 5 and 7 set out a general procedure and would apply where confidential material was involved, whether or not there was any material on the premises in respect of which a claim of parliamentary privilege might reasonably be made.
- 11. Even what confidential material could not properly be the subject of a claim of parliamentary privilege, a claim of public interest immunity might need to be addressed.
 - a) Even if no claim of parliamentary privilege is raised, the executing officer should take all reasonable steps to conduct the search and obtain seizable material without unnecessarily examining or removing third-party confidential material that might be in the electorate office;
 - b) If, in respect of any material proposed to be seized, the member indicates that public interest immunity will be claimed, the AFP, unless it needs urgent access to the material, should treat that material as under 9(c) and (d) to enable a reasonable opportunity for the claim to be resolved (although the safekeeping third party would not normally be a Parliamentary officer);

- c) If the AFP needs access to the material urgently for the purposes of an investigation or prosecution, it may take possession of the material provided:
 - (a) there is no court ruling to the contrary and
 - (b) it allows reasonable opportunity in the circumstances for any challenge to the seizure. It should ensure that the material is not disclosed more widely than necessary for those purposes.

Conclusion of search

- 12. A receipt recording things seized should be provided to the member (whether requested or not) in accordance with section 3Q of the *Crimes Act 1914*. If copies are not provided, the receipt should contain sufficient particulars of any document record or thing seized in order to facilitate the obtaining of further advice by the member.
- 13. Where any document/record or thing is seized by police pursuant to the warrant the executing officer should inform the member that the AFP will, to the extent possible, provide or facilitate access by the member to any document/record or thing seized under the warrant which is necessary for the performance of the member's duties as a member.

Parliament House

- 14. If a search under warrant is proposed in relation to the offices of a member in Parliament House these guidelines should be treated as applicable and:
 - a) it should be determined at a senior level within the AFP (General Manager) that the need for the search warrant is clear, and that it relates to a sufficiently serious matter; and
 - b) the usual practice should be followed of prior consultation with the Presiding Officers before conducting enquiries or executing any process in the parliamentary precincts.