

Should additional protection be extended?

The need to balance interests

- 4.1 The Committee does not hesitate to acknowledge the genuine concerns of Members who would wish to have the certainty and the protection that would come from an extension of parliamentary privilege. It recognises that Members in some circumstances feel constrained in their representational duties in particular and that, should privilege be extended, they could proceed with greater confidence and directness in some matters.
- 4.2 The Committee is aware that Members would not seek to have protection for the full range of their records and correspondence and that indeed such a protection could hardly be justified. Equally Members would not seek to have an extension that might either cloak wrongdoing or be seen to provide the opportunity for wrongdoing.
- 4.3 In the matters discussed, the first and most direct impact of an extension of the protection would be to reduce the ability of courts to obtain all relevant material to help in their determination of matters. A second but closely related impact would be on the ability of parties to legal proceedings to obtain relevant or potentially relevant material. The balance between these competing considerations is not struck easily.
- 4.4 The Committee also notes that the ability of Members to take action themselves on the grounds of contempt is significant. The ability of the House to punish for contempt—in these matters constituted by improper interference in the free performance by Members of their duties as Members—is very significant. It means that Members are not without the

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

- 4.5 The discussion in the previous chapter of the options which could be considered for extending additional protection to the records and correspondence of members shows that any proposal for extension raises wider implications without necessarily dealing adequately with the concerns which members have about the status of their records and correspondence. In this chapter the Committee considers whether additional protection should be extended and other ways of dealing with Members concerns about their records and correspondence.
- 4.6 As has been noted, there are several important interests at the centre of privilege. These include the interests of Members and their constituents in the free flow of information and advice; the interests of the courts in having available to them all relevant material and information in their attempts to administer justice; and the interests of ordinary Australians in being able to pursue legal action on an equal footing with others, particularly when protecting their good name.
- 4.7 In *Prebble v Television New Zealand*, the major issues that need to be balanced were defined as follows:
- the need to ensure that the legislature can exercise its power freely on behalf of its electors, with access to all relevant information (this was considered to be the first priority);
 - the need to protect freedom of speech generally; and
 - the interests of justice in ensuring that all relevant evidence is available to the courts.⁹⁰

Effect on communications to Members

- 4.8 It is necessary to assess whether the possibility of disclosure or use in legal proceedings has an appreciable, inhibiting effect on communications between Members and constituents. As was indicated earlier, a number of Members have a perception that disclosure will inhibit communication. Members are not often faced with subpoenae to produce records that comprise or include confidential communications with constituents, and it is not clear how conscious Members or constituents are of the possibility of communications being disclosed this way. However, the Committee considers the possibility may be sufficiently remote as to have little or no
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90 [1995] 1 AC 321 at 327.

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

Extension of privilege to the records of Members

- 4.9 As noted earlier, the Attorney-General's Department has stated that a privilege should be no wider than is necessary to achieve its proper objective. Justifications for evidentiary privilege are to promote the administration of justice as a whole, despite an adverse effect in particular cases, and to place another interest over the public interest in the administration of justice.
- 4.10 The Department urges caution when facing arguments seeking privilege to protect confidential communications made outside the context of litigation or legal rights.⁹¹ The existence of an evidentiary privilege may determine whether a person is convicted or imprisoned and it may result in conviction of innocent or acquittal of guilty persons. Such a privilege may also affect civil proceedings with implications for welfare and health of children, financial loss, and loss of reputation, for example.⁹² On the other hand, the Department notes that disclosure of material in a court proceeding does not mean that it will become widely known—for example the court may hear a matter in camera or make a suppression or non-publication order.⁹³
- 4.11 While recognising the concerns that Members have about ensuring that their relationship with their constituents is sufficiently protected to enable a free flow of information, the options for extending greater protection raise significant difficulties. The protection afforded by privilege already is very powerful and, as we have seen from assessing the definition of 'proceedings in Parliament', very wide. Any extension would need to reflect an overwhelming and pressing concern about the adequacy of the current position. The Committee has not been presented with evidence

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

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

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

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

Correspondence between Members and Ministers

- 4.12 If there is not justification for a broad extension of privilege to cover all the records of Members, is there a basis for treating the correspondence between Members and Ministers as a special case where additional protection is warranted? The correspondence between a Member and a Minister is special in the sense that issues raised with a Minister in correspondence are ones that otherwise could have been raised by means of a question with or without notice, and consequently have enjoyed absolute privilege. With the increasing number and complexity of matters that are being raised with Members, it is not possible for Members to raise all the issues in the House or by means of written questions. Is it reasonable that such matters raised in the House should enjoy absolute privilege, but those matters raised in correspondence enjoy only a common law qualified privilege?
- 4.13 In the Exposure Report of the Joint Select Committee on Parliamentary Privilege, the Joint Committee was of the view that privilege should attach to the correspondence between Members and Ministers and it recommended that for the purposes of the law of defamation, 'proceedings in Parliament' should include:
- All things said, done or written between Members and Ministers of the Crown for the purpose of enabling any Member or Minister of the Crown to carry out functions as such, provided that the publication thereof be no wider than is reasonably necessary for that purpose.⁹⁴
- 4.14 However, in its final report the Joint Committee did not proceed with the recommendation and offered the following reasons for reconsidering:
- to provide an absolute immunity in these cases could protect a Member who, actuated by malice, deliberately made a defamatory attack on another person;
 - there was a community view that, unless for the most compelling reasons, further specific protections or privileges should not be granted to Members of Parliament; and

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

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

United Kingdom position

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

Article 9 provides an altogether exceptional degree of protection... In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege. Members are not in the position that, lacking the absolute immunity given by article 9, they are bereft of all legal protection. In the ordinary course a member enjoys qualified privilege at law in respect of his constituency correspondence.... So long as the member handles a complaint in an appropriate way, he is not at risk of being held liable for any defamatory statements in the correspondence. Qualified privilege means a member has a good defence to defamation proceedings so long as he acted without malice, that is, without some dishonest or improper motive.⁹⁶

Conclusion

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

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

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

Recommendation 1

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

Scope of definition of 'proceedings in Parliament'

- 4.18 An important reason for the Committee's caution in supporting an extension of the coverage of parliamentary privilege generally to the records and correspondence of members is that the coverage is already wide, and, so far as the records and correspondence of Members is concerned, undefined. Subsection 16 (2) of the Parliamentary Privileges Act provides that not only are words spoken and acts done in the course of conducting the business of a House or of a committee regarded as proceedings in Parliament, but also words spoken and acts done 'for purposes of or incidental to' the transacting of that business are proceedings in Parliament. In any individual case involving the records and correspondence of a Member there could be an issue of establishing the extent to which the records and correspondence relate to the transacting of the business of a House or a committee. The extent to which records and correspondence would fall within the definition of proceedings in Parliament and hence enjoy the protection of parliamentary privilege is a matter for statutory interpretation.
- 4.19 As was noted in Chapter 2, the boundary of 'proceedings in Parliament' as it relates to the record and correspondence of Members has been open only to very limited statutory interpretation. The Clerk of the Senate indicated to the Committee that rather than recommend a legislative extension of the protection of parliamentary privilege there should be intervention in relevant judicial proceedings 'to ensure appropriate interpretations in cases which arise'.⁹⁷
- 4.20 The Clerk of the Senate advised the Committee that he would recommend the Houses not seek to legislate to clarify and establish protection of relevant acts and protection of documents from disclosure, but should seek to ensure there was appropriate interpretations in cases, if necessary by intervention in relevant judicial proceedings. He anticipated that this was the likely course to be taken in future by the Senate and its Privileges Committee.⁹⁸

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

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

- 4.21 Later the Clerk of the Senate advised that the Senate had adopted the recommendation of the 94th report of the Senate Committee of Privileges, that the Senate authorise the President, if required, to engage counsel as *amicus curiae* [friend of the court] if either the action for defamation against Mr O’Chee, or Mr Armstrong, were set down for trial.⁹⁹
- 4.22 The Committee notes that while such action may have the disadvantage of taking place after the event, that is, after documents have been produced and/or disclosed to an extent, the option provides an opportunity for the interests of the Member and Parliament to be raised in Court, in appropriate circumstances, and in the long term for the nature of the protection to be clarified.
- 4.23 The Committee supports the approach taken by the Senate.

Recommendation 2

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

Execution of search warrants

- 4.25 An area of particular concern to Members has been the execution of search warrants on their offices. The nature of the concerns of Members about the execution of search warrants was outlined in Chapter 2.
- 4.26 It also was noted in Chapter 2 that a draft set of guidelines had been developed for the execution of search warrants by the Australian Federal Police on the electorate offices of members of Parliament. The guidelines have not yet been endorsed formally by the Minister for Justice and the Presiding Officers. However, they do form a very good basis for giving Members some certainty about the process that would be followed in such cases.
- 4.27 The draft guidelines (copy attached to the Clerk's memorandum) give appropriate coverage to those areas that are of concern to Members such as:
- prior advice of execution of the warrant, where appropriate;

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

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

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

Recommendation 3

- 4.28 **The Committee recommends that a memorandum of understanding (MOU) be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by the Commonwealth law enforcement agencies on Members, the employed staff of Members and Members' Parliament House and electorate offices. Such an MOU would not be intended to create any immunity or change to the existing law, but enable ground rules to be agreed to assist Members when dealing with these situations.**
- 4.29 As the execution of search warrants on Member's electorate offices often could involve State or Territory police, it will be important that similar memoranda of understanding are developed to apply to the execution of search warrants on Members' electorate offices by State and Territory police. The development of such memoranda could be concluded through the Standing Committee of Attorneys-General.

Recommendation 4

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

The development of guidelines

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

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

4.31 It is suggested that guidelines could cover:

- a brief statement of the current law as it affects the records of Members including the applicability of parliamentary privilege and qualified privilege;
- the nature of documents held by Members;
- the effect of the purpose for which documents were created or supplied and the question of who created or supplied them;
- the responsibility of Members in relation to material supplied to them;
- the confidentiality of documents and the responsibility of Members;
- the reason for access and associated procedures for handling Freedom of Information requests;
- search warrants; and
- orders for production issued by either a court or a tribunal.

Recommendation 5

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

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

