VICTIMS OF ABUSE IN THE AUSTRALIAN DEFENCE FORCE ASSOCIATION INC.
A0059257W

Supplementary Submission

To

The Senate Inquiry Into

Veterans' Affairs Legislation Amendment (Digital Readiness and Other Measures) Bill 2016 [provisions]

Jennifer Jacomb

Secretary And Public Officer

The Association For The Victims Of Abuse In The Australian Defence Force A0059257

ABSTRACT

[This Bill is an ill conceived and ill considered bill that will result in suicide of Veterans and embarrassment to the Government and the Department Of Veterans Affairs. It is directly counter to good public policy and is instead, very bad public policy.

It must be rejected.]

The Voice For The Voiceless

The Australian Defence Force And Abuse:-

"It was Hubris that made Angels into Devils.

It is obstinacy that keeps them in Hell"

1.0 Management Summary

1.1 Overview

The purpose of this additional submission is to deal with issues raised by Submission 2 from the Department Of Veterans Affairs and others.

In particular:-

- The lack of legal status of the Department Of Veterans Affairs submission.
- The Privacy Issues and how this Act proposes to make Department Of Veterans Affairs exempt from the Privacy Act.
- Deal with a number of fraudulent arguments raised in favour of Computer "Decision".

1.2 Lack Of Legal Status Of DVA Submission

The Department Of Veterans Affairs Submission and its so called assurances should have been part of the:-

- Explanatory Memorandum for the Bill or
- The Minister's Second Reading Speech

By being part of neither it has no weight in law.

Thus the "assurances" have no meaning at all.

1.3 Stripping From Veterans Their Rights Under The Privacy Act – Minister Wants The Senate To Buy Pig In Poke

1.3.1 Overview

This bill proposes to strip from Veterans their rights under the Privacy Act and it's well established case law.

It takes the Department Of Veterans Affairs away from the operation of that Act.

Furthermore, no justification for this extraordinary action has been given for this except the specious example of correcting "misinformation".

There are no guidelines – there should be. The Minister could have submitted them as part of their Second Reading Speech or Explanatory Memorandum.

There are no minimum standards specified in the Bill.

In effect the Minister wants the Senate to buy a pig in a poke - "**Trust Me**".

When I was back in the Navy, a common training example was this:-

Someone would ask you to sign for things you had yet to receive and say "**Trust Me**".

When it did not turn up and you complained, the response would be:-

"It all your fault.

You stuffed up

You trusted me"

You would be left holding the bag.

The same applies here.

1.3.2 Bill Allows The DVA To Attack Directly The Sovereignty Of Parliament – It Must Be Rejected

By allowing the Department Of Veterans Affairs to release the massive, individual files of Veterans, it allows the Department Of Veterans Affairs to attack the independence of those members of Parliament.

Those members of Parliament who have been "uncooperative" and held the Department Of Veterans Affairs to account.

For this reason, if no other reason, this provision must be projected.

Any real or potential threat to the independence of Parliament or its members is a Contempt Of Parliament and Parliamentary Privilege.

This is simply unacceptable.

Members of Parliament must be free to exercise their duties without fear.

Electors must be free to raise their concerns with Members Of Parliament.

This Bill is a clear and present threat and danger to both.

See Annexure B - ***A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*** – Erskine May

I have also with submission by way of Separate Attachment included the Report On The Complaint By The Member For Preston (Mills Oakley), Legislative Assembly Privileges Committee, July 2006.

This shows that the Privilege extends to electors raising matters with members of Parliament.

1.4 Computerised Decision Making

1.4.1 Most Examples Provided In DVA Submission Are Not "Decisions"

This Department Of Veterans Affairs and Minister claim this is need to permit computerise decision making of various sorts.

Most of the examples in their submission are bad examples because they do not require this bill e,g, Reimbursement of Travel Expenses is not a "decision" but rather a consequence of the real decision, the granting of a Gold or White Card.

1.4.2 Proposes To Make Decisions On Known Dodgy Information From Defence

Furthermore, they propose to use this bill, via their submission, to automate decision making based solely upon the information provided by Defence.

1.4.3 Fraudulent Arguments In Support

Fraudulent Arguments have been made in support of decision making.

1.4.4 DVA Asking For Blank Cheque – No Standards For Proper Certification For Automated Decision Making

The Department Of Veterans Affairs is asking for a blank cheque in this matter where it is clear our brave veterans will pay the price.

1.4.4 What DVA Should Have Done But Failed To Do

This bill should have specified exactly what decision were going to be automated – it does not.

Further more, the approval that should have been sought was:-

- The computerised system could only say yes
- Where it would say "No" that file should be handed over to a human delegate to make the final decision given the shaded nuances of the various Acts.

1.5 Final Conclusions - Bill Must Be Rejected

This bill is ill conceived and considered.

It must be rejected.

2.0 Lack Of Legal Status Of Department Of Veterans Affairs Submission

Under the Acts Interpretation Act, Courts can only give weight to:-

- The Minister's Second Reading Speech
- The Explanatory Memorandum

By not being included in either the submissions and assurances of the Department Of Veterans Affairs have no weight in law and are not worth the ink they are printed with.

3.0 The Privacy Issues

3.1 Taking The DVA Out Of The Privacy Act

At the end of the day, this legislation takes the Department Of Veterans Affairs out of the Provisions of the Privacy Act and its well established case law.

After taking the Department Of Veterans Affairs out of the protection of the Privacy Act, it proposes to have a non specialist in Privacy Law, the Department Of Veterans Affairs Minister try and reinvent the wheel.

Furthermore in the bill, there is no requirement as to the standards the Minister has to meet.

All for the sake of correcting public “Mis-information”.

Yet in neither the bill, explanatory memorandum or Minister’s Second Reading Speech do they give examples of this evil of misinformation they are trying to address through the bill.

3.2 DVA Records Include Military, Centrelink Etc

The record of a Department Of Veterans Affairs Beneficiary at the DVA includes:-

- Your Military Records
- Medicare Records as required
- Centre link Records as required
- Com Care Records
- Com Super Records
- Current Medical Records

In other words every aspect of a Department Of Veterans Affairs Beneficiaries Life.

What the Department Of Veterans Affairs proposes and is asking for is the right to fully expose all of your private life for the sake of correcting a public misinformation that it chooses not to define.

3.3 Test For The Minister And Secretary – Have Their Own Personal Details Publicly Revealed

If this violation and sacrifice of the Privacy of the Department Of Veterans Affairs Beneficiary, is so necessary for the public good, no doubt for the same public good, the Minister and Secretary would support an amendment requiring their details to be publicly released at the same time.

Of course they will say:-

"No Way Hose!"

which begs the question why it is okay violate and sacrifice the privacy of Department Of Veterans Affairs beneficiaries and not their own.

3.4 Minister Not Required To Meet Minimum Standards

3.4.1 Minister Should Have Provided Draft Regulations

The proposed Act requires the Minister to right guidelines via way of disallowable regulations.

However, the Act does specify any minimum standards.

The Minister should have provided draft regulations in the Explanatory Memorandum – they did not.

"The Minister is asking the Senate to take him on faith that he will get it right, where the Privacy Commissioner and the Courts have got it wrong.

"Trust Me"

3.5 Military Records Wrong

As the Department Of Veterans Affairs has admitted to the Senate and elsewhere, it has been handicapped by the records provided to it by Defence being missing or just plain wrong and fraudulent.

3.6 Far From Correcting Misinformation Bill Creates More Misinformation

Given the preceding information, by publishing the individual's file to correct "misinformation" we would be creating further misinformation by publishing the false information from Defence.

3.7 Overturns Well Established Good Public Policy

It is well established public policy that people speak freely with their doctors with certain clear exceptions.

This bill, would directly discourage this with Department Of Veterans Affairs Beneficiaries being aware that at any time the Secretary could release their details publicly.

At a time when we are encouraging our victims to seek help, this would actively discourage it.

This alone is ground to set aside this provision of the bill.

3.8 DVA Release Information Already Without Breaching Privacy

The Department Of Veterans Affairs is already empowered to release information to correct misinformation all the rime.

Be it through:-

- Fact Sheets
- Reports To Parliament
- Statistics through its Website

This provision of the bill is not needed.

3.9 Secretary Able To Selective Release To Create Disinformation

The provisions of this bill would allow the Secretary to cherry pick and quote of context.

Instead of correcting misinformation, it would be creating more.

3.10 Genuine Consultation Has Not Taken Place For Bill

Only the Ex Service Organisations Round Table were consulted by the Department Of Veterans Affairs' own admission.

Furthermore that consultation was not a genuine opportunity to influence the decision maker.

> "***Consultation is not perfunctory advice on what is about to happen. This is common misconception. Consultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker. Taking The Department Of Veterans Affairs Out"***
>
> **CPSU v Vodafone Network Pty Ltd - PR911257 [2001] AIRC 1189 (14 November 2001)**

The purported consultation has been perfunctory and selective.

3.11 Genuine Consultation Has Not Taken Place For Minister Guidelines

This has not even occurred because the guidelines have not even been created.

3.12 DVA Already Has Reputation For Targeting DVA Beneficiaries – This Will Only Make It Worse

Whether the Department Of Veterans Affairs likes it or not, the Department Of Veterans Affairs has a bad reputation for targeting Department Of Veterans Affairs beneficiaries and their Ex Service Organisations and Advocates who they see as "uncooperative".

Annexure A documents this.

This Bill will only make that perception worse.

It will further encourage them not to engage with the Department Of Veterans Affairs when it is in everyone's interest, including the Department Of Veterans Affairs to engage.

4.0 Computerised Decision Making

4.1 Most So Called Decisions In DVA Submission Are Not Decisions

The Department Of Veterans Affairs in its submission refers to things that are decisions that need to be automated.

One good example is reimbursement of travel expenses.

This is not a decision.

This is a consequence of the real decision, to award a Gold Card or White Card to the Veteran.

This should have been automated by now and could be.

It does not require a bill to authorise it, the Department Of Veterans Affairs already has the power.

It has been put to us that things such as Travel Expense Reimbursement are actually decisions under SRC and MRCA.

If so, the correct solution is an amending act to make them consequences and not decisions.

Not this Bill.

4.2 Making Decisions On Solely On Known False / Incorrect Information From Defence

4.2.1 Overview

The Department Of Veterans Affairs has fessed up to the Senate and elsewhere that its ability to correctly assess applications has been handicapped by false / incorrect information from the Australian Defence Force.

This concession is rightly and properly made.

Yet now in its submission it proposes to automate decisions about eligibility for benefits based solely on information from Defence that the Department Of Veterans Affairs has previously admitted is quite often wrong or false.

4.2.2 DVA Asking The Senate To Allow It To Approve Decisions That DVA Knows Are Wrong

Thus the Department Of Veterans Affairs, through this Bill, is asking the Senate for permission to:-

- Allow it to base its decisions solely on wrong information and
- Make decisions that it knows to be wrong and denying Veterans their entitlements.

This is an absurdity that must be rejected.

4.3 Lack Of Standards And Certification

There is no mention in this Bill of any standards or certification that the computer programmes make decisions in accordance with the Act.

The granting or non granting of entitlements under the Act has very serious implications for the Veteran concerned.

It has to be got right.

The current approach of the Department Of Veterans Affairs in this matter is one of a "**Suck It And See Approach**".

This is clearly unacceptable.

4.4 DVA Needs This Bill Now Because Of Rapidly Changing Technology

Last week during a Teleconference between the Association and senior members of the Department Of Veterans Affairs, it was put to the Association that:-

- Technology is changing rapidly
- They have to start experimenting now because it is changing so rapidly.

This argument is horse puckey.

A Decision Making Programme would have to be written in a current language such as DB2, PL1 etc.

These run on any platform and when platform changes, they can be ported across.

This is a fallacious argument.

4.5 DVA Asking For Blank Cheque On Decisions – Trust Us

The Department Of Veterans Affairs in its submission has said we could do it for this or we could do it for that.

As has been documented previously, most of this is either:-

- Not a decision but a consequence or
- Simple data capture from defence - not a decision

Given the importance of "Decisions" and their effect upon Veterans, the Bill should have specified exactly what decisions will be automated.

It does not.

Again The Department Of Veterans Affairs is saying to the Parliament "Trust Us".

This is unacceptable.

4.6 What Should The Bill Have Authorised Vis A Vis Computerised Decision Making?

The approach the Department Of Veterans Affairs should have done is:-

- Specify exactly what decisions would be automated
- Set up so that the Computerised Decision Making can only say yes.
- Where it would say "No" that file is referred to a human delegate to make the final decision.

This they have not done.

This part of the bill must be rejected – our braver veterans deserve this.

5.0 Conclusions – Bill Must Be Rejected

This bill, for the most part is an ill-conceived and ill-considered bill.

It must be rejected.

Annexure A – Press Release And Letter By Amanda Rishworth

Labor

MEDIA RELEASE | WE'LL PUT PEOPLE FIRST

THE HON AMANDA RISHWORTH MP
SHADOW MINISTER FOR VETERANS' AFFAIRS
SHADOW MINISTER FOR DEFENCE PERSONNEL
MEMBER FOR KINGSTON

DRACONIAN SOCIAL MEDIA MONITORING IS NOT JUSTIFIABLE

Today, I have written to the Minister for Veterans' Affairs, Dan Tehan to seek assurances and for the Minister to urgently investigate reports our ex-service personnel and veterans going through the claims process at Department of Veterans' Affairs (DVA) are not falling victim to draconian social media monitoring which is an abuse of the Departments mandate.

Submissions made to the Senate Inquiry into Suicides by War Veterans and Ex-Service Personnel raise serious concerns of the privacy of our veterans and ex-service personnel.

The claims process already asks for detailed and substantiated information from veterans when making a claims process.

That is why abusive prying into the private lives of veterans and ex-service personnel is not justifiable.

Our veterans and ex-service personnel should feel supported when they leave the ADF, not victimised by their own Department.

Our veterans deserve the knowledge they are being treated fairly and with the respect they deserve.

Making claims through DVA is already hard enough for some veterans, with issues like today's reports only exacerbate feelings of frustration and persecution within the veterans and ex-service communities.

The Minister should come clean on these claims and take action.

Veterans and ex-service personnel deserve to know if these reports are true and if necessary the Minister demand that his Department cease this behaviour immediately.

THURSDAY, 2 FEBRUARY 2017

Amanda Rishworth MP
Shadow Minister for Veterans' Affairs
Shadow Minister for Defence Personnel
Federal Member for Kingston

The Hon Dan Tehan MP
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600
Ref: AR/KH

2 / February 2017

Dear Minister Tehan, Dan

I write to you in regards to recent reports of abusive social media monitoring and internet use of claimants of the Department of Veterans' Affairs.

Reports veterans and ex-service personnel have their internet use and social media monitored to further substantiate their claims through the Department has rightly concerned veterans, ex-service personnel and the wider Defence community. These reports have only exacerbated overwhelming feelings of the claims process which many find extremely difficult.

Labor asks that this matter be investigated notwithstanding the current inquiry to ensure those who are seeking claims through the DVA can do so with the upmost confidence.

I would appreciate it if you could investigate the issues I have raised above.

Yours sincerely

Amanda Rishworth MP
Shadow Minister for Veterans' Affairs
Federal Member for Kingston

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Annexure B – Extract From – "A Treatise upon the Law, Privileges, Proceedings and Usage of Parliament" – Erskine May

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IMPROPER INFLUENCE

Attempts by improper means to influence Members in their parliamentary conduct may be considered contempts. One of the methods by which such influence may be brought to bear is bribery; and it is as culpable for an individual to offer a corrupt consideration to a Member of either House with a view to influencing his conduct in that capacity as it is for the consideration to be accepted. For a detailed treatment of contempts of this character, see pp 132–136.

A committee of the Commons concluded that 'pressure' involved a positive and conscious effort to shift an existing opinion in one direction or another; and premeditation was not an essential precondition. Thus, the committee considered that the Chairman of a Select Committee (on Members' Interests) had exceeded the bounds of propriety in participating in a conversation with a government whip about matters within that Committee's remit, and the whip ought not to have raised with the Chairman a matter critical to the deliberations of the Committee.[1]

Conduct not amounting to a direct attempt improperly to influence Members in the discharge of their duties but having a tendency to impair their independence in the future performance of their duty may be treated as a contempt. An example of such a case is the Speaker's ruling that a letter sent by a parliamentary agent to a Member informing him that the promoters of a private bill would agree to certain amendments provided that he and other Members refrained from further opposition to the bill constituted (under the procedure then in force) a *prima facie* breach of privilege.[2]

Influence by private solicitation in certain circumstances has also been found objectionable. The Lords have resolved that the private solicitation of Members on matters of claims to honours or other judicial proceedings was a breach of privilege.[3] Upon the same principle, it would be a contempt, when Members are acting in a judicial or quasi-judicial capacity, eg when serving on committees on private bills, to attempt, by letters, anonymous or other, to influence them in the discharge of their duties.[4]

1 Select Committee on Standards and Privileges, First Report, HC 88 (1996–97).
2 CJ (1962–63) 251. The Member concerned, having received an apology, did not submit a motion to the House.
3 LJ (1802–03) 227.
4 LJ (1810–11) 332, 341; CJ (1884) 167 and Parl Deb (1884) 287, c 11; and HC Deb (1921) 145, c 831. See also Select Committee on Standards and Privileges, First Report, HC 88 (1996–97).

given before either House or a committee.[1] The courts have refused to entertain such actions based on statements made in evidence before a committee.[2]

CONTEMPT, PETITIONERS AND CONSTITUENTS

PETITIONERS, ETC

Those having business before either House or its committees, as petitioners, counsel, agents and solicitors, are considered as under the protection of the High Court of Parliament, and obstruction of, or interference with such persons in the exercise of their rights or the discharge of their duties, or conduct calculated to deter them or other persons from preferring or prosecuting petitions or bills or from discharging their duties may be treated as a contempt.

Instances of this kind of contempt include causing the arrest of persons soliciting business before the House, knowing them to be such, within the period of freedom from arrest (see pp 126–127);[3] assaulting or threatening them within the precincts[4] or by reason of their approach to the House;[5] insulting them,[6] or challenging them to fight;[7] bringing an action for a libel alleged to have been contained in a petition to the House;[8] or libelling them in respect of professional conduct before a committee.[9]

CONSTITUENTS AND OTHERS

Similar protection is not afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide to Members information that has no connection with proceed-

1 LJ (1845) 690, 712, 729 and Parl Deb (1845) 82, cc 431, 494; CJ (1693–97) 591, 613; ibid (1845) 672, 680, 696 and Parl Deb (1845) 81, c 1436.

2 *Goffin v Donnelly* (1881) 6 QBD 307, 50 LJ (QB) 303 was an action for slander in respect of evidence given to a select committee by a witness. Field J observed:

> it may be a hardship upon individuals that statements of a defamatory nature may be made concerning them [sc before a select committee] but the interest of the individual is subordinated by the law to a higher interest, viz that of public justice, to the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences.

He went on to rebut the contention that there was a difference in this respect between evidence in court and evidence given to the Commons (though without making any reference to article IX of the Bill of Rights).

3 CJ (1547–1628) 702, 767, 787; ibid (1644–46) 31.

4 LJ (1709–14) 752; ibid (1831–32) 384, 387 and Parl Deb (1832) 14, cc 425, 495; CJ (1667–87) 341.

5 CJ (1757–61) 264, 270.

6 LJ (1826) 128, 142, 145; ibid (1831–32) 384, 387; CJ (1547–1628) 805, 806.

7 LJ (1831–32) 388.

8 CJ (1693–97) 599, 699.

9 LJ (1795–1800) 638, 646.

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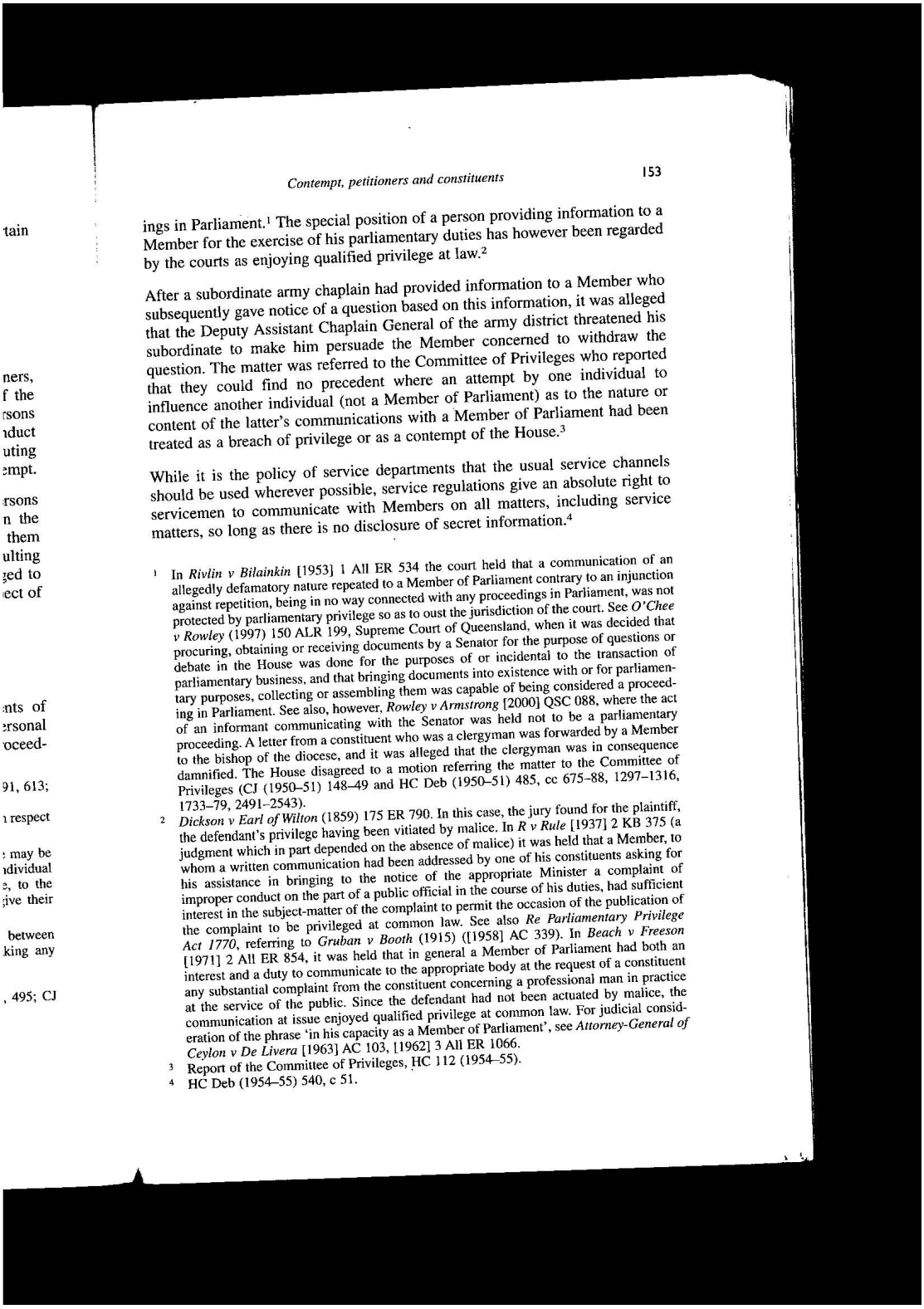

Contempt, petitioners and constituents 153

ings in Parliament.[1] The special position of a person providing information to a Member for the exercise of his parliamentary duties has however been regarded by the courts as enjoying qualified privilege at law.[2]

After a subordinate army chaplain had provided information to a Member who subsequently gave notice of a question based on this information, it was alleged that the Deputy Assistant Chaplain General of the army district threatened his subordinate to make him persuade the Member concerned to withdraw the question. The matter was referred to the Committee of Privileges who reported that they could find no precedent where an attempt by one individual to influence another individual (not a Member of Parliament) as to the nature or content of the latter's communications with a Member of Parliament had been treated as a breach of privilege or as a contempt of the House.[3]

While it is the policy of service departments that the usual service channels should be used wherever possible, service regulations give an absolute right to servicemen to communicate with Members on all matters, including service matters, so long as there is no disclosure of secret information.[4]

1 In *Rivlin v Bilainkin* [1953] 1 All ER 534 the court held that a communication of an allegedly defamatory nature repeated to a Member of Parliament contrary to an injunction against repetition, being in no way connected with any proceedings in Parliament, was not protected by parliamentary privilege so as to oust the jurisdiction of the court. See *O'Chee v Rowley* (1997) 150 ALR 199, Supreme Court of Queensland, when it was decided that procuring, obtaining or receiving documents by a Senator for the purpose of questions or debate in the House was done for the purposes of or incidental to the transaction of parliamentary business, and that bringing documents into existence with or for parliamentary purposes, collecting or assembling them was capable of being considered a proceeding in Parliament. See also, however, *Rowley v Armstrong* [2000] QSC 088, where the act of an informant communicating with the Senator was held not to be a parliamentary proceeding. A letter from a constituent who was a clergyman was forwarded by a Member to the bishop of the diocese, and it was alleged that the clergyman was in consequence damnified. The House disagreed to a motion referring the matter to the Committee of Privileges (CJ (1950–51) 148–49 and HC Deb (1950–51) 485, cc 675–88, 1297–1316, 1733–79, 2491–2543).

2 *Dickson v Earl of Wilton* (1859) 175 ER 790. In this case, the jury found for the plaintiff, the defendant's privilege having been vitiated by malice. In *R v Rule* [1937] 2 KB 375 (a judgment which in part depended on the absence of malice) it was held that a Member, to whom a written communication had been addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct on the part of a public official in the course of his duties, had sufficient interest in the subject-matter of the complaint to permit the occasion of the publication of the complaint to be privileged at common law. See also *Re Parliamentary Privilege Act 1770*, referring to *Gruban v Booth* (1915) ([1958] AC 339). In *Beach v Freeson* [1971] 2 All ER 854, it was held that in general a Member of Parliament had both an interest and a duty to communicate to the appropriate body at the request of a constituent any substantial complaint from the constituent concerning a professional man in practice at the service of the public. Since the defendant had not been actuated by malice, the communication at issue enjoyed qualified privilege at common law. For judicial consideration of the phrase 'in his capacity as a Member of Parliament', see *Attorney-General of Ceylon v De Livera* [1963] AC 103, [1962] 3 All ER 1066.

3 Report of the Committee of Privileges, HC 112 (1954–55).

4 HC Deb (1954–55) 540, c 51.

Legislative Assembly Privileges Committee

Report on the Complaint by the Member for Preston

JULY 2006

Legislative Assembly

Privileges Committee

Report on the Complaint by the Member for Preston

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APPOINTMENT OF THE PRIVILEGES COMMITTEE

Extract from the Votes and Proceedings of the Legislative Assembly

Wednesday 26 March 2003

6 **APPOINTMENT OF COMMITTEES**

…

(4) That a select committee be appointed to inquire into and report upon complaints of breach of **privilege** referred to it by the House; such Committee to consist of Mr Cooper, Mr Herbert, Mr Honeywood, Ms Lindell, Mr Lupton, Mr Maughan, Mr Nardella, Mr Perton and Mr Stensholt, and that the committee has power to send for persons, papers and records; to sit on days on which the House does not meet, to meet and take evidence when the House is actually sitting, and to move from place to place; five to be the quorum.

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Chair's introduction

It is with pleasure that I present this report to the Legislative Assembly. It has been several years since the Legislative Assembly Privileges Committee has conducted an inquiry of this nature and I am honoured to have chaired the Committee through this inquiry. The matters raised and dealt with in this report are some of the most significant issues to come before the Committee in my time as Chair. I am sure the findings in this report will be of interest to members of the Assembly and in other jurisdictions as well.

I thank my fellow committee members for the time and effort they gave to the inquiry and for their thoughtful consideration of the matters. The inquiry gave us all an opportunity to reflect on our own roles as members of the Assembly and the ways in which we represent our constituents. I also thank the witnesses who gave evidence to the committee and acknowledge the cooperative manner of their participation.

Mr Ray Purdey, Clerk of the Legislative Assembly, prepared a background paper for the Committee early in the inquiry and I thank him for his contribution. I also thank the staff of the Committee, Mr Robert McDonald and Ms Bridget Noonan, for their valuable assistance and guidance.

Don Nardella, MP
Chair

Complaint by the Member for Preston

Introduction

1 On 28 February 2006, the Speaker informed the Legislative Assembly that the Member for Preston had lodged with her written notification of a complaint that a constituent, who had provided information to the Member relating to an issue he had previously raised in the House, later received a solicitor's letter threatening legal action if the Member repeated certain allegations in the House.[1]

After debate, the House resolved that the complaint made by the Member for Preston be referred to the Privileges Committee for investigation and report.

Background

2 When giving precedence to the matter of privilege[2] the Speaker said:

> There are two questions to be considered in this case. The first is whether such a threat, when directed at a constituent for the provision of information to a member of Parliament for the use in the House, constitutes a contempt. There is no doubt that members are provided with a range of information from time to time and that such information becomes an important source for members to raise matters in the House. To have the provision of such information regularly subjected to legal threats would significantly hamper members in the performance of their duty. Whilst this particular question has not been fully determined by the courts or parliamentary practice, I am of the opinion that this matter could fall within this category of contempt.
>
> The second question to be considered is whether the threat could be considered as an improper means to influence the Member for Preston in the performance of his duties.[3]

3 In speaking to the motion that the matter be referred to the Privileges Committee, Mr Leighton said:

> I am moving this motion because there has been a clear and premeditated attempt to stop me from speaking in this House … [in] the Westminster system — indeed, in any parliamentary system — the right of elected members of Parliament to go into their chambers and to speak without fear or favour is one of the pillars of democracy. This right is protected by privilege and the Privileges Committee has an important role to play in investigating any breaches.[4]

4 Four members spoke to the motion and it was agreed to.[5]

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[1] VP (2003–06) p 972
[2] In accordance with SO 150
[3] *Hansard*, 28 February 2006, p 291
[4] *Hansard*, 28 February 2006 p 292
[5] VP (2003–06) p 297

5 Mr Leighton read to the House the letter his constituent, Mr John Cannard, had received from Mills Oakley Lawyers[6]:

> 21 January 2006
>
> Dear Mr Cannard,
>
> Defamation of Mr Stephen Wellard
>
> As you are aware, we act for Ellerton Lodge Pty Ltd. You may not be aware that we also act for Mr Stephen Wellard, a director of Ellerton Lodge.
>
> We are instructed by Mr Wellard that you have made erroneous allegations that he at some point assaulted you. We are instructed that those allegations have been made verbally in the hearing of a number of other residents and Mr Michael Leighton, minister of Parliament for Preston.
>
> As you are also aware, Mr Leighton has made numerous false and embarrassing allegations and name calling of Mr Wellard under the protection of parliamentary privilege. He cannot be sued for defamation at this point, because he has not dared to make those allegations outside of Parliament.
>
> You are not protected from parliamentary privilege and can be sued for false and damaging allegations made about Mr Wellard which have the effect of besmirching his character and damaging his reputation.
>
> We request that you make an immediate and formal apology to Mr Wellard for your false allegations and cease to make those allegations immediately. We hereby put you on notice that, should your false allegation be repeated in any media or by Mr Leighton in Parliament or by yourself or any other person, we will bring action against you to recover the damages suffered by our client.
>
> If you have any questions or require further information, please contact Jeanette Thomson on (03) 9605 0879.
>
> Yours faithfully,
>
> Mills Oakley Lawyers.

[6] *Hansard*, 28 February 2006, p 292

Conduct of inquiry

6 The Committee resolved to request a paper from the Clerk of the Legislative Assembly, Mr Ray Purdey, commenting on the issues arising from the terms of reference and providing guidance on parliamentary practice, precedents (including from other jurisdictions) and case law.

7 After consideration of the Clerk's paper and relevant precedents, the Committee took the view there were two main aspects to the complaint:

- whether the immunity afforded by parliamentary privilege extends to the communication of information to members by other persons; and
- whether the threat of adverse action against a constituent could be considered as an improper means to influence a member of Parliament in the performance of their duties.

8 The Member for Preston forwarded to the Committee a letter dated 9 March 2006 he had received from Mills Oakley Lawyers in which the firm stated it had not been the intention of the letter sent to Mr Cannard on 21 January 2006 to restrict the ability of Mr Leighton to speak freely and openly before the House.

9 The Committee determined to hear oral evidence from witnesses at a hearing and resolved the hearing would be conducted in camera.

10 Witnesses invited to attend the hearing were also invited to prepare written submissions. The Committee resolved that any written submissions received would be kept confidential.

11 In order to determine the relative roles and responsibilities of individuals at Mills Oakley Lawyers in relation to the correspondence sent to Mr Cannard on 21 January 2006, the Committee wrote to the Chair of Partners, Mr Stephen Moulton and Senior Partner Mr Roger Jepson. Mr Moulton responded on behalf of both he and Mr Jepson and the response was noted by the Committee.

12 In camera hearings were held on Thursday 25 May 2006 in Melbourne. Some of the witnesses chose to send written submissions in support of their oral evidence. The Committee thanks all witnesses for their participation in the inquiry.

Comment

Proceedings in Parliament

13 In the Commonwealth *Privileges Act 1987*, 'proceedings in Parliament' are defined as:

> all words spoken or acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee.[7]

May states:

> [P]rotection is not afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide to Members information that has no connection with proceedings in Parliament. The special position of a person providing information to a Member for the exercise of his or her parliamentary duties has however been regarded by the courts as enjoying qualified privilege at law.[8]

In determining this issue, the Committee considered the circumstances in which Mr Cannard provided the information to Mr Leighton, including:

- the closeness of the connection between the communication and the proceedings in Parliament; and
- whether there was a reasonable expectation the matters contained in the communication would be raised in Parliament.

14 Given the history of Mr Leighton speaking on the matter in the House[9] and the likelihood he would do so again, it can be concluded that there was a reasonable expectation that the information provided by Mr Cannard would be used by Mr Leighton as part of his parliamentary duties and role as a member. Evidence provided to the Committee indicated that Mr Leighton's constituents including Mr Cannard, had a strong belief that Mr Leighton would represent their views and the Committee therefore sees the provision of this information as being for the purposes of, or incidental to, transacting business in the House.

15 In the circumstances, the provision of information to Mr Leighton by his constituent was directly connected with the business of the House and it is the Committee's view that it is therefore protected by parliamentary privilege.[10] The letter by Mills Oakley Lawyers dated 21 January 2006 states:

> We hereby put you on notice that, should your false allegation be repeated … by Mr Leighton in Parliament … we will bring action against you to recover damages suffered by our client.

The letter is a clear attempt by Mills Oakley to interfere with the provision of information relevant to Mr Leighton's duties as a member of the Legislative Assembly. The Committee is of the view that by threatening legal action against Mr Cannard, Mills Oakley Lawyers sought to prevent information from being given to Mr Leighton and this is a contempt.

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[7] Parliamentary Privileges Act 1987 (Cth), s 16. Section 16 states that this definition applies in relation to the provisions of article 9 of the Bill of Rights 1688.
[8] *May*, 23rd ed, pp 152–3
[9] A chronology of Mr Leighton raising the matter in the House is attached at Appendix 2
[10] See also Senate Committee of Privileges, *67th Report*, p 12

Improper means to influence a member

16 Attempts by improper means to influence members in their parliamentary conduct may be considered contempts.[11] The Clerk of the Australian Senate, advised the Senate Committee of Privileges in the course of an inquiry that '[t]he taking or threatening of legal action can constitute a contempt of Parliament or a contempt of court if the effect or tendency is to interfere with the conduct of proceedings in Parliament or court proceedings'[12] and the Committee agrees with this view. To attempt to influence a member by threat or molestation may impair a member's independence in the performance of their duties.[13]

17 The Committee is of the opinion that the threat of an adverse action against a person other than a member can, in certain circumstances, also be considered an improper means to influence a member if it prevents, or attempts to prevent, a member from carrying out their duties.

18 The Committee concludes it is necessary to demonstrate a close link between the 'threat' and the actual or anticipated outcome of influencing/impairing the member's duties.

19 In a similar situation, the Senate Privileges Committee determined that threats and the carrying out of threats, by commencing legal proceedings against a constituent, could be viewed as intended to prevent the constituent from providing information to a Senator, thereby interfering with the Senator's duties.[14] The Committee finds parallels with this case.

20 The Committee formed the view that the threat of adverse action against a constituent may be considered an improper means to influence a member, if it was reasonably likely to have the effect of preventing a member from carrying out their duties and fulfilling the obligations of their role.

21 Mills Oakley Lawyers and Mr Leighton both advised the Committee that the law firm had written to Mr Leighton on 9 March 2006, to apologise and explain that it had not been the firm's intention in communicating with Mr Cannard, to prevent Mr Leighton carrying out his duties as a member. Notwithstanding the evidence presented to the Committee that indicated it was not Mills Oakley Lawyers' intention to prevent Mr Leighton from raising the matter in the House (or to make him reluctant to do so), the Committee concludes that this was, in fact, part of the intention of the letter to Mr Cannard. The Committee accepts the letter was sent to Mr Cannard without being properly checked by a partner at Mills Oakley Lawyers, as is the firm's standard practice and that the firm acknowledges that the letter was poorly worded. However, none of this alters the effect the letter was designed to have.

22 The Committee notes that Mr Leighton has not raised the matter in the House since the matter has been referred to the Committee. The Committee is of the

[11] *May*, 23rd ed, p 147
[12] Senate Committee of Privileges, *67th Report*, pp 12–3
[13] *House of Representatives Practice*, 5th ed, p 731
[14] Senate Committee of Privileges, *67th Report*, pp 21–4

opinion that the letter to Mr Cannard was an indirect threat to Mr Leighton, thereby constituting an improper means to influence a member.

Findings

23 The Committee concludes that while the letter to Mr Cannard was partly to prevent Mr Cannard from making potentially defamatory statements to people in his community other than Mr Leighton, it was also intended to — (a) prevent the constituent from communicating freely with his elected representative; and (b) prevent the elected representative from speaking in the House. The Privileges Committee therefore makes the following findings:

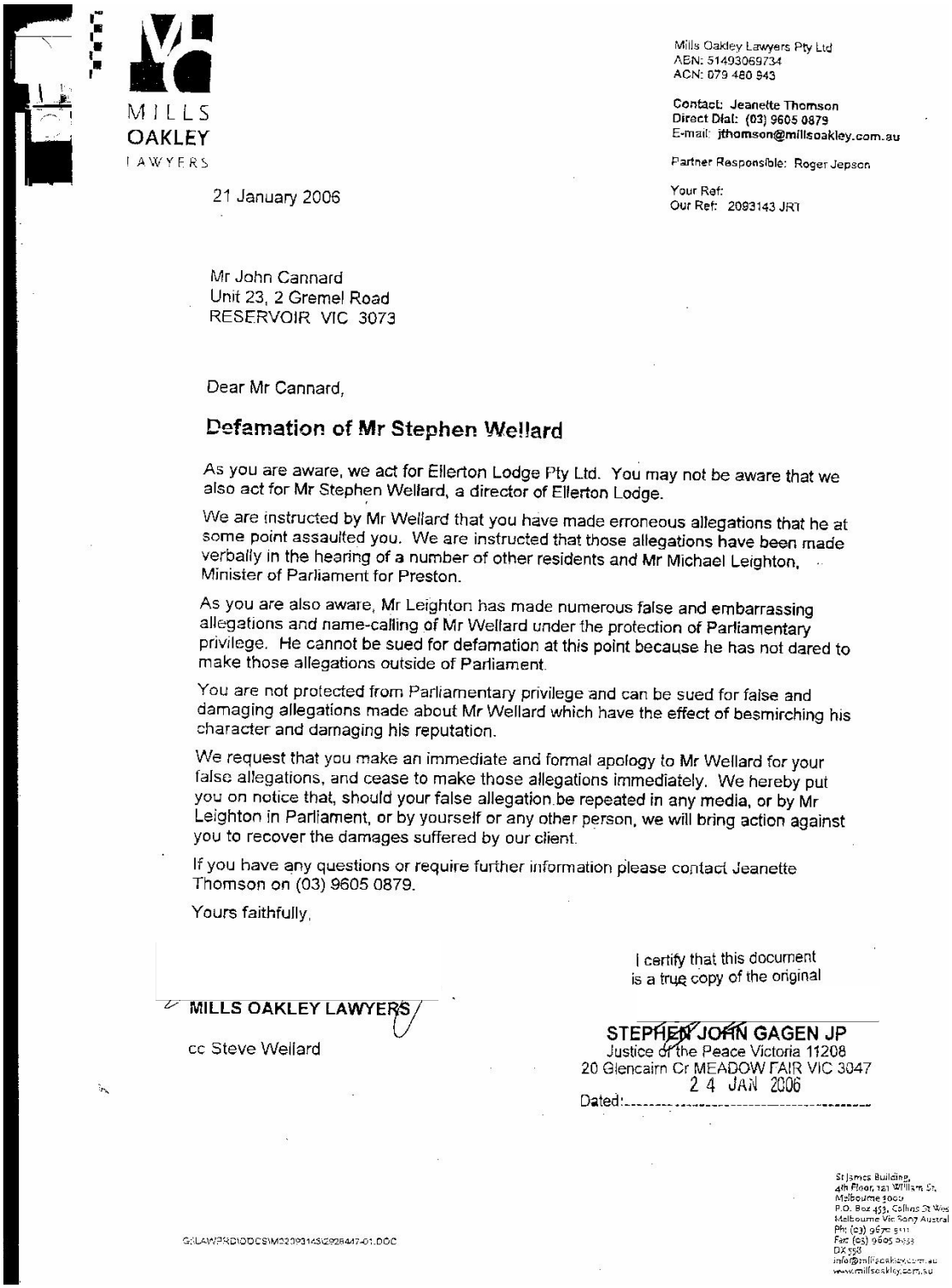
24 The Committee finds that the provision of information by Mr Cannard to Mr Leighton for use in the House, as part of his role in representing his constituents, was a proceeding in parliament and therefore protected by parliamentary privilege. The letter sent by Mills Oakley Lawyers to Mr Cannard constituted an attempt to interfere with the provision of this information and is therefore a breach of privilege.

25 In relation to the question of whether the threat of adverse action against a constituent could be considered an improper means to influence a member of Parliament in the performance of their duties, the Committee finds that, in this case, a contempt has occurred and notes:

- the subsequent letter of apology to Mr Leighton from Mills Oakley Lawyers cannot alter the fact that the letter to the constituent had the effect, or was intended to have the effect, of preventing the flow of information from constituent to member and of hindering the member in the exercise of his parliamentary duties;
- the threat of adverse action against the constituent can be seen as a contempt in cases where the threat is intended, or could be reasonably expected to have the effect, to prevent a member carrying out his or her duties as a member of the House.

APPENDICES

Appendix 1



MILLS OAKLEY LAWYERS

Mills Oakley Lawyers Pty Ltd
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Contact: Jeanette Thomson
Direct Dial: (03) 9605 0879
E-mail: jthomson@millsoakley.com.au

Partner Responsible: Roger Jepson

Your Ref:
Our Ref: 2093143 JRT

21 January 2006

Mr John Cannard
Unit 23, 2 Gremel Road
RESERVOIR VIC 3073

Dear Mr Cannard,

Defamation of Mr Stephen Wellard

As you are aware, we act for Ellerton Lodge Pty Ltd. You may not be aware that we also act for Mr Stephen Wellard, a director of Ellerton Lodge.

We are instructed by Mr Wellard that you have made erroneous allegations that he at some point assaulted you. We are instructed that those allegations have been made verbally in the hearing of a number of other residents and Mr Michael Leighton, Minister of Parliament for Preston.

As you are also aware, Mr Leighton has made numerous false and embarrassing allegations and name-calling of Mr Wellard under the protection of Parliamentary privilege. He cannot be sued for defamation at this point because he has not dared to make those allegations outside of Parliament.

You are not protected from Parliamentary privilege and can be sued for false and damaging allegations made about Mr Wellard which have the effect of besmirching his character and damaging his reputation.

We request that you make an immediate and formal apology to Mr Wellard for your false allegations, and cease to make those allegations immediately. We hereby put you on notice that, should your false allegation be repeated in any media, or by Mr Leighton in Parliament, or by yourself or any other person, we will bring action against you to recover the damages suffered by our client.

If you have any questions or require further information please contact Jeanette Thomson on (03) 9605 0879.

Yours faithfully,

MILLS OAKLEY LAWYERS

cc Steve Wellard

I certify that this document is a true copy of the original

STEPHEN JOHN GAGEN JP
Justice of the Peace Victoria 11208
20 Glencairn Cr MEADOW FAIR VIC 3047
24 JAN 2006
Dated:

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Appendix 2

Timeline of events

Date	Event
22 February 2005	Mr Leighton raises issues relating to Summerhill Residential Park during statements by members in the House.
22 February 2005	Mr Leighton raises the issue of Summerhill Residential Park in the adjournment debate in the House.
24 February 2005	Mr Leighton mentions concerns relating to the management of Summerhill Residential Park during debate on the Retirement Villages (Amendment) Bill in the House.
20 July 2005	Mr Leighton raises the issue of rates at Summerhill Residential Park during statements by members in the House.
16 August 2005	Mr Leighton raises the issue of Summerhill Residential Park during debate on the Residential Tenancies (Further Amendment) Bill in the House.
18 August 2005	Mr Lim raises the issue of Summerhill Residential Park during debate on the Residential Tenancies (Further Amendment) Bill in the House.
21 January 2006	Mills Oakley Lawyers write a letter to Mr Cannard titled 'Defamation of Mr Stephen Wellard'.
3 February 2006	Mr Leighton writes to the Speaker raising an alleged breach of privilege.
7 February 2006	Mr Leighton raises the issue of the management of Summerhill Residential Park in the adjournment debate in the House.
28 February 2006	A motion is passed in the House referring the complaint made by Mr Leighton to the Privileges Committee for investigation.[15]
9 March 2006	Stephen Moulton, Chairman of Partners, Mills Oakley Lawyers, writes a letter of apology to Mr Leighton.

[15] *Votes and Proceedings*, (2003–06), p 972

Dear Mr Sullivan,

I only worked this out afternoon.

Otherwise I would have included this in my submission of this morning.

When a Department Of Veterans Affairs Beneficiary makes application they have to prove proof of identity - amongst other things this includes your drivers licence.

The Bill gives the Secretary to release all of your file to correct “misinformation”.

This would make the Department Of Veterans Affairs beneficiary susceptible to easy identity theft.

This makes this provision of the bill completely unacceptable.

This email forms part of my submission.

Yours Respectfully

Jennifer Jacomb

Ms Jennifer Jacomb
Secretary and Public Officer Victims Of Abuse In The Australian Defence Force Association Inc. A0059257W

The Voice For The Voiceless

The Australian Defence Force And Abuse:-

"It was Hubris that made Angels into Devils.

It is obstinacy that keeps them in Hell"

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