

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON PROCEDURE

35TH PARLIAMENT

THIRD REPORT

THE PUBLICATION OF TABLED PAPERS

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES
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Terms of reference of the committee

To inquire into and report on the practices and procedures of the House generally with a view to making recommendations for their improvement or change and for the development of new procedures.

Members of the committee

Chairman: Mr J G Mountford, MP
Deputy Chairman: Mr D M Cameron, MP

Members: Mr E C Cameron, MP
Mr R F Edwards, MP
Mr A H Lamb, MP
Mr E J Lindsay, RFD, MP
Mr P C Millar, MP
The Hon. G G D Scholes, MP

Secretary: Mr M J McRae

THE PUBLICATION OF TABLED PAPERS.

INTRODUCTION

1. On 23 February 1988 Madam Speaker wrote to the Chairman of the Standing Committee on Procedure suggesting the committee consider the question of the publication of tabled papers and report to the House in due course. In her letter, Madam Speaker referred to:

- . the recent decision of the Senate to replace its standing order 362 (similar to House standing order 320) with a standing order that would authorise unrestricted publication of all papers tabled in the Senate;
- . the differing practices of the Senate; and
- . the views of the Joint Select Committee on Parliamentary Privilege on the issue.

A copy of Madam Speaker's letter is at Appendix 1.

2. At its meeting on 23 February 1988 the Procedure Committee resolved to inquire into the publication of tabled papers. It also requested the Clerk of the House to submit a paper on the issue. A copy of the Clerk's paper is at Appendix 2.

THE CURRENT POSITION

3. During the course of a session of the Parliament many papers are tabled in the House and, subject to adequate copies being available and certain distribution guidelines, the vast majority of these are made freely available to Members and others. However, where it is thought that certain papers may contain actionable material their release (publication) by officers of the House is restricted.

4. The Clerk's paper details the background to the issue. In brief, section 11 of the Parliamentary Privileges Act 1987 provides for absolute privilege for the publication of tabled papers by officers of the House to Members of the House. It does not extend absolute privilege to wider publication by Members or officers. Where it is thought a paper may contain actionable material and wider publication is considered necessary, a motion is moved authorising publication of the document in accordance with the provisions of the Parliamentary Papers Act 1908. Over recent years an average of 14 such motions have been agreed to by the House each year. The House has declined to authorise publication of a paper.

5. Also, under the provisions of the Parliamentary Papers Act, where the House has ordered a paper to be printed the House is deemed, unless the contrary intention appears in the order, to have authorised the Government Printer to publish the paper. That protection, however, has been considered to apply only to a paper bearing the imprint of the Government Printer that it is a parliamentary paper (usually some time after the order is made) and not to the publication of the paper in any other form.

6. Obviously, there are cases where the question of whether papers contain actionable material arises and the House has not authorised publication.

Standing order 320 provides:

320. All papers and documents presented to the House shall be considered public. Papers not ordered to be printed may be inspected at the offices of the House at any time by Members, and, with permission of the Speaker, by other persons, and copies thereof or extracts therefrom may be made.

This committee sees a possible contradiction in the terms of the standing order (see below) but, as is pointed out in the Clerk's paper, the standing order has not been seen to represent an authorisation of publication in the terms of the Parliamentary Papers Act.

7. Where there is some question as to the contents of a paper, copies provided to Members are stamped as follows:

HOUSE OF REPRESENTATIVES

This document was provided to a Member in accordance with the provisions of subsection 11(1) of the **Parliamentary Privileges Act 1987** which provides that no action, civil or criminal, lies against an officer of a House in respect of publication to a Member of a document that has been laid before a House.

Clerk of the House of Representatives

8. If a request is received for access to, or copies of, such a paper from a person other than a Member, the paper is examined to ascertain whether it is thought to contain statements which may be regarded as actionable. Advice may be sought on the matter. Information may be sought as to the purposes for which the enquirer seeks access to a copy. The Speaker's decision on the matter has been sought. In some cases papers are not made available to persons other than Members because the scope of absolute privilege is strictly limited.

THE COMMITTEE'S DELIBERATIONS

9. In examining this matter the Procedure Committee considered two main questions:

- . should absolute privilege be extended to the publication (including re-publication by persons possibly outside the parliamentary sphere) of all tabled papers to any person; and
- . should standing order 320 be revised to remove possible ambiguities.

Extension of absolute immunity

10. In considering this matter in its 1984 report the Joint Select Committee on Parliamentary Privilege considered that there should be no doubt about the protection given to an officer handing out a paper to a Member or someone acting on the Member's behalf and that absolute immunity should cover this matter. It added however that it did not believe that the privilege should be extended to apply to other persons as it was '...very reluctant to make any recommendations concerning absolute privilege that might have the effect of extending its protection beyond the borders of what we regard to be fundamentally necessary for the workings of the Parliament'¹. Section 11 of the Parliamentary Privileges Act reflects the recommendation of the Joint Committee.

11. The criticisms of the present arrangements and the arguments for and against extension are set out in detail in the Clerk's paper. The committee considered these arguments and the recent action taken by the Senate. The committee also sought the views of the Leader of the House and the Manager of Opposition Business on the question. Neither supported a change to the existing arrangements.

12. Having considered the issues and whilst appreciating that there are benefits in adopting a provision to provide a blanket authority for the publication of all tabled papers, the committee has concluded that the current arrangements should be retained and that a positive action by the House should be required if it is proposed to authorise full publication of any paper thought to contain actionable material.

1. PP 219 (1984) 62

13. It is agreed that Members must have free and ready access to all papers tabled but in the Committee's view, and whatever other claims may be made for the process, it is not absolutely essential to the functioning of the House that absolute privilege be extended to the general publication of all tabled papers.

14. Unrestricted publication with absolute immunity carries with it the risk of damage to individuals and groups by repeated and malicious publication beyond the parliamentary sphere, and this risk is considered to outweigh the benefits of unrestricted publication of the documents in question. The committee believes that the present arrangements whereby a positive publication order by the House is required to grant absolute immunity should be retained. Under these arrangements the interests of the House, and its Members, are recognised, the wider public interest in the free publication of papers is served (because in most cases publication motions will be carried), but the dangers of misuse are lessened.

15. It must be remembered that this is not a matter of restricting access by the press and public to only those papers that have a publication order. The papers at issue are a very small proportion of those tabled each session and, in practical terms, there will be very little restriction on the access to papers tabled. Reports of inquiries and so on will presumably continue to be published by authority. The category of questionable papers not authorised is, in practice, likely to consist largely of documents of a more diverse, perhaps even incidental character, often tabled during other proceedings.

Adequacy of standing order 320.

16. As the Clerk points out in his paper various interpretations can be placed on the wording of standing order 320 and the committee believes that there is a possible contradiction between the first and second sentences. The second sentence could be regarded as qualifying the first, ancillary to it or, as the Senate Procedure Committee report observed, it may also reflect the state of technology in these matters in 1901.

17. The committee believes that the standing order should be reworded to remove possible ambiguities and to reflect the conclusions of this report. That is, that with respect to those papers not authorised for publication nor ordered to be printed, access to non Members be subjected to the discretion of the Speaker (subject to any direction by the House) where it is considered they may contain actionable material. It must also be borne in mind that there may be practical reasons for restricting access to or the copying of papers presented such as size, quality of print, condition of paper etc. These are matters which do not really fall within the jurisdiction of this committee.

Recommendation

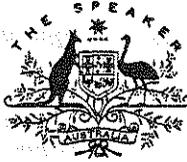
It is therefore recommended that standing order 320 be omitted and the following standing order substituted:

Papers and documents presented to the House and not authorised for publication or ordered to be printed may be made available to Members and, with the permission of the Speaker, may be inspected by other persons or copies thereof or extracts therefrom may be made.

JOHN MOUNTFORD
Chairman

Parliament House
22 November 1988

APPENDIX 1 - MADAM SPEAKER'S LETTER OF 23 FEBRUARY 1988



HON. JOAN CHILD, M.P.
PARLIAMENT HOUSE
CANBERRA 2600
TEL. (062) 726363

23 FEB 1988

Mr J G Mountford, MP
Chairman
House of Representatives Standing
Committee on Procedure
Parliament House
CANBERRA ACT 2600

Dear Mr Mountford

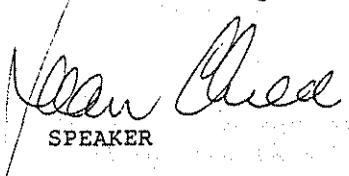
In its first report of the 63rd Session the Senate Procedure Committee recommended that standing order 362 (similar to House standing order 320) be replaced by a standing order that would authorise the unrestricted publication of all papers tabled in the Senate.

The Senate agreed to the amendment to standing orders last Friday. In the course of the Senate debate the differing practices of the House and the Senate regarding the distribution of tabled papers were referred to. As you may be aware, where it is thought certain papers may contain actionable material their release by officers of the House is restricted.

This is an important issue and one on which the Joint Select Committee on Parliamentary Privilege commented in 1984. That committee expressed a reluctance to recommend any changes that might extend the protection of absolute privilege beyond the borders of what it regarded as fundamentally necessary for the workings of Parliament.

I would be pleased if the Procedure Committee could consider this matter and report to the House in due course.

Yours sincerely


SPEAKER

APPENDIX 2 - NOTES PREPARED BY THE CLERK OF THE HOUSE
21 APRIL 1988

PUBLICATION OF TABLED PAPERS

These notes have been prepared for the information of the Procedure Committee and are structured as follows:

- . summary
- . definitions
- . papers authorised for publication
- . papers not authorised for publication
- . assessment of the current situation
- . the extension of absolute immunity
 - policy considerations
 - practical considerations
- . adequacy of the standing orders

SUMMARY

The overwhelming majority of tabled papers are distributed (published) freely to Members and others (within approved guidelines concerning the numbers of copies that can be supplied and so on).

The publication of all tabled papers to Members is absolutely privileged, but in respect of some papers, because of concerns that they may contain defamatory material, if it is considered that they should be published widely, motions are moved to 'authorise publication'.

The effect of such motions is to confer absolute immunity in respect of the publication of such papers to other persons, for example, media representatives.

In practice the effects of the present arrangements include:

- . the need (and the ability) for separate decisions to be made in respect of individual tabled papers containing material that may be actionable;
- . the fact that some papers which contain material that may be actionable, if a 'publication authority' motion is not agreed to, may not be given to persons other than Members (at least not with absolute immunity).

The Senate has recently taken action to amend its standing order 362 so as to provide a blanket authority for the publication of all tabled papers.

The committee has the general issue before it and, in particular, the question of whether it should recommend the adoption of procedures to provide that absolute immunity should apply to the publication of all tabled papers to persons other than Members.

These notes identify the problems with the present arrangements. They then deal with the issue of extending absolute immunity and they refer to the wider policy considerations that should be recognised.

The general conclusion we have reached is that whilst the extension of absolute privilege would overcome problems with the present arrangements, a test of necessity should be applied to any proposal to extend the ambit of absolute privilege. If this test is applied, it is considered that the arguments for extension fail - the change is not essential for the performance of the functions of the House or its Members.

DEFINITIONS

For the purposes of this paper -

'tabled papers' will be taken to refer to those papers - whether reports, notes, correspondence or other documents - tabled by Ministers or other Members which are not ordered by the House to be printed as parliamentary papers. The category of 'tabled papers' may be further broken down into those papers the publication of which is authorised by the House, and those not authorised for publication. For present purposes parliamentary committee reports and papers presented to committees are not included, as particular considerations and procedures apply to them.

'publication' will be interpreted as meaning the making known of matter after it has been written to some person other than the person of whom it is written (Gately on Libel and Slander, 7th edition, London 1974, p. 103). The word has a wide meaning. It goes beyond the writing or printing of matter and encompasses other acts which convey the matter to the person or persons to whom it is communicated.

'Absolute privilege' and 'qualified privilege' are described generally and distinguished as follows:

In certain situations, the law allows one to speak and write without restraint, even at the expense of another's good name and character. These are called Privileged Occasions. Privilege attaches not to content, but to occasion or form. What a member of Parliament says on the floor of the House is privileged, but repetition of the same words outside is not.... Privilege is admitted in title of a variety of individual and social interests which are deemed of sufficient importance to displace the countervailing claim to protection of reputation. The interest may be valued so highly that policy requires the writer or speaker to be completely immune regardless of his motive in giving currency to the defamation. More frequently, however, the interest is of lesser weight in the scale of social values, and prevails over the

plaintiff's only if the defendant was using the occasion to further the interest which the law regards as worthy of protection. In such cases, the privilege is not absolute but qualified, in the sense that it is forfeited by abuse. (J.G. Fleming, The Law of Torts, 6th Edn, Law Book Co, 1983, p.527-8.)

PAPERS AUTHORISED FOR PUBLICATION

Section 2 of the Parliamentary Papers Act 1908 provides, inter alia, that it shall be lawful for the Senate, the House of Representatives or a joint sitting to authorise the publication of any document laid before it. Section 4 provides that -

No action or proceeding, civil or criminal, shall lie against any person for publishing any document or evidence published under an authority given in pursuance of section 2 or deemed by section 3 to have been given.

The effect of these provisions is to confer absolute privilege.

When it is considered that a document to be tabled contains actionable material, and if it is felt that the document ought to be able to be distributed extensively - or at least to persons other than Members - with absolute privilege a motion is moved, usually in the following terms:

That this House, in accordance with the provisions of the Parliamentary Papers Act 1908, authorises the publication of the...

It should be noted that the practice is not to authorise any particular person or persons to do the 'publishing', nor is it the practice to specify to whom a document may be published. The motions moved are thus couched in very broad terms in respect of both the 'publishers' and the recipients. It is considered that the authority given by these motions would not be held to have retrospective effect - it might not, for instance, be held to protect the publication of any defamatory material before the motion is agreed to. (Section 16 of the Parliamentary Privileges Act 1987 is however relevant on this point.)

It should be noted that section 16 of the Parliamentary Privileges Act also provides that publication of a document pursuant to an order of a House (or a committee) is a 'proceeding in Parliament'. This means that such acts of publication are absolutely privileged.

In terms of the extent of protection after the motion is agreed to, it is considered that there is no doubt that what may be regarded as the 'official publication' of the document would be protected, for example, the handing out of copies by staff of the

Parliament to persons who ask for them, such as media personnel. Because of the very broad terms of the motions usually moved, it is considered that other acts of publication or re-publication would also be held to be absolutely privileged. If however these acts of publication were only of incomplete versions or parts of the document it could well be held that absolute privilege did not apply - the law in force in the ACT would, for instance, seem to require this.

PAPERS NOT AUTHORISED OR ORDERED FOR PUBLICATION

The majority of tabled papers are not authorised for publication. There is no need for such motions, as most documents do not contain defamatory statements. Over the years however some documents have been tabled which have contained such statements, but motions to authorise publication have not been moved. In some cases this would be because the practice of using such motions had not been established at the time the papers were tabled.

Staff members handing out copies of papers containing defamatory material are performing 'acts of publication'. The act of publishing to a Member a document that has been laid before a House is absolutely privileged. Section 11 of the Parliamentary Privileges Act 1987 provides that no action, civil or criminal, lies against an officer in respect of such a publication.

If the publication of a paper has not been authorised or ordered and if it is handed (published) to persons other than Members, a potential liability arises. At present it is considered that absolute privilege does not apply but, depending on the circumstances, qualified privilege may be held to apply. There is no case law of which officers of the House are aware which is directly relevant to this point. In practice this issue arises only in respect of a small proportion of the papers provided by staff of the department. If a request is received from a person other than a Member for a copy of a tabled paper about which there is some doubt then, typically, two steps follow. First, the paper will be examined to ascertain whether it is thought to contain statements which may be regarded as defamatory. Secondly, information may be sought on the purposes for which the person wishes to be given a copy of or access to the paper, as this is relevant, to the decision taken. For example, a favourable decision may be given if the person is engaged in bona fide historical research. In some cases the material may not be made available.

House of Representatives standing order 320 provides:

All papers and documents presented to the House shall be considered public. Papers not ordered to be printed may be inspected at the offices of the House at any time by Members, and, with permission of the Speaker, by other persons, and copies thereof or extracts therefrom may be made.

This standing order has not been considered to represent an authorisation of publication in terms of the Parliamentary Papers Act, and so it has not been seen as extending absolute privilege to acts of publication which may take place in respect of all tabled papers (House of Representatives Practice, p.545).

On 19 February 1988 the Senate agreed to a new standing order 362 which provides:

The publication of each document laid upon the table of the Senate is authorised by this Standing Order.

Before this the Senate standing order was virtually identical to House standing order 320. Even when the provisions of the standing orders were the same however it is understood that there had been differences in approach, with the Senate officers taking a freer attitude to the distribution of papers.

ASSESSMENT OF THE CURRENT SITUATION

Three main criticisms of the present arrangements may be made:

- (a) There is now a difference in the standing orders, as well as the practice, between the Houses. This may be seen as undesirable in principle, and confusing for persons involved.

Against this it may be argued that there is no overriding reason for the arrangements to be identical, especially if the matters of principle are viewed differently and considered important enough.

- (b) That it is wrong that, in respect of certain papers, officers should have to consider requests on an individual basis, leading them in some cases to decline to make papers available to persons other than Members, or, if it is decided to make a paper available, for some risk to arise.

The assessment of requests can be an inconvenience, and if a person seeking access to, or a copy of, a paper is refused they would presumably regard themselves as at least inconvenienced. Whilst there is a possibility of suit or prosecution if a paper containing defamatory material is published to a person other than a Member without authorisation, in practice only a small percentage of tabled papers is involved, and the possibility of action in respect of such acts of publication may be seen as so remote as to be negligible. Further, as the general law is understood, in the unlikely event of action arising, the department as the 'employer' would presumably be joined in any

action and could be held to be vicariously liable for actions performed by employees in the course of their employment.

- (c) It may seem contrary to the spirit of the standing orders - 'papers and documents ...shall be considered public' - that there should be any impediment to the free dissemination of papers tabled in the Parliament, whatever they contain. It may be argued that they have been placed in the public domain, and access and circulation should be unfettered.

Whilst the general purpose of tabling papers may be to make them public, papers may be tabled which contain unfair or baseless statements, and it may be seen as wrong in principle to confer absolute immunity in respect of the publication of such papers to any degree wider than necessary for the immediate purposes of the functioning of the House. The Joint Select Committee on Parliamentary Privilege took this view.

Having reflected upon the adequacy or otherwise of the present arrangements, the committee may wish to consider the desirability of various changes that could be made.

THE EXTENSION OF ABSOLUTE IMMUNITY

One option is to provide that absolute privilege, which is usually limited to publication of tabled papers to Members, should also apply to the publication of any tabled paper to any person. This would presumably be restricted to entire papers and not apply to extracts from or abstracts of papers. The policy and practical considerations involved in this matter should be considered.

Policy considerations

It could be argued that such a change would be in the wider public interest, in terms of the unrestricted and unchallengeable dissemination of tabled papers which could be presumed to be of some level of public interest. This action would be seen to be in conformity with the first sentence in standing order 320, viz: 'All papers and documents presented to the House shall be considered public'.

The committee will recognise however that the extension of absolute immunity, whether related to the Parliament or other institutions, is a very serious matter in terms of the rights of citizens. This fact is nicely put in the following extract from a decision of Mr Justice Evatt:

Absolute immunity from the consequences of defamation, as Mr E.E. Williams wrote in 1909,

'is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right of civic protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated' (25 Law Quarterly Review p.200).

Extension of the privilege by reason of analogies to recognised cases is not justified. (Gibbons v. Duffell 47 CLR, 534) (The case in point did not concern parliamentary privilege).

Dr J.G. Fleming has written:

Because of its drastic effect in foreclosing all opportunity for vindicating a traduced reputation, absolute immunity is but rarely granted, and only as an aid to the efficient functioning of our governmental institutions: legislative, executive and judicial. Although prevailing even in the teeth of malice and abuse, it is of course not accorded for the sake of shielding mischief-makers who have no claim whatever to the law's sympathy. Rather, so far-reaching an immunity can be justified only to protect certain highly-placed persons from the harassment of having to meet unjustified charges of malice or abuse (before somewhat unpredictable juries) and to remove the dampening effect such a spectre would inevitably have on the fearless discharge of their official functions. It should, and with rare exceptions is, matched by a high sense of responsibility in those who are its beneficiaries, like judges and Ministers of State, or by other effective safeguards against flagrant abuse, as in the case of judicial control over the conduct of witnesses. (J.G. Fleming, The Law of Torts, 6th Edn, Law Book Co, 1983, p.528)

Some recent reviews have contained comments that may be of interest to the committee.

In 1970, following a review of the whole subject, the British Parliament's Joint Committee on the Publication of Proceedings in Parliament concluded in respect of 'act papers' (papers presented pursuant to a statutory obligation):

Where, however, such Act Papers are not published by order of or under the authority of either House, there would seem to be no reason why the qualified privilege these Papers would enjoy at Common Law should not be sufficient. It is difficult, of course, to imagine the authors of such Papers making defamatory statements

about a subject which they know to be untrue, or which they make maliciously, even if they believe them to be true. The question is, however, whether the public interest requires that they should be free to do so, and in the opinion of this Committee the answer is in the negative. (H.L.109, H.C.261, 1970, p.14)

In respect of command papers (essentially papers tabled voluntarily by Ministers) the committee stated:

After giving the matter full consideration they [the Committee] are of the opinion that Command Papers should not, as such, receive the protection afforded by the 1840 Act. Command Papers will almost invariably attract qualified privilege at Common Law and this should be sufficient. Where Governments wish to obtain the protection of the 1840 Act for documents which they are proposing to publish it will be open to them to invoke the return procedure ... (H.L.109, H.C.261, 1970, p.16).

(Arrangements in the House of Commons differ from those in the House on certain aspects. It is understood that the return procedure is a mechanism by which formal motions are proposed which secure the absolute protection available under the Parliamentary Papers Act).

In 1975 the UK Committee on Defamation, known as the Faulks Committee, referred to the recommendations of the 1970 joint committee. The Faulks Committee report noted views put by the Law Officers on difficulties with the existing procedures (in particular delays that could occur when Parliament was not sitting). It concluded however:

While we see the force of the Law Officers' submission, it seems to us that it would involve an unacceptable extension of absolute privilege to a wide variety of reports, by no means all of which would merit absolute protection. We therefore prefer the Joint Committee's recommendation on this point. (Cmd 5909, 1975, p.57)

In its 1984 report the Commonwealth Parliament's Joint Select Committee on Parliamentary Privilege stated:

We add that we do not believe that this privilege should be extended to apply to the furnishing of such papers to other persons, for example, research scholars or members of the media. We take this view as, while we realise such persons may have a very real interest in getting and using such papers, we are very reluctant to make any recommendations concerning absolute privilege that might have the effect of extending its protection beyond the borders of what we regard to be fundamentally necessary for the workings of the Parliament. (PP 219(1984) 62).

In 1987, in recommending the change to Senate standing order 362 noted above, the Senate Procedure Committee, having referred to the previous practice of the Senate in making tabled papers freely available, stated:

The Senate now needs to make a decision on whether all tabled papers are to be published as in the past, or whether only those papers in respect of which there is a specific authorisation to publish are to be made generally available.

It would not seem to the Committee to be rational to alter the existing practice, as part of the purpose of tabling papers is to make them part of the public record. Tabled papers are frequently referred to or quoted in debate, and it is open to a Senator to read a document in the course of the Senator's speech, thereby giving publication of the document absolute privilege. (It should be noted, however, that a Senator other than a minister may table a document only by leave, unless the document is one which the Senate has ordered to be produced.) There would seem to be no rationality, therefore, in restricting access to tabled documents to Senators. (First Report of the Sixty-third Session, 2 November 1987, p.3).

It may seem as somewhat incongruous to move to extend absolute privilege at a time when there is concern at the position of persons reflected upon in Parliament. These concerns have been sufficient to cause a mechanism to be formulated (but not adopted by the House as yet) to enable replies by those reflected upon to be published. If the House moves to extend the ambit of absolute privilege, it has to recognise that there may be an additional ground for concern by those who are the subject of defamatory statements. The 1984 joint select committee noted the possibility of those reflected upon in papers having access to a 'Parliamentary mechanism' to respond. The committee may however see a distinction between the position of those reflected upon in debate and those reflected upon in tabled papers. A response from a person reflected upon in a speech in the House would carry the reply back to the source (and perhaps have it published in Hansard), whereas in the great majority of cases Members are not the source of critical statements in tabled papers. It may be unreasonable, as well as unwise, to expect the House to provide a mechanism for those so criticised - the statements have not originated in the House. Presumably persons involved could however point out that the House would be responsible for giving currency or publicity to a statement originating elsewhere and that this action by the House might be the greater cause of any harm.

In assessing the merits of the arguments for extension, it is important to have regard to, and attach weightings to, the end purposes in the publication of papers. The highest objective is

surely the provision of information to Senators and Members - Members must be able to have free and ready access to tabled papers for the proper performance of their function as Members. Whilst the objective of the completely free dissemination of tabled papers to persons other than Members is to be accorded a high value, it is not considered to be of the same priority as is the case in respect of Members. It is not seen as essential to the functioning of the House as such and needs to be balanced against other considerations. Absolute immunity protects those acting with malice, and a blanket extension to cover perhaps multiple acts of publication by individuals or groups to any other persons or groups is a step which would protect actions taken well beyond those that may be necessary or even important to the operation of the House and its Members.

Blanket extension would clarify the position, but it would amount to an extension of the rights of one group in society - the 'publishers' of tabled papers not authorised - at the expense of another group - those whose welfare or reputation may be affected by such acts of publication.

There are undoubtedly unsatisfactory features in the present arrangements, and there may be some merit in the argument for the blanket extension of absolute immunity as outlined. If the considerations in terms of the various end purposes noted above are accepted however, the conclusions of the Commonwealth Parliament's own joint select committee, the UK joint select committee and the Faulks Committee must be accorded a good deal of weight. In short the proposal may be said to fail the test of necessity referred to earlier.

As the Senate Procedure Committee has pointed out, a Member who wished to ensure wide publication or publicity for a tabled paper not able to be circulated freely could seek an opportunity to read the damaging material, or have it read, into the Hansard record. This is correct for, provided they are in order, Members are free to say whatever they wish in debate. The fact that any limitation or qualification may be circumvented is not however seen as justification for abandoning it. Further a Member may table a paper containing the most scurrilous or damaging material, but that does not necessarily mean the Member wants the full detail to be given the widest circulation. It may, for instance, be a case of fulfilling an obligation, or establishing his or her own bona fides in some matter, or even rebutting a statement already made.

It should also be noted that, in terms of public policy, in those few papers containing defamatory material where there is no motion to authorise publication, the choice is not between publication and suppression. The choice is rather between completely protected publication to any person, or completely protected publication to a sub-set (Members). The consequence of not extending absolute immunity is not that information remain

secret or unknown, but merely that it may only be published (at least with absolute immunity) to Members. It is a matter of the extent of publication to which absolute immunity should apply.

Practical considerations in extension of absolute immunity

If the committee believes that absolute immunity should be extended, it will need to consider the best method of doing so. There would seem to be two options, either by legislation or by resolution or standing orders.

Amendments could be made to either the Parliamentary Privileges Act 1987 or the Parliamentary Papers Act 1908. One advantage of legislation is that it could, if desired, be drafted so as to confer absolute immunity in respect of all papers which have been tabled in the past, as well as all papers to be tabled in the future. This gives rise to an important policy question.

An alternative is action by the House to pass a resolution or a standing order to extend effectively absolute immunity without qualification in terms of the recipients. Doubts have been expressed in the past by officers of the Attorney-General's Department as to the ability to authorise publication before a paper has been tabled. These reservations were founded in the phrasing of section 2 of the Parliamentary Papers Act which refers to the publication by a House 'of any document laid before it', it being considered that this phrase should be interpreted as meaning that the paper(s) in question must have already been tabled when a publication motion is moved. A different view has however been taken on this point by others.

Paragraph 16(2)(d) of the Parliamentary Privileges Act provides that 'for the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section' the term 'proceedings in Parliament' includes

... the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

This provision is another source of authority and could, it would seem, be used as a basis for a motion conferring authorisation in general terms, that is, encompassing papers to be presented in the future, there being no reference to when a paper must be tabled.

Whatever method was chosen to effect an extension of absolute immunity, it has to be recognised that, for all practical purposes, the House would lose the ability to make individual decisions on these matters. It could not for instance without some extraordinary action decide not to authorise the publication of a particular paper, perhaps regarded as totally scurrilous.

If no action is taken to extend absolute immunity, it should still be noted that in practice Ministers can table documents without leave, such documents may contain untrue material or damaging material unrelated to any matter of public interest, and motions to authorise publication may be passed on party lines.

ADEQUACY OF THE STANDING ORDERS

There is some tension between the two sentences of standing order 320 (quoted above). The first sentence is simple enough:

All papers and documents presented to the House shall be considered public.

The second sentence deals with access to papers by Members and other persons and the making of copies or extracts from them. (It is to be noted that the standing order makes a distinction between Members and other persons.)

Various constructions can be put on these words - the first sentence can be seen as a basic statement of intent, and the second sentence as subsidiary or consequential, and to do with the achievement of the ends espoused by the first. Another interpretation is that the sentences can be read such that the first is a statement of intent or attitude - 'shall be considered' - but the second read as qualifying the application of the first, and not just as ancillary to it.

It is also presumed that, to some degree, as the Senate committee has observed, the second sentence reflects the state of technology in these matters at the time of its first insertion in substance (1901).

Whatever interpretation is to be preferred, it is considered that the standing order need not be interpreted as a directive to officers to publish all tabled papers to any person. It is also considered that the second sentence can be read as comprehending situations in which tabled papers may not be published to, that is, made available for inspection by, or copies made for, persons other than Members.

The fact that this very situation has happened in practice, and may recur, does not mean that the standing order is contradictory in itself. Certain papers not authorised for publication are not held in conditions of secrecy, it is rather the publication to certain persons that may be restricted, if it is desired to avoid all risk of action.

