

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

Purpose of guidelines

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

Documents held by members

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

Responsibilities of Members

- 1.4 Parliamentary privilege refers to the special rights and immunities which belong to the Houses, their committees, and their members, which are considered essential for the proper operation of the Parliament. They are not the prerogative of members in their personal capacities and are intended to allow members to discharge their responsibilities to constituents without obstruction or fear of prosecution.¹

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

- 1.5 There may be a number of important interests to be considered when an issue of parliamentary privilege arises, and the interests may not sit easily with each other. Members, in seeking to represent their constituents, have a strong interest in protecting the free flow of information between them and their constituents. However, there is a public interest in the courts having available all relevant material and information as they administer justice.

Court orders to produce documents and or to appear

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

Responding to an order

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

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.²

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

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

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

... all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House ... and, ..., includes: ...

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

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

Test for ‘proceedings in parliament’

- 1.10 In determining whether documents fall within ‘proceedings in Parliament’, and so are entitled to immunity from impeachment or question in courts or tribunals, there are two questions to be considered:
- has an act been done (in this instance by a member or someone acting on his or her behalf) in relation to the records or correspondence ‘in the course of, or for purposes of or incidental to’ the transacting of the business of a House or committee? Broadly speaking, if the records and correspondence in the possession of the member are used in some way to transact the business of a House or a committee, then parliamentary privilege would likely attach; and

- if the answer to the first question is ‘yes’, then a second question arises: does the use that is proposed to be made of the records amount to ‘impeaching’ or ‘questioning’ those proceedings in Parliament? A member may have some difficulty in persuading a court or tribunal that an order which simply required that documents be disclosed or produced to a court or tribunal amounted to impeaching or questioning.⁴

1.11 In summary, then, to claim immunity from an order to produce documents, a member would need to satisfy a court that:

- the documents fell within the definition of ‘proceedings in Parliament’ and so were not subject to impeachment or question; and
- the order to produce the documents amounted to such an impeaching or questioning.

1.12 While some records and correspondence of members would be seen by a court or tribunal to attract the protection of parliamentary privilege, for example, when they have been the subject of debate or a question, it is clear that much of it, including most electorate correspondence and the correspondence by members to Ministers and their departments, would not. The matter is one for interpretation by the courts or tribunals.

1.13 To provide guidance to members, the case of *O’Chee v Rowley* is relevant. The case concerned the production in a court of documents in the possession of then Senator O’Chee. These documents included communications from constituents and letters exchanged between the Senator and another MP. The documents were sought in relation to a defamation action by a Cairns fisherman following statements that Senator O’Chee had made in a radio interview. Senator O’Chee had addressed the issue of long line fishing in two speeches in the Senate and claimed he had used the documents in making his remarks (although he did not table them). He claimed the documents were ‘proceedings in Parliament’ and hence were covered by parliamentary privilege.

4 For a discussion of the reasoning behind these questions see the report by the House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, November 2000, paragraphs 2.16-2.23.

- 1.14 The Court of Appeal in Queensland held that if documents came into the possession of a member of Parliament who retained them with a view to using them, or the information contained in them, for questions or debate in a House of Parliament, then the procuring, obtaining or retaining of possession were acts done for the purpose of, or incidental to the transacting of the business of that House pursuant to subsection 16(2) of the Privileges Act.⁵
- 1.15 In other words, if the records and correspondence in the possession of parliamentarians are used, in some way, for the purpose of transacting the business of a House or a committee, parliamentary privilege would attach. In relation to the earliest point when privilege might attach to the records it is worth quoting from the judgement of McPherson J in the *O'Chee* case:

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

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

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

...an informant in making a communication to a parliamentary representative is not regarded as participating in ‘proceedings in Parliament’ and therefore the provisions of the *Parliamentary Privileges Act* do not apply.⁷

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

5 (1997) 150 ALR 199.

6 (1997) 150 ALR 199 at 209.

7 (2000) QSC 88.

8 Senate Committee of Privileges, 92nd report.

Temporary immunity provided in the Privileges Act

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

Search warrants

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

9 See paragraphs 1.9 and 1.14 above.

10 See paragraphs 1.23 and 1.24 below.

- 1.21 The Committee of Privileges has recommended that a memorandum of understanding be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by Commonwealth law enforcement agencies on members, members' staff and members' Parliament House and electorate offices. The memorandum would enable ground rules to be agreed that would assist members when these situations arise.
- 1.22 There is a draft of guidelines for the execution of search warrants by the Australian Federal Police on the electorate offices (and Parliament House offices with prior consultation of the Presiding Officers) of members of Parliament (see attachment 1 for copy of draft guidelines). While these guidelines do not have official status, they provide the basis on which members might expect search warrants to be executed. The guidelines also do not apply formally to State and Territory police. However, in the recent execution of a search warrant on the office of a Senator, the procedures of the Queensland Police were essentially in accord with the guidelines. Both the House and Senate Committees of Privileges have recommended that guidelines should cover State and Territory police.

Contempt

- 1.23 The Houses have the power to punish for contempt. In some circumstances a member might seek to resist an order for production of documents on the grounds that the action proposed in the order amounts to contempt of the parliament. That is, the member would claim that the actions or elements of them fall within the definition of section 4 of the Privileges Act, which sets out the nature of conduct that constitutes an offence against a House.¹¹ However, it would be necessary to show that the seeking of the order or pressing for compliance with the order amounted to or was intended or likely to amount to an improper interference with the free performance by the member of the member's duties as a member.¹²

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

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

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

Freedom of information requests

- 1.27 While the application of the *Freedom of Information Act 1982* is limited to records held by government, it is relevant to the work of members. Ministers' offices and government agencies would hold copies of representations by members on behalf of constituents and these may be sought for release under freedom of information legislation. A document may be exempt from disclosure if it would involve the unreasonable disclosure of personal information about any person.¹⁴ However, the decision as to whether disclosure is unreasonable is one for the agency, and depends on the balance of privacy interests of the third party and the public interest in disclosure. The decision of an agency also is subject to review by the Administrative Appeals Tribunal.

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

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

Handling of correspondence and information

Guidance for handling of correspondence and information

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

Limited protection against defamation action: qualified privilege

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

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

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

**GUIDELINES FOR EXECUTION OF SEARCH WARRANTS
BY THE AFP ON THE ELECTORATE OFFICES
OF MEMBERS OF PARLIAMENT (issued 29 June 1998)**

Background

1. These guidelines apply to the execution of search warrants by the AFP on the electorate office of a member of either House of the Commonwealth Parliament (called here 'a Member'). Naturally they apply subject to any overriding legal requirement in a particular case such as an order of a court or the Parliament. To the extent that the AFP has a discretion, they also apply subject to the principle that the integrity of the investigation not be compromised. (Where the Member or a member of his / her staff is a suspect in the investigation, this may affect the way in which the guidelines are applied).
2. The guidelines may also be applied to searches within Parliament House as mentioned in paragraph 14. However, they are not designed to apply to searches by the AFP of offices of members of State or Territory Parliaments. In such cases the AFP should act with appropriate caution and restraint and seek legal advice if necessary.
3. While the guidelines are not expressed to cover residences or other offices used by a Member, paragraph 6 would apply to any search involving Members. Where in the course of *any* search paragraphs 9(a) or 11(b) become applicable, the AFP should proceed as indicated in the relevant sub-paragraphs.

Preliminary

4. When a search warrant is executed upon the electorate office of a Member one or more of the following issues could arise:
 - (a) an 'offence against a House' might be involved (e.g. obstruction of performance of the Member's duties as a Member or disclosure of privileged material);
 - (b) a thing apparently seizable under the warrant might not be seizable because it is not admissible in a court in that it attracts parliamentary privilege - a related issue being the possibility of a statutory offence of unauthorised disclosure; or
 - (c) the execution of the search warrant might involve seizure or exposure to the police in the course of search, or subsequent disclosure, of confidential material (although the material does not attract parliamentary privilege, and no offence against a House or any other offence is involved).

Guidelines

5. The AFP should consult the Office of the Commonwealth Director of Public Prosecutions before seeking or executing a search warrant on the electorate office of a Member. The purpose of this requirement is to help avoid unnecessary warrant action and to ensure that the proposed search and seizure is securely based.
6. Search warrant action should not be taken in relation to material concerning proceedings in the Parliament without consulting the relevant Presiding Officer of the chair of the relevant committee. (This is because s16(3) of the *Parliamentary Privileges Act 1987* limits use in courts of such material.)
7. Where possible and providing the integrity of the investigation is not compromised:
 - (a) the search warrant should not be executed on a parliamentary sitting day and should be executed at a time when the Member, or a senior member of his / her staff, will be present;
 - (b) unless appropriate, contact should be made with the Member, or a member of his / her staff, prior to the execution of the warrant to agree on a time for the execution; and
 - (c) the Member, or the member of his / her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before execution of the warrant commences.

Claim of privilege

8. In paragraph 9 'claim of privilege' means a claim that a search warrant should not be executed either because that action would amount to an offence against a House or because the warrant does not authorised seizure of something that attracts privilege.
9. The course of action set out in this guideline is designed to provide for suspension of police action until there has been opportunity for consideration by or on behalf of Parliament of a claim of privilege. (In due course a court might also need to rule on the matter, but that aspect can be left to be dealt with as and when it arises.)
 - (a) If the Member (or a person acting on his / her behalf) identifies anything to be seized where such action is likely to give rise to a claim of privilege the following procedure should be followed:
 - (b) The Member (or representative), if raising a claim of privilege, should be asked to indicate the basis for the claim;

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

Confidential material

- 10. With respect to confidential material, paragraphs 5 and 7 set out a general procedure and would apply where confidential material was involved, whether or not there was any material on the premises in respect of which a claim of parliamentary privilege might reasonably be made.
- 11. Even where material could not properly be the subject of a claim of parliamentary privilege, a claim of 'public interest immunity' might need to be addressed in relation to material claimed to be confidential.

- (a) Even if no claim of parliamentary privilege is raised, the executing officer should take all reasonable steps to conduct the search and obtain seizable material without unnecessarily examining or removing third-party confidential material that might be in the electorate office;
- (b) If, in respect of any material proposed to be seized, the Member indicates that public interest immunity will be claimed, the AFP, unless it needs urgent access to the material, should treat that material as under 9(c) and (d) to enable a reasonable opportunity for the claim to be resolved (although in this case the safekeeping third person would not normally be a Parliamentary officer);
- (c) If the AFP needs access to the material urgently for the purposes of an investigation or prosecution, it may take possession of the material provided there is no court ruling to the contrary. Pending any challenge to the seizure that the AFP might have reason to expect, the material should not be disclosed more widely than strictly necessary for those purposes.

Conclusion of search

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

Parliament House

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