

Current use of electronic devices

Introduction and the current regulatory framework

- 2.1 In a letter to all Members in May 1997, Speaker Halverson advised that notebook style or laptop computers were permitted in the Chamber, provided they were not disruptive or the cause of distraction to proceedings.¹ At that time, computers could only be used in stand-alone mode as there were no connections from the Chamber to the parliamentary computer network. In August 2000, connections to the network were provided to each desk in the Chamber by cable and at the central table, for connection to laptop computers. In August 2009, wireless connectivity was made available in Parliament House, including the Chambers. This increasing accessibility has seen a rise in the use of electronic devices in the Chamber and Federation Chamber and committees.
- 2.2 There are no specific standing orders governing the use of electronic devices in the Chamber or Federation Chamber, but the standing orders do provide guidance on the expected behaviour of Members: they may not disrupt or disturb proceedings (SO 65(b)); use offensive words against the House or a Member (SO 89); or make imputations of improper motives or personal reflections on other Members (SO 90). However, some Members

¹ 'After due consideration I have decided to allow the use of notebook or laptop computers within the Chamber, provided they do not become a major distraction. I would expect that the computers would be completely silent and that the member with the call would not use the equipment while he or she has the call.' Letter to all Members, 6 May 1997.

indicated to the Committee that they find standing orders provide them with little direct information on the regulation of electronic devices when used in the Chamber.²

2.3 Since electronic devices were first permitted in the Chamber and Federation Chamber, Speakers have from time to time made rulings about their use. These include:

- mobile phones must not be used for voice calls and any audible signal from phones or pagers must be turned off;
- text messaging is permitted and notebook computers may be used for emails;
- devices must be used discreetly so as not to interrupt the proceedings of the House; and
- the use of cameras, including mobile phone cameras, and i-pods, is not permitted.³

2.4 In 2010 a newspaper published a photograph of a Member, apparently taken by a Member inside the Chamber, using a mobile phone. This led the Leader of the House to move the following motion referring the matter to the Committee of Privileges and Members' Interests:

... whether formal rules should be adopted by the House to ensure that the use of mobile devices during proceedings does not interfere with the free exercise by a House or a committee of its authority or functions, or with the free performance by a Member of his or her duties as a Member.⁴

The House was dissolved on 19 July 2010, before the Committee reported on the reference.

2.5 Today, Members use a range of electronic devices, such as personal digital assistants, 'smart' phones and tablets, for multiple purposes. Given the changing technology associated with electronic devices, the Committee has focused its inquiry on the *activity* generated by Members on the devices, rather than considering the types of devices currently in use. This chapter examines the type of communications by Members from the Chamber and Federation Chamber, and the potential to affect proceedings in the House.

2 See, for example, Mr T Watts MP, Member for Gellibrand, *Submission 3*, p. 2 and Hon M Dreyfus QC MP, Deputy Manager of Opposition Business, *Submission 4*.

3 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, pp. 159-60.

4 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, Appendix 25 at p. 910.

Members' use of devices

- 2.6 In submissions, correspondence and at the roundtable, Members provided comments outlining their use of electronic devices in the Chamber. They reported using devices for private communications to:
- check and write emails;
 - liaise with staff in their office;
 - carry out research;
 - read the news; and
 - display speaking notes to assist them to deliver speeches in the Chamber and Federation Chamber.
- 2.7 Members reported using devices for public communications to:
- circulate text and video of their speeches via social media;
 - engage with their constituents and the broader community and facilitate the participation of Australians in political debate; and
 - comment on proceedings in the Chamber including other Members' conduct and receive feedback on their actions from interested followers.
- 2.8 The Committee accepted there was potential for criticism when Members are observed by visitors in the public galleries using their devices for matters apparently unrelated to their work as a Member.⁵ Members could be perceived to be not paying attention to proceedings. The Committee notes the Speaker has reminded Members that should they use devices inappropriately they will be judged accordingly by those who observe them, and that the misuse of devices could lower the standing of the House.⁶
- 2.9 During the inquiry no objection was raised to devices being permitted in the Chamber or Federation Chamber. There was general acceptance that they assist Members meet their responsibilities and should be permitted as long as they do not cause disruption or interference.⁷ As the UK House of Commons Procedure Committee noted in 2011, such devices are a part of modern life, and banning them from the House 'would mean that those in the Chamber would be the last to know of breaking news widely available on the internet.'⁸

5 Mr D Elder, Clerk of the House of Representatives, *Submission 2*, p. 4.

6 See, for example, HR Deb (15.02.2012) 1421; and HR Deb (27.10.2010) 1829.

7 Hon C Pyne MP, Leader of the House, *Submission 1*; Mr T Watts MP, Member for Gellibrand, *Submission 3*, p. 1; Hon M Dreyfus QC MP, Deputy Manager of Opposition Business, *Submission 4*.

8 UK House of Commons Procedure Committee, *Use of hand-held electronic devices in the Chamber and committees*, HC 889, March 2011, p. 8.

Social media

- 2.10 Many Members are active on social media. In August 2014, out of 150 Members, 126 had Twitter accounts, 145 had Facebook accounts and 131 had YouTube channels.⁹
- 2.11 The frequency with which Members communicate via social media varies, with some Members posting or uploading content each day. Many posts reflect current affairs or items of political significance to Members or their party, while others may relate to matters of personal interest. Members use social media to share information with their constituents, by posting comments and pictures from local events in their electorates that they have attended, as well as information about their day-to-day activities as a Member.
- 2.12 Mr Tim Watts MP, Member for Gellibrand, highlighted the importance of Members' use of social media to engage with Australian citizens, including from inside the Chamber. Mr Watts wrote:
- If the Parliament and Members engage with these forums, they will foster political engagement and debate that will strengthen the health of our democracy.¹⁰
- 2.13 Members also use social media to interact with members of the press gallery who provide commentary on the political activity in the Chambers on sitting days. With many journalists and Members on Twitter, it is a tool that is used to break news stories and release information as well as to converse and even dispute comments and stories in a public forum.¹¹
- 2.14 A 2010 study which analysed the use of Twitter by Australian politicians noted that Twitter had increasingly become 'the political space in Australia in which ideas, issues and policies are first announced, discussed, debated and framed.' While political interaction between Members of Parliament and the community through social media has only increased since the study was undertaken, by 2010 Twitter was already 'providing a venue for Australia's leading politicians, journalists and politically engaged citizens to connect and shape the political discussion'.¹²
- 2.15 In developing its *Social Media Guidelines for Parliaments*, the IPU noted that a broad range of Members comment on a wide range of topics through
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9 Chamber Research Office statistics, 3 September 2014.

10 Mr T Watts MP, Member for Gellibrand, *Submission 3*, p. 4.

11 Judith Ireland, Senate Occasional Lecture, *The impact of social media on political journalism*, 27 June 2014.

12 Grant, Moon and Grant, 'Digital Dialogue? Australian Politicians' use of the Social Network Tool Twitter', *Australian Journal of Political Science*, Vol. 45, No. 4, December 2010, p. 599.

social media. These contributions are seen to benefit Members and their parliaments by broadening public perspectives about parliamentary procedure and widening democratic discussion and engagement.¹³

- 2.16 Parliaments have markedly increased their institutional presence on social media over the last five years. The growth in this area is demonstrated in the United Nations' *World e-Parliament Report 2012*: in 2009, around one quarter of parliaments were either using or planning to use social networking platforms. By 2012 this had increased to two thirds.¹⁴
- 2.17 The Australian Parliament has a strong social media presence with the House of Representatives; Senate; Parliamentary Library; and Parliamentary Budget Office each maintaining active accounts on Twitter or Facebook, or both. On the respective Twitter accounts of the House and Senate, lists of all Members and Senators on Twitter are maintained so that Members of the public can easily locate and subscribe to those parliamentarians whose posts they wish to follow.

Order, decorum and the Chair

- 2.18 As the principal office holder in the House of Representatives, one of the Speaker's main functions is to preside over the debates of the House and to enforce 'the observance of all rules for preserving order in its proceedings'.¹⁵ These duties, arguably the Speaker's most challenging as well as significant, require that the rules of parliamentary procedure as described in the standing orders and practices of the House are accurately and correctly interpreted and applied to ensure that meetings of the House are orderly.
- 2.19 One of the issues that arose during the inquiry is the potential for the use of electronic devices to cause disorder, particularly when Members publish comments which reflect on other Members or the Chair. The Committee's inquiry also led Members to raise questions over the potential application of parliamentary privilege to communications from electronic devices during proceedings.¹⁶ These issues are examined further below.

13 Dr Andy Williamson, *Social Media Guidelines for Parliaments*, IPU 2013, p. 14.

14 Global Centre for Information and Communication Technology in Parliament, *World e-Parliament Report 2012*, p. 30.

15 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 162, citing Erskine May's *Treatise on the Law, Privileges, Proceedings and usage of Parliament*, 24th ed., 2012, p. 59.

16 Hon C Pyne MP, Leader of the House, *Submission 1*.

Reflections on Members

- 2.20 As noted previously, standing order 90 provides that personal reflections on other Members when made during debate in the Chamber are considered highly disorderly. A Member who reflects upon the character or conduct of another Member must do so by substantive motion (SO 100(c)). During proceedings in the Chamber, the Chair may be called upon to decide whether remarks are offensive. If they are considered to be offensive or unparliamentary, the offending Member will be asked to withdraw them.
- 2.21 In 2013 Speaker Burke was asked to request a Member to withdraw a comment made on Twitter during Question Time. The Speaker reminded Members that:
- ... any comments made on social media, even if made from the chamber precincts, are not covered by parliamentary privilege. While I cannot reasonably adjudicate on members' private communications, I remind members they should have regard to the perceptions the wider community will have of any comment that is made by them, including via social media. They should also be conscious of their relationships with other members and seek to have a level of discourse that enables civil relationships to be maintained between members.¹⁷
- 2.22 On the potential for Members to make inappropriate or offensive comments from the Chamber on social media, it was suggested that the close public scrutiny of Members' interactions would ensure a degree of self-regulation. Mr Tim Watts MP stated:
- Both self-regulation and informal regulation by political parties will provide incentives for any communication by Members on social media to remain appropriate. The negative political impact of offensive tweets will ensure Members do not behave improperly, as does the existence of other legal mechanisms such as defamation law and discrimination law.¹⁸

Reflections on the Chair

- 2.23 Speaker Hawker observed in 2005 that it is a well-established parliamentary principle that reflections on the Chair, inside or outside the Chamber, are highly disorderly but, since the introduction of the *Parliamentary Privileges Act 1987*, these matters are treated as important

17 HR Deb (12.3.2013) 1628; HR Deb (13.3.2013) 1935.

18 Mr T Watts MP, Member for Gellibrand, *Submission 3*, p. 6.

matters of order rather than as a contempt of the House.¹⁹ Any criticism of the Speaker's actions can only be made by substantive motion, for example by moving dissent from a Speaker's ruling under standing order 87, or by moving a censure or want of confidence motion in the Speaker.²⁰

- 2.24 *House of Representatives Practice* cites several situations where reflections on the Speaker have occurred outside the House, for example in newspapers, to the press and verbally. Members have been required to withdraw the reflection and apologise to the Chair, and the House was reminded that such reflections undermine the orderly conduct of the business of the House.²¹ In recent years, the Chair has been asked to rule upon the use of social media to reflect upon the Chair. In 2013 Speaker Burke stated that any reflection upon the Chair, whether made inside or outside the Chamber would be dealt with as any other comment made outside the House that reflected on the Chair.²²
- 2.25 In 2012 after a Member of the Victorian Legislative Assembly used Twitter to express discontent with a ruling of the Speaker of the Assembly, the Assembly's Standing Orders Committee was asked to inquire into the use of social media in the Legislative Assembly and reflections on the Office of Speaker. The incident highlighted the potential for confusion and differing interpretation where new technology intersects with long-standing rules and precedent.²³
- 2.26 The Assembly's Standing Orders Committee recommended the adoption of guidelines that summarise existing rules and practice. In particular, the recommended guidelines sought to remind Members that comments made on social media are not covered by parliamentary privilege and that the use of social media to reflect on the Office of Speaker or Deputy Speaker may amount to a contempt. To date, the proposed guidelines have not been adopted by the Assembly.

Parliamentary privilege

- 2.27 During the current inquiry, Members sought clarification on whether electronic communications made from the Chamber received any protection under parliamentary privilege.

19 HR Deb (30.11.2005) 78; HR Deb (5.12.2005) 46-47; HR Deb (8.12.2005) 70; Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 198.

20 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 192.

21 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 198.

22 HR Deb (13.3.2013) 1935.

23 Legislative Assembly of Victoria Standing Orders Committee, *Report into use of social media in the Legislative Assembly and reflections on the Office of Speaker*, December 2012.

- 2.28 Parliamentary privilege refers to the special rights and immunities which apply to the Houses, their committees and their Members, and enable them to fulfil their roles. These privileges are not the entitlement of Members in their personal capacities, but by the House in its corporate capacity and its Members on behalf of their constituents. These special rights and powers are considered essential for the proper operation of the Parliament and allow the Houses and committees to meet and carry out their proper constitutional roles without obstruction or fear of prosecution.²⁴
- 2.29 Freedom of speech is considered one of the most important privileges of Members. Article 9 of the Bill of Rights 1688 provides:
- 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.
- This article applies to the Commonwealth Parliament by virtue of section 49 of the Constitution and section 16(1) of the *Parliamentary Privileges Act 1987* again asserts the application.²⁵
- 2.30 Section 16(2) of the *Parliamentary Privileges Act 1987* defines ‘proceedings in Parliament’ as:
- ... 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 or of a committee, and, without limiting the generality of the foregoing, includes:
- (a) the giving of evidence before a House or a committee, and evidence so given;
 - (b) the presentation or submission of a document to a House or a committee;
 - (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
 - (d) 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.
- 2.31 Therefore, Members are considered to be absolutely protected by privilege for things they say in the course of ‘proceedings in Parliament’. Absolute privilege is an immunity that sets aside the ordinary law, providing immunity from suit or prosecution. This protection enables Members to
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24 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 731.

25 See Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 735.

exercise freedom of speech in the context of proceedings in Parliament. Qualified privilege, on the other hand, exists where a person is not liable for an action for defamation if certain conditions are fulfilled, for example, if there is a duty to pass on and to receive the information complained of, and the statement is not made with malice.²⁶

2.32 Comments not made formally as part of the proceedings of the House or a committee, are considered to be unlikely to be covered by absolute privilege. To have the protection of parliamentary privilege, it would be necessary to establish that the comments were for purposes 'incidental' to the House or a committee transacting its business.

2.33 Comments made by Members to each other that are not part of proceedings, and tweets or emails sent from Members in the Chamber and Federation Chamber, are not assumed to attract the protection of parliamentary privilege as they do not form part of proceedings in the House.²⁷

2.34 *Hansard* reports of proceedings are absolutely privileged, however, Members when circulating excerpts of *Hansard* or repeating comments made in the House, whether on websites, via social media, email or verbally, are not considered to be protected by parliamentary privilege. These are considered separate publications or 'effective repetition' and a step removed from actual proceedings in Parliament.²⁸ The Clerk of the House acknowledged that for most communications by Members the content would not raise concerns as to the protection – or otherwise – of parliamentary privilege. He noted the uncertainty of the application of privilege beyond occasions clearly comprising 'proceedings in Parliament' and provided the following examples:

- if a Member had links from their website to the official *Hansard* record of their speeches and this also included the full *Hansard* of proceedings, it would seem unlikely that the Member would not enjoy protection, and perhaps would have the full protection of absolute privilege;
- alternatively, if a Member routinely reproduced the verbatim texts of their speeches online or in printed form, the protection is likely to be less and would rely on qualified privilege ie you would need to demonstrate there was not malice in the publication;
- further, if a Member specifically reproduced, either on his or her own website or in print, a specific speech which may have contained defamatory material and particular attention was

26 See Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 736.

27 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 737.

28 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 739.

drawn to that speech, then again the Member would be relying on qualified privilege, but it may be more difficult to establish that there has not been an adoption of the defamatory remarks or that there is no malice.²⁹

- 2.35 Similarly, under the *Parliamentary Proceedings Broadcasting Act 1946*, absolute privilege is attached to the broadcast or re-broadcast of parliamentary proceedings, however only qualified privilege is considered to be attached to the broadcast of excerpts of proceedings, as this is considered to be done on a person's own initiative and not by the law.³⁰
- 2.36 The Committee is concerned that, with the increasing use of devices by Members, and the instantaneous publication and re-publication of their comments, Members need to be aware of the limits on the protection of parliamentary privilege.
- 2.37 In 2000 the House of Representatives Standing Committee of Privileges inquired into the status of the records and correspondence of Members. It examined whether there should be additional protection extended to Members in respect of their records and correspondence and, if so, what form and nature such protection should take.³¹ The Privileges Committee concluded that there should be no additional protection, beyond that provided by the current law and that parliamentary privilege should remain confined to the core activities of Parliament. It noted the need to balance competing interests and the already broad protection provided by parliamentary privilege.
- 2.38 The Privileges Committee also acknowledged that, by definition, any broadening of the area of absolute privilege would carry with it a greater risk of misuse.³² Advice from the Solicitor General stated any additional protection would need to clearly demonstrate that the extension would:
- ... have the purpose of enabling Members of the Parliament to better discharge their functions, and ... be reasonably adapted to achieve this purpose.³³
- 2.39 One of the outcomes of that report was the development of 'Guidelines for members on the status and handling of their records and correspondence'.

29 Mr D Elder, Clerk of the House of Representatives, *Submission 2.1*, pp. 2-3.

30 Wright, BC, *House of Representatives Practice*, 6th ed., 2012, p. 120.

31 House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, 2000, Terms of Reference.

32 House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of Members*, 2000, p. 38.

33 Advice from the Australian Government Solicitor, 7 May 1999, p. 5. (This advice was attached to the Clerk's submission to the Committee of Privileges' Inquiry into the status of the records and correspondence of Members, included at Appendix B of the printed version of that report.)

These Guidelines relate to the current law as it affects the records of Members – including the application of parliamentary privilege and qualified privilege; the nature of documents held by Members; the responsibility of Members in relation to material supplied to them; the reason for access and associated procedures for handling Freedom of Information requests; orders for production issued by either a court or a tribunal; whether documents are classified as ‘proceedings in Parliament’ and other related issues. A copy of the Guidelines is at Appendix C.

Committee comment

- 2.40 The Committee acknowledges the concerns raised by Members regarding the application of parliamentary privilege to communications from electronic devices in the Chamber. Parliamentary privilege, with the significant rights and immunities it bestows on Members, is founded on preservation of the freedom of speech, in the context of proceedings in parliament – whether statements, speeches, questions, and so on. Social media sites, by their very nature, are not confined to a particular person or groups of people. Comments are widely disseminated and can achieve the same, if not greater reach, as a Member participating in a press conference, for example. Content may occasionally be about proceedings in Parliament, or about participants in proceedings in Parliament, but the connection is a limited one.
- 2.41 Current protections afforded by parliamentary privilege are powerful. Any extension of protections for Members – such as to accommodate communications by Members via electronic devices – would be at the cost of the rights of others. Such a change would likely involve amendment to the *Parliamentary Privileges Act 1987* and the definition of ‘proceedings in Parliament’. The Committee notes the comments of the Clerk, that for Parliament to consider changing – and particularly extending – its powers by legislation, it would have to be demonstrated that an extension was required as an overwhelming and pressing concern by all Members and the lack of protection was inhibiting Members or preventing the House from properly performing its work.³⁴
- 2.42 While recognising the concerns that Members have expressed, the Committee is not persuaded that any consideration should be given to extending ‘proceedings in Parliament’ to include electronic communications by Members from the Chambers.
- 2.43 The Committee is mindful of its procedural remit – and the contrasting remit of the Standing Committee of Privileges and Members’ Interests.

34 Mr D Elder, Clerk of the House of Representatives, *Submission 2.1*, pp. 5-6.

The Committee considers that the Guidelines are very helpful for the practical ways in which they address the usual issues encountered by Members in their correspondence and records. Because the Guidelines provide a useful resource already, the Committee would welcome their review by the Committee of Privileges and Members' Interests and consideration of additional coverage to address communications made by Members on electronic devices.

Recommendation 1

- 2.44 **The Committee recommends that the House of Representatives Standing Committee of Privileges and Members' Interests consider reviewing and updating its 'Guidelines for members on the status and handling of their records and correspondence' to include communications by Members via electronic devices.**