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The Parliament of the Commonwealth of Australia

# Use of electronic devices in the Chamber and Federation Chamber

House of Representatives  
Standing Committee on Procedure

September 2014  
Canberra

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# Contents

Foreword .....	v
Membership of the Committee .....	vi
Terms of reference .....	vii
List of abbreviations .....	viii
List of recommendations .....	ix
<b>1 Introduction .....</b>	<b>1</b>
Scope of the inquiry.....	3
Conduct of the inquiry.....	4
Structure of the report.....	4
<b>2 Current use of electronic devices .....</b>	<b>7</b>
Introduction and the current regulatory framework.....	7
Members' use of devices .....	9
Order, decorum and the Chair .....	11
Reflections on Members .....	12
Reflections on the Chair.....	12
Parliamentary privilege.....	13
Committee comment.....	17
<b>3 Committee conclusions .....</b>	<b>19</b>
<b>Appendix A–List of submissions .....</b>	<b>23</b>

**Appendix B–Proposed House Resolution Relating to the Use of Electronic Devices in the Chamber .....25**

**Appendix C–‘Guidelines for members on the status and handling of their records and correspondence’ published by the Committee of Privileges and Members’ Interests.....27**

**Guidelines for members on the status and handling of their records and correspondence ..... 29**

Purpose of guidelines..... 29

Documents held by members..... 29

Responsibilities of Members ..... 29

Court orders to produce documents and or to appear..... 30

Responding to an order..... 30

Test for ‘proceedings in parliament’ ..... 31

Temporary immunity provided in the Privileges Act ..... 34

**Search warrants ..... 34**

Contempt ..... 35

**Freedom of information requests ..... 37**

**Handling of correspondence and information..... 37**

Guidance for handling of correspondence and information ..... 37

Limited protection against defamation action: qualified privilege..... 38



## Foreword

On 27 February 2014, the Procedure Committee resolved to inquire into the use of electronic devices in the House of Representatives Chamber and the Federation Chamber.

This inquiry was generated by a genuine concern from Members regarding the appropriate use of electronic devices in the Chamber and Federation Chamber – what rules apply and what guidance might assist Members to be aware of and understand their responsibilities.

The report covers a range of issues including relevant aspects of parliamentary privilege, Members' obligations when using electronic devices, and the nature and content of their communications from electronic devices. The Committee has made two straight-forward recommendations. I believe all Members would benefit from the proposed resolution on the use of electronic devices: this will provide clarity and complement our standing orders.

The Committee also recommends current guidance on the status of Members' records and correspondence be updated to include communications by electronic devices. By addressing the broader context of communications by Members and the diverse nature of the forms of communication they use currently, this will provide a more comprehensive resource for all Members.

On behalf of the Committee, I would like to thank Members who contributed to discussions and provided written submissions. I would also like to thank my Procedure Committee colleagues for their work and support during the inquiry.

Don Randall MP  
Chair



## Membership of the Committee

Chair Mr Don Randall MP

Deputy Chair Hon Michael Danby MP

Members Mr Russell Broadbent MP

Ms Jill Hall MP

Mr Scott Buchholz MP

Mr Chris Hayes MP

Mr Ian Goodenough MP

## Committee Secretariat

Secretary Ms Catherine Cornish

Inquiry Secretary Mrs Lynne Eveston

Research Officers Ms Naomi Swann (to 14.3.2014)

Ms Susan Dinon (from 17.3.2014)

Ms Penny Branson



## Terms of reference

To inquire into and report on the use of electronic devices in the House of Representatives Chamber and Federation Chamber for public communications, including but not limited to:

1. The adequacy of the current regulatory framework; and
2. Members' awareness of the regulatory framework.



## List of abbreviations

ACTLA Deb	Australian Capital Territory Legislative Assembly Debates (Hansard)
HC Deb	House of Commons Debates (Hansard)
HR Deb	Parliamentary Debates (Hansard – House of Representatives)
IPU	Inter-Parliamentary Union
MP	Member of Parliament
NSWLA Deb	New South Wales Legislative Assembly Debates (Hansard)
NZ Deb	New Zealand Debates (Hansard)
SO	Standing order
US HR	United States House of Representatives





## List of recommendations

### 2 Current use of electronic devices

#### Recommendation 1 (para 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.

### 3 Committee conclusions

#### Recommendation 2 (para 3.7)

The Committee recommends that:

- the House consider and adopt a resolution in the terms set out in the proposed resolution on the use of electronic devices extracted at Appendix B;
- the terms of the resolution be included with published versions of the Standing Orders; and
- the terms of the resolution be drawn to the attention of all Members, in particular to new Members as part of their orientation program.



## Introduction

- 1.1 The House of Representatives appoints a Procedure Committee in each parliament to inquire into and report upon matters concerning the changing practices and procedures of the House.<sup>1</sup> Its coverage includes the Chamber, the Federation Chamber, and the House committee system. In its deliberations before adopting terms of reference for this inquiry into the use of electronic devices in the Chamber and Federation Chamber, the Procedure Committee noted the increasing use of electronic devices by Members of the House of Representatives participating in social media and the issues this raises about their use in the Chamber, in particular. The Committee notes these issues are by no means confined to the House of Representatives – parliaments around the world are addressing similar practices and the implications of those practices.
- 1.2 Members have been using electronic devices while in the Chambers and parliamentary committees, to communicate with their staff, constituents, the general public and others, via sms, email and, more recently, social media. The increased use of smart phones and tablets and easier access and portability provided by wireless internet connectivity, means that electronic devices are changing the way many Members work,<sup>2</sup> including in their parliamentary duties. The Committee considered it was timely to examine the regulatory framework on the use of electronic devices by Members in the House of Representatives Chamber and the Federation Chamber.

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1 The Committee's role is prescribed in standing order 221.

2 See Mr T Watts MP, Member for Gellibrand, *Submission 3*, p. 1.

- 1.3 The universality of the issues arising from the use of electronic devices in chambers can be demonstrated by debate and consideration of this subject in the United Kingdom House of Commons,<sup>3</sup> the New Zealand Parliament,<sup>4</sup> the United States Congress,<sup>5</sup> the Canadian Parliament,<sup>6</sup> and a number of Australian State and Territory Parliaments.<sup>7</sup> The use of some electronic devices is possible in these chambers but they must be silent and used in a way that does not disrupt proceedings. For example, in accordance with a motion agreed by the UK House of Commons that had been recommended by its Procedure Committee, hand-held electronic devices (not laptops) may be used on silent in the Chamber but must not impair decorum.<sup>8</sup> Members are urged to show good sense and behave with courtesy and not tweet messages which would be considered disorderly if said in the House.<sup>9</sup> In December 2012 the Legislative Assembly of Victoria Standing Orders Committee reported on the use of social media and drafted guidelines on the use of hand-held devices in the Chamber.<sup>10</sup>
- 1.4 In 2013 the Inter-Parliamentary Union (IPU) prepared *Social Media Guidelines for Parliaments* based on good practice and drawing on lessons learned by parliaments. The IPU found that a large percentage of parliaments allow tablet and smartphone use in plenary sessions; these are used by members for a variety of purposes, including social media. The

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- 3 See for example HC Deb (13.10.2011) accessed electronically at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111013/debtext/111013-0002.htm> on 25 August 2014.
- 4 See for example NZ Deb (27.06.2012) accessed electronically at [http://www.parliament.nz/en-nz/pb/debates/debates/speeches/50HansS\\_20120627\\_00001297/robertson-h-v-ross-depleted-uranium-prohibition-bill](http://www.parliament.nz/en-nz/pb/debates/debates/speeches/50HansS_20120627_00001297/robertson-h-v-ross-depleted-uranium-prohibition-bill) on 25 August 2014.
- 5 See for example US HR, Rules of the House, Rule XVII (5) accessed electronically at <http://clerk.house.gov/legislative/house-rules.pdf#page=32> on 2 September 2014.
- 6 See for example Parliament of Canada, Speaker's Ruling May 16 2006 accessed electronically at <http://sen.parl.gc.ca/nkinsella/PDF/Rulings/Ruling16May06-e.pdf> on 25 August 2014.
- 7 See for example 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; NSWLA Deb (3.4.2012) 10521 (Speaker's statement); ACTLA Deb (23.2.2010) accessed electronically at <http://www.hansard.act.gov.au/hansard/2010/week02/476.htm> on 25 August 2014.
- 8 HC Deb (13.10.2011) accessed electronically at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111013/debtext/111013-0002.htm> on 25 August 2014.
- 9 UK House of Commons Procedure Committee, *Use of hand-held electronic devices in the Chamber and committees*, HC 889, March 2011, p. 11.
- 10 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, pp. 7, 9. As at 19 August 2014, the guidelines had not been adopted.

IPU noted that social media usage within parliaments needed to be considered in the context of ‘parliamentary protocol, guidelines for courtesy and conventions’.<sup>11</sup>

- 1.5 In the 43<sup>rd</sup> Parliament, Speaker Burke, after a Member made certain comments on Twitter, noted that the House may wish to ask the Procedure Committee to address the issue of the use of electronic devices:

As Speaker ... My role is to adjudicate on the proceedings of the House. It is not practical to extend this role to adjudicating on a range of matters incidental to proceedings such as private communications, conversations or use of social media when it is thought that they have come from the chamber.

To prevent tweeting would necessitate a blanket restriction on all electronic and communication devices in the chamber. Although this may appeal to some members, I imagine it would be strongly resisted by others ... If the House wishes to come to a more considered view on this matter, it may wish to use the avenues available to it, such as asking the Procedure Committee to address the question of tweeting or sending other forms of public communication from the chamber.<sup>12</sup>

- 1.6 In the current Parliament, Speaker Bishop, when asked to consider whether certain Members had been reflecting on the Chair in their use of Twitter, ruled that:

... we have decided in this Chamber that we do allow electronic media to be used and that it is the responsibility of individual Members to abide by the standing orders in the way in which they use those electronic and social media.<sup>13</sup>

## Scope of the inquiry

- 1.7 At its meeting on 27 February 2014, the Committee adopted the following terms of reference:

To inquire into and report on the use of electronic devices in the House of Representatives Chamber and Federation Chamber for public communications, including but not limited to:

- i. The adequacy of the current regulatory framework; and
- ii. Members’ awareness of the regulatory framework.

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11 Dr Andy Williamson, *Social Media Guidelines for Parliaments*, IPU 2013, pp. 3, 14-15.

12 HR Deb (13.3.2013) 1934-35.

13 HR Deb (21.11.2013) 1030.

## Conduct of the inquiry

- 1.8 Following adoption of the inquiry, the terms of reference were advertised on the Committee's website.<sup>14</sup> The Committee wrote to all Members to inform them of the inquiry, and invited them to comment on the current regulatory framework and whether formal guidelines would assist the House.
- 1.9 The Committee received five submissions to the inquiry, listed at Appendix A. Informal feedback was also received from Members via email and correspondence.
- 1.10 To encourage discussion on the matters raised by the terms of reference and responses, the Committee held an informal private roundtable on 26 May 2014 to which all Members were invited. Two private briefings were also held with the Clerk of the House on 19 June and 17 July 2014.
- 1.11 A draft resolution proposed by the Clerk of the House in his submission to the inquiry was circulated to all Members of the House by the Committee on 26 June 2014, inviting comment and feedback by 15 July 2014. A copy of the resolution is attached at Appendix B.

## Structure of the report

- 1.12 In Chapter 2 the Committee examines the regulatory framework on the use of electronic devices, the current use of devices by Members, and the issues raised in relation to proceedings in Parliament. In particular, the Committee considers order, decorum, and the role of the Chair, including reflections on Members and the Chair, as well as parliamentary privilege and the status of comments made by Members on social media.
- 1.13 Chapter 3 provides the Committee's conclusions and considers the resolution proposed by the Clerk.
- 1.14 Appendix A lists the submissions to the inquiry.
- 1.15 Appendix B contains the terms of the resolution that was proposed by the Clerk of the House in his submission and which the Committee circulated to all Members. The terms of the draft resolution have been endorsed generally, albeit informally, by Members.
- 1.16 Appendix C contains the current 'Guidelines for Members on the status and handling of their records and correspondence'. These were prepared by the Committee of Privileges and Members' Interests to assist Members.

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14 See [www.aph.gov.au/proc](http://www.aph.gov.au/proc).

They have no legal standing but they are comprehensive and practical. The Procedure Committee would be pleased to see additional comment that would assist Members and complement the proposed resolution in Appendix B.<sup>15</sup>

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<sup>15</sup> See Chapter 2 for more detailed comment.





## 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.<sup>1</sup> 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

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<sup>1</sup> '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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.

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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*, 6<sup>th</sup> ed., 2012, pp. 159-60.

4 Wright, BC, *House of Representatives Practice*, 6<sup>th</sup> 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.<sup>5</sup> 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.<sup>6</sup>
- 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.<sup>7</sup> 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.'<sup>8</sup>

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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.<sup>9</sup>
- 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.<sup>10</sup>
- 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.<sup>11</sup>
- 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'.<sup>12</sup>
- 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.<sup>13</sup>

- 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.<sup>14</sup>
- 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'.<sup>15</sup> 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.<sup>16</sup> These issues are examined further below.

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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*, 6<sup>th</sup> ed., 2012, p. 162, citing Erskine May's *Treatise on the Law, Privileges, Proceedings and usage of Parliament*, 24<sup>th</sup> 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.<sup>17</sup>
- 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.<sup>18</sup>

## 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

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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.<sup>19</sup> 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.<sup>20</sup>

- 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.<sup>21</sup> 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.<sup>22</sup>
- 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.<sup>23</sup>
- 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.

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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*, 6<sup>th</sup> ed., 2012, p. 198.

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

21 Wright, BC, *House of Representatives Practice*, 6<sup>th</sup> 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.<sup>24</sup>
- 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.<sup>25</sup>
- 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*, 6<sup>th</sup> ed., 2012, p. 731.

25 See Wright, BC, *House of Representatives Practice*, 6<sup>th</sup> 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.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup> 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

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

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

28 Wright, BC, *House of Representatives Practice*, 6<sup>th</sup> 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.<sup>29</sup>

- 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.<sup>30</sup>
- 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>
- 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*, 6<sup>th</sup> 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.<sup>34</sup>
- 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.

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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.

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**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.**

## Committee conclusions

- 3.1 In much the same way as the advent of the internet and e-mail changed the way Members interacted with their constituents, ongoing advancements in technology and the growth of social media platforms have continued to shape the way in which Members communicate. They can now reach mass audiences instantaneously from their places in the Chamber. While many Members have adopted this new technology with enthusiasm and clearly value the opportunities to interact this way, they need to be mindful of the rights of other Members and the need to uphold the dignity of the House and its formal proceedings.
- 3.2 Notwithstanding the consistency of Speakers' rulings on the use of electronic devices in the Chamber, a number of Members strongly favoured the establishment of an authoritative source of guidance on the use of electronic devices in the Chambers. Currently, Members need to be aware of the statements made by successive Speakers, and the Committee agrees with suggestions that one set of guidelines would assist to remove any uncertainties about what is and what is not appropriate use of electronic devices.
- 3.3 The Committee accepts suggestions that Members should continue to be able to use devices for social media and other purposes in the Chamber, but that devices should not be used by Members:
- in any way that disrupts the House or Federation Chamber;
  - to display information to other Members; nor
  - to take photographs, record proceedings, or produce an audible signal.
- 3.4 These suggestions are largely consistent with rules governing the use of electronic devices in other legislatures. These emphasise the responsibility

on Members to be discreet and to maintain order and respect for proceedings.

- 3.5 All Members were informed of the draft resolution appended to the Clerk of the House's submission. Feedback to the Committee endorsed it as a sound and timely complement to the Standing Orders. Importantly, given some Members were unsure of the status of their public communications from electronic devices, the draft resolution confirms that such communications, whether transmitted from the Chambers or not, are unlikely to be protected by parliamentary privilege. The draft resolution also reminds Members that reflections on the Chair made by Members via social media may be treated as important matters of order, in just the same way as if they were made by remarks inside or outside the Chamber.
- 3.6 The Committee notes that the draft resolution includes a provision that communication on social media regarding private meetings of committees or *in camera* hearings will potentially be considered a breach of privilege. The Committee did not examine this issue in depth as it focused on the use of electronic devices in the Chamber and Federation Chamber. However, it is entirely appropriate that any resolution provides comprehensive coverage and reminds Members about their responsibilities in general, including during committee activities. The Committee recommends the House adopt the Resolution proposed by the Clerk, that it be published with the Standing Orders and that Members, especially new Members, be made aware of its provisions.

## Recommendation 2

- 3.7 **The Committee recommends that:**
- **the House consider and adopt a resolution in the terms set out in the proposed resolution on the use of electronic devices extracted at Appendix B;**
  - **the terms of the resolution be included with published versions of the Standing Orders; and**
  - **the terms of the resolution be drawn to the attention of all Members, in particular to new Members as part of their orientation program.**
- 3.8 Should the House adopt this proposed resolution and, should the Committee of Privileges and Members' Interests add to its Guidelines for Members on the status and handling of their records and correspondence,

then Members will have the benefit of the straightforward, formal resolution on the use of electronic devices as well as practical guidance that addresses comprehensively the diverse nature of the communications they use in the course of their duties as Members of the House of Representatives.

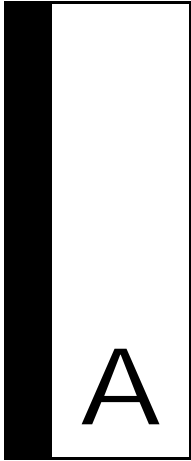
DON RANDALL MP

Chair

September 2014



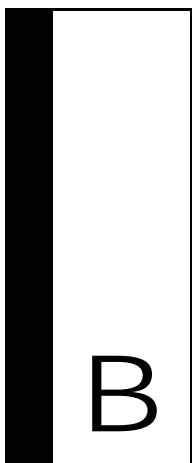




## Appendix A–List of submissions

1. Hon Christopher Pyne MP, Leader of the House
2. Mr David Elder, Clerk of the House of Representatives
- 2.1 Mr David Elder (Supplementary)
3. Mr Tim Watts MP, Member for Gellibrand
4. Hon Mark Dreyfus QC MP, Deputy Manager of Opposition Business



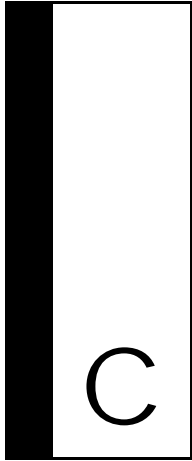


## Appendix B–Proposed House Resolution Relating to the Use of Electronic Devices in the Chamber

That the House:

1. permits Members' use of electronic devices in the Chamber, Federation Chamber and committees, provided that:
  - a. use of any device should avoid interference or distraction to other Members, either visually or audibly, and should not interfere with proceedings – in particular, phone calls are not permitted and devices should be operated in silent mode;
  - b. devices are not permitted to record the proceedings (either by audio or visual means);
  - c. communication on social media regarding private meetings of committees or in camera hearings will be considered a potential breach of privilege; and
  - d. use of devices should be as unobtrusive as possible and should be directly related to the Members' parliamentary duties; and
2. notes:
  - a. that communication via electronic devices, whether in the Chamber or not, is unlikely to be covered by parliamentary privilege; and
  - b. reflections on the Chair by Members made on social media may be treated as matters of order just as any such reflections made inside or outside the Chamber.





Appendix C–'Guidelines for members on the status and handling of their records and correspondence' published by the Committee of Privileges and Members' Interests



## **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 and Members’ Interests 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.<sup>1</sup>

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1 *House of Representatives Practice*, 5<sup>th</sup> ed., 2005, p.707.

- 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.<sup>2</sup>

- 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.<sup>3</sup> The *Parliamentary Privileges Act 1987* (the Privileges Act), in subsection 16(2), provides clarification of what amounts to 'proceedings in Parliament':

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2 *House of Representatives Practice*, 5<sup>th</sup> ed., p. 711.

3 *House of Representatives Practice*, 5<sup>th</sup> ed., pp. 712-714 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.<sup>4</sup>
- 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.

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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.<sup>5</sup>

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 likely 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.<sup>6</sup>

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.<sup>7</sup>

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5 (1997) 150 ALR 199.

6 (1997) 150 ALR 199 at 209.

7 (2000) QSC 88.

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

## 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'.<sup>9</sup> 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.<sup>10</sup> 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 could provide an opportunity for members to seek advice and raise concerns about the documents liable to be seized or disclosed during a search.

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8 Senate Committee of Privileges, 92<sup>nd</sup> report.

9 See paragraphs 1.9 and 1.14 above.

10 See paragraphs 1.23 and 1.24 below.

- 1.21 A memorandum of understanding has been concluded between the Presiding Officers, the Attorney-General and the Minister for Justice and Customs on the execution of search warrants by the Australian Federal Police on members’ Parliament House and electorate offices.
- 1.22 The memorandum includes 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 memorandum and guidelines). The guidelines 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 although similar guidelines have been developed with the Tasmanian Police. Also, in the 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 all 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.<sup>11</sup> 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.<sup>12</sup>

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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*, 5<sup>th</sup> ed., pp. 726-738.

- 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. The use of the guidelines for the execution of search warrants means it less likely that such matters would be seen to give rise to matter of contempt.
- 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 In a case considered by the Committee of Privileges, a Member had alleged that documents had been fraudulently and inaccurately written, purportedly in the Members' name. The Committee found that a certain person had, on a number of occasions, deliberately misrepresented the Member by producing and distributing documents that fabricated the Members' letterhead and signature to make it appear that the documents were prepared and sent by the Member. The Committee found the person guilty of a contempt of the House in that the person had undertaken conduct which amounted to an improper interference in the free performance by the Member of his duties as a Member.<sup>13</sup> The person was reprimanded by the House for the conduct.
- 1.27 Standing Orders 51, 52 and 53 refer to the means by which a matter of privilege such as the suggestion that certain action is a contempt may be raised.<sup>14</sup>

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13 House of Representatives Standing Committee of Privileges, *Report on Allegations of documents fraudulently and inaccurately written and issued in a members' name*, May 2007.

14 See *House of Representatives Practice*, 5<sup>th</sup> ed., pp. 743-46.

## Freedom of information requests

1.28 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.<sup>15</sup> 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.

## Handling of correspondence and information

### Guidance for handling of correspondence and information

- 1.29 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.
- 1.30 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
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15 See subsection 14(1), and a definition of ‘personal information’ in subsection 4(1).

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

1.31 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 faith<sup>16</sup> 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.<sup>17</sup>

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

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