Search warrants, privilege and intrusive powers

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There is uncertainty about the extent to which parliamentary material may be protected from seizure under search warrant. In the Australian Commonwealth jurisdiction, the matter is currently governed by a settlement between the Legislature and the Executive, which draws upon the traditional scope of parliamentary privilege in the courts. That settlement has been tested for the first time in the investigation of a suspected leak from NBN Co[1], involving the execution of search warrants at a senator's Melbourne office, at the home of one of his staff, and at Parliament House, Canberra (directed at seizing material from the servers managed by the Department of Parliamentary Services).

After being put before the Senate, two matters were referred to its Privileges Committee. The first concerned the *status of the seized documents*: were they protected by privilege, and should they be withheld from the police investigation? The second involved allegations that *contempts* were committed in the execution of the warrants. The background was set out in the committee's 163rd report.

The committee's has now, in its 164th report, reported on those matters and its recommendations have been adopted by the Senate. This paper tells the story of those inquiries and mentions further work the Privileges Committee is undertaking in related areas. First, though, I wanted to sketch the legal and institutional landscape in which the inquiries took place, beginning with a brief meditation on the purpose of privilege.

The purpose of privilege

There are numerous ways to approach parliamentary privilege. Many treatments survey the assertion by the UK House of Commons of its institutional autonomy; its struggles to establish itself against the superior royal courts and to assert the immunity of its members from their orders and judgments. In Parliaments descended from Westminster, the time, extent and method by which "powers, privileges and immunities" were conferred or inherited form a crucial part of the story, and affect their content and operation. It's an evolving story, particularly in jurisdictions like New South Wales, with its reliance on the doctrine of reasonable necessity and its

[1] The government-owned company building Australia's National Broadband Network

reluctance — to date — to codify its powers and privileges, as has been done to some extent at the Commonwealth level.

Other treatments of privilege seek contemporary justification for powers inherited down the centuries that jangle inharmoniously against a modern, intuitive understanding of competing public interests, privacy and human rights charters. Still others catalog the rights and powers enjoyed by Houses and their members which exceed those possessed by other bodies or individuals, and attempt to identify the circumstances which warrant their use.

The discussion among students at the ANZACATT Parliamentary Law, Practice and Procedure Course this past weekend began by examining the concept of prīvus (one's own) leges (laws). These were exclusive commercial laws which travelled with the trader across the Roman Empire, applying to their trade regardless of differences in laws from region to region, and seeding the idea that some persons, bodies or areas may have private and separate legal status.

If we return to parliament, what unites the different approaches is an appeal to purpose. So it is, for instance, that the 1984 Report of the Commonwealth Joint Standing Committee on Parliamentary Privilege declares:

> Parliamentary privilege is the sum of the special rights attaching to Parliament and its Members. It attaches to them for one prime and fundamental purpose: the proper and fearless discharge of Parliament's functions.' JSC Report, 1984, 3.5, citing Senator Sir Magnus Cormack, 'Press, Parliament and Privilege', 1972.

Similarly, *Odgers' Australian Senate Practice* contends that:

> Parliamentary privilege exists for the purpose of enabling the Senate effectively to carry out its functions. The primary functions of the Senate are to inquire, to debate and to legislate, and any analysis of parliamentary privilege must be related to the way in which it assists and protects those functions... Odgers', 14th ed. Ch. 2, p.41.

It is this protective focus that best explains, justifies and — for that matter — circumscribes privilege. Whatever its content, however it may be defined, the law of parliamentary privilege is intended to protect the ability of legislative Houses, their members and committees, to exercise their authority and perform their duties without undue external interference.

‘protected by privilege’

To understand the place that search warrants inhabit in this landscape, it is necessary to understand the different ways in which parliamentary proceedings (and, in this case, Senate proceedings) are protected.

To risk oversimplifying matters, there are two ways in which participants in Senate proceedings are protected by parliamentary privilege. The first involves the use of contempt powers. The Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. The purpose of this contempt jurisdiction is to protect the ability of the Senate, its committees and senators to carry out their functions without improper interference. [See the statutory threshold for contempt in section 4 of the *Parliamentary Privileges Act 1987* and the Senate’s 1988 Privilege Resolutions.]

The other way participants may be protected is by a legal immunity, commonly known as freedom of speech in parliament. This is what people tend to mean when they say that something is ‘covered’ by privilege. Generally, participants in Senate proceedings are immune from legal liability for things said or done in the course of proceedings; evidence may not be tendered before courts or tribunals for prohibited purposes (traditionally, for the purposes of ‘questioning or impeaching’ those proceedings). This immunity is descended from Article 9 of the Bill of Rights ,1688 and recited in section 16 of the Parliamentary Privileges Act. The interpretation and application of these provisions is not a matter for the Senate, but for the courts.

Privilege and search warrants

What was at issue in this case, however, is the extent of the protection which attaches to parliamentary material seized under search warrant. There is no statutory provision, and little by the way of Australian authority, dealing with the intersection between parliamentary privilege and search warrants.

A background paper by the then Clerk of the Senate, Dr Rosemary Laing, noted that in Australian law parliamentary privilege may provide a basis for resisting compulsory production of documents in *court-supervised* discovery processes. The same principles might be expected to apply in relation to the seizure of material under search warrant, however, the position is somewhat uncertain following the federal court judgment in *Crane v Gething*. In that case it was held that the court did not have jurisdiction, as the issue of search warrants is an executive act and not a judicial proceeding; only the House concerned and the executive may resolve such an issue.

This finding was contrary to a submission made by the Senate, to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected. In 2008, former Clerk of the Senate, the late Harry Evans, identified the dilemma. He wrote that the legal immunity:

> …protects members and legislative proceedings against criminal actions as well as civil, and therefore the production or seizure and scrutiny of members' legislative documents should not be used to undermine the bar on criminal proceedings any more than civil actions. Parliamentary proceedings and members' contributions thereto could effectively be impeached and questioned by requiring the production of the documents which lie behind these proceedings, particularly sources of information used by members, which could then be attacked through other investigations and legal proceedings. [Papers on Parliament No. 48]

Is perhaps unsurprising that the court found that it did not have jurisdiction in the matter, however its actions nevertheless ensured a path for questions of privilege to be considered. It ordered that the documents be forwarded to the Senate so that the Senate itself could determine their status. The matter was resolved by the appointment of a third party arbitrator, although the resolution took almost four years. The background paper mentioned above reflects on some perceived short-comings in that process. Some 94% of the documents were eventually returned to the senator, being protected by privilege or outside the scope of the warrants.

The National Guideline

In 2005, as a practical response to the court's disavowal of jurisdiction in *Crane*, the then Presiding Officers and Attorney-General entered into a Memorandum of Understanding about the execution search warrants on the premises of members, or where parliamentary privilege may be involved. The AFP adopted a national guideline setting out processes its officers would be required to follow in executing such warrants.

In its 163rd report, the committee noted that the guideline fills a gap in the law:

> 1.11 …It represents a settlement between the Legislature and the Executive about the processes that are to apply in executing search warrants in relevant circumstances, including a process for members to make claims of parliamentary privilege over material seized. It also, in setting out the legal background, prescribes the applicable test for determining those claims; that is, by reference to the definition of 'proceedings in parliament' in the Parliamentary Privileges Act.

The committee took the view that the purpose of the guideline – from its preamble, "to ensure that search warrants are executed without improperly interfering with the functioning of Parliament" – should inform its interpretation and implementation. The question whether the warrants were executed strictly in accordance with the guideline was to become important to the committee's deliberations.

In the NBN matter, then Senator the Hon. Stephen Conroy made a claim of privilege over all of the material seized, in accordance with the processes set out in the guideline, and elected to have the status of the documents determined by the Senate. In the meantime, the material was sealed and secured in the possession of the Clerk.

The first matter referred to the Privileges Committee concerned the status of the seized documents. The committee's task was to recommend to the Senate whether Senator Conroy's claim should be upheld. This required an examination of the material.

The status of the seized material

In examining the seized material, the committee was concerned to determine whether it came within the definition of *proceedings in parliament*. Generally, *proceedings in parliament* may not be questioned in legal proceedings, and the national guideline imports similar protections in relation to the execution of search warrants. The test adopted by the committee for this question was derived from the approach of the NSW Legislative Council in the Breen matter, a 2004 case in which the Council asserted its right to determine a claim of privilege over material seized from a member's office during an ICAC investigation.

In advice sought by the committee, the then Clerk of the Senate advocated adapting the Breen test to the statutory language of the Parliamentary Privileges Act, to include "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". [See 1.36 – 1.38, and the Clerk's advice in Appendix B.]

Armed with that test, on the evidence before it — including submissions from the AFP and the former senator — the committee was satisfied that the documents met the definition and warranted protection on the basis of their connection to parliamentary business. The committee particularly noted Senator Conroy's detailed submission recording the use of material in proceedings of the Senate, the House, and two committees.

The committee also considered a broader question connected to the purpose of privilege: how well the stated purposes of the guidelines were met in the execution of the warrants.

The guideline is intended to enable claims of privilege to be made and determined, with seized material sealed away with a third party until that question is resolved. The committee considered that any practice which, in the meantime, allows the use of such material undermines that purpose. This is the context in which the committee examined the second matter referred, the question whether any contempt may have occurred in the execution of the warrants.

The contempt allegations

There were two allegations raised by former Senator Conroy.

One involved photographs of the covers of various documents being permitted to be sent off-site to NBN officers, to help identify whether certain of the documents seized were the documents alleged to have been leaked. The committee found, ultimately, that this conduct did not amount to an improper interference, because appropriate restrictions were applied to the use of the photographs and agreed arrangements were made for their disposal.

The Chair of the Committee, Senator the Hon. Jacinta Collins, told the Senate that the second allegation was more concerning. Senator Conroy alleged that information which should have been quarantined after his privilege claim may have been communicated to NBN and used as part of disciplinary proceedings against unnamed NBN employees; those alleged to have provided him with information. NBN Co conceded that disciplinary action was, in fact, taken against two employees, but submitted that it had occurred independently of the AFP investigation, was taken solely through its own internal investigation and that 'the breaches relied upon did not include any communications with parliamentarians, their office or their staff'.

The committee noted that information discovered at the site of one of the warrants may have assisted in identifying one of those employees for investigation, although there was conjecture as to the extent to which that material may have been used. Nevertheless the committee concluded that any such use demonstrates the risk that information which ought to be quarantined may be used for purposes which are not authorised by the warrant and are inconsistent with the purposes of the guideline.

The committee considered that the execution of the Melbourne warrants may have had the effect of interfering with the duties of a senator, and with the functions of the parliament more broadly, by undermining the operation of the national guideline and diminishing the protection that should be available to parliamentary material. The committee also noted that information which ought to have been protected may have been used to the detriment of a person with a connection to parliamentary proceedings.

On that basis, the committee considered that an improper interference had occurred, although it stopped short of concluding that a contempt had occurred. The threshold for a finding of contempt is a high one, requiring cogent evidence of an improper act or motive. The committee noted various mitigating factors and – rather than recommend that a contempt be found – suggested that an alternative remedy lay in the resolution of the privilege claims mentioned earlier.

Documents withheld

You will recall that the committee had recommended that the claim of privilege over the documents be upheld, because of their demonstrated connection to parliamentary business. In finding that an improper interference has occurred, the committee has concluded that the seized material also warrants protection on those grounds.

One of the effects of the recommendation that the claim of privilege be upheld is that the subject material would be withheld from the investigation and, therefore, incapable of being used in any prosecution or other legal proceedings, thereby limiting the detriment to any persons involved. The committee considered this to be an acceptable outcome, given the difficulty of further establishing the facts of this matter.

On the motion of the chair, the Senate adopted the committee's recommendation that the claim of privilege be upheld, and that the seized documents be returned to Senator Conroy.

The committee also asked the Senate to note the requirement for remedial action in relation to the national guideline to address the shortcomings it had observed.

Intrusive powers and parliamentary privilege

The committee is considering the adequacy of the national guideline as part of a further inquiry, this time into the adequacy of privilege as a protection for parliamentary material against the use of intrusive powers. Bringing us back to the protective purpose of privilege, the inquiry is also considering more broadly whether the use of intrusive powers by law enforcement and intelligence agencies might interfere with the ability of members of Parliament to carry out their functions, and whether changes to oversight and accountability mechanisms might be required. A background paper published by the committee notes recent changes in technology and investigative practices, observing that:

> …recent manifestations of intrusive powers — such as telecommunication interceptions, electronic surveillance and the storage and production of metadata — are commonly utilised without the knowledge of the target of the

> investigation, either before or after the fact. The integrity of investigations by law enforcement and intelligence agencies often depend on a large measure of secrecy in exercising such intrusive powers. However, it is unclear how a member of Parliament might raise a claim of privilege in such circumstances, given a member will typically have little if any visibility of the investigation or knowledge of what material has been procured by investigators.

The committee also notes the uncertainty and complexity introduced by laws which require the retention of telecommunications metadata, and provide agencies with access to it without a warrant. The inherent difficulties in identifying and protecting material which ought be privileged is obvious. Another factor is the extent to which metadata domestic preservation orders might have a chilling effect on the provision of information to members of Parliament.

Part of the motivation for this inquiry is rapidly changing technology; another is the evolution of law enforcement and security agencies. This is not to doubt the need to enhance the capabilities of such bodies. Nevertheless, armed with forensic technologies, and with questions yet to be settled about appropriate regimes of oversight, how may dusty old privilege shield the parliament from these executive agencies in full flight?

Yet, there are other concerns, too, including whether agencies are aware of or have regard to privilege requirements. In her tabling statement for the 164th report, Senator Collins noted that:

> … evidence provided by the Australian Federal Police as background to its inquiry indicates that the [investigation] initially involved pre-warrant inquiries to departments and private entities about members' offices and their staff. The evidence to the committee indicated that there are no particular protocols applying in relation to making and responding to such inquiries, so the sorts of protections required in the execution of search warrants may be entirely absent here.

In this regard, according to the background paper, the inquiry will:

> …seek to clarify what regard, if any, law enforcement and intelligence agencies currently have to the requirements of parliamentary privilege when exercising intrusive powers. The inquiry will also consider whether specific protocols should be developed in relation to the use of intrusive powers — and, by extension, access by investigating authorities to metadata and other electronic material — when matters of parliamentary privilege may be involved.

Pending problems

This is where I swing back to the purpose of privilege — so I can leave pending some questions.

If the protections of privilege prove inadequate, how may this be resolved? Does the existing settlement require adjustment, overhaul or reimagining? Will or should the courts assume a role should a case come along enabling them to do so; or if the Parliament so provides? How will the relationship with crime and corruption commissions develop? With whistleblower laws? Will the Houses legislate to codify further protections against a changed executive, or to recognise changed and changing functions of parliaments and members?

The Senate Opposition Leader, Senator Wong, commenting on the 163rd report, highlights the danger:

> Fundamentally, parliamentary privilege is designed to protect the rights of the legislature from incursion by the executive and by the judiciary. It ensures that all of us enjoy a right to freedom of speech in the debates and proceedings in parliament that ought not to be impeached or questioned in any court or place out of the parliament. It is a fundamental right that ensures that all of us can raise issues in this place and hold the government to account without fear of reprisal, without fear of arrest and without fear of prosecution. It is a right that has been jealously guarded for a very long time, and rightly so, by all members and senators — indeed, by all members of parliaments in the Westminster tradition. Without this right, this parliament would be a facade of democracy, and it is for this reason that this Senate has always carefully guarded its privileges.