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Members' documents, parliamentary privilege and search warrants

A key immunity possessed by parliament is the freedom of speech and other 'proceedings in Parliament' from impeachment or questioning in the courts or any other place, as originally contained in Article 9 of the Bill of Rights 1689.

However, the broad compass of Article 9 disguises many areas of uncertainty. This paper examines just one of those areas: the law of parliamentary privilege as it relates to members' documents, and the difficulties that may arise where investigative authorities such as the police or anti-corruption bodies attempt to seize members' documents through the execution of a search warrant.

In general terms, the law of parliamentary privilege acts to protect a member's documents from seizure under search warrants, but only where the documents were specifically produced for the purposes of the member's actions or participation in the proceedings in Parliament. In this sense, the protection afforded to a member's documents is very much the protection of the House of its processes, rather than a privilege of the individual member.

However, the law of parliamentary privilege in this area is far from settled, as shown by a range of interesting cases in recent years. As a result, it has prompted some parliaments to adopt protocols governing the interaction of parliament with investigative bodies in order to ensure that parliamentary privilege is preserved over members' documents where appropriate.

This research continues the focus of previous ANZACATT Professional Development seminars on this topic, particularly the seminar on 'How the needs of investigative authorities and the application of privilege to some Members' papers can be balanced', delivered at the 6th ANZACATT seminar in Wellington in 2005.

Introduction

This paper examines the circumstances in which parliamentary privilege attaches to members' documents, and the difficulties that may arise where the police or investigating agencies attempt to seize members' documents that are protected by privilege by way of the execution of a search warrant. The paper initially examines the meaning of the term 'parliamentary privilege' and the privilege that attaches to 'proceedings in Parliament', before examining what sort of members' documents attract privilege. Subsequently, it examines recent cases where search warrants have been executed by law enforcement and investigatory agencies on the offices of

members of Parliament and members' documents have been seized, prompting in turn the development of protocols for the execution of search warrants on members' offices.

Parliamentary privilege

The term 'parliamentary privilege' refers to the powers and immunities possessed by individual Houses of Parliament.

A key immunity possessed by individual Houses of Parliament is the freedom of speech and other 'proceedings in Parliament' from 'impeachment or questioning in any court or place out of Parliament'.

The powers and immunity of parliament have historically derived from Article 9 of the *Bill of Rights 1689*. This famous article declares:

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

By virtue of Article 9, members speaking in parliament, and witnesses giving evidence before committees, are immune from impeachment before the courts, in effect granting them immunity against prosecution for what they may say. This is an essential safeguard to the integrity of the legislature within the separation of powers: it prevents the other branches of government, the executive and the judiciary calling into question or inquiring into the proceedings of the legislature.

The *Bill of Rights 1689* applies in New South Wales under the *Imperial Acts Application Act 1969*. Section 6 of the Act declares, among other things, that the *Bill of Rights*, so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day.

However, it is notable that the majority of other parliaments in Australia have further codified their powers and immunities either by reference to the powers and immunities of the British House of Commons at a particular time or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth).

It is also important to emphasise that parliamentary privilege belongs to the House itself, and is not the privilege of any individual member of parliament. In other words, privilege attaches to a member's service in the House, and not to activities external to the House connected with the member's wider duties. In *Prebble v Television New Zealand Ltd* the Judicial Committee of the Privy Council stated that:

The privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual member, even if he has an individual privilege of his own, cannot determine whether or not the privilege of parliament is to apply ... The decision of an individual member cannot override the collective privilege of the House to be the sole judge of such matters.¹

Individual members of Parliament can claim privilege only to the extent that some action, such as the execution of a search warrant of their office and subsequent

¹ [1995] 1 AC 321 at 335.

seizure of documents, would impede them in carrying out their responsibilities and duties as a member of the House, or adversely affect the proper functioning of the House or a committee.

Entailed in this, however, lies one of the interesting questions concerning the operation of Article 9. While absolute privilege applies to members' documents that constitute 'proceedings in Parliament' within the definition of Article 9, just when do members' documents become 'proceedings in Parliament'?

A definition of 'proceedings in Parliament'

In *May's Parliamentary Practice*, the term 'proceedings in Parliament' is broadly described as:

...some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee...Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.²

According to Halsbury:

An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in committees.

It covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.

In its wider sense 'proceedings in Parliament' has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee of it and while the House or committee is sitting.³

The *Parliamentary Privileges Act* 1987 (Cth) has attempted to provide a clearer and more comprehensive definition of 'proceedings in Parliament' as well as to clarify the extent of the use of evidence which derives from such proceedings. Section 16(2) provides:

² McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, p 111.

³ *Halsbury's Laws of England*, 4th ed., 1980, vol. 34 at para. 1486

For the purposes of the provisions of Article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the 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.

Based on this definition in the *Parliamentary Privileges Act 1987* (Cth), proceedings in Parliament covers not only debates in Parliament, including motions, parliamentary questions and answers, committee proceedings, tabling of documents, and petitions once they are presented, but can also include words and acts 'for purposes of or incidental to' such proceedings. This definition is revisited later in this paper.

Do members' documents attract privilege as 'proceedings in Parliament'?

The issue of whether members' documents attract parliamentary privilege by virtue of being 'proceedings in Parliament' is not clear-cut.

In general terms, documents produced and actions taken by members and documents supplied to members for the purpose of 'proceedings in Parliament' would normally attract privilege. For example, various correspondence, such as correspondence with ministers, correspondence with other agents of the executive arm of government, correspondence with members of the public, and research and briefing notes in relation to matters which a member intends to bring before Parliament, may fall within the ambit of parliamentary privilege. The same may hold true for diary notes or file notes of attendances or conversations relating to the business of Parliament.

However, there are other aspects of a member's role that extend beyond 'proceedings in Parliament', such as some dealings with constituents, ministers or political parties. Documents produced by members or supplied to members in the ordinary course of fulfilling their role as a member of Parliament would not normally attract privilege. Not all correspondence between members and ministers, agencies of the executive, or the public, attract privilege. Neither do all research and briefing notes. For example, a letter from a constituent to his or her local member concerning aircraft noise would not normally constitute 'proceedings in Parliament'. Even if the member then chose to raise the matter in the House, it is uncertain to what extent the original document itself is protected.

Nor are meetings of party caucuses considered to be ‘proceedings in Parliament’. They are meetings which are attended by members of Parliament because they are members. While parliamentary business may be under discussion at such meetings, they are not transactions of parliamentary business as such.

French J observed in *Crane v Getbing*,⁴ that documents relating to a Senator’s travel arrangements would also be unlikely to constitute ‘proceedings in Parliament’:

I would not have regarded the itineraries as falling within the protected class. The fact that they may include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator would want to make public does not of itself raise an issue of parliamentary privilege. The documents do not otherwise answer the description in s. 16 (of the Parliamentary Privileges Act 1987).⁵

The provision of information to members was considered in *O’Chee v Rowley*, which involved an appeal against an order of the Supreme Court of Queensland, requiring the defendant in defamation proceedings, Senator Bill O’Chee, to produce certain documents for inspection. In relation to documents provided to members, McPherson JA commented that, while it is not possible for ‘an outsider to manufacture parliamentary privilege for a document by the artifice of planting it upon’ a member, it is nonetheless possible for the document to attract privilege if ‘the member or his or her agent does some act with respect to it for the purposes of transacting business within the House’.⁶

This aspect of ‘proceedings in Parliament’ was also discussed by Crispin J in relation to the *Parliamentary Privileges Act 1987* (Cth) in *In the matter of the Board of Inquiry into Disability Services*:

Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind. Hence, if a Member obtains a document that has been prepared for some reason unrelated to the business of the Assembly but elects to retain it for such purpose, subs 16(3) [of the *Parliamentary Privileges Act 1987* (Cth)] would prevent the admission of any evidence of that retention or any subsequent use for such a purpose.⁷

The true test of whether members’ documents are covered by parliamentary privilege would seem to lie in the purpose for which the action has been taken and for which the documents have been created. As the Clerk of the New Zealand House of Representatives has pointed out:

The application of the Bill of Rights to actions taken off the floor of the House is confined to activities which have a close formal link with the business to be transacted in the House or in a select committee, or which are transacted in execution of an order of the House. The Bill of Rights does not confer a protection on a member of Parliament in respect of all, or even most,

⁴ [2000] FCA 45 (18 February 2000)

⁵ Ibid at para. 43

⁶ *O’Chee v Rowley* (1997) 150 ALR 199 at 209.

⁷ *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28 (10 April 2002) at para 22.

of the work members carry out on behalf of constituents; neither does it offer protection in respect of the party political activities of members in the country at large.⁸

In 2004, the NSW Legislative Council Privileges Committee developed a specific test for determining whether a document falls within the scope of ‘proceedings in Parliament’, by reference to the purpose for which the document was created, used or retained. This test, which was subsequently incorporated into the Council’s draft protocol for the execution of search warrants, discussed later in this paper, is as follows:

(1) Were the documents **brought into existence** for the purposes of or incidental to the transacting of business in a House or a committee?⁹

- YES → falls within ‘proceedings in Parliament’.
- NO → move to question 2.

(2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within ‘proceedings in Parliament’.
- NO → move to question 3.

(3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within ‘proceedings in Parliament’.
- NO → does not fall within ‘proceedings in Parliament’.¹⁰

Of note, this test picks up from the *Parliamentary Privileges Act 1987* (Cth) the definition of ‘proceedings in Parliament’ as including words and acts ‘for purposes of or incidental to’ such proceedings.

The House of Representatives has also developed particular guidelines for members on determining the status of members’ documents, notably ‘Guidelines for members on the status and handling of their records and correspondence’ and ‘Handling of Members’ records and documents: Common Questions.’

The execution of search warrants and the seizure of members’ documents

The difficulty in certain instances in determining whether members’ documents are covered by parliamentary privilege arises most dramatically in circumstances where investigative authorities such as the police or anti-corruption bodies, with extensive statutory powers of entry, inspection and subsequent seizure of documents, seek to execute a search warrant on the offices of a member in order to seize as evidence documents in the possession of the member.

As previously indicated in this paper, in most instances, parliamentary privilege restricts the impeaching or questioning of members in the courts. However, in circumstances where a search warrant is executed on the offices of a member, parliamentary privilege acts to prevent documents that are deemed to be privileged

⁸ McGee D, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p. 475

⁹ In this test, the expression ‘for the purposes of’ includes ‘or predominantly for the purposes of’.

¹⁰ NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 8.

from being seized, regardless of the terms of the warrant or the use to which the documents may be put.

In recent years, a number of parliaments have had to deal with the execution of search warrants on the offices of their members. The cases that occurred prior to 2005 were considered in detail in the paper entitled 'How can the needs of investigative authorities and the application of privilege to some Members' papers be balanced?', presented at the ANZACATT conference in Wellington in January 2005. For example:

- In Western Australia in 1995, the Legislative Council established a Select Committee to inquire into *Documents Obtained and Retained by the Royal Commission into Use of Executive Power* in relation to documents held by the Hon John Halden.
- Members of the House of Representatives have on a number of occasions in recent years been required to provide records for use in connection with court or other proceedings. On other occasions, search warrants have been executed on the offices of members, notably in the cases of Mr Cameron MP, Member for Stirling (WA) in 1995, and Mr Brereton MP, Member for Kingsford-Smith (NSW) in 2000. The House of Representatives Standing Committee on Privileges has published a number of reports addressing the issue of search warrants.
- In the ACT Legislative Assembly in 2002, a small number of documents was seized following the execution of a search warrant on a member's parliamentary office as part of a police investigation into IT Security at the Assembly.
- In Queensland in 2004, Report 60 of the Members' Ethics and Parliamentary Privileges Committee recommended the development of a protocol for independent assessment of documents seized under warrant from a Members' office where privilege is claimed.

However, it is developments in the Australian, NSW and New Zealand Parliaments that have been the focus of most discussion concerning members' documents and the execution of search warrants. The four cases of particular interest discussed below are those of Senator Crane and Senator Harris, which occurred in the Senate in 1998 and 2001, the case of the Hon Peter Breen, which occurred in the NSW Legislative Council in 2003, and the case of Mr Taito Philip Field which occurred in the NZ Parliament in 2006.¹¹

Senator Crane

In 1998, officers of the Australian Federal Police executed a search warrant on the office of Senator Crane, during which they seized documents in relation to suspected offences by the Senator concerning travel allowance claims. The officers

¹¹ As a postscript, however, it is interesting to note the recent Police investigations into the activities of Mr Damian Green MP, in the UK House of Commons. In November 2008, the Serjeant at Arms consented to a search of Mr Green's parliamentary office without a warrant. A Committee has been appointed by the Speaker to inquire into the matter.

seized a range of documents that covered many aspects of the Senator's parliamentary business.

The matter was removed to the Federal Court, where Senator Crane claimed parliamentary privilege over all documents that had been seized. Counsel acting for the President of the Senate, who was granted leave to intervene in the proceedings, submitted that privilege only attached to those documents 'closely connected to proceedings in the Senate'.

In his ruling, French J ruled that documents seized by officers of the Australian Federal Police from the office of Senator Crane, and claimed to be protected by parliamentary privilege, were not sufficiently closely connected to 'proceedings in parliament' for the purposes of Article 9 of the *Bill of Rights 1689* or section 16 of the *Parliamentary Privileges Act 1987* (Cth). However, somewhat surprisingly, he disclaimed any jurisdiction to decide whether seizure of the documents was in breach of the privileges of the Senate. He concluded that it 'is not, in the ordinary course, for the courts to decide questions of privilege as between the executive and the parliament in litigation between the subject and the executive'.¹²

Accordingly, the documents were forwarded to the Clerk of the Senate by order of French J. The Senate appointed an independent counsel, Mr Stephen Skehill SC, to examine the documents and determine whether any were protected from seizure by reason of privilege. Of the 25,000 pages of documents examined, about 1,400 pages of documents were found to be within the scope of the warrant and not privileged. These were returned to the police. After examining those documents the police announced that no prosecution would be instituted against Senator Crane.

Senator Harris

In 2001, the Queensland Police executed a search of Senator Harris's electoral office. In this case the Clerk of the Senate immediately wrote to the Queensland Police saying that some of the material may be protected by parliamentary privilege, and recommending that the material be sealed until the question was determined. The Queensland Police agreed and the material was sealed and held by the Queensland Police solicitor.

The Senate subsequently referred to the Senate Privileges Committee the question of whether there was any contempt involved in the issuing and execution of the search warrant. The Committee found that at that stage the Queensland Police had behaved appropriately, sealing the documents and allowing the question of privilege to be determined before seeking to examine them. However, as Senator Harris and the Queensland Police could not agree on the status of the documents in dispute (Senator Harris insisting on claiming privilege in relation to all the documents seized), the matter came back to the Senate for resolution. The Senate again commissioned Mr Skehill to undertake examination of the documents. Of the 74,000 pages of documents examined, Mr Skehill found that all were outside the authorisation of the warrant (Mr Skehill went beyond the issue of whether the documents were covered by privilege).

¹² (2000) 97 FCR 9 at 30

The Hon Peter Breen

On 3 October 2003 officers of the Independent Commission Against Corruption executed a search warrant at the Parliament House office of the Hon Peter Breen, a member of the NSW Legislative Council. During the execution of the warrant, the officers seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It became evident later that, despite section 122 of the *Independent Commission Against Corruption Act 1988* which expressly preserves parliamentary privilege, and assurances from the officers themselves that they would respect that privilege, some of the material seized was outside the authorisation of the warrant and some was immune from seizure by virtue of parliamentary privilege.

Subsequently, in a letter dated 14 October 2003 to the President, and in a speech delivered in the Legislative Council on 15 October 2003, Mr Breen claimed that breaches of the immunities of the Legislative Council had occurred in the search and seizure of documents from his office.

The Clerk, on behalf of the President, subsequently sought legal advice from Mr Bret Walker SC concerning the execution of the search warrant. Mr Walker explained that 'privilege prevents the seizure of material directly connected to the votes or utterances of a member in any session of the House (including any Committee).' Mr Walker concluded that it is 'quite possible' that the seized hard-drive contains material 'which could not lawfully have been demanded because of parliamentary privilege':

The authority to seize, in my opinion, depends on an actual consideration of the substance of the material sufficiently to decide whether it falls within the category or topic specified in the search warrant itself. In theory, it may be that an unaccessed hard-drive could wholly answer that description, but that would be very difficult to justify in the abstract.¹³

In response to this issue, the House implemented certain interim measures for the storage of the seized material pending resolution of the matter. The matter was then referred to the Legislative Council Standing Committee on Parliamentary Privilege and Ethics for detailed consideration. Following receipt of the report of the Privileges Committee,¹⁴ the House adopted a resolution to resolve the matter to the following effect:

- The seized material was to be returned to the President, and retained in the possession of the Clerk, until the issue of parliamentary privilege had been determined.
- Mr Breen, the Clerk, and a representative of the Commission were to 'jointly be present at' the examination of the material.

¹³ Opinion of Mr Bret Walker SC, 9 October 2003, p. 2

¹⁴ NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003; see also NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004.

- Mr Breen and the Clerk were to identify any items claimed to be within the scope of ‘proceedings in Parliament’, according to a definition of that expression which was stated in the resolution, in the same terms as the definition contained in the *Parliamentary Privileges Act 1987* (Cth).¹⁵
- The Commission was to have the right to dispute any such claims, and to provide reasons; Mr Breen was to have the right to provide reasons in support of any disputed claim.
- Any items that the House determined as within the scope of ‘proceedings in Parliament’ were to remain in the custody of the Clerk until the House otherwise decided, with a copy to be made available to the member.
- Any items that the House determined were not privileged, or in respect of which a claim of privilege was not made, were to be returned to the Commission.

As a result of this process, most of the material seized by the ICAC during the execution of the search warrant was returned to the ICAC, however a small number of documents was retained in respect of which a claim of parliamentary privilege was made.

In 2004, following a further inquiry by the Privileges Committee into the matter,¹⁶ the House upheld the claim of privilege relating to those particular documents,¹⁷ which were later released to Mr Breen.

In upholding Mr Breen’s claim of privilege, the Privileges Committee applied the test outlined at page 5 of this paper. The Committee found that while the documents were not brought into existence for the purposes of or incidental to the transaction of parliamentary business, at least some of the documents were nevertheless subsequently used for the purposes of transacting parliamentary business – they were used by Mr Breen in speeches or questions in the House. Moreover, the Committee was also satisfied that Mr Breen retained the documents for the purposes of speeches and other proceedings in the House. Accordingly the Committee found:

That having been retained for purposes of or incidental to the transacting of parliamentary business the documents fall within the scope of ‘proceedings in Parliament’ for the purposes of Article 9.¹⁸

Mr Raito Philip Field

¹⁵ See s 16(2) of the *Parliamentary Privileges Act 1987* (Cth).

¹⁶ NSW Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004.

¹⁷ *NSW LC Minutes* (1/4/2004) 650.

¹⁸ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and seizure of documents by ICAC No 2*, pp 8-10

On 27 November 2006, Police executed a search warrant on the electorate office, Auckland home and Parliament office of Mr Taito Phillip Field as part of their inquiry into his dealings with constituents seeking help with immigration.

As part of the police investigation, the Police met the Acting Clerk of the Parliaments before the execution of the search warrant, and accompanied by a representative of the Parliament, sealed Mr Taito's office.

The search was executed in accordance with the terms of a search warrant issued in accordance with an interim protocol between the Speaker and the Commissioner of Police, based on the New South Wales model. During the search, police imaged Mr Field's computer and took various documents.

Charges of corrupt practice against Mr Field (who lost his seat at the general election in November 2008) are still to be heard.

This was the first occasion this had occurred in the New Zealand Parliament, requiring the development of the interim protocol, since updated and reissued, as discussed further below.

Protocols for the execution of search warrants

In response to the difficult issues that have arisen through the execution of search warrants on the offices of members of parliament, the Australian Parliament, NSW Legislative Council, NZ Parliament and ACT Parliament have all developed protocols governing such matters. These protocols are examined below.¹⁹

The Federal Parliament Memorandum of Understanding

In early 2005, the Commonwealth Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate signed a *Memorandum of Understanding on the execution of search warrants in the premises of members of Parliament*. The Memorandum records the understanding of the office holders concerned on the process to be followed where the Australian Federal Police (AFP) propose to execute a search warrant on the premises occupied or used by a member of Federal Parliament. The agreed process is spelled out in the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*.

The *Memorandum of Understanding on the execution of search warrants in the premises of members of Parliament* and the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* were tabled in both the Senate and the House of Representatives on 9 March 2005.

¹⁹ In 2006, the Queensland Legislative Assembly's Members' Ethics and Parliamentary Privileges Committee also recommended the development of a protocol for the execution of search warrants on the offices of members of the Legislative Assembly. See Legislative Assembly of Queensland, Members' Ethics and Parliamentary Privileges Committee, *Report on Inquiry into Communications to Members, Members' Representations to Government and Information Provided to Members*, Report No 60, November 2003, p i. The recommendation received the support of the Premier in principle, however to date no further action has been taken to date.

The AFP National Guideline is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that members and their staff are given a proper opportunity to raise claims for privilege or public interest immunity in relation to documents or other things that may be on the search premises.

The Guideline explicitly states that any documents and other things that attract parliamentary privilege cannot be seized under a search warrant. The Guideline provides:

- Before applying for a search warrant in respect to premises used or occupied by a member of Parliament, an AFP officer must seek approval at a senior level within the AFP.
- Before executing the warrant on a parliamentary office, the AFP officer is to contact the relevant Presiding Officer and notify them of the search. If the Presiding Officer is not available the executing officer is to contact the Clerk or Deputy Clerk, or in the case of committee documents, the Chair of that committee. Under the Guideline the executing officer is also to consider the feasibility of contacting the member or a senior staffer to arrange a suitable time for the execution of the warrant.
- Unless it would affect the integrity of the investigation, executing officers are to avoid execution of a warrant on premises in Parliament on a parliamentary sitting day; to ensure the member or a senior staff member are present; and to give the member or their staffer reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed. They are also to ensure that reasonable opportunity is given to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises, and take all reasonable steps to limit the amount of material that is examined in the course of the search.
- If privilege or immunity is claimed, the relevant documents are to be placed in audit bags in accordance with the AFP national guidelines on exhibits, and a list of the documents prepared. The member is to be given an opportunity to copy the documents, before the documents are delivered to a neutral third party for safekeeping. The neutral third party can be the warrant issuing authority or an agreed third party. The member has five working days to notify the executing officer that the claim for privilege or immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. Depending on the preference of the member, the ruling can be sought from a court or the relevant House. The items remain with the neutral third party until the claim is determined. If the member or their staff do not contact the executing officer within five working days, the claim for privilege or immunity will be assumed to have been abandoned.
- If the member or their staff refuses to cooperate with the procedure outlined above, the executing officer may execute the warrant anyway,

although they are advised to minimise the extent to which documents which may attract privilege or public interest immunity are seized. If a claim for privilege or immunity appears arbitrary, vexatious or frivolous, unless the executing officer considers that there is a reasonable basis for the claim, they are to inform the member of their intention to execute the warrant, having first given the member an opportunity to specify the particular documents which attract privilege. If the executing officer considers that there is a reasonable basis for such a claim, it may be necessary for a large number of documents to be placed in audit bags.

- The AFP has to notify the Attorney-General, in his or her capacity as First Law Officer, and the Minister responsible for the AFP in any case where a claim of parliamentary privilege has been made by or on behalf of a member of Parliament.
- At the conclusion of the search the executing officer has to provide a receipt recording things seized under the warrant, which unless the member has taken copies, must be sufficiently detailed to allow the member to recall details of the things seized and obtain further advice. If it is necessary for the performance of the member's duties to access the seized material, the AFP is to facilitate access on those terms. They will also facilitate access on any other grounds permitted under applicable laws and guidelines.

The NSW Legislative Council draft protocol

In 2005, in the aftermath of the Breen matter, the NSW Legislative Council referred to the Council Privileges Committee a further inquiry into the appropriate protocols to be adopted for the execution of search warrants of members' offices by law enforcement agencies and investigative bodies.²⁰

In its report on the matter in February 2006, the Legislative Council Privileges Committee recommended the adoption of a protocol to be followed in any future instances involving the execution of search warrants by investigatory or law enforcement bodies at NSW Parliament House.²¹

The draft protocol drew on many of the elements of the Federal Parliament Memorandum of Understanding, as outlined above. However, it was adjusted to include procedures specific to New South Wales, notably the 'Breen test' outlined at page 5 of this paper.

Since the events of the Breen case in October 2003, the ICAC has adopted new practices to deal with issues of privilege where they arise in the execution of search warrants in the New South Wales Parliament. The ICAC initially adopted revised search warrant procedures in May 2005. Subsequently, following the publication of the Privileges Committee Report in February 2006 and the publication of the draft protocol outlined above, it adopted further revised procedures on 28 June 2006,

²⁰ NSW LC Minutes (6/4/2005), 1313

²¹ NSW Legislative Council Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No 33, February 2006.

reflecting closely the draft protocol. These procedures were further revised in a small number of respects in August 2008.²² They are reproduced in Appendix 1.

It is notable the similarities and consistency of approach that are incorporated into the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* and the ICAC's *Procedures for obtaining and executing search warrants*. Common themes include consultation with the Presiding Officers, the member concerned, the provision of a reasonable opportunity for a member to claim privilege, and an independent process to assess claims of privilege.

These similarities clearly derive from the shared experience of the federal Parliament and the NSW LC in dealing with search warrants. However, it may be that as other parliaments are forced to grapple with this issue in the future, similar approaches will be adopted, with the possibility too of significant and welcome innovations.

It is also notable that the Presiding Officers of the New South Wales Parliament are currently developing a new Memorandum of Agreement with the NSW Police Force for the provision of security services at Parliament House. The final agreement is anticipated to include a provision to the effect that where the Police, ICAC or other investigative agencies seek to access a member's office, the relevant presiding officer must be advised and all relevant protocols put in place by either the agency or the House are to be followed.

The New Zealand Parliament Protocol²³

An agreement between the Speaker of the New Zealand House of Representatives and the Commissioner of the New Zealand Police governing police functions within the New Zealand parliamentary precinct was first signed in 2004. This initial agreement dealt with operational matters such as interviewing members and staff.

In October 2006, a separate agreement relating to the execution of search warrants within the parliamentary precinct was made. This was an 'interim' agreement to cover the intended search of the parliamentary office of Taito Phillip Field MP, as discussed previously.

The current agreement was updated and reissued in December 2007. The New Zealand Protocol has a number of common features with the Australian federal and NSW Legislative Council protocols. Of note, it provides that:

- The exemption for members from legal liability for parliamentary conduct does not exempt criminal acts from prosecution.

²² See Office of the Inspector of the Independent Commission Against Corruption, 'Special Report of the Inspector of the Independent Commission Against Corruption to the Parliament of New South Wales pursuant to section 77A of the *Independent Commission Against Corruption Act 1988* on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Honourable Peter Breen, MLC', September 2008, p 47

²³ *Execution of search warrants on premises occupied or used by Members of Parliament: An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police*, October 2006.

- In obtaining a warrant, approval must be sought from the level of Assistant Commissioner or above, and advice may be sought from the Chief Legal Adviser of Police or Solicitor General.
- The Speaker and Clerk are to be notified of the execution of a warrant, and the Speaker may direct a member's office to be closed. Members should have the opportunity to obtain legal advice.
- Warrants should be executed on non-sitting days when possible, and in the presence of the member or the member's staff where possible.
- An inventory of seized material is to be provided to the member, and members may contest the seizure of material where they consider it outside the authority of the warrant.

ACT Legislative Assembly Agreement²⁴

The Agreement between the Speaker of the Legislative Assembly of the ACT and the Chief Police Officer of the ACT, incorporating a protocol for the execution of search warrants within the ACT parliamentary precinct, draws largely on the agreement between the Federal Parliament and the Australian Federal Police, since it involves the same police service.²⁵ As such, its provisions largely mirror those of the federal agreement.

Comment

Members of parliament can only claim parliamentary privilege over a document in their possession to the extent that the document constitutes a 'proceeding in Parliament' which attaches to their service in their House, or is retained 'for purposes of or incidental to' such proceedings. Privilege does not attach to a document concerning a member's activities external to their service to their House. In that sense, the privilege that attaches to certain documents is very much a privilege of the House, rather than of the individual member.

In recent years, a series of cases has brought into stark relief the difficulty in determining what members' documents constitute 'proceedings in Parliament' where they are subject to seizure under the terms of a search warrant. This is a significant problem. On the one hand, there is an important public interest in investigative bodies being able to carry out their statutory functions and obtain information without undue interference, including through spurious claims of parliamentary privilege. On the other hand, parliament must be protected from external interference in the conduct of its business, which includes interference with the members of parliament in the performance of their role. In the Breen and Crane cases in particular, documents that were privileged, but also fell within the

²⁴ *Execution of Search Warrants where parliamentary privilege may be applied – Execution of Search Warrants and interviews with Members of the Legislative Assembly*, June 2006.

²⁵ The protocol was adopted in 2002 in response to a set of emails that were destined to go to a Minister but instead went to a staffer of the Leader of the Opposition. As a result, as discussed previously, the AFP undertook an investigation into IT security at the Legislative Assembly, which involved the execution of a search warrant on the office of the staffer involved.

terms of the respective warrants, were seized, in contravention of their privileged status.

When initially confronted with this problem, the Senate and NSW Legislative Council adopted different approaches to its management. In the Breen case, the Legislative Council dealt with the matter internally, with advice from the Clerks. By contrast, in the Senate, an independent 'legal arbiter' was appointed to review material seized under warrant, and to make an assessment as to whether any of the material was immune from seizure.

Since then, the Federal Parliament, NSW Legislative Council, New Zealand Parliament and ACT Parliament have developed protocols, in consultation with the relevant investigative bodies, to regulate the claiming of privilege by members over documents in their possession, but subject to seizure under a search warrant. To date, these protocols have not been challenged.²⁶ Arguably, however, their existence provides greater certainty in protecting members from the compulsory forfeiture of documents in their possession that they have retained for purposes of or incidental to the transacting of parliamentary business.

²⁶ See Odgers, 12th edn, p 48, for a discussion of developments in the United States Congress, which has adopted similar arrangements for resolving claims of legislative immunity.

Appendix 1

ICAC Procedures for obtaining and executing search warrants: Execution on parliamentary office (August 2008)

Execution On Parliamentary Office

In executing a warrant on the office of a Member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any document which falls within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee.

Parliamentary privilege belongs to the Parliament as a whole, not individual members.

This procedure is based on the protocol recommended by the Legislative Council Privileges Committee in February 2006 (Report 33).

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.

5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.

15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.
16. Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.
17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.