

**INQUIRY INTO EXECUTION OF SEARCH WARRANTS BY
THE AUSTRALIAN FEDERAL POLICE NO. 3**

Name: The House of Lords, United Kingdom

Date Received: 9 March 2021

House of Lords submission to the New South Wales Legislative Council Privileges Committee

Introduction

1. This submission supplements the more detailed submission made by the House of Commons. The protocols relating to privilege and search warrants, as well as the privileged status of translations are the same in both Houses. However, each House has passed separate reports relating to these issues.

a) The rights available to a staffer to make a claim of privilege over documents

2. In the context of police searches, the process for settling matters of privilege is covered by the House's protocol on police requests for access to the precincts of the house of lords with a view to arresting a member or searching a member's office (set out in full at paragraph 7 of this submission). Paragraphs 9-11 of the protocol set out the process by which any claim of privilege can be made by a senior parliamentary official:

"9. Any search of a Member's office or belongings will proceed only in the presence of Black Rod or the Yeoman Usher, who will require a record to be provided of what has been seized. Black Rod may attach conditions to such a search which require the police to describe to a senior Parliamentary official the nature of any material being seized which may relate to a Member's Parliamentary work and may therefore be covered by Parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material, until such time as any issue of privilege has been resolved.

10. Any request by the police to access a Member's electronic files, stored on Parliamentary servers, will be referred by the Parliamentary Information Communications Technology Service to Black Rod, who will in turn consult the appropriate authorities as described in paragraph 8 above.

11. The execution of a warrant, or admission to search without a warrant, shall not constitute a waiver of privilege with respect to any Parliamentary material which may be removed by the police."¹

3. It should also be noted that the Clerk of the Parliaments has powers to certify certain information as privileged, and therefore not required to be released, during the process of preparing responses to Freedom of Information Act requests.

b) The rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer

4. In addition to the information provided in the House of Commons submission, we also draw your attention to the following paragraph from Erskine May:

¹ <https://publications.parliament.uk/pa/ld200809/ldselect/ldhouse/74/74.pdf>

“In 2010, three Members of the House of Commons and one Member of the House of Lords were charged with false accounting. The defence argued that the alleged offences—involving in the case of Commons Members allowance claims, originating in resolutions of the House—were matters of privilege over which the court had no jurisdiction. That argument was rejected in the Crown Court and in the Court of Appeal. It was also rejected by the Supreme Court where the leading judgment distinguished between the protection provided by Article IX and that provided by exclusive cognizance. In respect of the former, the judgment concluded that submitting claims did not form part of, nor was it incidental to, the core business of Parliament and was therefore not part of the proceedings of Parliament. As to the latter, whereas the allowances scheme itself was a matter that (at that time) fell with the House's exclusive cognizance, its implementation was not, so there was no bar in principle to the Crown Court considering whether the claims made by the defendants were fraudulent.”² (11.18 Erskine May)

c) The privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege

5. The House of Lords has the same interpretation of the privileged nature of translation as the House of Commons puts forward in their submission. In addition, the House of Lords Procedure Committee confirmed that “the wording in the Companion authorises committees to take oral evidence in another language, or in British Sign Language (BSL), through interpretation, and to accept written evidence originating in another language, or in BSL, if accompanied by a translation into English.”³ Once accepted as submissions by a select committee, these are protected by parliamentary privilege.

d) The merits of adoption of a formal memorandum of understanding between the [Parliament] and the [police]

6. Prior to 2008, there was no formal protocol relating to police searches in Parliament. However, in 2008, the police searched the parliamentary office of a Member of the House of Commons in pursuit of a criminal investigation into the leaking of documents from the private office of the Home Secretary. The search was conducted without a warrant, consent having been obtained from the Serjeant at Arms. The police also arrested the Member at his home. The Speaker made a statement to the House of Commons and issued a protocol requiring the issue of a warrant in all cases involving a police search within Parliament and specifying certain conditions for the execution of such a warrant. The committee appointed to consider issues of privilege relating to these events concluded that, while the conduct of the police fell below acceptable standards, nothing they did ‘amounted to a breach of privilege or a contempt of the House.’⁴ Subsequent searches of the estate have been made pursuant to a warrant. (For more detailed information on

² <https://erskinemay.parliament.uk/section/4545/proceedings-precincts-and-criminal-acts/>

³ <https://publications.parliament.uk/pa/ld201516/ldselect/ldproced/62/62.pdf>

⁴ <https://publications.parliament.uk/pa/cm200910/cmselect/cmmisspriv/62/62.pdf>

this incident and the actions which flowed from it in the House of Commons, see their submission.)

7. In April 2009, the House of Lords House Committee published a report *Police Access to the Precincts: Protocol*⁵. This set out, for approval by the House of Lords, a unilateral protocol governing police requests for access to the precincts of the House of Lords with a view to arresting a Member or searching a Member's office. The protocol is as follows:

PROTOCOL ON POLICE REQUESTS FOR ACCESS TO THE PRECINCTS OF THE HOUSE OF LORDS WITH A VIEW TO ARRESTING A MEMBER OR SEARCHING A MEMBER'S OFFICE

1. Although much of the precincts of the House are open to the public, there are parts of the buildings which are not public. The House controls access to its precincts for a variety of reasons, including security, confidentiality and effective conduct of Parliamentary business.
2. The House has no wish to impede the proper administration of justice, but it is of equal concern that the work of the House and of its Members is not unnecessarily hindered.
3. The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts or by a Member of the House is no different from any other offence and is a matter for the courts. It is long established that a Member may be arrested within the precincts.
4. In all cases where any member of the staff of the House is made aware that the police seek access to the precincts either to arrest a Member or to search a Member's office, the Clerk of the Parliaments and Black Rod must be informed. No member of the staff of the House may undertake any duty of confidentiality which has the purpose or effect of preventing or impeding communication with these Officers.
5. In cases where the police seek access to the precincts in order to arrest a Member, Black Rod must be notified. Black Rod will in turn notify the Lord Speaker.
6. Black Rod or the Yeoman Usher will accompany the police and an arrest will only be made in their presence. Black Rod will ensure that in the making of the arrest no breach of Parliamentary privilege is committed.
7. In cases where the police seek access to the precincts of the House in order to effect a search, and where a warrant may lawfully be required by the House authorities, a warrant must be obtained.
8. Before admitting the police to the precincts to undertake a search, Black Rod, having consulted the Clerk of the Parliaments and Counsel to the Chairman of Committees, will seek the authority of the Lord Speaker. The Lord Speaker will consult, as appropriate, the Leader of the House and others. She may also seek the advice of a Law Officer.
9. Any search of a Member's office or belongings will proceed only in the presence of Black Rod or the Yeoman Usher, who will require a record to be provided of what has been seized. Black Rod may attach conditions to such a search which require the police to describe to a senior Parliamentary official the nature of any material being seized which may relate to a Member's Parliamentary work and may therefore be covered by Parliamentary privilege. In the latter case, the police shall be

⁵ <https://publications.parliament.uk/pa/ld200809/ldselect/ldhouse/74/74.pdf>

required to sign an undertaking to maintain the confidentiality of that material, until such time as any issue of privilege has been resolved.

10. Any request by the police to access a Member's electronic files, stored on Parliamentary servers, will be referred by the Parliamentary Information Communications Technology Service to Black Rod, who will in turn consult the appropriate authorities as described in paragraph 8 above.

11. The execution of a warrant, or admission to search without a warrant, shall not constitute a waiver of privilege with respect to any Parliamentary material which may be removed by the police.