

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

Name: The House of Commons, United Kingdom

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United Kingdom House of Commons submission to the Privileges Committee of the Legislative Council, New South Wales Parliament

Introduction

Exclusive cognisance, the control of each House over its own proceedings, precincts and business, is not used to frustrate the criminal law. The House of Commons generally permits the execution of search warrants on the Parliamentary precincts, subject to certain conditions.

In 2008, the police searched the Parliamentary office of a Member 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 Speaker, soon after the incident, made a statement to the House 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. Subsequent searches of the estate have been made pursuant to a warrant. The Speaker's Protocol is annexed to this submission.

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

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;

Enforcing or insisting on privilege is a matter for the House as a whole. Members cannot make a 'claim' of privilege as such; they can only make a complaint of a potential contempt. Staff cannot make such a complaint on their own authority. The process is described *May*:

A Member who wishes to raise a privilege complaint is required to give written notice to the Speaker as soon as reasonably practicable after the Member has notice of the alleged contempt or breach of privilege. Privilege complaints should not be raised on the floor of the House without first writing to the Speaker. The Speaker has discretion to decide whether or not the matter should have the precedence accorded to matters of privilege (see paras 18.39, 19.2, 19.25). A decision by the Speaker not to allow precedence in no way limits the Member's right to use other procedures for publicising their complaint but the Speaker has ruled against such matters being raised on a point of order.⁴

If it is decided that a matter should not have precedence, the Member is informed by letter. If precedence is allowed, the Speaker will announce their decision to the House, and the Member is told beforehand when such an announcement will be made. When the announcement has been made, the Member is entitled to table a motion for the following day formally calling attention to the matter, and either proposing that it be referred to the Committee on Standards and Privileges or making some other appropriate proposition.¹

In relation to search warrants specifically, following the police search of a Member's office in 2008, as noted above the then Speaker issued a protocol under his own authority for any police searches of MPs' offices on the Parliamentary estate. It provides that any search will only take place in the presence of the Serjeant at Arms and Speaker's Counsel or their deputies. In practice, a senior clerk is also present. These officials advise whether any documents engage Parliamentary privilege and, if so, the Protocol states that the Speaker "may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been

¹ Erskine May's *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 25th edn, 2019, para 15.32

resolved”. Although constituency correspondence is not covered by Parliamentary privilege, the Protocol states that it should be treated with the same degree of care as would client information taken from a solicitor’s office.

In most cases, were a senior official to advise that a document engaged Parliamentary privilege, it could still be taken from the precincts. However, in such a case, the police must keep it confidential (and/or subject to other conditions laid down by the Speaker) whilst a determination is made as to whether the document is privileged and therefore whether and how the document could be used in subsequent legal proceedings. (Article IX of the Bill of Rights would affect its admissibility as evidence in court, depending on the proposed use of the material).

The Protocol was written under considerable time pressure and in response to a particular set of circumstances. It does not therefore cover all eventualities. There have been a number of cases where, rather than obtaining a warrant to search the premises, the police have instead obtained a Production Order – this requires the House Authorities to produce documents in response to specified search terms, for example from electronic records. In recent cases involving a Production Order, the police have retained independent Counsel to sift material before the police receive it. The House Authorities have first identified where material is covered by Parliamentary Privilege and the independent Counsel has assessed whether any or all of the disclosed material is relevant to the investigation. The practical implications (including the application of Article IX) would only need to be considered if the material were assessed as relevant.

The Protocol makes it explicit that the execution of a warrant “shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police”. As a statutory provision, Article IX cannot of course be waived in any event.

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

The Parliamentary Papers Act 1840 provides protection from criminal or civil liability for printing any “report, paper, votes, or proceedings” by order of the House, and “any extract from or abstract of such report, paper, votes, or proceedings” providing such extract or abstract is “published bona fide and without malice”.

If the House ordered the printing of a translation, this would be covered by the Act. It would be a matter for the courts whether a translated document of proceedings published other than by order of the House amounted to an “extract from or abstract of” proceedings. The protection given to published proceedings by the Act is afforded to the publisher.

If a Member were themselves, outside of proceedings, to repeat or provide a translation of something they said in proceedings (for example), this might instead constitute “effective repetition” in cases such as defamation proceedings, thereby losing the protection of privilege. The position would depend on the facts of the case and how closely linked the repetition was to the original proceedings. Article IX (which protects the proceedings, not the Member) may also be relevant, depending on the purpose of the reference – for example, if the reference was intended to be used in order to question the content of the Parliamentary proceedings in a court, then this would risk a breach of Article IX regardless of the language used.

The House of Commons Liaison Committee (responsible for overseeing the select committee system) concluded in its 2019 report on *The effectiveness and influence of the select committee system* that “The protection afforded by section 3 of the Act to extracts and summaries is slightly

less certain [compared to the protection of evidence reported to the House, in whatever form it is received]”.²

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

The House of Commons does not have a bilateral memorandum of understanding with the police in relation to the execution of search warrants. The Speaker’s Protocol sets out the position of the House, given the Speaker’s authority over access to the precincts of the House.

The Parliamentary Commissioner for Standards and the Committee on Standards each has a bilateral protocol with the Metropolitan Police in respect of investigations by the Commissioner or cases before the Committee which may involve criminal matters.³ This sets out the procedure where investigations may overlap, but does not explicitly cover the execution of a search warrant or production order.

² Fourth Report of Session 2017-10, HC 1860, para 193, <https://publications.parliament.uk/pa/cm201719/cmselect/cmliaisn/1860/186002.htm> See also Erskine May, 25th edn, paras 16.28 and 16.30

³ Committee on Standards, The House of Commons and the criminal law: protocols between the police and the Parliamentary Commissioner for Standards and the Committee on Standards, Tenth Report of Session 2019-21 (HC 883)

Annex: Speaker's protocol on searches

- 1. In my statement of 3 December 2008 (OR col 3) I said I would issue a protocol to all Members on the searching of Members' offices. In future a warrant will always be required for a search of a Member's office or access to a Member's parliamentary papers including his electronic records and any such warrant will be referred to me for my personal decision.*
- 2. Though 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.*
- 3. Responsibility for controlling access to the precincts of the House has been vested by the House in me. It is no part of my duties as Speaker 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.*
- 4. The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts. It is long established that a Member may be arrested within the precincts.*
- 5. In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me. In all cases where any Officer or other member of the staff of the House is made aware that a warrant is to be sought the Clerk of the House, Speaker's Counsel, the Speaker's Secretary and the Serjeant at Arms must be informed. No Officer or other 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.*
- 6. I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere. I reserve the right to seek the advice of the Attorney General and Solicitor General.*
- 7. I will require a record to be provided of what has been seized, and I may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved.*
- 8. Any search of a Member's office or belongings will only proceed in the presence of the Serjeant at Arms, Speaker's Counsel or their deputies. The Speaker 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 removed, until such time as any issue of privilege has been resolved.*
- 9. If the police remove any document or equipment from a Member's office, they will be required to treat any data relating to individual constituents with the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office.*
- 10. The execution of a warrant shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police.*

11. In view of the concern shown by Members, I am circulating this document without delay, but I shall take into account any representations by Members for its revision and will issue a revised document, should this be necessary.