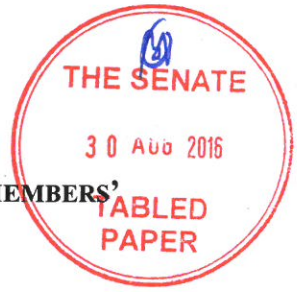
D16/121967




**BACKGROUND PAPER**

# PARLIAMENTARY PRIVILEGE AND THE EXECUTION OF SEARCH WARRANTS ON MEMBERS' PREMISES—DETERMINATION OF CLAIMS OF PRIVILEGE

---

*Parliamentary privilege and compulsory production of documents – the legal background*

Members are subject to the law of the land and have no explicit immunity against subpoenas, orders for discovery issued by courts or tribunals, or search warrants, all of which may be used to obtain access to documents held by members. However, the law of parliamentary privilege limits the use that may be made of such material by a court or tribunal (the "use immunity").

In the United States, the courts have also found that parliamentary privilege encompasses a "testimonial" privilege which provides a basis for lawful refusal to produce documents or evidence without going to the use to which the evidence may be put. For example, if a senator were to be asked to give evidence about the sources for a speech in the Senate, the senator could refuse to answer any such questions about the speech on the basis that answering would in itself constitute questioning of proceedings in parliament, regardless of any other use to which the answers might be put. Testimonial privilege is recognised in the *Parliamentary Privileges Act 1987* which provides, in subsection 16(4), that a record of evidence taken by a House or committee in camera is not to be admitted in evidence before a court or tribunal for any purpose. The use to which the evidence might be put is immaterial. It is the fact that the material constitutes in camera evidence that determines its immunity from production.

There may be an effective immunity against processes for the compulsory production of documents where the documents are so closely connected with proceedings in parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings (see *Brown and Williamson Tobacco Corp v Williams*, 1995, 62 F 3d 408). This US case influenced the Queensland Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199 in holding that parliamentary privilege could provide a basis for resisting an order for discovery of documents, although there was some uncertainty about whether this extended to documents created by persons other than the senator concerned. Since then, courts have accepted that certain documents were immune from production because they were matters done for purposes of or incidental to proceedings in parliament (for details, see *OASP*, 13th edition, p. 60).

*Determination of the Crane matter*

Most of the jurisprudence relates to cases involving subpoenas or orders for discovery of documents, but the same principles apply to seizure of documents under search warrant by law enforcement bodies. In one such case, *Crane v Gething* (2000) 97 FCR 9, submissions made on behalf of the Senate argued that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could

determine as a matter of fact whether particular documents were so protected. However, a single judge of the Federal Court found that the court did not have jurisdiction to determine the question because the execution of a search warrant was an executive act, not a judicial proceeding, and that only the House concerned and the executive could resolve the issue. The court ordered that the documents be forwarded to the Senate for determination of their status. As the judgment was not appealed, the Senate, by resolution, proceeded to do so. It appointed a person to examine the documents and determine whether any were protected from seizure by parliamentary privilege, to return any so protected to the senator, and to provide the remainder to the police.

*Other cases*

In both Houses, the execution of search warrants in members' offices has been examined as a possible contempt. In a 1995 case (*Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP*), the Privileges Committee of the House of Representatives recommended that the Speaker initiate discussions with the relevant minister about developing guidelines for use by the AFP. In a 2002 case in the Senate involving the execution of a search warrant by the Queensland Police, the Senate Committee of Privileges found that the police had taken appropriate steps to allow the senator to claim privilege. Following continuing disagreement between the senator and the police about the treatment of the documents, the committee then facilitated a similar arrangement to that used in the Crane matter and an independent arbiter examined the material, finding that none of it was covered by the terms of the warrant.

*AFP Guideline*

Experience of members of both Houses subjected to search warrants (or their staff as in the Brereton/Dorling case in 2000) led to the finalisation in 2005 of a memorandum of understanding between the Presiding Officers, the Attorney-General and Minister for Justice, underpinned by an *AFP Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*. The guideline includes a procedure to be followed where a claim of parliamentary privilege is made ("unless the executing officer considers a claim to be arbitrary, vexatious or frivolous" in which case another procedure is followed). The procedure includes the following elements:

- the documents are placed in audit bags;
- a list of the documents is prepared;
- the member is given an opportunity to take copies of the documents;
- the secured items are delivered to a neutral third party ("who may be the warrant issuing authority or an agreed third party");
- the member has five working days to notify the executing officer whether the claim is abandoned or to commence action to seek a ruling on whether the claim can be sustained;
- it is a matter for the member to determine whether to seek a ruling from a court or the relevant House;

- the items remain in the possession of the neutral third party until the claim is determined.

*The question for determination*

On 19 May 2016, officers of the AFP executed search warrants at the office of Senator Conroy in Treasury Place, Melbourne, and at the Brunswick home of a staff member. It was widely reported that the seized material related to unauthorised disclosure of documents from NBN concerning the rollout of the network. In accordance with the relevant Guideline, Senator Conroy claimed parliamentary privilege over the seized documents which were delivered into the custody of the Clerk. Senator Conroy maintained his claim of privilege and has asked for the question to be placed before the Senate for determination.

For parliamentary privilege to prevent the seizure of documents by a law enforcement agency in a case where the matter has been placed before a House for determination, the question to be answered is whether the documents fall within the meaning of "proceedings in Parliament" and, in particular, the expression used in the Parliamentary Privileges Act, "for purposes of or incidental to" the transaction of parliamentary business.

In order to ascertain whether any particular document is immune from production by virtue of parliamentary privilege, the document's relationship with proceedings in Parliament must be assessed. For example, was a document given to a senator to:

- provide source material for a speech to made in the Senate?
- provide information for the formulation of questions on notice or without notice?
- inform questions asked either at a specific committee inquiry or at estimates hearings?

If that relationship is not clear from a description of the document, or from its face, the assessor may require evidence of the connection with proceedings in Parliament, and it is important that any such evidence be gathered in a fair and transparent manner.

In the Crane matter, the process for obtaining such evidence, and the manner in which the assessment was to be carried out, were not sufficiently specified in the resolution appointing the arbiter. Although the resolution directed the person to have regard to the *Parliamentary Privileges Act 1987*, relevant court judgments relating to the interpretation and application of the Act and relevant sections of Privileges Committee reports dealing with protection of documents of senators, it was not specifically provided that the task should be carried out in a judicial manner, to replicate as far as possible the task that the court had been expected to perform in determining the facts.

A strong reason for appointing an independent arbiter to make an assessment was to keep the process at arm's length from any partisan involvement. However, private consultations occurred between the independent arbiter and stakeholders, including party representatives, the senator concerned and the AFP. Without ground rules for such consultations, arm's length detachment was not able to be demonstrated, regardless of whether it had occurred. As a model for future processes, it was open to criticism on this basis.

*A better process?*

These problems could be overcome if the process were conducted with more formality, as befits the significance of the matter, and less outsourcing of the Senate's responsibility to make the determination. The obvious option would be to involve the Privileges Committee, at least in the initial definition of the task to be performed and in recommending a further process.

The Privileges Committee is accustomed to operating in a quasi-judicial manner in contempt inquiries and to making findings on questions of fact. Any evidence-gathering by the committee would be done in the context of known parliamentary powers and immunities, and in accordance with its usual procedures. These are documented in the Committee's *125th Report* and involve seeking submissions from any person whom it believes may be able to assist with its inquiry, and exchanging submissions between the parties to seek responses to the extent it considers necessary. At that point, if the committee were in a position to do so, it could make a recommendation to the Senate about the status and disposition of the documents.

Alternatively, the committee could recommend that a further assessment occur. Such an assessment might involve the engagement of a third party to examine the matter further (including authorising that person to examine the documents if that were considered necessary). The committee could make recommendations about the procedures to be followed in the further assessment and the identification of any such third party. The appointed assessor would report to the committee. After deliberating on the assessor's report, the committee could then make a recommendation to the Senate about the status and disposition of the documents. Adoption of the committee's recommendation, with or without amendment, would constitute determination by the Senate of the matter, as envisaged by the AFP Guideline.

Clerk's Office
August 2016