Chapter 2

Key issues raised in the inquiry

2.1 The committee has been asked to report on whether existing protocols for the execution of search warrants on the premises of members of Parliament ('Members') sufficiently protect the capacity of Members to carry out their functions without improper interference. This chapter summarises some of the key issues raised in the evidence, including:

- the scope for updating the existing National Guideline in relation to search warrants;
- the extent to which parliamentary privilege applies to the actual exercise of intrusive powers;
- the extent to which the exercise of covert intrusive powers is likely to raise issues of parliamentary privilege;
- existing oversight and accountability mechanisms as they relate to the exercise of intrusive powers where issues of parliamentary privilege may be involved;
- considerations specific to access to 'metadata'; and
- the importance of preserving the integrity and efficacy of law enforcement and intelligence investigations.

Search warrants and the National Guideline

2.2 In the Commonwealth jurisdiction, the extent to which parliamentary material is protected from seizure under search warrant is governed by a settlement between the Parliament and the Executive Government.[1] This was prompted in part by the experience of members of both Houses being subjected to search warrants, with the catalyst being the Federal Court's disavowal of jurisdiction in *Crane v Gething* (2000) 97 FCR 9. The Court held that it could not make a finding relating to parliamentary privilege because the execution of search warrant was an executive act, not a judicial proceeding.[2] It was a matter for the Senate and the executive to resolve.[3] The MoU put in place processes to resolve such claims.

2.3 The MoU underpins the *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* ('National Guideline'). The National Guideline sets out the process to be followed where the AFP proposes to

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1 Senate Committee of Privileges, 164th report, March 2017, paragraph 2.1.

2 Clerk's Office, *Background Paper: Parliamentary Privilege and Execution of Search Warrants on Members' Premises—Determination of Claims of Privilege*, tabled by the President on 30 August 2016 and reproduced in Appendix A of the committee's 163rd Report, p. 1.

3 *Odgers' Australian Senate Practice*, 14th Edition, pp. 62-63.

execute a search warrant on premises occupied or used by a member of the Federal Parliament ('a Member'), including the Parliament House office of a Member, the electorate office of a Member, and the residence of a Member. It 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 parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.[4]

2.4 It provides guidance in relation to the procedure to be followed prior to obtaining a search warrant, prior to executing the warrant, in the actual execution of the warrant, and if a claim of privilege is claimed. The National Guideline further sets out obligations on the executing officer at the conclusion of a search.

2.5 The National Guideline provides that the AFP officer seeking the search warrant should first seek approval at a senior level within the AFP. If approval is given, the officer should in turn consult the office of the appropriate Director of Public Prosecutions (for Commonwealth offences, this would be the CDPP), who can 'provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant'.[5]

2.6 The MoU stipulates that both the President of the Senate and the Speaker of the House of Representatives will be consulted when the AFP revise and reissue the National Guideline. To date there has been no consultation. However, the AFP has put in place additional procedures that are required to be followed when investigations of serious crimes relate to members of Parliament. These additional procedures relate to both actions taken on initial referral and 'the subsequent approvals to take investigative steps'.[6] These procedures are set out in an associated document: the AFP's *National Guideline on Politically Sensitive Investigations*.[7]

2.7 The right to claim parliamentary privilege in relation to the execution of search warrants does not derive from the MoU and National Guideline. It adheres to material closely connected to parliamentary proceedings by reason of the Commonwealth Parliament's inheritance of the House of Commons powers, privileges and immunities. Therefore, the National Guideline should not be viewed as providing any particular authority to make such claims; rather it guides officers of the executive arm of government in their interactions with members of parliament.

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4 Preamble of the *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*, as reproduced in Appendix A of the Committee of Privileges 163rd report.

5 Paragraphs 5.1 and 5.2 of the National Guideline.

6 Australian Federal Police, *Submission*, pp. 12 -13.

7 https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP National Guideline on politically sensitive investigations.pdf.

Updating the National Guideline to account for technological change

2.8 Evidence received would suggest that while the National Guideline is essentially sound, there is scope for updating it to ensure it remains relevant in light of technological changes, including the shift toward electronic storage and filing systems. In particular, the AFP expressed support for the notion of updating the National Guideline to ensure it 'continues to provide adequate guidance and appropriate instruction for protecting parliamentary privilege in today's environment'.[8]

2.9 The committee notes that in recent years there have been both legislative and technological changes which are reflected in how the AFP obtains materials under search warrants, how it collates those materials and how they are secured within the AFP's systems.

2.10 There would also appear to be scope and support for updating the National Guideline to cover the use of constables assisting in the execution of search warrants. In its 164th Report, the committee concluded that:

> … if it is to meet its stated purpose, the [National Guideline] must be revised to ensure that all persons involved in the execution of warrants understand and respect the requirement to quarantine information while claims of privilege are determined.[9]

2.11 The AFP in acknowledging the committee's report indicated that those who are involved in the execution of search warrants should 'understand and respect the requirements around use and disclosure of information while claims of parliamentary privilege are being determined'.[10]

Intrusive powers and parliamentary privilege

2.12 A range of views were expressed in submissions regarding the interface between intrusive powers and parliamentary privilege. Differences related less to the extent to which parliamentary privilege limited the use of material obtained through intrusive powers, but more to the degree that parliamentary privilege should or could constrain the actual use of intrusive powers when materials constituting 'proceedings in Parliament' were involved.

2.13 The fact that parliamentary privilege limits the use by a court or tribunal of materials that are part of 'proceedings in Parliament' is not disputed; this 'use immunity'—that is, a rule relating to the use to which evidence may be put—is largely codified in section 16 of the *Parliamentary Privileges Act 1987*. However, 'use immunity' is only one element of privilege.

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8 Australian Federal Police, *Submission*, p. 12.

9 Committee of Privileges, *Search warrants and the Senate*, 164th Report, March 2017, p. 19.

10 Australian Federal Police, *Submission*, pp. 11–12.

2.14 The focus on the 'use immunity' aspect of parliamentary privilege is distracting and disconnects it from its raison d'être. *Odgers' Australian Senate Practice* sets out the reasons thus:

> 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.[11]

2.15 Parliamentary privilege is both a set of immunities and a set of powers. This duality is acknowledged in the National Guideline in stating its purpose:

> This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.[12]

Covert intrusive powers and parliamentary privilege

2.16 The AFP expressed some scepticism regarding the potential for its exercise of intrusive powers to have a chilling effect on the work of the parliament and its members. For example, in relation to its powers to access information held by parliamentary departments, departments of state or private agencies, the AFP noted that police inquiries remain secret unless and until their results are used in a criminal prosecution, and the public has confidence in the AFP fulfilling its statutory obligations in regard to enforcing the criminal law. On this basis, the AFP argued that its exercise of such powers 'do not have any "chilling effect" on parliamentary free speech'. The AFP further argued that its use of covert intrusive powers, in contrast to the execution of search warrants, would be unlikely to disrupt the work of a Member's office or impede the ability of constituents to communicate with a Member, precisely because they are covert.[13]

2.17 In making this argument, the AFP observed that there is no ' ... judicial authority for parliamentary privilege so as material or information is immune from the exercise of police functions and powers'.[14] As such, in the AFP's analysis the operation of parliamentary privilege as a rule of evidence—that is, as a 'use immunity'—is not affected by its exercise of covert intrusive powers.[15] The AFP

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11 *Odgers' Australian Senate Practice*, 14th Edition, p. 42.

12 *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*, as reproduced in Appendix A of the Committee of Privileges 163rd report, p. 27.

13 Australian Federal Police, *Submission*, p. 22.

14 The AFP noted that rather than any judicial authority, the basis for the prevention of privileged material being seized under a search warrant is through the agreed terms of the MoU on the execution of search warrants on the premises of members. Australian Federal Police, *Submission*, p. 7.

15 Australian Federal Police, *Submission*, pp. 22–23.

concluded that it considers that current arrangements 'allow police to conduct covert investigations into serious criminal matters, while maintaining parliamentary privilege over any privileged material so obtained'.[16]

2.18 In contrast, the President of the NSW Legislative Council submitted that there is good cause to believe that any use of covert intrusive powers has 'the potential to curtail the free and ready flow of information to members, issues of privilege may arise, albeit that such activities by their very nature would presumably not often enter into the public domain'.[17]

2.19 Section 16 of the Privileges Act applies aspects of the inherited provisions of Article 9 of the Bill of Rights, 1688 to the Australian context, and subsection (2) defines 'proceedings in Parliament'. In her background paper, the former Clerk noted that section 16 is regarded as a correct codification of the existing law, indicating that 'Its validity was affirmed by the Federal Court in *Amman Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223'.[18] The former Clerk continued by stating that 'neither Article 9 nor section 16 is confined to documents' and advising the committee to consider in the context of making an assessment as to whether privilege might apply to documents seized from a senator and his staff:

> Whether there may be a basis for a claim of privilege and possibly for resisting compulsory process, such as seizure under search warrant, if the impact of the seizure would involve improper interference with legislative activities, regardless of the use to which the documents may be put. The concept at stake is the protection of members' sources and the chilling effect on the provision of information to members of Parliament recognised by McPherson JA in *Rowley v O'Chee*:
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> > Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for the purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1989 are intended to prevent. (*O'Chee v Rowley* (1997) 150 ALR 199 at 215).[19]

2.20 In undertaking the current inquiry, the committee queries why the same principle should not apply to material (in whatever form) obtained through the use of covert intrusive powers. The lawful use of covert intrusive powers can have a chilling

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16 Australian Federal Police, *Submission*, p. 23.

17 NSW Legislative Council, *Submission*, p. 6.

18 Clerk's Office, *Background Paper: Parliamentary Privilege and Execution of Search Warrants on Members' Premises—Determination of Claims of Privilege*, tabled by the President on 30 August 2016 and reproduced in Appendix A of the committee's 163rd Report, p. 6.

19 Clerk's Office, *Background Paper: Parliamentary Privilege and Execution of Search Warrants on Members' Premises—Determination of Claims of Privilege*, tabled by the President on 30 August 2016 and reproduced in Appendix A of the committee's 163rd Report, p. 7.

effect on the work of the parliament. Any suggestion that privilege diminishes because a covert intrusive power is used to access material is inconsistent with the view that privilege should operate to protect against the chilling effects that the executive's exercise of its powers can have on the parliament. The purpose of privilege is to protect Members pursuing the duty they have to scrutinise legislation and make government accountable and transparent. How material relating to the work of a parliamentarian is accessed is not determinative as to whether a question of privilege is enlived.

Current oversight mechanisms

2.21 Another aspect of the AFP's submission went to the oversight mechanisms in place for both the use of intrusive powers and the storage and use of any material obtained in the exercise of the powers. It argued that its use of covert intrusive powers is currently subject to 'robust oversight and accountability mechanisms', including internal governance arrangements to ensure legislation is followed and record keeping and reporting obligations are met, external scrutiny by the Commonwealth Ombudsman, and scrutiny by the courts.[20] The suggestion is that these mechanisms act as safeguards to ensure that questions of parliamentary privilege are not overlooked.

2.22 However, the Ombudsman has advised that in performing its statutory compliance audits of law enforcement agencies, it currently does not consider the implications for parliamentary privilege in the operation of the relevant legislation.[21] The Ombudsman further explained that its audits are generally in relation to powers used to investigate a criminal offence and 'provide protections for unnecessary and unwarranted privacy intrusion for all members of the public, including Parliamentarians'.[22] In making this point, the Ombudsman's submission arguably, albeit perhaps inadvertently, suggests an equivalence between the protections afforded by parliamentary privilege and more general privacy protections.

2.23 The Ombudsman also advised that the scope and focus of its oversight role is prescribed in the legislation, and this currently does not extend to considering parliamentary privilege. The Ombudsman concluded that amendments to legislation can change this scope and focus, and when this occurs, 'we adjust our audit methodology accordingly'.[23] The Ombudsman would not consider the implications for parliamentary privilege in its audits unless it was directed to do so either by legislation or another mechanism such as a request for an inquiry.

2.24 The Inspector-General of Intelligence and Security (IGIS) has a similar oversight role in relation to Australian intelligence agencies. In its submission, IGIS explained that it regularly examines selected agency records to 'ensure that the

20 Australian Federal Police, *Submission*, p. 17.

21 Commonwealth Ombudsman, *Submission*, p. 2.

22 Commonwealth Ombudsman, *Submission*, p. 2.

23 Commonwealth Ombudsman, *Submission*, p. 2.

activities of the intelligence agencies comply with the relevant legislative and policy requirements'. Parliamentary privilege, it advised, raises issues of both legality and propriety: IGIS could, for example, consider compliance with the Privileges Act, or whether agency 'policies and procedures pay sufficient regard' to parliamentary privilege.[24]

2.25 There is little in the evidence received to suggest that parliamentary privilege is given any particular consideration through the existing oversight and accountability mechanisms that apply to the use of covert intrusive powers.

2.26 It is significant that to the extent that issues of parliamentary privilege might be considered through existing oversight and accountability mechanisms that apply to the exercise of covert intrusive powers, this would only happen *after* a power has been exercised. There is no mechanism to ensure accountability and no oversight to identify possible improper interferences and potential contempts that may have occurred through the exercise of an intrusive power. Nor is there any indication at what point or how a member could make a claim of privilege relating to the information collected, or of a process as to how such a claim may be resolved.

Considerations specific to metadata access

2.27 In the Senate, the view was expressed that this inquiry was about the implications of the metadata preservation and access regime for the privileges and immunities of members of Parliament. Amendments to the TIA Act made by the *Cybercrime Legislation Amendment Act 2012* and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* created a preservation and access regime for stored communications and obligations on carriage service providers to store certain data (that is, 'metadata') for certain periods of time. While these amendments significantly enhanced the ability of law enforcement and intelligence agencies to access new sources of information, they made no particular provision for the protection of members of Parliament. This, in itself, is not unusual. The law of parliamentary privilege is of general operation and applies without being specifically acknowledged in individual laws. Nonetheless, this recent expansion of intrusive powers does raise questions regarding the adequacy of existing safeguards to protect the ability of members of Parliament to carry out their functions without possible improper interference.

2.28 The AFP contended that parliamentary privilege is more likely to apply to the content of communications as opposed to the metadata about those communications.[25] The AFP's reasoning here was based on its view that privilege is primarily concerned with protecting the content of communications from impeachment or questioning.

2.29 However, even allowing that metadata lacks 'content' (a proposition that is questionable) concerns have been raised that the exposure of a member's metadata to the intrusive powers of law enforcement and intelligence agencies could have a

24 Inspector-General of Intelligence and Security, *Submission*, pp. 6–7.

25 Australian Federal Police, *Submission*, p. 22.

chilling effect on the work of the parliament. For example, as the submission from the Clerk of the House of Commons (United Kingdom) noted, some MP's have raised concerns that 'the ability of the police and intelligence services to access MPs' metadata would inhibit their ability to hold the Government to account by potentially identifying whistleblowers'.[26] One such case referred to in the Clerk's submission concerned the use of metadata in the investigation of a leak of information by a civil servant to Mr Damian Green MP, Member for Ashford. The investigation ultimately led to the arrest of Mr Green, and the importance of certain metadata in this case was a cause for concern for some members. Mr David Davis MP captured these concerns, telling the House of Commons:

> The collection of metadata cripples whistleblowers, because it tells us precisely who has talked to whom, when and where. Metadata tracking led to the arrest of my right hon. friend the Member for Ashford. That area is material to the operation of holding the Government to account.[27]

2.30 In a 2013 submission to the New Zealand Privileges Committee's inquiry into the question of privilege regarding the use of intrusive powers, former Clerk of the House of Commons (United Kingdom), Sir Robert Rogers KCB, wrote that parliamentary privilege in effect applied to metadata in the same way it applied to 'content'. This, he explained, reflected the fact that metadata could be 'very revealing about individuals and organisations', and in some situations 'even more revealing than content':

> Our approach to metadata such as e-mail or telephone logs is fundamentally the same as for data which might be regarded as substantive content (such as the body of an email, or the voice recording of a telephone conversation). Some such metadata may be virtually meaningless on its own but, when combined with other data (whether other metadata or substantive data), it may become part of a more significant data set. Such aggregation may have the effect of turning non-personal data into part of a personal data set, or turning non-sensitive data into a sensitive data set. A simple example would be the time-stamps on e-mails, when added to the core data.[28]

2.31 A similar position was put by the Clerks of the Parliament in Australia in their submission to the same New Zealand inquiry:

> There is no reason for metadata (or any other sets of information held on parliamentary information and security systems) to be treated differently from other information. The underlying concern is to ensure that parliamentary privilege is considered as part of any request for information – the format of that information is not relevant.

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26 Clerk of the House of Commons (United Kingdom), *Submission*, p. 2.

27 Clerk of the House of Commons (United Kingdom), *Submission*, pp. 2–3. The case against Mr Green did not proceed, due to 'insufficient evidence'.

28 Sir Robert Rogers KCB, Clerk of the House of Commons, United Kingdom, Submission to the New Zealand House of Representatives Privileges Committee, 31 October 2013, p. 10.

> It may theoretically be possible to categorise some sets of information (e.g. particular types of data) as being administrative, technical, or otherwise unlikely to raise issues in relation to parliamentary privilege, however any process designed to pre-identify sets of information that may or may not attract parliamentary privilege is fraught with difficulty – instead, it is best to consider issues of parliamentary privilege on a case-by-case basis as requests for information are received.[29]

2.32 In considering the implications of metadata domestic preservation orders on the privileges and immunities of members of Parliament, the committee notes that at present there is little if any transparency regarding when an investigating agency has accessed or sought to access a member's metadata. In responding to questions taken on notice at Additional Estimates in February 2016, the AFP declined to advise if any parliamentarians have been subject to an AFP initiated metadata domestic preservation order, and pointed to 'operational security reasons' that prevent it from providing advice on preservation orders in relation to classes of particular persons. The AFP further advised that the total number of preservation orders and revocations made by the AFP in a given year, and the number of telecommunications data disclosure authorisations made by the AFP in that year, is publicly reported. However, the AFP also observed that it is an offence under the TIA Act to communicate specific preservation notice information to another person, as it is to disclose whether an authorisation to access telecommunications data has been, or is being, sought. 'It is also an offence', the AFP continued, 'to disclose information about the making of a Division 4 authorisation, the existence or non-existence of such an authorisation, the revocation of such an authorisation, or the notification of such a revocation'.[30]

2.33 The lack of transparency in relation to metadata access presents a problem. To the extent that access by law enforcement and intelligence agencies to certain metadata might be said to have amounted to an improper interference with the free exercise by a House or committee of its authorities or functions, or with the free performance by a member of the member's duties as a member, then the access to this metadata could be dealt with as a potential contempt, even if such access was otherwise lawful. Yet as it stands, it is highly unlikely that information on the extent to which members of Parliament and their staff have been subjected to metadata access orders will be made public or otherwise made available to members of Parliament, let alone brought to the attention of members whose metadata may have been accessed.

Preserving the efficacy and integrity of investigations

2.34 A number of law enforcement and intelligence agencies were keen to impress upon the committee the need to preserve the flexibility and efficacy of their

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29 Mr Richard Pye, Acting Clerk of the Senate, and Mr Bernard Wright, Clerk of the House of Representatives, Submission to the New Zealand House of Representatives Privileges Committee, 11 November 2013, p. 3.

30 Australian Federal Police, responses to Question on Notice AE16/059, 27 September 2016.

investigative activities. These submissions argued that efforts to strengthen the protections provided by parliamentary privilege in relation to the use of intrusive powers should be weighed against the need to ensure the integrity of investigations.

2.35 Arguing that existing oversight mechanisms in relation to the use of intrusive powers were sufficient to protect parliamentary privilege, the AFP submitted that 'to the extent additional oversight would add time and delay, it may come at some cost, both financially, and in terms of the AFP's efficacy and perceived integrity as an independent agency'.[31]

2.36 The AFP also referred to the 'practical difficulty' in distinguishing between privileged and non-privileged material, and cautioned that restrictions on evidence gathering 'would have the detrimental effect of assisting wrongdoers in the concealment of their criminal activity'.[32]

2.37 While ASIO did not refer to any specific tension between its operational efficacy and potential new measures to protect parliamentary privilege, it did emphasise the importance of considering the matters raised by the terms of reference in the context of threats from hostile foreign actors. It noted, in this regard, that parliamentarians are 'not immune from the attention of foreign states', and indeed are likely 'aspirational targets for those who engage in politically motivated violence'.[33] This could be read as a caution that measures designed to protect the integrity of parliament could prove counterproductive, to the extent such measures hinder ASIO's ability to investigate the activities of hostile foreign actors targeting the parliament and its members.

2.38 ACLEI used its submission to note the care taken by Australian parliaments and their respective privileges committees to 'ensure that the criminal law is able to apply equally to elected members of parliament, as it would to any other Australian'.[34] While this statement is unremarkable, it serves as a reminder that any new mechanism to strengthen the application of parliamentary privilege in relation to the use of intrusive powers should not serve to make parliamentarians any less accountable before the law.

2.39 For its part, the AFP was more explicit in this regard, submitting that it was of 'obvious importance that parliamentary privilege should not impede the investigation of offences committed by serving members of Parliament'.[35]

2.40 Any protocol relating to the exercise of intrusive powers and parliamentary privilege should have proper regard to the fact that the ability to exercise intrusive

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31 Australian Federal Police, *Submission*, p. 9.

32 Australian Federal Police, *Submission*, p. 16.

33 Australian Security Intelligence Organisation, *Submission*, p. 4.

34 Australian Commission for Law Enforcement Integrity, *Submission*, p. 2.

35 Australian Federal Police, *Submission*, p. 9.

powers, and to do so covertly when appropriate, is an important part of the law enforcement and intelligence toolkit.

2.41 Equally, instances where matters of parliamentary privilege are raised by the exercise of intrusive powers are likely to be rare. To the extent that law enforcement and intelligence agencies are required to follow additional processes in their exercise of intrusive powers under a protocol, any associated costs in time or resources needs to be weighed against the likelihood that such processes would only be necessary on a very occasional basis.

CCTV and access control system data at Parliament House

2.42 The difficulties with the argument offered by the AFP and others suggesting that if a Member is not aware of the intrusion there can be no effect on the Parliamentary work, was evident in the committee's inquiry into the use of CCTV material in Parliament House. In that instance - a matter of a possible contempt - the argument that was put that as 'the investigators were unaware they were witnessing something connected to parliamentary business, they could not be not be said to be obstructing it, and certainly not knowingly'.[36] The merits of the argument were not explored by the committee because of other evidence, but it did express concern and made a recommendation around the development of a new Code of Practice that 'emphasises accountability to the Presiding Officers …'.[37]

2.43 During this inquiry the committee reviewed the development of the new policies relating to the closed-circuit television (CCTV) system and those for any proposed systems to access private area systems at Parliament House and in particular the release of CCTV footage and stored data from the private area access system.

2.44 The committee understands that the approval of the Presiding Officers would be required for any release of data which may have implications for parliamentary privilege and which is maintained by either system. Because the Presiding Officers would have a role in approving the release of CCTV footage where parliamentary privilege may be involved, or the release of access control data which pertains to a Senator or Member, it would appear that proper consideration would be given to parliamentary privilege if such material was subject to the exercise of an intrusive power.

Conclusion

2.45 Evidence received suggests that there is scope to both update the existing protocol in relation to the execution of search warrants, and to expand the protocol to cover the exercise of a broader range of intrusive powers when matters of parliamentary privilege may be raised. This evidence suggests growing uncertainty regarding the operation and application of parliamentary privilege in relation to the exercise of intrusive powers. In part, this uncertainty derives from recent changes in

36 Committee of Privileges 160th Report, December 2014, p. 15.

37 Committee of Privileges 160th Report, December 2014, p. 38.

technology and related shifts in investigative practice, including the increasing use of covert intrusive powers by law enforcement and intelligence agencies. These covert intrusive powers include communication intercepts, electronic surveillance, access to stored communications and access to stored telecommunications data. It is possible the National Guideline could be relevant in the instance the AFP sought a warrant to access the telecommunications content of a Member, or a warrant to use a surveillance device in relation to the communications or activities of a Member. However, none of the evidence received by the committee suggests that it is considered in the exercise of any warrant other than those that are executed on physical premises. Further the National Guideline does not extend to the access of metadata, or other information held by parliamentary departments, departments of state or private agencies in relation to members of Parliament and their staff.

2.46 Finally the evidence indicates that none of the current oversight mechanisms of the exercise of covert intrusive powers, including those examining the storage and access of the information garnered in the use of those powers consider the question of parliamentary privilege.