Chapter 3

Is a new protocol required?

Introduction

3.1 Evidence considered by the committee indicates the absence of any consideration as to how questions of parliamentary privilege may be resolved in the exercise of covert intrusive powers, and that the provisions of the National Guideline are limited to warrants that are executed on physical premises. In addition, there is a lack of evidence that any consideration is given as to whether the information collected where a warrant is not required raises questions of parliamentary privilege and how such questions should be resolved. Current oversight mechanisms are also blind to any questions of privilege.

3.2 The task the committee has been given is to ascertain whether the work of the Parliament is sufficiently free from possible improper interference given the technological and legislative developments in recent years. The purpose of parliamentary privilege, both in terms of immunities and powers, is to ensure that parliamentarians can hold governments to account and undertake their legislative duties. The purpose of the powers that have been legislated under the TIA Act and the SD Act are to facilitate those in law enforcement and intelligence agencies to ensure that they can do the work with which they are tasked. As the world of information storage and access becomes increasingly virtual, the technology available to law enforcement and intelligence agencies has expanded into new spheres and so have their powers. How do the protections afforded by privilege to parliamentarians so that they can undertake their duties free from improper interference operate in this environment?

3.3 This chapter considers first the existing protocols as set out in the MoU and the National Guideline, before considering the use of intrusive powers and the implications for parliamentary privilege.

Current protocols for the execution of search warrants

Opportunities to make claims of parliamentary privilege and have those claims resolved

3.4 The current protocols as embodied in the MoU and the National Guideline have operated for over a decade. In 2016, the first determined claims of parliamentary privilege under the protocols were made by a senator over material, largely documents, which were seized during the execution of a search warrant. Those claims were resolved by the Senate, following a report by this committee. In addition to the recommendation relating to the privilege claims, the committee recommended that the Senate:

> note the requirement for remedial action in relation to the national guideline for the execution of search warrants where parliamentary privilege may be

> involved, which the committee will address in its inquiry into intrusive powers.[1]

3.5 The recommendation arose from the possible contempt matter investigated by the committee and reported together with the matter of privilege as the two matters were related. In investigating the possible contempt the committee was made aware of the use of a mobile phone by a 'constable assisting' to take snapshots of documents before transmitting the snapshot to other officers within the same agency for advice. The committee did not make a contempt finding. However, it was alerted to a possible need to update the National Guideline which was negotiated prior to such practices becoming commonplace. The AFP's evidence supported an update to '… address the use of constables or third parties assisting in the execution of search warrants ...'.[2]

3.6 The incident reveals not only that the National Guideline does not envisage the use of third parties to provide technical assistance but those who provide that assistance are not provided with the requisite knowledge of either the terms of the protocol or the immunities and powers provided by parliamentary privilege.

3.7 The National Guideline indicates that:

> It is not always easy to determine whether a particular document falls within the concept of 'proceedings in parliament'. In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.[3]

3.8 It recognises the importance of providing Members with proper opportunity to make a claim of privilege and have that claim assessed and sets out that in executing a search warrant where a Member or a senior member of his/her staff is present, the executing officer 'should ensure that the Member, or member of staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises'.[4] The National Guideline in turn sets out the procedure to be followed in the instance a claim of parliamentary privilege is made.[5]

3.9 The committee's view is that the protocol is sound in terms of the process for claims of parliamentary privilege, but it is in the practice that the process can falter. All officers engaged in the execution of search warrants should be aware of the requirements of the National Guideline. The committee considers that until there is an opportunity to consult and amend the National Guideline, this shortcoming initially could be addressed in an administrative manner, by the AFP briefing all those assisting in the execution of the warrant on the protocols set out in the National

---

1 Committee of Privileges 164th Report, p. 20.

2 Australian Federal Police, *Submission*, p. 11.

3 *National Guideline*, p. 2.

4 *National Guideline*, p. 4 (paragraph 6.7).

5 *National Guideline*, pp. 45 (paragraphs 6.10 – 6.14).

Guideline. This should be regarded as a temporary measure with the view of incorporating the requirement in the National Guideline following consultations.

The implications of the use of intrusive powers on privileges

3.10 Evidence provided by the AFP also acknowledged that the technological developments since the signing of the MoU influence not just police practices, but how information is stored, the amount of information stored and the forms in which that information is stored. They expressed the view that:

> there may be benefit in a review of the NG [National Guideline] to ensure that it continues to provide adequate guidance and appropriate instruction for protecting parliamentary privilege in today's environment.[6]

3.11 However, this view does not extend to the use of other intrusive powers covertly or otherwise. The exclusion is based on the view that an intrusion that is undetected cannot constitute an improper interference (and therefore a contempt) and the view that parliamentary privilege is limited to 'use immunity'. It is one which is shared across other agencies giving evidence about the use of these powers.

3.12 This argument is maintained despite one of the key aspects of the Parliament's powers – the ability to investigate and punish actions that it finds are improper attempts to interfere with the conduct of members and their duties – is articulated in the National Guideline. The Senate has clearly established procedures for dealing with interference or attempted interference and the National Guideline is explicit in its consideration of the need to prevent actions that could amount to a contempt in the execution of search warrants.

3.13 Further, the acknowledgement in the National Guideline that it is not always readily discernible whether a document relates to parliamentary proceedings reflects the Senate's view that the class of document does not define whether a question of privilege can be invoked. It is difficult to see how the method used to access a document or information could be determinative as to whether a question of privilege is enlivened.

3.14 The committee notes that the interception of communications and other electronic surveillance requires a warrant. Access to stored communications content and the issuance of preservation notices also requires a warrant. However, access to telecommunications data ('metadata') does not require a warrant (except where a journalists' or their employers' telecommunications data is sought for the purposes of identifying a source of the journalist). Any information relating to the proceedings of parliament gained from those activities should be able to be subject to a claim of parliamentary privilege and the committee considers that there should be a clear mechanism by which those claims can be resolved. However, although warrants are generally required, there is no evidence to indicate that that any of the procedures required by the National Guideline are considered to apply in this context.

---

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

3.15 The committee is of the view that under current arrangements there is reason to question whether Members are provided with any opportunity to make claims of privilege in relation to the exercise of intrusive powers other than search warrants, particularly when those powers are covertly exercised. Consequently the committee has concluded that the existing protocols are not sufficient to protect the work of the Parliament from possible interference.

Intrusive powers, current oversight regimes and acknowledgement of Parliamentary Privilege

3.16 The committee notes that there was little in the way of evidence provided during the inquiry that suggests that there is any acknowledgment of parliamentary privilege in any of the oversight mechanisms that are currently operating.

3.17 Further it would appear to the committee that despite the AFP's *Guideline on Politically Sensitive Investigations*, which reminds investigators of the need to consider parliamentary privilege, the storage of metadata information is such that there is no consideration given to where that information has been sourced, unless it relates to the interception of the journalist's metadata. The AFP was unable to indicate to the committee whether any such information relating to members or senators or their staff had been collected, as their systems were not designed to provide this information.

Specific protocols

3.18 The committee is concerned that there are no protocols in place and no practices observed in relation to the intrusive powers where matters of parliamentary privilege may be involved. The notion that questions of privilege are not relevant because the parliamentarian does not know that the intrusive powers have been exercised are equally concerning. There is clear evidence cited in the Clerk of the United Kingdom House of Commons' submission that material collected in such exercises can be established to invoke claims of parliamentary privilege. The question for the committee is how such claims can be made and resolved in practice.

3.19 In considering this question the committee is cognisant that there are different elements at play both for intelligence and law enforcement agencies using the intrusive powers and the Parliament. For the intelligence and law enforcement agencies, intrusive powers are an important part of their investigative toolkit, while the protections against improper interference offered by parliamentary privilege are central to the work of the Parliament.

3.20 The committee heeds the message in ASIO's submission that '… Parliamentarians are not immune to the attention of foreign states; …'[7] and does not seek to confer any general immunity on Members, nor place evidential material beyond the reach of agencies simply because that material originated with or is in the possession of a Member. It accepts that the purpose of privilege is enable the

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

Parliament, its committees and Members to carry out their functions without improper interference, and to deal with any such interference or attempted interference. The committee accepts that not all material or information held by a Member requires the protection of parliamentary privilege simply because that material or information was created by or is in the possession of a Member.

3.21 However, as argued in another sphere by Mr Bret Walker SC, privilege is not for the protection of members, but the institution:

> Seen in that light – and that's the traditional and contemporary understanding of the purpose of parliamentary privilege – an entrenchment on it is in reality a reduction in the efficacy of the system of parliamentary government, which is for the people, not the parliamentarians.[8]

3.22 The committee is of the view that the best way to resolve the tension between those exercising intrusive powers and the parliament is the development of agreed protocols between the relevant parties.

Use of intrusive powers under warrant

3.23 In considering what features any such protocols might have, the committee found it useful to draw a distinction between those powers that are exercised subject to a warrant and those that can be exercised without a warrant. The value of this distinction from the committee's perspective is that there is an existing set of agreed protocols already in operation in relation to the execution of search warrants where questions of parliamentary privilege might arise. The successful operation of these processes as set out in the MoU and the National Guideline provides a useful template for the development of further guidelines to be used in the execution of warrants where intrusive powers are deployed.

Quarantine and review of material obtained through intrusive powers

3.24 One of the key features of the existing processes that the committee considers should be incorporated into any new protocol is a process to quarantine and review material or information that may give rise to parliamentary privileges issues where the information has been obtained through intrusive powers.

3.25 Where a Member's communications are intercepted, or where material or information in the possession of a Member is sought or obtained through the exercise of intrusive powers, it would be preferable where possible to provide that Member with an opportunity to review the material in question. If the Member considers the material part of proceedings in Parliament, they would then be able to make a claim of privilege and have that claim assessed. The material or information should remain quarantined until that claim had been assessed. It would only be provided to law enforcement and intelligence agencies if any claim of privilege were rejected.

3.26 Where covert intrusive powers are exercised, the process would still be relevant in cases of what could be termed 'collateral intrusion'—that is, cases where a

8 Parliamentary Joint Committee on Intelligence and Security, *Hansard*, 16 February 2018, p. 5.

Member is not themselves the target of an investigation, but where their communications or material in their possession has been obtained, possibly inadvertently or unexpectedly, through an investigative process.

3.27 The committee acknowledges there may be occasions where it would prove difficult to provide a Member with an opportunity to make a claim of parliamentary privilege over material obtained through the exercise of an intrusive power. Careful consideration would need to be given as to how this process would be managed in the circumstances where a Member was themselves the subject of an investigation and where covert intrusive powers were used.

Applications for warrants and other authorisations to exercise intrusive powers

3.28 Quarantining the information subject to a claim of parliamentary privilege until the claim is adjudicated occurs after an intrusive power is exercised. It is possible that an improper interference or potential contempt could occur at the point a covert power is exercised. In developing an agreed set of processes consideration should also be given to establishing a mechanism that would ensure that law enforcement and intelligence agencies have proper regard to parliamentary privilege in the exercise of intrusive powers whether covert or otherwise. One possible mechanism is to agree to a process where the issuing authority (or the Minister in the case of ASIO) prior to authorising the warrant would need to have regard to question of parliamentary privilege and in the event that a claim of parliamentary privilege was likely to arise, additional processes in both the issuing of the warrant and its execution would be triggered.

Acting without warrant

3.29 The committee now turns to the information held by parliamentary departments, departments of state or private agencies in relation to members of Parliament or their staff which can be acquired without a warrant. This includes the information commonly referred to as metadata that is collected under the TIA Act, as well as electronic information captured in the use of such things as electronic keys. Access to such information does not necessarily require the use of intrusive powers whether covertly or otherwise as such information can be obtained during routine investigations.

3.30 In addressing the extent to which 'metadata' might be subject to the claims of parliamentary privilege, the Clerks of the Australian Parliament have argued that in considering whether parliamentary privilege relates to certain information, the format of information is ultimately irrelevant[9]. This principle serves as a response to the erroneous view that claims of parliamentary privilege cannot be found to exist in relation to 'metadata', as opposed to 'content'. The distinction between 'metadata' and 'content' is questionable. Clearly, metadata can be very revealing, and legitimate

9 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.

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 chilling effect on the work of the parliament.

3.31 Given the possibility of parliamentary privilege issues arising in the accessing of this type on information, the committee formed the view that agreed protocols should also be put in place to ensure a process of establishing whether there are parliamentary privilege matters that need to be raised and resolved. The difficulty in developing such protocols is finding an appropriate trigger point at which the member or their staff can make such a claim. The access to information under the terms of the TIA Act requires legal tests to be met prior to the provision of the material. The committee envisages that such points prior to accessing the information should be the point where questions of privilege become a consideration – the application of the legal tests should be regarded as mimicking the granting of a warrant. Any protocol developed which would allow information to be quarantined so that any privilege claims can be made and resolved would come into play at that point. This would allow any claims of privilege to be properly assessed prior to the material or information being used in the investigation. The committee is of the view that this should be standard practice if any of the information revealed during the investigation relates to a Member of Parliament.

3.32 A more difficult task is to establish a trigger point where such information is accessed as part of routine investigations without the use of a warrant. Finding that trigger point may not be possible, but it should not prevent the application of protocols that allow claims of privilege to be made and resolved post the access to the information and prior to its use in any inquiry.

Recommendation: The committee recommends that, to ensure claims of parliamentary privilege can be raised and resolved in relation to information accessed in the exercise of intrusive powers and other investigative powers, the Presiding Officers, in consultation with the executive, develop protocols that will set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers.

Accountability and oversight mechanisms

3.33 The operation and effectiveness of the proposed new protocol would be enhanced by accountability and oversight mechanisms. The committee established that the current oversight mechanisms do not examine whether questions of parliamentary privilege have been enlivened as a consequence of the use of intrusive powers.

3.34 Both the agencies tasked with oversight responsibilities – in the case of law enforcement, the Ombudsman and for the intelligence community, IGIS - indicated that such matters were not currently within their remit. The committee understands that both organisations would be prepared to extend their remit if required.

3.35 The committee considers that reviews by the Ombudsman and IGIS would be useful. However, it is of the view that, where a law enforcement or intelligence agency has accessed (inadvertently or otherwise) potentially privileged material

through the exercise of an investigative power, and has not followed the process set out in an agreed protocol, these instances should be reported to either the relevant Presiding Officer or the appropriate privileges committee.

3.36 To maintain comity between the Houses, it would be appropriate for the Senate privileges committee to consider Senate-only matters, and for the House privileges committee to likewise consider matters that relate solely to the House. Where a matter arises that directly concerns both Houses, it would be open to the two committees to consider the matter jointly.

3.37 The privileges committees should also have an ongoing review function in relation to the effectiveness and appropriateness of the protocol. In this way, the committee in question would be able to provide advice in relation to any required amendments to the protocol.

Senator the Hon Jacinta Collins

Chair