



D17/13116

Background paper:

Inquiry into parliamentary privilege and the use of intrusive powers

The Committee of Privileges is undertaking an inquiry into the adequacy of parliamentary privilege¹ as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies—including telecommunications interception, electronic surveillance and metadata domestic preservation orders. The inquiry will also consider whether the use of intrusive powers by law enforcement and intelligence agencies interferes with the ability of members of Parliament to carry out their functions, and explore potential changes to oversight and accountability mechanisms in this regard.

As part of the inquiry the committee will also consider whether protocols for the execution of search warrants in the premises of members of Parliament, or where matters of parliamentary privilege may be raised, sufficiently protect the ability of members to undertake their functions without improper interference.

The committee is currently seeking written submissions to the inquiry. This background paper provides some basic guidance on the scope of the inquiry to assist submitters.

Please note that the committee is not inquiring into or seeking submissions on the merits or otherwise of the use of intrusive powers by law enforcement or intelligence agencies. Rather, the committee is concerned with the narrower question of how the use of intrusive powers relates specifically to the operation and integrity of parliamentary privilege.

Parliamentary privilege and the expanding use of intrusive powers by the state

Recent changes in technology and related shifts in investigative practice have created some uncertainty regarding the use of intrusive powers by the state in matters that may involve parliamentary privilege. Broadly speaking, current practice and procedure applying to investigations when matters of parliamentary privilege may be

¹ 'Parliamentary privilege' refers to the special legal powers and immunities which apply to each House of the Parliament, its committees and members. These powers and immunities protect the ability to the Parliament, its committees and members to carry out their functions without interference, and to deal with attempted interference.

involved has been developed in the context of what might be termed 'formal' requests or orders for documentation or other material—for example, subpoenas, discovery and search warrants. While such requests or orders may fall within the definition of 'intrusive powers'—a search warrant is, after all, a form of intrusive power—in such cases the target of an investigation will typically be aware that such powers will or have been employed. As such, opportunities will generally exist for a member of Parliament or their staff to raise a claim of privilege.

By contrast, more recent manifestations of intrusive powers—such as telecommunication interceptions, electronic surveillance and the storage and production of metadata—are commonly utilised without the knowledge of the target of the investigation, either before or after the fact. The integrity of investigations by law enforcement and intelligence agencies often depends on a large measure of secrecy in exercising such intrusive powers. However, it is unclear how a member of Parliament might raise a claim of privilege in such circumstances, given a member will typically have little if any visibility of the investigation or knowledge of what material has been procured by investigators.

Recent legislative amendments creating a preservation and access regime for stored communications have introduced a new level of uncertainty and complexity with regard to the interface between the intrusive powers of the state and parliamentary privilege. In particular, the introduction of metadata domestic preservation orders has significantly expanded the amount of data that law enforcement and intelligence agencies can access. To date, minimal consideration has been given to how access to and use of metadata by law enforcement bodies and intelligence agencies, or indeed the broader expansion of the intrusive powers of the state in recent years, may impact upon the ability of members of Parliament to carry out their functions. Uncertainty also prevails regarding the extent to which metadata might be considered 'proceedings in Parliament' (as defined in the *Parliamentary Privileges Act 1987*) and thus subject to the protections of parliamentary privilege. Another factor is the extent to which metadata domestic preservation orders might have a chilling effect on the provision of information to members of Parliament.

Protocols, oversight and accountability mechanisms

The inquiry will also seek to clarify what regard, if any, law enforcement and intelligence agencies currently have to the requirements of parliamentary privilege when exercising intrusive powers. The inquiry will also consider whether specific protocols should be developed in relation to the use of intrusive powers—and, by extension, access by investigating authorities to metadata and other electronic material—when matters of parliamentary privilege may be involved.

The committee understands that the New Zealand Parliament has an agreement in place with the New Zealand Security Intelligence Service and the relevant minister governing the activities of intelligence agencies in relation to members of Parliament

and their staff. The committee will consider whether this agreement, or any comparable agreements or proposed agreements in other jurisdictions, might help inform the development of similar arrangements in Australia.

Moreover, the committee will consider whether current oversight and reporting regimes on the use of intrusive powers are adequate to protect the capacity of members of Parliament to carry out their functions. It might be noted in this regard that a range of statutory agencies have operational oversight of intelligence, security and law enforcement agencies, including the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and the Independent National Security Legislation Monitor. However, it remains unclear how parliamentary privilege sits within this oversight framework.

Protocols for the execution of search warrants

In addition to the above matters, the inquiry will consider the adequacy and operation of current protocols applying to the execution of search warrants in the premises of members of Parliament, or where parliamentary privilege may be raised. These protocols are set out in a 2005 Memorandum of Understanding between the then Presiding Officers and the Attorney-General, and in a National Guideline issued by the AFP. The purpose of these protocols, as expressed in the National Guideline, is 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 or parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises'.² The committee will consider whether the protocols, as they currently stand, are effective in achieving this purpose.

² Australian Federal Police, *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, <https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20for%20Execution%20of%20Search%20Warrants%20where%20Parliamentary%20Privilege%20involved.pdf>.