PARLIAMENT OF AUSTRALIA

D22/272501

1 November 2022

Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
R1.81
Parliament House

Dear Chair,

Review of Item 250 of Schedule 1 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

We would like to thank the committee for drawing our attention to the committee's review of item 250 of Schedule 1 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 and for noting that the amendment proposed by that item may have implications for parliamentary privilege.

The committee has often sought advice from the Parliament's Clerks on matters of privilege and procedure, and we welcome the opportunity to provide a brief submission on this review.

Item 250 proposes to amend subsection 110A(1) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act). Part 3.3 of the TIA Act permits and regulates access by criminal law-enforcement agencies to stored communications data. Subsection 110A(1) provides that each entity listed in that subsection is a criminal law-enforcement agency. Item 250 would amend that list by removing the Australian Commission for Law Enforcement Integrity (ACLEI) and substituting the National Anti-Corruption Commission (NACC).

As noted at p. 304 of the explanatory memorandum (EM) to the NACC bills, this is one of the many consequential amendments to Commonwealth law that confers powers on the NACC that are currently conferred on ACLEI. The EM goes on to note that 'Many of these powers would be significant components of the NACC's overall investigative powers and would complement the powers conferred by the NACC Bill (in particular Part 7).'

There are two matters concerning parliamentary privilege that we wanted to highlight.

The first is the question of whether privilege is sufficiently recognised and safeguarded in the operation of the TIA Act. This involves similar principles to those considered and accepted by the committee in relation to the Foreign Influence Transparency Scheme legislation.

The second matter involves work being done across the Parliament to develop processes to enable claims of privilege to be made against the use of covert investigative powers where parliamentary privilege may be involved. A consideration here is whether relevant laws should be amended to

allow agencies to provide information to the Houses, their committees, or members, so that claims of privilege may be made and determined.

Before turning to those matters, it is important to note the sense in which privilege is being discussed here.

The protections of privilege

Senators and members have no explicit immunity from legal processes requiring the production of documents, for instance, through orders for discovery in the courts or the execution of search warrants. However, material they hold may receive a measure of protection through parliamentary privilege if it is sufficiently closely connected to parliamentary business.

The law of parliamentary privilege is intended to protect the ability of legislative Houses, their members and committees, to exercise their authority and perform their duties. At the Commonwealth level it achieves this principally by providing procedural and legal protections to those who participate in parliamentary proceedings.

Privilege in the relevant sense is a legal immunity, commonly known as freedom of speech in parliament. Generally, participants in parliamentary proceedings are immune from legal liability for things said or done in the course of proceedings. Privilege also operates as an evidentiary rule, whereby parliamentary proceedings may not be tendered as evidence before courts or tribunals for forensic purposes: s. 16, *Parliamentary Privileges Act 1987*.[1]

The drafting in section 16 restricts evidence before courts and tribunals, however, it is accepted that there are other occasions and other forums in which privilege should operate to protect materials closely connected to the parliament from the use of coercive powers.

An obvious example is in the execution of search warrants. Although the scope of legal protection is unclear (for reasons examined in the 163rd and 164th reports of the Senate Privileges Committee) an MOU between the Executive Government and the Commonwealth Parliament, and the associated AFP National Guideline, provide an appropriate level of procedural protection to parliamentarians and to material in their possession which is closely connected to parliamentary business. These protections comprise an opportunity for parliamentarians to raise claims of privilege and a mechanism respecting the right of the relevant House to determine those claims. Material subject to a claim is temporarily withheld from investigation; material determined to be privileged is returned to the parliamentarian.

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[1] These protections apply in relation to 'proceedings in parliament', which are defined in section 16(2) of the Parliamentary Privileges Act to mean:

> … all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
> (a) the giving of evidence before a House or a committee, and evidence so given;
> (b) the presentation or submission of a document to a House or a committee;
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

The MOU and guideline do not displace the underlying operation of privilege. Rather, they set out the ground rules by which claims may be made and determined. This promotes certainty both for parliamentarians and for officers involved in executing warrants.

An updated MOU was tabled on 23 November 2021. The Australian Federal Police (AFP) also issued a new national guideline which updated the procedures that the AFP follows for the collection and quarantining of material that could be subject to parliamentary privilege. The Presiding Officers advised the Houses when they tabled these revised protocols that further negotiations with the executive would occur during this Parliament regarding the implementation of procedures to ensure covert powers are exercised in a manner which does not intrude on parliamentary privilege.

It is important that parliamentarians and officers of investigative agencies have clarity about the interaction of privilege and these statutory powers.

Interaction between the TIA Act and parliamentary privilege

Item 250 of Schedule 1 of the Bill seeks to amend the TIA Act to allow the NACC to obtain stored communications warrants and authorise access to telecommunications data under the Act. The TIA is silent as to the interaction of these powers and parliamentary privilege.

There is a presumption that the 'powers, privileges and immunities' of the Houses, their committees and members (per section 49 of the Constitution) are not affected by legislation except by express words (*see* Senate Privileges Committee, 144th and 153rd reports; *Odgers' Australian Senate Practice*, 14th edition, pp.68 – 73). If an Act does not by express words affect those powers etc., the parliament's privileges are not disturbed.

There is no express provision in the TIA Act overriding the operation of parliamentary privilege. It follows that the use of investigative powers under that Act is subject to privilege. This is currently the case with the exercise of these powers by the ACLEI and would be the case if equivalent powers were conferred on the NACC.

Having said that, the intersection between the NACC legislation and the TIA Act gives rise to some uncertainty here. First, because the NACC will oversee the conduct of parliamentarians, where the ACLEI did not. This might suggest a greater likelihood of powers under the TIA Act being used in relation to privileged parliamentary material. The other consideration is that the NACC bill expressly preserves privilege. In that context, because the TIA Act is silent on the matter, there is a greater risk that people may incorrectly interpret its provisions as circumscribing parliamentary privilege. In those circumstances, it may be unsatisfactory to rely on a presumption that privilege is not affected. This echoes a point made by the then Clerks in submissions to the PJCIS on the FIT Scheme legislation.

The committee may wish to consider whether it would be wise for the TIA Act to be amended to include an explicit provision regarding the relationship between the powers agencies exercise under the Act and parliamentary privilege. That provision could be modelled on clause 274 of the National Anti-Corruption Commission Bill 2022 or subsections 9A (1) and (3) of the *Foreign Influence and Transparency Scheme Act 2018*. An alternative approach might be to expressly provide in the NACC legislation that privilege is not disturbed by the Commission's use of powers under the TIA Act. This approach may also be warranted in relation to the use of other covert investigative powers.

As well as ensuring that there is an understanding that privilege is preserved, it is useful to consider how claims of privilege may be made and determined.

Exercise of covert investigative powers in relation material which may be protected by parliamentary privilege

As noted above, the execution of search warrants where privilege might be involved is regulated to a degree by an MOU between the executive and the Commonwealth Parliament and by procedures in an AFP guideline that reflect the MOU. The principles which underpin that settlement also apply in relation to the use of covert powers by executive agencies where privilege might be involved. The position of both Houses is that the protection of Parliament's functions articulated in Article 9 of the Bill of Rights and secured through section 49 of the Constitution encompasses the protection of privileged material against seizure by executive agencies. However, it is acknowledged that there are complexities in applying those principles because of the nature of the powers involved.

The experience of state legislatures and corruption commissions illustrates both the immunity of parliamentary proceedings from incursion by executive agencies, and the need for the executive and the parliament to agree to protocols for raising and determining claims that material is protected by privilege. There has been some success at the Commonwealth level in establishing these protocols and applying them when necessary.

One of the issues raised in relation to extending existing protocols to covert powers relates to concerns about how the protocols can operate where it is a criminal offence to divulge information about the exercise of covert powers or material collected through the exercise of those powers. This is seen as a bar to agencies providing material to the Houses, its committees or members to enable claims of privilege to be made and determined.

Arguably such disclosures would themselves be protected by parliamentary privilege, on the principle that privilege 'is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information: Odgers', 14th ed., p.68. However, it may assist investigative agencies, including the NACC, to have relevant legislation (including the TIA Act) amended to explicitly permit agencies to provide information in relation to the exercise of covert powers for these purposes.

Alternatively, it may be that privilege is best secured through more general legislative amendments providing that it is not lawful for unpublished material within the ambit of 'proceedings in Parliament' to be seized, accessed or observed through the use of covert powers.

Please let us know if we can be of any further assistance.

Yours sincerely

[redacted]

(Richard Pye)
Clerk of the Senate

[redacted]

(Claressa Surtees)
Clerk of the House