
Parliamentary Privilege, Search Warrants and Intrusive Powers: Are Memoranda of Understanding Fit For Purpose?*

Rebecca Burton

Executive Officer, Office of the Clerk of the Legislative Council, Western Australia.

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Abstract The rule of law is a principle under which all citizens, including Members of Parliament, are subject to the same laws that are publicly promulgated and equally enforced. However, in order to effectively discharge their duties and preserve the independence of the legislature from other areas of government, Members of Parliament have special immunities under the law of parliamentary privilege. These special immunities, first enshrined by the Bill of Rights (1688), result in investigative and evidentiary restrictions involving parliamentary proceedings. This paper explores parliamentary privilege in Australia and how Australian jurisdictions have navigated the competing requirements of the law of parliamentary privilege and the rule of law. Recommendations to improve outcomes in light of new investigative techniques are proposed to ensure material subject to parliamentary privilege is treated appropriately and the independence and integrity of Parliament is maintained.

INTRODUCTION

Parliamentary privilege can be a shield against investigations by restricting access to material when investigating agencies execute search warrants and by prohibiting the use of material subject to parliamentary privilege being used in a court or other place

outside of Parliament.¹ Whilst parliamentary privilege is essential to preserve the independence of the legislature from the other arms of government, the special immunities conferred on the Parliament and its Members sit uneasily with the principle of the rule of law, which dictates that Members of Parliament should be subject to the same criminal law regime as ordinary citizens.²

There is an inevitable tension between the desire of investigating agencies to obtain all relevant evidence, and laws such as parliamentary privilege that result in investigative and evidentiary restrictions. This makes the investigation of Members suspected of having committed a criminal offence more complex and increases the likelihood of conflict between investigating agencies and Parliaments.

Australian jurisdictions have grappled with the best way to achieve transparency and preserve the integrity of investigations while upholding parliamentary privilege. Some jurisdictions have attempted to resolve this issue by entering into formal arrangements with law enforcement agencies outlining protocols for the execution of search warrants. This includes factors to be considered when determining if material is subject to parliamentary privilege, and how and who determines claims of parliamentary privilege. However, investigative techniques have progressed beyond what was contemplated in these agreements; namely through the use of covert surveillance and metadata collection.

This article outlines the source and scope of parliamentary privilege and the material covered by parliamentary privilege in Australia. Existing search warrant protocols in Australian jurisdictions and how these have been utilised in recent cases are reviewed. The development of more sophisticated investigative techniques and the intersection of their use by law enforcement agencies with parliamentary privilege will be explored. Finally, suggestions are made to optimise agreements for search warrant protocols in Australian jurisdictions, including incorporating provisions for covert and intrusive powers outlined in the Senate Privilege Committee Reports and

¹ S. Reynolds, 'Parliamentary Privilege and Searches by Investigatory Agencies'. Parliamentary Law Seminar, Sydney 9 June 2017, p. 2. Accessed at:

<https://www.parliament.nsw.gov.au/lc/articles/Documents/Legalwise%20paper%202017%20-%20Parliamentary%20Privilege%20and%20Searches%20by%20Investigatory%20Agencies.pdf>

² A. Sykes, 'The Rule of Law as an Australian Constitutionalist Promise', *Murdoch University Electronic Journal of Law* 9(1) 2002. Accessed at: <http://www.austlii.edu.au/au/journals/MurUEJL/2002/2.html>

establishing an independent adjudicator or Parliamentary Inspector to ensure each compulsory process adheres to agreed protocols.

SOURCE AND SCOPE OF PARLIAMENTARY PRIVILEGE

Parliamentary privilege refers to the powers and immunities from ordinary law possessed by Houses of Parliament in carrying out their parliamentary functions.³ It protects the Houses of Parliament and participants in parliamentary proceedings from things said or done in connection with those proceedings.⁴ The privilege is attached to a House of Parliament, rather than an individual Member; however, a Member may claim parliamentary privilege where to do otherwise would impede the functioning of the House.⁵

In Australia, parliamentary privilege originates from common law and Article 9 of the *Bill of Rights 1689* (UK), which states: ‘That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament’.⁶

Except for New South Wales and Tasmania, Australian jurisdictions have given statutory force to parliamentary privilege by allowing Parliament to define their privilege in legislation.⁷ The New South Wales constitutional legislation, most recently the *Constitution Act 1902* (NSW), is silent on parliamentary privilege and the definition and scope of privilege has evolved through common law.⁸ Tasmania supplemented some of Parliament’s powers through its general legislative power. The *Constitution Act 1934* (Tas) is silent on parliamentary privilege, except with

³ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017*, May 2018, p. 9. Accessed at: [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/899D1306BAD8FB04482582890011F7F5/\\$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/899D1306BAD8FB04482582890011F7F5/$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf)

⁴ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 9.

⁵ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 10.

⁶ Article 9, *Bill of Rights 1689* (UK).

⁷ Reynolds, ‘Parliamentary Privilege’, p. 3.

⁸ Reynolds, ‘Parliamentary Privilege’, p. 3.

respect to money Bills and the provision to declare absent Members' seats vacant. Any gaps in parliamentary privilege, for example the power to expel Members or define the parliamentary precincts, relies on principles derived from common law.

In Western Australia, the ability for Parliament to determine its own privileges was enacted in s 36 of the *Constitution Act 1889 (WA)* and the *Parliamentary Privileges Act 1891 (WA)* subsequently defined those privileges. Section 1 of the *Parliamentary Privileges Act 1891 (WA)* provides that the privileges set out within it are in addition to all of the privileges, immunities and powers of the United Kingdom House of Commons as at 1 January 1989, to the extent that those Commons privileges are not inconsistent with the *Parliamentary Privileges Act 1891 (WA)*.⁹

Parliamentary privilege is essential in ensuring Houses of Parliament are able to carry out their core functions of legislating, debating and scrutinising the executive without undue interference. This includes protection for Members and other participants in parliamentary proceedings so that they can speak freely and provide all information and material without fear of recourse from external bodies.¹⁰ However, this immunity may also be used to shield Members from scrutiny themselves, as it prevents material that is a proceeding in Parliament from being compulsorily disclosed or used as evidence in places outside of Parliament, including courts, Royal Commissions, quasi-judicial tribunals and anti-corruption agencies.

'PROCEEDING IN PARLIAMENT'

In order to determine if parliamentary privilege applies, the question turns on what is considered a proceeding in Parliament. The concept of a 'proceeding in parliament' is defined in section 16(2) of the *Parliamentary Privileges Act 1987 (Cth)* as follows: '... 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 ...'.

The courts have historically not provided any additional clarity on this definition. For example, in *Crane v Gething* (2000), which involved the seizure of documents over which Senator Crane claimed privilege from the Senator's office, French J noted that

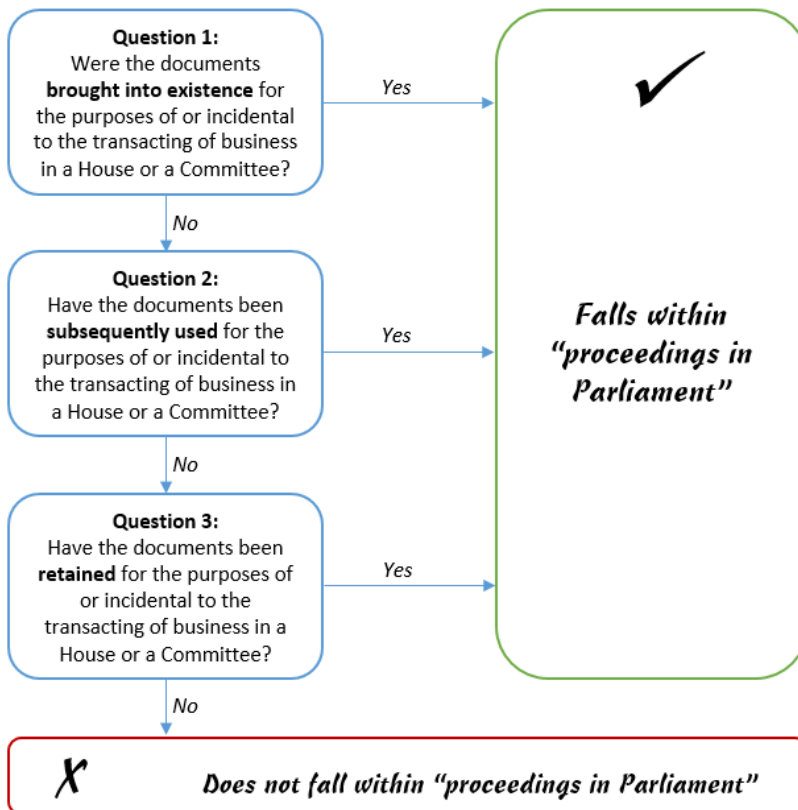
⁹ *Parliamentary Privileges Act 1891 (WA)* s 1; Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 16.

¹⁰ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 16.

it was: ‘... not in the ordinary course for the courts to decide questions of privilege as between the Executive and the Parliament in litigation between the subject and the executive’.¹¹ In the absence of a court deciding the issue, it was up to the legislature and the executive to determine what constituted a proceeding in Parliament.

Following the seizure of material under search warrant from the New South Wales parliamentary office of the Hon Peter Breen MLC in 2003, the Privileges Committee of the New South Wales Legislative Council developed a three step test to assess whether the seized material formed part of a proceeding in Parliament (see Figure 1).

Figure 1. Three Step Test to Assess Whether Material is a Proceeding of Parliament



¹¹ *Crane v Gething* (2000) FCA 45. Accessed at: <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2000/2000fca0045>

In this test, the purpose for the creation, use and retention of a document ‘for purposes of or incidental to’ proceedings in Parliament determines whether parliamentary privilege applies.¹² This three-step test draws upon the definition of proceedings in Parliament in the *Parliamentary Privileges Act 1987 (Cth)*¹³ and has set the benchmark for other jurisdictions faced with the same issue.¹⁴

AGREEMENTS BETWEEN PARLIAMENTS AND INVESTIGATING BODIES

Some Australian jurisdictions have formalised agreements with investigatory agencies outlining the process to follow when executing search warrants on Members’ premises. These agreements are intended to preserve parliamentary privilege while maintaining the integrity of investigations. Figure 2 provides an overview of agreements in place in each jurisdiction at 30 November 2018 (for a full list of agreements, see Appendix A).

Those Parliaments that have entered into agreements with investigating agencies have chosen the format of a non-binding Memorandum of Understanding (MoU), with some MoUs including accompanying guidelines. Common themes in the agreements include:

- legal basis for parliamentary privilege;
- who is notified prior to executing a search warrant;
- how a Member may make a claim of privilege;
- how privileged material will be handled while the claim is assessed;

¹² Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC No. 2*, 31 March 2004, p. 8. Accessed at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2059/No.%2028%20Parliamentary%20privilege%20and%20seizure%20of%20documents%20by%20ICAC%20No.%202.pdf>

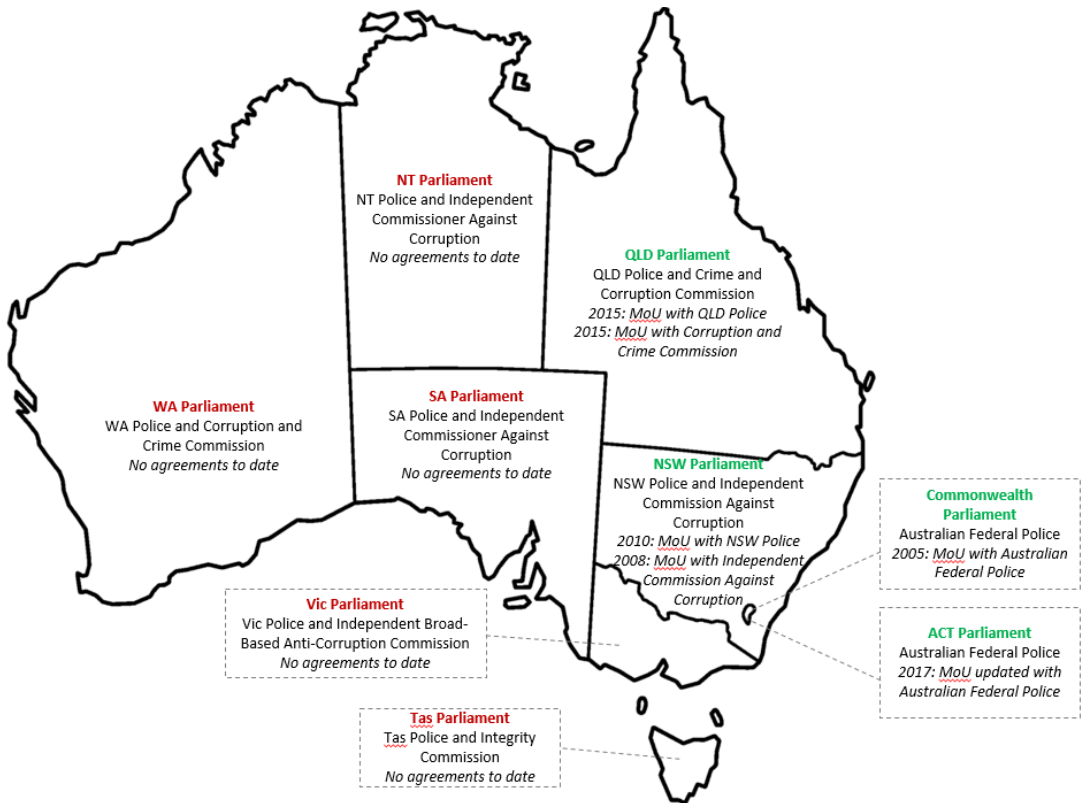
¹³ Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC No. 2*, p. 4.

¹⁴ See, for example, The Senate, Committee of Privileges, *Search Warrants, 164th Report*. March 2017, p. 6. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-2019/Documents_seized/Final_Report

- the timeframe a Member has to review the material;
- who determines the claim of privilege; and
- any recourse available to a Member for disputing the outcome.

Figure 2. Formalised Agreements between Parliaments and Investigatory Agencies



SEARCH WARRANT CASE STUDIES

The agreement between the Australian Federal Police (AFP), the Senate and the House of Representatives was tested in 2016 and 2018. The following case studies demonstrate that the agreement provides a valuable guide for handling material once a claim of privilege has been made. However, they also show a concerning gap between the pre-execution process to be followed by the AFP articulated in the agreement and what actually occurs in practice.

Case Study 1- Senator Stephen Conroy – Commonwealth: 19-20 May 2016

On 19 and 20 May 2016, the AFP executed search warrants at the Melbourne office of Senator Conroy and the Brunswick home of an Opposition staff member as part of its investigation into leaks to the media concerning the rollout of the National Broadband Network (NBN). On 24 August 2016, the AFP also executed search warrants on Department of Parliamentary Services servers in relation to the same matter.

Senator Stephen Conroy submitted a claim of parliamentary privilege over the seized material in accordance with the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (AFP Guideline).¹⁵ The AFP delivered the material to the Clerk of the Senate on 24 August 2016, as required under the AFP Guideline. The matter was referred by the Senate to the Committee of Privileges for consideration on 31 August 2016 and the Committee reported on the matter in its 163rd and 164th Reports.¹⁶ The Senate agreed to the recommendations and conclusions contained in the 164th Report on 28 March 2017.¹⁷

Contemporaneously, the House of Representatives' Privileges Committee considered a parallel claim of privilege made by the Hon Jason Clare MP on the seizure of materials by the AFP on 24 August 2016 from the Department of Parliamentary Services servers. The Committee recommended that the claim be upheld on the basis that the subject of the search warrants demonstrated a close relationship between the material seized and the nature of the Hon Jason Clare's duties as Shadow Minister for Communications.¹⁸ The House of Representatives agreed with this recommendation on 1 December 2016.¹⁹

¹⁵ Accessed at:

<https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20for%20Execution%20of%20Search%20Warrants%20where%20Parliamentary%20Privilege%20involved.pdf>

¹⁶ The Senate, Committee of Privileges, *Status of Material Seized Under Warrant, Preliminary Report, 163rd Report*, December 2016. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-current/Documents_seized/Preliminary_Report; The Senate, Committee of Privileges, *Search Warrants, 164th Report*.

¹⁷ The Parliament of the Commonwealth of Australia, *Journals of the Senate, No. 36*, 28 March 2017, p. 1209.

¹⁸ House of Representatives. Privileges and Members' Interests Committee, *Claim of Parliamentary Privilege by a Member in Relation to Material Seized Under a Search Warrant*, November 2016. Accessed at:

Likewise, the Senate Committee of Privileges considered Senator Conroy's parliamentary duties closely corresponded with the scope of the warrants.²⁰ In assessing the claim of privilege, the Committee went further than the House of Representatives Committee of Privileges and recommended that the Senate empower the Committee to access and examine the material seized.²¹ The Senate agreed to this recommendation on 1 December 2016 and the Committee subsequently examined the material.²²

The Senate Committee of Privileges assessed whether the material seized was subject to parliamentary privilege by adapting the NSW Legislative Council three-step test to include the definition of proceedings in Parliament in the *Parliamentary Privileges Act 1987* (Cth).²³ Senator Conroy provided a detailed submission to the Committee, satisfactorily demonstrating how the material was used for the purposes of or incidental to transacting business in the Senate and therefore satisfied the test that the material fell within the definition of proceedings in Parliament.²⁴

In reviewing the material seized and Senator Conroy's submission, the Senate Committee of Privileges noted that Senator Conroy satisfied step two in the three step test for determining whether or not material was considered a proceeding in Parliament.²⁵ On the basis that the scope of the warrants closely corresponded with Senator Conroy's parliamentary duties and that Senator Conroy demonstrated the materials seized formed a proceeding in Parliament, the Committee recommended that Senator Conroy's claim of privilege be upheld.²⁶

The Senate Committee of Privileges noted that it also had a responsibility to consider whether or not the act of seizing the material improperly interfered with legislative

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/completed_inquiries

¹⁹ The Parliament of the Commonwealth of Australia, House of Representatives, *Votes and Proceedings No. 27*, 1 December 2016, p. 428.

²⁰ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 8.

²¹ The Senate, Committee of Privileges, *Status of Material*, 163rd Report, p. 9.

²² The Parliament of the Commonwealth of Australia, Journals of the Senate, No. 23, 1 December 2016, p. 767.

²³ The Senate, Committee of Privileges, *Status of Material*, 163rd Report, p. 8.

²⁴ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 6.

²⁵ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 7.

²⁶ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 8.

activities. In the Queensland decision in *Rowley v O'Chee* (1997), McPherson JA highlighted that Members' sources must be protected and that any improper interference may result in a chilling effect on the provision of this information to Members.²⁷

As the purpose of parliamentary privilege is to ensure the House, its committees and Members can carry out their duties and functions without interference, the Committee considered whether seizing the material amounted to a contempt.²⁸ For a contempt to be found, the Committee had to be satisfied that the person against whom the allegations were made intended to, or substantially did, interfere with the functions and duties of the Senate or Senator Conroy.²⁹ The Committee held that an improper interference occurred with the execution of the Melbourne search warrants; however, it refrained from a finding of contempt as the requisite intention to commit a contempt was absent.³⁰ This highlights a difficulty when intention must be proven in order to find contempt has occurred. The outcome of improper interference and arguable subsequent chilling effect is the same, regardless of the intention of the warrant being executed.

The Senate Committee of Privileges also considered Senator Conroy's claims that the seized material was not quarantined in accordance with the AFP Guideline and that knowledge of the material led to an adverse action against the person who provided him with the material.³¹ The Committee reflected on the purpose for the search warrant guidelines and whether the manner in which the search warrants were executed upheld the spirit of the guidelines.³² The Committee noted that the capacity for material to be reviewed by investigators and others at the time of seizure allowed for a third party to use the material in a manner that was not authorised by the warrants or consistent with the AFP Guideline. This led to NBN becoming aware

²⁷ The Senate, Committee of Privileges, *Status of Material*, 163rd Report, p. 9.

²⁸ The Senate, Committee of Privileges, *Status of Material*, 163rd Report, p. 10.

²⁹ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 17.

³⁰ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 18.

³¹ The Senate, Committee of Privileges, *Search Warrants*, 164th Report, p. 13.

³² The Senate, Committee of Privileges, *Status of Material*, 163rd Report, p. 10.

of an employee providing material to Senator Conroy and subsequently disciplining that employee.³³

The Senate Committee of Privileges found that an improper interference occurred as the provision of information to Senator Conroy led to the imposition of a penalty on the person who provided that information. However, the Committee refrained from a finding of contempt on the basis that the guideline was silent on third parties being present when search warrants were executed, and the difficulty in proving that adverse consequences were intended at the time the action was taken. The Committee agreed with the AFP and NBN Co submissions that contempt could not be found 'where public officers are fulfilling their lawful public duties in good faith and for a proper purpose'.³⁴

The Committee further noted that the transmitting of photographs to NBN Co of material seized was not in accordance with the guidelines, which stipulate that material that may be subject to parliamentary privilege must be sealed and delivered to the Clerk.³⁵ The Committee noted that the guidelines should be revised to include a provision that all parties present when a search warrant is executed must be made aware of the requirements of the AFP Guideline.³⁶

Case Study 2 - Senator Louise Pratt – Commonwealth: 11 October 2018

On 11 October 2018, the AFP executed a search warrant on the office and home of an Australian Border Force (ABF) employee as part of its investigation into the leaks to media concerning Home Affairs Minister Peter Dutton's au pair saga. The ABF employee notified Senator Louise Pratt of the search and, following the process stipulated in the AFP Guideline, Senator Pratt submitted a claim of parliamentary privilege over the seized material about the same time as the AFP notified the Presiding Officer of the search. Later that day, the seized material was sealed and delivered to the Clerk of the Senate for safe keeping whilst the claim of privilege was assessed by the Senate. On 16 October 2018, the Senate referred the matter to the

³³ The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 16.

³⁴ The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 18.

³⁵ The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 16.

³⁶ The Senate, Committee of Privileges, *Search Warrants, 164th Report*, p. 20.

Senate Committee of Privileges for consideration. The Committee reported on the matter in its 172nd Report³⁷.

Senator Pratt's claim of privilege related to her role as the Chair of the Legal and Constitutional Affairs References Committee. This Committee inquired into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters. During the inquiry, Senator Pratt had contact with the ABF officer in her capacity as Chair of this Committee.³⁸

The AFP furnished the Senate Committee of Privileges with copies of the search warrants, which identified a Senator and noted that seizure of information was conditional upon it relating to the inquiry into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters.³⁹ In the AFP submission to the Committee, the Commissioner of the AFP advised that the circumstances 'did not automatically, in our minds, give rise to an obvious claim of parliamentary privilege'.⁴⁰ The AFP also provided a list of material seized, with the subject matter noted as 'Senate inquiry into allegations concerning the inappropriate exercise of ministerial powers with respect to the visa status of au pairs and related matters, or witnesses'.⁴¹

In assessing Senator Pratt's privilege claim, the Senate Committee of Privileges followed the three-step test described above.⁴² While Senator Pratt was not provided with a list of items seized under the search warrants, her submission to the Senate Committee of Privileges detailed the items that she believed may have been seized. Senator Pratt confirmed that the items had been created for, or were subsequently used in, a proceeding in Parliament; that being 'transacting business with the Senate Legal and Constitutional Affairs References Committee'.⁴³ In doing so, Senator Pratt satisfied step one and two of the three-step test previously used by

³⁷ The Senate, Committee of Privileges, *Disposition of Material Seized Under Warrant, 172nd Report*, November 2018. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/Report

³⁸ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 2.

³⁹ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 2.

⁴⁰ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 8.

⁴¹ The Senate, Committee of Privileges, *Disposition of Material*, pp. 172nd Report, 2, 6.

⁴² The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 5.

⁴³ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 7.

the Committee to determine if the Conroy material fell within the definition of proceedings in Parliament.⁴⁴

The Senate Committee of Privileges tabled its findings in its 172nd Report on 26 November 2018 and upheld Senator Pratt's claim of privilege over all of the material seized on the basis that the material could be regarded as proceedings in Parliament.⁴⁵ In this report, the Committee also signalled its intention to call the AFP Commissioner and the Acting Commander to provide further evidence and clarification in relation to a possible contempt arising from the execution of the search warrants.⁴⁶

The Senate Committee of Privileges expressed concerns as to the manner of execution of the warrants and the stated purpose of the AFP Guideline. The Committee noted that the execution of the warrants may have amounted to an improper interference with the authority or functions of the Senator and/or the Senate Committee. The subject matter of the warrants referred to a Senator and a Senate Committee, which should have given rise to questions of parliamentary privilege. Despite these clear indicators, the AFP failed to follow the notification procedures outlined in the AFP Guideline and only notified the Presiding Officer of the execution of the warrants nearly three hours after the fact.⁴⁷ Had the ABF employee not contacted Senator Pratt directly, a claim of privilege may never have been made prior to the seized material being inspected by the AFP.⁴⁸

A similar issue was raised in the execution of warrants relating to Senator Conroy and on that occasion, the Senate Committee of Privileges noted that a contempt should not be found 'where public officers are fulfilling their lawful public duties in good faith and for a proper purpose'.⁴⁹ In spite of the AFP's assurances that it followed the AFP Guideline in the Senator Conroy case, the Committee 'question[ed] whether the same circumstances apply' and stated it would call on the AFP for an explanation.⁵⁰

⁴⁴ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 7.

⁴⁵ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 8.

⁴⁶ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 9.

⁴⁷ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 4.

⁴⁸ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 9.

⁴⁹ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 9.

⁵⁰ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*, p. 9.

In Senator Pratt's case, as in Senator Conroy's case before it, the AFP did not comply with the requirements for notification outlined in the AFP Guideline. The AFP did not notify the Presiding Officer or the Senator named in the subject of the search warrants prior to the execution of the warrants. Lack of notification expressly negated the stated purpose of the AFP Guideline:

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.⁵¹

This substantially impeded the preservation of parliamentary privilege and caused privileged material that would otherwise not have been sighted by investigative agencies to be caught up in the search warrant net.

As signalled in the 172nd report, the Committee subsequently undertook a preliminary inquiry into whether or not the AFP's actions amounted to an improper interference with a Senator, Committee or the Senate. The Committee focused its inquiry on two limbs:

1. whether the inclusion of the name of the Senate, Senate Committee and Senate Committee Inquiry in the scope of the warrants may have led to interference; and
2. whether the processes articulated in the AFP Guidelines were followed.⁵²

The Committee formed the view that the terms of the warrants could have been written so that the material sought could have been obtained without reference to the name of the Senate, Senate Committee and Senate Committee Inquiry. The Committee noted in the AFP's submission that it was cognisant of the dates of the

⁵¹ Accessed at:

<https://www.afp.gov.au/sites/default/files/PDF/IPS/AFP%20National%20Guideline%20for%20Execution%20of%20Search%20Warrants%20where%20Parliamentary%20Privilege%20involved.pdf>

⁵² The Senate, Committee of Privileges, *Parliamentary Privilege and the Use of Search Warrants, 174th Report*, pp. 8, 9. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Dispositionofmaterial/174th_report

relevant Senate Committee Inquiry and sought to execute search warrants once the reference dates had expired so as not to interfere with parliamentary privilege.⁵³

While the AFP did not comply with the AFP Guidelines regarding actions taken prior to the execution of warrants, the Committee formed the view that the processes articulated at paragraph 4.2 of the AFP Guidelines were sufficiently ambiguous that the Senate's Privilege Resolutions' requirements for intention on the part of the AFP could not be substantiated. The Committee noted its concern with the AFP's assertion in its submission that parliamentary privilege was a use immunity, where material seized during a search may be subject to parliamentary privilege, but that privilege is not impinged upon unless the seized material is produced in Court.⁵⁴

The Committee drew the AFP's attention to the Senate's resolution of 6 December 2018, reiterating the powers of Parliament and the requirement for the executive and executive agencies to 'observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege'.⁵⁵ The resolution called for a new protocol to be developed for the execution of search warrants incorporating other intrusive powers. The Committee affirmed the Senate's view that the AFP Guideline should be amended to 'better deliver its stated purpose'.⁵⁶

REVIEW OF EXISTING GUIDELINES AND CONSIDERATION OF COVERT AND INTRUSIVE POWERS

In light of the issues that occurred when the search warrant guidelines were tested in the Senator Conroy case, in November 2016, the Senate Committee of Privileges commenced an inquiry into the guidelines to ensure that they adequately protected Members in effectively carrying out their functions. At the same time, the Committee considered the implications of covert and intrusive powers of investigation and

⁵³ The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, p. 11.

⁵⁴ The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, pp. 11-12.

⁵⁵ The Senate, Journal of the Senate, No. 137, 6 December 2018, p. 4485.

⁵⁶ The Senate, Committee of Privileges, *Parliamentary Privilege, 174th Report*, p. 13.

whether or not sufficient oversight and reporting regimes were in place to preserve parliamentary privilege or if specific protocols should be developed.⁵⁷

The Committee found that the existing search warrant guidelines sufficiently outlined the appropriate process to follow for claims of parliamentary privilege, however they were not always followed in practice. The existing guidelines did not contemplate the presence or possible involvement of third parties where search warrants were executed. The Committee noted that all parties present at a search warrant should be made aware of the requirements of the guidelines and that the AFP could address this matter in the short term by briefing all parties prior to the execution of a warrant.⁵⁸ Following consultation, this requirement might be incorporated in an updated guideline.⁵⁹

The covert and intrusive powers in which the Committee was particularly interested included the power of investigating agencies to:

- enter and search premises and seize evidential material under search warrant;
- intercept live communications and conduct other electronic surveillance;
- access stored communications; and
- access telecommunications data (metadata).⁶⁰

All of these powers, with the exception of accessing metadata, generally require a warrant.⁶¹ A review of the existing oversight and reporting regimes revealed that there was no legislative requirement for oversight bodies to specifically identify when these powers had been exercised where parliamentary privilege may apply. The Committee also identified that there was no point at which Members could make a claim of parliamentary privilege or any process in place to resolve claims.⁶²

⁵⁷ The Senate, Committee of Privileges, *Parliamentary Privilege and the Use of Intrusive Powers*, 168th Report, p. 1. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2016-current/intrusivepowers/Report

⁵⁸ The Senate, Committee of Privileges, *Parliamentary Privilege*, 168th Report, p. 24.

⁵⁹ The Senate, Committee of Privileges, *Parliamentary Privilege*, 168th Report, p. 25.

⁶⁰ The Senate, Committee of Privileges, *Parliamentary Privilege*, 168th Report, p. 2.

⁶¹ The Senate, Committee of Privileges, *Parliamentary Privilege*, 168th Report, p. 2.

⁶² The Senate, Committee of Privileges, *Parliamentary Privilege*, 168th Report, p. 17.

Moreover, while there were special provisions to protect journalists and their sources, there were no similar provisions for Members or in other situations where parliamentary privilege may arise.⁶³

The existing search warrant guidelines are silent on the use of covert and intrusive powers. In their submission to the Committee, the AFP advised that it considered the existing arrangements allowed 'police to conduct covert investigations into serious criminal matters, while maintaining parliamentary privilege over any privileged material so obtained'.⁶⁴ The AFP asserted that the possibility for the use of these powers to have a chilling effect was minimal due to their secrecy and that parliamentary privilege was primarily concerned with protecting the use of the material outside Parliament.⁶⁵

Submissions to the Committee from the President of the NSW Legislative Council and the former Clerk of the Senate went beyond the AFP's use immunity view of parliamentary privilege to encompass the purpose for the existence of parliamentary privilege, that being to enable the Senate to effectively carry out its functions.⁶⁶ The Committee considered that this principle should apply to all material obtained by investigative agencies, regardless of how that material is obtained. The use of covert and intrusive powers might still have a chilling effect on the provision of information to Members and thereby interfere with proceedings in Parliament, regardless of whether or how the material seized was later used.⁶⁷

With respect to metadata in particular, the Committee noted the concerns raised by the United Kingdom House of Commons submission. Metadata is data about other data and does not contain the content of communication. It includes information about the parties to the communication, including where they are located, the telephone numbers, email addresses, chat names and IP addresses being used, when the communication occurred and the length of time of the communication. Metadata must be stored in Australia for up to two years by telecommunications

⁶³ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, pp. 5-6.

⁶⁴ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, Australian Federal Police Submission, p. 23.

⁶⁵ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 14.

⁶⁶ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 15.

⁶⁷ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 16.

agencies. Investigating agencies can currently access this metadata without a warrant, which demonstrates a lack of oversight of access to this highly sensitive information.⁶⁸ The House of Commons submission noted that metadata access has the potentially devastating effect of identifying whistleblowers, thereby inhibiting Members in their integral role of holding the Government to account.⁶⁹

While parliamentary privilege is critical to protect against improper interference with Parliament, the Committee recognised that powers to access metadata are also necessary investigative tools. In an effort to balance parliamentary privilege and investigative integrity, the Committee suggested that any material or information garnered using these powers should be quarantined and subject to a claim of privilege in a manner similar to that in the existing search warrant guidelines.⁷⁰

To ameliorate against an improper interference of the legislature by the use of the covert powers, the Committee suggested that, regardless of the information or material gleaned, the issuing authority must have regard to parliamentary privilege and that additional processes be established to address a question of privilege where it is raised.⁷¹ The Committee recommended:

... 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.⁷²

The Committee suggested that adequate oversight may be achieved by self-reporting of agencies to the relevant Presiding Officer or privileges committee of any instances where potentially privileged material is accessed in a manner contrary to the

⁶⁸ B. Grubb, and J. Massola, 'What is "Metadata" and Should You Worry If Yours is Stored by Law?'. *Sydney Morning Herald*, 6 August 2014. Accessed at: <https://www.smh.com.au/technology/what-is-metadata-and-should-you-worry-if-yours-is-stored-by-law-20140806-100zae.html>

⁶⁹ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, Clerk of the House of Commons (United Kingdom) Submission, pp. 2-3.

⁷⁰ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 26.

⁷¹ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 28.

⁷² The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 29.

protocols. Finally, the Committee noted that relevant privileges committees should undertake an ongoing review of the guidelines.⁷³

COVERT AND INTRUSIVE POWERS CASE STUDY: WESTERN AUSTRALIA

Due to the secretive nature of the use of covert and intrusive powers, there are few known instances where these powers have been utilised. Lessons should be learnt from an occasion where these powers have interfered with parliamentary privilege in Western Australia.

Hon Shelley Archer MLC: 28 February 2007

On 28 February 2007, the Western Australian Corruption and Crime Commission (CCC) was conducting a public hearing into political lobbyists. Counsel Assisting the CCC announced their intention to focus on approaches made by former Premier and now lobbyist Mr Brian Burke to the Legislative Council's Standing Committee on Estimates and Financial Operations about commencing an inquiry into the State's iron ore policy. Counsel Assisting intended to question the Hon Shelley Archer MLC about her role in the deliberations and decisions of the Committee.⁷⁴ Prior to this announcement being made, the Presiding Officers were unaware that any confidential parliamentary material was to be examined by the CCC. This announcement was of considerable concern to Parliament and the public hearing was adjourned later that day.⁷⁵

The Commissioner of the CCC wrote to the President of the Legislative Council on 12 March 2007, advising the nature of the investigation and requesting access to parliamentary material for the purposes of the investigation. The President and the Procedure and Privileges Committee advised the Commissioner that the House had

⁷³ The Senate, Committee of Privileges, *Parliamentary Privilege, 168th Report*, p. 30.

⁷⁴ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017*, May 2018, p. 48. Accessed at: [http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/899D1306BAD8FB04482582890011F7F5/\\$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/899D1306BAD8FB04482582890011F7F5/$file/Standing%20Committee%20on%20Procedure%20and%20Privileges%20-%20Report%20No.%2048%20-%20Corruption%2C%20Crime%20and%20Misconduct%20Amendment%20Bill%202017.pdf)

⁷⁵ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 49.

the power to release the material but any release did not abrogate the rights enshrined in Article 9 of the *Bill of Rights 1689*.⁷⁶ The House subsequently released certain material and allowed Council officers to give evidence to the CCC, provided that the CCC did 'not act in breach of the powers, privileges, rights and immunities of this House'.⁷⁷

On 21 March 2007, the Legislative Council formed a Select Committee of Privilege to commence its own inquiry into breaches of parliamentary privilege and possible contempt arising from approaches made by lobbyists to Members. The CCC assisted by providing surveillance material, which enabled the Committee thoroughly to investigate the matter and provide recommendations to the House.⁷⁸

In its report, the Committee noted that 'the CCC has access to the most advanced investigative techniques, including undercover operatives, telephone intercept devices and surveillance devices'.⁷⁹ On this occasion, the CCC accessed parliamentary material through these advanced investigative techniques. Parliament was only made aware of this access through a public hearing, when the CCC already intended to use the material without any consideration being given to parliamentary privilege. This highlights the difficulty in quantifying the extent to which potentially privileged material has been accessed and used without Parliament's knowledge.

Covert and Intrusive Powers in Western Australia

To date, Western Australia has no agreement in place with investigating agencies concerning search warrants on Members' premises or the use of covert and intrusive powers where parliamentary privilege may apply. There is also no legislative oversight for reporting occasions where potentially privileged material has been accessed and/or used in Western Australia. The *Surveillance Devices Act 1998 (WA)* requires a report be made to Parliament each year, including information about the number of applications for warrants, extensions of warrants and emergency authorisations. While the figures shed some light on the total number of applications and their approval or otherwise each year, they do not provide any information on

⁷⁶ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 49.

⁷⁷ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, pp. 49-50.

⁷⁸ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 50.

⁷⁹ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 50.

how many surveillance warrants are currently active or the targets of these applications; e.g., Members, journalists and organised crime identities. There is no requirement under the Act for any such breakdown to be provided.

The most recent known use of covert and intrusive powers in Western Australia was the 2007 CCC investigation into lobbyists (see above), which included contacts between lobbyists and Members of both Houses of Parliament. The investigative techniques employed by the CCC included surveillance of two lobbyists, Brian Burke and Julian Grill, who were both former Members. The material gleaned using these techniques included communications between the lobbyists and Members of both Houses.⁸⁰

The tension between investigative agencies and protecting parliamentary privilege in Western Australia reignited in April 2019. The Corruption and Crime Commission of Western Australia (CCC) issued notices to produce documents or things to the Director General of the Department of the Premier and Cabinet (DPC) relating to parliamentary email accounts of three former Members of the Legislative Council and 14 of their staff over a three year and nine month period. The scope of the notices is estimated to cover thousands of emails sent and received using their @MP email accounts, including material subject to parliamentary privilege and therefore protected from access or use in any place outside of Parliament.⁸¹ Unlike other Australian Parliaments, Western Australian parliamentarians' email accounts are located and managed by the DPC.

Against the express direction of the Legislative Council's Procedure and Privileges Committee (PPC), the DPC instructed the States Solicitor's Office (SSO) to conduct its own review for parliamentary privilege of the emails and other records subject to the notices identified by the CCC as relevant. Emails and other records determined by

⁸⁰ Legislative Council of Western Australia, Select Committee of Privilege on a Matter Arising in the Standing Committee on Estimates and Financial Operations, *Report*, November 2007. Accessed at: http://www.parliament.wa.gov.au/Parliament/commit.nsf/0/c602551b655196c348257831003e9721?OpenDocument&ExpandSection=1#_Section1

⁸¹ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 6. Accessed at: [https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2B235E4EE1F5259548258456000DCB60/\\$file/pp.ntp.190814.rpf.055.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2B235E4EE1F5259548258456000DCB60/$file/pp.ntp.190814.rpf.055.pdf)

SSO not to be subject to parliamentary privilege were subsequently released to the CCC by DPC.⁸²

As at July 2020, the PPC is investigating the actions of the DPC and the CCC by way of privileges inquiries.⁸³ The PPC summonsed copies of material released to the CCC by DPC to undertake its own audit to identify privileged material.⁸⁴ By order of the House, this material, as well as material over which claims of privilege have been made by a former Member, is held securely by the Clerk of the Legislative Council. Subsequently, the Clerk has been served with notices to produce records issued by the CCC.⁸⁵

The matter remains subject to two actions in the Supreme Court of Western Australia. On 27 August 2019, the Attorney-General launched an action challenging the Legislative Council's power to direct its Clerk not to produce House documents to a government agency with statutory powers of compulsion. The action seeks to limit parliamentary privilege to use immunity only, so that privilege cannot be relied upon to refuse to produce documents subject to statutory powers of compulsion.⁸⁶ The Attorney-General's position is that the order of the Legislative Council to its Clerk not to produce documents in his custody to the CCC is invalid and beyond the power of the Legislative Council. The second action was taken by the Legislative Council against the CCC and DPC, challenging the validity of the CCC notices and the purported determination of parliamentary privilege by SSO.⁸⁷

Interpretation of s 3(2) of the *Corruption, Crime and Misconduct Act 2003* (WA) will be crucial to the outcome. This section states:

Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891*

⁸² Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 2 and 20.

⁸³ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 56*, p. 1.

⁸⁴ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 55*, p. 2.

⁸⁵ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 57*, p. 1. Accessed at: [https://www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/FEDEA6C3804602024825847F0016A35C/\\$file/190924.rpf.57.pdf](https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/FEDEA6C3804602024825847F0016A35C/$file/190924.rpf.57.pdf)

⁸⁶ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 56*, p. 4.

⁸⁷ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 57*, p. 1.

and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable by a House of Parliament.

The CCC notices were issued under s 95 of the *Corruption, Crime and Misconduct Act*. The Legislative Council argues that the notices are invalid because, amongst other things:

1. they require the production of records that are subject to parliamentary privilege and immune from production; or
2. they require the Legislative Council to exercise one of its privileges to determine which of the records are proceedings in Parliament and which are not—a matter determinable by a House of Parliament.

In 2018, the Legislative Council Standing Committee on Procedure and Privileges reported on the Corruption, Crime and Misconduct Amendment Bill 2017. That Bill sought to amend s 3(2) to insert the word ‘exclusively’ after ‘determinable’. The objective of that amendment was to reinstate the CCC’s power to investigate Members for certain offences under the *Criminal Code Compilation Act 1913* which are also offences punishable by either House of Parliament under s 8 of the *Parliamentary Privileges Act 1891*.⁸⁸ The Government reassured the Parliament that the reinsertion of the word ‘exclusively’ in subsection 3(2) of the *Corruption, Crime and Misconduct Act* would have no impact on parliamentary privilege.⁸⁹ After considering advice from Mr Bret Walker QC and the then Solicitor General of Western Australia, the PPC concluded that the amendment Bill would not result in a diminution in the scope or operation of parliamentary privilege.⁹⁰ Given the current legal conflict, the Legislative Council has referred the Bill back to the PPC for further consideration.

⁸⁸ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48 Corruption, Crime and Misconduct Amendment Bill 2017*, May 2018.

⁸⁹ Hon Sue Ellery, Western Australia, *Hansard*, Legislative Council, 28 November 2017, p. 6071.

⁹⁰ Legislative Council of Western Australia, Standing Committee on Procedure and Privileges, *Report 48*, p. 7.

IS PARLIAMENTARY PRIVILEGE A SHIELD?

In the vast majority of cases involving the execution of search warrants where parliamentary privileges have been claimed, the outcome has been that the claim has been upheld and the material seized under warrant returned. A summary of published instances where search warrants have been executed since 2000 is as follows:

1. 2018 Australian Senate: Senator Louise Pratt, Non-Government Member. The AFP seized material as part of its investigation into the au pair saga. Senator Pratt's claim of privilege was upheld and all materials seized were subsequently returned.⁹¹
2. 2016 Australian Senate: Senator Stephen Conroy, Non-Government Member. The AFP executed search warrants at the office of Senator Conroy, at Parliament House and at the home of a staff member as part of its investigation into NBN leaks. Senator Conroy's claim of privilege was upheld and all materials were returned.⁹²
3. 2016 Australian House of Representatives: Mr Jason Clare, Non-Government Member. The AFP executed search warrants on Department of Parliamentary Services servers as part of its investigation into NBN leaks. Mr Clare's claim of privilege was upheld and all material was returned.⁹³
4. 2003 New South Wales Legislative Council: Hon Peter Breen, Non-Government Member. The Independent Commission Against Corruption seized material from the Parliament House office of Hon Peter Breen as part of its investigation into suspected breaches of allowances and resources by Mr Breen. Mr Breen's claim of privilege was upheld and all material was returned to him.⁹⁴

⁹¹ The Senate, Committee of Privileges, *Disposition of Material, 172nd Report*.

⁹² The Senate, Committee of Privileges, *Search Warrants, 164th Report*.

⁹³ House of Representatives, Privileges and Members' Interests Committee, *Claim of Parliamentary Privilege*.

⁹⁴ Legislative Council of New South Wales, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC*, 3 December 2003. Accessed at: <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5571/Final%20Committee%20Report%2003%20December%202003%20-%20Inquiry%20.pdf>

5. 2001 Australian Senate: Senator Len Harris, Non-Government Member. The Queensland Police seized material from the electoral office of Senator Harris as part of its investigation into election reimbursement claims for the 2001 State Election. Senator Harris' claim of privilege was upheld and all material was returned to him. The Senate Committee of Privileges reiterated the recommendation from their 75th Report that guidelines for executing search warrants on Members' premises should be established to preserve parliamentary privilege.⁹⁵
6. 2000 Australian House of Representatives: the Hon Laurie Brereton, Non-Government Member. The AFP executed search warrants on the home of the Hon Brereton's advisor as part of its investigation into leaked government documents relating to East Timor. While no material was seized, the Hon Brereton requested the matter be referred to the House Privileges Committee on the basis that the executing officers were able to access and review privileged material during their search. The Speaker declined the referral, as an improper interference defined by section 4 of the *Parliamentary Privileges Act 1987* (Cth) had not occurred.⁹⁶

In most instances where material has been seized from Members' premises or where claims of parliamentary privilege have been made, parliamentary privilege has shielded that material from being used outside of parliament. In all of the known cases since 2000, search warrants have been executed on non-government Members whose fundamental role it is to scrutinise the executive and hold the government to account.

The use of search warrants or covert or other intrusive powers by investigating agencies may have a significant chilling effect on the flow of information to Members in the event that material subject to parliamentary privilege is available to those

⁹⁵ The Senate, Committee of Privileges, *Execution of Search Warrants in Senators' Offices – Senator Harris*, 105th Report, June 2002. Accessed at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/~/~link.aspx?_id=84A4F53EFFAC4890BCC5591990C6B885&_z=z

⁹⁶ House of Representatives, *House of Representatives Practice* (6th edition), September 2012, Appendix 25. Accessed at:

https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice6/Practice6HTML?file=appendix25

agencies. Informants would be in short supply where misconduct or criminal action could be taken against them in the absence of the investigatory and evidential restrictions arising from parliamentary privilege and the capacity of a Parliament to punish for contempt. The absence of these immunities and powers would have serious and concerning consequences for the capacity of the legislature and its Members to undertake their constitutional responsibilities of inquiring, scrutinising and making the government of the day accountable to the Parliament.

Ultimately, the rationale for the immunities and powers granted by parliamentary privilege is to ensure the Parliament and its Members can carry out their functions. Mechanisms that ensure investigating agencies are aware of parliamentary privilege and comply with agreed protocols when exercising their powers will reduce the potential for conflict between Houses of Parliament and those agencies.

IMPROVING OUTCOMES

On 6 December 2018, the Australian Senate passed a resolution regarding parliamentary privilege and the seizure of material by executive agencies.⁹⁷ The resolution noted the intention of parliamentary privilege, the source of parliamentary privilege and acknowledged the AFP Guideline. The resolution further noted the right of the House to determine claims of privilege over any material accessed or seized through whatever means, including through covert and intrusive powers. The resolution concluded by calling on the Attorney-General to work with the Parliament to

... develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the

⁹⁷ The Senate, Privilege Resolutions. *38A Seizure of material by executive agencies*. 6 December 2018 J.4483-84. Accessed at: https://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders/d00/~link.aspx?_id=2E1A8CD342494B6A942AB5DB2674E4A2&_z=z#Procedural-orders_38A

House of Representatives Committee of Privileges and Members Interests.⁹⁸

In Western Australia, the development of a protocol with State investigating agencies for the execution of search warrants similar to the AFP Guideline could incorporate the improvements relating to covert and intrusive powers outlined in the Senate Privilege Committee Reports and any protocol subsequently developed by the Commonwealth Parliament and Attorney-General. A protocol with Western Australia Police and the Corruption and Crime Commission would have the status of statutory recognition, in the event that the Parliament agreed to the amendment to the *Corruption, Crime and Misconduct Amendment Bill 2017* (WA) proposed by a non-government Member. This would address some of the major shortcomings evident when investigative techniques and parliamentary privilege intersect, providing some independent oversight.

The following options may be considered for optimising memoranda of understanding or other agreements between Parliaments and investigating agencies:

1. Establishment of an independent adjudicator, or Parliamentary Inspector, if there is not one already.
2. Ensure the adjudicator or Parliamentary Inspector is notified at the outset of any investigation into a Member or where a Member is involved, that they are informed at each stage of the investigation and that they are satisfied there is no infringement upon parliamentary privilege. This includes use of covert and intrusive investigative techniques.
3. Follow the protocols stipulated in agreements, including notification obligations, to the letter.
4. Ensure agreements include protocols for covert and intrusive surveillance, including metadata access.
5. Conduct thorough pre-search warrant inquiries, including ensuring the specified subject matter of the search warrant does not in its own right impinge upon parliamentary privilege.

⁹⁸ The Senate, Privilege Resolutions. 38A Seizure of Material by Executive Agencies. Journal of the Senate, 6 December 2018, pp. 4483-84.

6. Ensure search warrants are approved internally by the most senior person in the agency.
7. Ensure all parties present when the search warrant is executed are aware of any agreements in place and that they act in accordance with the agreement.
8. Consider gathering evidence via requests for information rather than search warrant.

The cost of implementing the above would arguably be negligible compared to the cost associated with the execution of search warrants on Members' premises since 2000 referred to above, where only a fraction of material seized has been able to be used in evidence outside of Parliament.

CONCLUSION

Parliamentary privilege is essential in maintaining the free flow of information and to enable Houses of Parliament and their Members to carry out their functions effectively. The fact that parliamentary privilege may function as a shield to prevent material seized by investigating agencies from being used outside Parliament is a necessary attribute of an independent legislature and insulates it against oppression from the other arms of government. While Members must be subject to the rule of law, exclusive cognisance afforded to the Houses of Parliament is, in effect, an exception to the general principal of the rule of law.

As noted by the UK Parliament's Joint Committee on Parliamentary Privilege:

The ancient origins of parliamentary privilege, and the archaic language that is sometimes used in describing it, should not disguise its continuing relevance and value. ... [T]he work of Parliament is central to our democracy, and its proceedings must be immune from interference by the executive, the courts or anyone else who may wish to impede or influence those proceedings in pursuit of their own ends.⁹⁹

⁹⁹ House of Lords House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege Report of Session 2013-14* 18 June 2013, p. 7

Parliamentary privilege is not a shield against Parliament investigating misconduct by a Member, particularly where Houses have the power to punish for contempt. This power is also necessary to ensure parliamentary independence, the control of its own proceedings and to maintain the dignity and integrity of the institution.

Existing memoranda of understanding between Australian Parliaments and investigating agencies go some way towards protecting the interests of Parliaments and their Members through protocols to determine whether any material seized is subject to parliamentary privilege. However, there is a substantial gap between the intention of the agreements and what occurs in practice. There is also a range of investigative techniques being used that may infringe on parliamentary privilege with little oversight. In light of the most recent search warrant incident with Senator Pratt, it is an opportune time to renegotiate existing memoranda of understanding to include protocols covering more advanced investigative techniques and better safeguards to ensure material subject to parliamentary privilege is treated appropriately.

APPENDIX A: EXISTING MEMORANDA OF UNDERSTANDING

Jurisdiction	House	Agency	Date	HTML Link
Cth	Senate	Australian Federal Police	2005	Senate and AFP MoU and AFP National Guideline
Cth	House of Representatives	Australian Federal Police	2005	House of Representatives and AFP MoU and AFP National Guideline
ACT	Legislative Assembly	Australian Federal Police	2017	LA and AFP MoU and Procedure
NSW	Legislative Council	New South Wales Police	2010	LC and NSW Police Procedure
NSW	Legislative Council	Independent Commission Against Corruption	2008	LC and ICAC Procedure
NSW	Legislative Assembly	New South Wales Police	2010	LA and NSW Police Procedure
NSW	Legislative Assembly	Independent Commission Against Corruption	2008	LA and ICAC Procedure
QLD	Legislative Assembly	Queensland Police Service	2015	LA and QPS Protocol
QLD	Legislative Assembly	Corruption and Crime Commission	2015	LA and CCC Protocol