



PARLIAMENT OF AUSTRALIA

PRESIDENT OF THE SENATE
SENATOR THE HONOURABLE SCOTT RYAN

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Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
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Parliament House
Canberra ACT 2600

Dear Mr Hastie *Andrew*

I am writing concerning the intersection between the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 and parliamentary privilege. I realise the period for submissions has passed, but events and ongoing discussions regarding the application of parliamentary privilege have required further consideration of these matters in recent weeks. Although the bill does not deal with privilege directly, it sits in tension with work being undertaken across the Parliament to properly secure privilege against the exercise of executive investigative powers.

In the Commonwealth jurisdiction, the protection of parliamentary material from seizure under search warrant is governed by an MOU between the Parliament and the Executive signed in 2005. The scope of that protection, and the means by which it is secured, are set out in an AFP National Guideline for the execution of search warrants where parliamentary privilege may be involved. By its own terms, the 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.

The guideline is intended to ensure that search warrants may be executed without improperly interfering with the functions of the parliament, and that parliamentarians and their staff are afforded the opportunity to raise claims of privilege for resolution (whether by the Houses or the courts). The catalyst for the MOU and guideline can be found in recommendations of the Privileges Committees of each House in 1999 and 2000. The recent work of those committees has led them to consider whether those purposes are being met in the execution of search warrants and whether they are adequately accommodated in the exercise of other intrusive powers. They are now working with me and the Speaker to assess the need for legislative and procedural changes to secure the proper protection of privileged material, given the legislative and technological changes which have ensued since the National Guideline was adopted.

The background to that consideration is set out below.

Background

The MOU and National Guideline were tested for the first time in the investigation of an alleged 'leak' from NBN during the 2016 election campaign. An inquiry by the Senate Privileges Committee

found that documents seized in that matter were protected by privilege and should be withheld from the investigation. The committee also found that the manner in which the search warrants were executed constituted an improper interference with the functions of the parliament.

In a subsequent inquiry, the committee examined shortcomings in the processes for the execution of search warrants where privilege may be involved, and the intersection between parliamentary privilege and the use of other intrusive powers. This included the question of how privilege may be secured when agencies are accessing and examining preserved metadata, which may be accessed without a warrant. The committee expressed its view that, where information which might attract privilege is seized or accessed law enforcement and intelligence agencies should follow processes which enable claims of privilege to be raised and resolved prior to the information being interrogated. The committee recommended that protocols be developed between the parliament and executive setting out agreed processes for those agencies to follow when exercising those powers.

Following that inquiry, the Senate adopted the committee's recommendation 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 set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers.

The Speaker and I have embarked on that process. The Senate committee has now established a working group with the equivalent committee in the House to examine these matters, and have expressed their concerns to the Speaker and me that the use of these powers is eroding the protections of parliamentary privilege.

A particular concern to the Senate committee in relation to the covert use of such powers was the question how claims of parliamentary privilege can be raised and resolved when no-one with standing to make a claim is aware that such information is being accessed. These concerns may be exacerbated by the provisions of the Assistance and Access Bill 2018.

The Assistance and Access Bill

The bill extends the use of intrusive powers in several ways. In particular, provisions in Schedule 2 expand the circumstances where computer access warrants may be executed covertly. The *Surveillance Devices Act 2004* would be amended to allow Commonwealth, State and Territory law enforcement agencies to covertly access computers for various purposes (proposed section 27A). Currently, ASIO is able to obtain a covert computer access warrant but not law enforcement agencies (section 25A of the *Australian Security Intelligence Organisation Act 1979*). At present, law enforcement agencies can seize material on a computer or a smart phone under a warrant but to do so they must attend the search premises.

Similar provisions in Schedules 3 and 4 would allow law enforcement agencies and Australian Border Force officers to remotely access computers under the *Crimes Act 1914* and *Customs Act 1901* under warrant. Currently, when executing such warrants, an executing officer must attend the search premises to access data held on computers. The amendments in Schedules 3 and 4 would also enable law enforcement agencies and the ABF to remotely access 'account-based data' of a person who is the owner or user of a computer (in other words a broad range of people who may be unaware of the execution of the warrant).

I note, and accept, advice that there is nothing in the bill that would abrogate parliamentary privilege. However, the main issue with covert access in relation to privilege (whether through remotely accessing the device or concealing physical access to it) is that there would be no opportunity for a parliamentarian who considers that material is protected by privilege to raise such

a claim. Similarly, while in some respects the amendments relate to existing powers, they are proposed to be exercisable by additional organisations that do not have MOU arrangements for the execution of warrants where parliamentary privilege may be engaged.

Unlike search warrants applying to premises, computer access warrants and warrants used to secure remote access to devices are not served on any party with an interest, if they are served at all. There is therefore no trigger for anyone within the parliamentary sphere to seek to raise privilege. Neither is there a clear path for the resolution of such claims if they are made. In that case, the Parliament has to rely on the agency seeking the warrant, and the authority approving it, to have proper regard to privilege. No-one within the parliamentary sphere is empowered to intervene.

Clearly the purposes sought to be secured in the MOU and National Guideline are not met in the exercise of these powers. Although the bill does not create these difficulties, it extends them, at the same time as the Privileges Committees are seeking to rein them in.

Given the current consideration of this bill by your committee, I ask that you give consideration to the most effective manner of addressing these concerns. I expect that their resolution will require a combination of procedural and legislative action.

Action

It may be that it is possible for the Parliament to negotiate with the Executive an effective settlement as to the interaction between the use of these powers, as proposed to be extended, and the proper protection of parliamentary material. This negotiation could proceed as part of the process which has commenced to address short-comings in the current MOU and related matters raised by the Privileges Committees, including protecting privileged material against the access to metadata without warrant.

Alternatively, it may be that privilege may best be secured through legislative amendment, providing that it is not lawful for proceedings in Parliament to be seized, accessed, listened to, recorded or observed by use of such powers. The Access and Assistance Bill may provide a vehicle for addressing these concerns, by introducing provisions to constrain officers from seeking, authorising or exercising these powers in relation to privileged material or to introduce a trigger in the use of these powers to enable claims of privilege to be raised and resolved.

If the timeframe for the consideration of that bill does not permit these matters to be addressed, it may be that an agreement could be reached to introduce future legislative amendments to address them. Of course a recommendation from the Committee in this regard could assist this.

I have also written to both the Attorney-General and the Minister for Home Affairs regarding these matters. I note that there is a precedent for the committee to work with the ministers responsible to secure the proper protection of privileged material, as was done in relation to the Foreign Influence Transparency Scheme Bill.

Please consider this as a late submission. I look forward to hearing the views of the Committee in regard to these matters.

Yours sincerely


SCOTT RYAN

 November 2018