

EXECUTION OF SEARCH WARRANTS

This note is to update the information contained in the report to the committee of 6 August 2007 concerning Australian and overseas cases involving parliamentary privilege. For convenience, I attach a copy of that report. This note refers to further developments in some cases in that report, and also covers some new cases, and the two categories are distinguished below.

Australian cases

Previously reported cases

Niyonsaba v Commonwealth. The claim by the Commonwealth of exemption on the basis of parliamentary privilege from discovery of briefing notes prepared for Senate question time and estimates hearings was not contested by the other party and the documents were not produced. The case has since been settled and the proceedings thereby concluded.

Smith and Department of Foreign Affairs and Trade. The Industrial Relations Commission found that the dismissal of Mr Smith by the department was harsh, unjust and unreasonable within the meaning of the *Workplace Relations Act 1996*. The Commission ordered his reinstatement. Subsequent press reports suggested that the Commonwealth would consider an appeal to the Federal Court, a course which would appear to be open under the Act. In the event, the Commonwealth decided not to appeal, and Mr Smith duly returned to his employment.

Western Australian case. Following a report from the select committee, in December 2007 the government moved in the Legislative Council for the expulsion from the Council of the two members responsible for the unauthorised disclosure of the committee proceedings. The Council did not agree with this motion, but imposed alternative penalties on the two members. They were prohibited from serving on any parliamentary committee until the next general election, and ordered to apologise to the Council and to undertake training provided by the Clerk of the Council on parliamentary privilege. Three non-members, including former premier Mr Burke and former senator Mr Crichton-Browne, were ordered to apologise for their roles in the unauthorised disclosure.

New cases

Ennis v TCN. In this defamation case in the Supreme Court of New South Wales, a subpoena was issued requiring the Commissioner of the Australian Federal Police to produce certain documents. The Commissioner, represented by the Australian Government Solicitor, contested the subpoena, and raised the question of parliamentary privilege in relation to one document, a transcript of evidence given by the Commissioner before the Senate Legal and Constitutional Legislation Committee. The party seeking the production of this evidence and intending to rely upon it in the course of the action agreed to abandon that course. The parliamentary privilege point was therefore not fully argued or referred to in the judgment.

SZLDG v Minister for Immigration and Citizenship. This case in the Federal Court involved an application to compel the Minister for Immigration to issue a visa. The plaintiff sought discovery of documents including "possible parliamentary questions", that is, briefing notes for question time. The government, represented by the Australian Government Solicitor, sought immunity from production of these documents on the basis of parliamentary privilege. This submission was accepted by the justice. The judgment, which ordered the minister to determine the plaintiff's application for a visa, did not mention the parliamentary privilege issue.

Employment case. The statement in the report of 6 August 2007 that the kind of employment case which has caused difficulty in Canada and the United States could not arise in Australia proved to be premature. An employee of the Legislative Council of South Australia contested in the Industrial Relations Court a decision by the staff of the Council in relation to his remuneration. Council staff mounted an argument that the court did not have the jurisdiction to hear the case because the relevant law did not apply to the Council because of parliamentary privilege. The judge rejected this contention and, while finding that some provisions of the relevant statute, the Fair Work Act, could not apply to the Council, found that other provisions could apply by their terms, and the court had jurisdiction to deal with the applicant's claim.

Overseas case

Jefferson search warrant case

The US Department of Justice has not accepted the judgment of the Court of Appeals on the parliamentary privilege issue involved in the Jefferson case.

The department petitioned the full Court of Appeals for a review of the judgment. The government then maintained that parliamentary privilege does not prevent the disclosure to law enforcement agencies of privileged material (material associated with the performance of a congressman's legislative functions) during the execution of a search warrant directed at non-privileged material. The petition sought to draw a distinction between search warrants and legal processes for compelling production of documents, while apparently accepting that privileged material cannot be searched for or seized under warrant. The petition was accompanied by a good deal of media publicity, generated by the government and public interest groups, to the effect that the judgment of the Court of Appeals would unduly hinder criminal investigations of members of Congress.

The Court of Appeals, by majority, dismissed the application for review.

The government, however, has now petitioned the US Supreme Court for a review of the judgment. The government appears now to have changed its argument, and is inviting the Supreme Court to rule that the parliamentary immunity is only a use immunity, that is, that it restricts the use to which legislative materials may be put in legal proceedings, but does not prevent the compulsory disclosure of those materials.

Congressional staff who will be supporting the Court of Appeals judgment in the Supreme Court, if the case is heard there, have asked that an account be published here on the significance of this case for Australia, so that that published account can be cited and used in the argument in the Supreme Court. A brief article has been published accordingly, and a copy is attached for the information of the committee.

**PARLIAMENTARY PRIVILEGE AND SEARCH WARRANTS:
WILL THE US SUPREME COURT LEGISLATE FOR AUSTRALIA?**

It is not often that a matter before the United States Supreme Court has the potential to reach into Australia and influence a basic constitutional law of this country. Such is the situation with an issue now potentially before the Court, involving the question of whether members of the legislature have any immunity against the seizure of their legislative documents by executive agencies through the execution of search warrants.

Significant developments in the law on this subject occurred in Australia, based partly on US precedents, before the distinct question arose in Washington. There is the possibility of the Supreme Court's first pronouncement on the issue feeding back into Australian law and changing the rights of members of the Parliament here.

The law

The law involved relates to the immunity of parliamentary proceedings from impeachment and question in the courts.

There are two aspects of this immunity. One is the immunity from civil or criminal action and examination in legal proceedings of members of the Houses and of witnesses and others taking part in proceedings in Parliament. This immunity is usually known as the right of freedom of speech in Parliament. Secondly, there is the immunity of parliamentary proceedings as such from impeachment or question in the courts.

The immunity is in essence a safeguard of the separation of powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.¹

Members of the Houses and other participants in proceedings in Parliament, such as witnesses giving evidence before committees, are immune from all impeachment or question in the courts for their contributions to proceedings in Parliament. As those contributions consist mainly of speaking in debate in the Houses and speaking in committee proceedings, this immunity has the significant effect that members and witnesses cannot be prosecuted or sued for anything they say in those forums. Thus the common designation of the immunity as freedom of speech. It has long been regarded as absolutely essential if the Houses of the Parliament are to be able to debate and to inquire utterly fearlessly for the public good.

The other important effect of the immunity is that the courts may not inquire into or question proceedings in Parliament as such. Subject to explicit constitutional provision, the courts will not invalidate legislative or other decisions of the Houses on the grounds that the Houses did not properly adhere to their own procedures, nor will they grant relief to persons claiming to be disadvantaged by the application of those procedures. The two Houses are thus free to regulate their internal proceedings as they think fit. The immunity of parliamentary proceedings from question in the courts is regarded as necessary for the two Houses to carry out their functions without the fear of their proceedings being delayed, restricted or regulated by actions in the courts.

In Britain the immunity was given a statutory form in Article 9 of the Bill of Rights of 1689, which was interpreted and applied by the courts in a number of cases. The famous article declares:

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. (I Will. & Mar., Sess. 2, c.2, spelling and capitalisation modernised. The commas which appear in some versions are not in the original text.)

That body of law became part of the law in Australia by virtue of section 49 of the Constitution, which provides:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

In section 16 of the *Parliamentary Privileges Act 1987*, the Parliament used its legislative power to define “proceedings in Parliament” for the purposes of the application of the article 9 law as including “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 to define impeaching or questioning to include any “questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings”. These definitions reflected the case law on the subject in Britain and Australia developed since 1689.²

The British law was also inherited in a form in America. The Constitution of the United States provides that “Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place” (Article I, s. 6). The immunity thus applies there to members, not to proceedings, and only to speech or debate, and therefore appears at first sight to be narrower than its British equivalent. The provision has been

interpreted, however, as conferring a wide immunity on members in respect of their participation in legislative activities.³ The immunity, because it is expressed to apply to members, does not protect congressional witnesses in respect of their evidence, which is a difference from the Australian and British law. Congressional witnesses are granted certain immunities under legislation, but they may be prosecuted in the courts for perjury.

The Australian cases

In 1999 a senator's office was raided by Australian Federal Police investigating alleged misuse of entitlements, and documents, printed and electronic, in the office were seized. The senator challenged the legality of the seizure of the material, and the Senate supported his challenge in part, on the basis of parliamentary privilege.

The Senate's submission was to the effect that the immunity of proceedings in Parliament from impeachment or question in the courts, as explicated in section 16 of the *Parliamentary Privileges Act 1987*, means that a senator should not be compelled by legal process to produce documents closely connected with the senator's participation in parliamentary proceedings. The rationale of this interpretation is that senators would be impeded in their free participation in parliamentary proceedings if the documents connected with those proceedings could be compulsorily disclosed or seized by law enforcement agencies, even where the documents could not be subsequently used in legal proceedings.

In presenting this submission, the Senate had only one legal precedent to appeal to. This consisted of a judgment of the US Court of Appeals in 1995 which held that a member of Congress could not be compelled by the discovery of documents process to reveal documents associated with the member's legislative activities. The court held that compelling members to produce such documents would have a chilling effect on their information gathering and their legislative functions, and that the discovery process could not be used for a wide-ranging search of members' documents.⁴

This judgment had already been referred to in Australia. It was persuasive in influencing two justices of the Queensland Court of Appeal in 1997 to hold that a senator could not be compelled by discovery to produce documents prepared for the purpose of parliamentary proceedings.⁵

The difficulty was that these judgments dealt with the discovery process, not with seizures under search warrant, and there was no certainty that the courts would apply the same

principle in the case of such seizures. On the contrary, it was quite possible that the courts would draw a distinction between legal processes such as discovery and the execution of search warrants, which allows the executive government to seize materials to gain evidence for a prosecution but does not determine whether the evidence can subsequently be admitted before a court. Also, the cases dealt with discovery in civil proceedings. An argument could be mounted that different considerations apply to criminal proceedings and the investigations leading to them.

On the interpretation put by the Senate, such distinctions would be erroneous and founded on an incomplete understanding of the immunity. It protects members and legislative proceedings against criminal actions as well as civil, and therefore the production or seizure and scrutiny of members' legislative documents should not be used to undermine the bar on criminal proceedings any more than civil actions. Parliamentary proceedings and members' contributions thereto could effectively be impeached and questioned by requiring the production of the documents which lie behind these proceedings, particularly sources of information used by members, which could then be attacked through other investigations and legal proceedings. This evil would result regardless of how documents were compelled. Indeed, search warrants are more deadly in that respect than discovery and subpoena; an application for discovery and a subpoena can be challenged in the court through whose authority they occur, but the unimpeded execution of a search warrant means that documents immediately fall into the hands of executive agencies. The potential for intimidation of legislative activities is obvious.

The apprehended evil is clearly seen when it is remembered that members of the legislature, in their capacity as tribunes of the people, both rely upon and protect the public they serve. They receive complaints from constituents about government departments and agencies, complaints which are often made on the basis that parliamentarians will investigate them without disclosing their sources. In the past some such complaints have been the means of exposing serious official wrongdoing. Both the members and their constituent informants would be constrained by the thought that executive agencies, whether indirectly through law enforcement bodies or directly through their own search and seizure powers which many of them possess, would be able to identify citizens who are complaining about them by reading members' documents under cover of a search warrant. This would certainly chill parliamentary activities.

In the challenge brought by the senator, a justice of the Federal Court held that the question was one for the Senate and the executive and not for the court, as search warrants are an

executive process. This judgment has been much criticised as contrary to the many cases in which courts have reviewed the form and application of search warrants, and is not likely to be followed in the future. The judgment produced the desired result, however, because the court ordered that the seized documents be delivered to the Senate.⁶ The Senate was then able to arrange for a neutral third party to examine the documents and to return those protected from seizure, according to the view taken by the Senate, to the senator.⁷ Some unprotected documents were passed to the police, but the senator was not prosecuted.

A similar procedure was used in 2002 following the seizure under warrant of documents from the office of another senator. In that case, the state police accepted that some documents are immune from seizure by virtue of parliamentary privilege, and agreed to the process for the neutral “filtering” of the documents. All of the documents were returned to the senator, as none were found to be covered by the search warrant. Again the senator was not prosecuted.

The federal government also accepted the parliamentary privilege argument of the Senate, and adopted a procedure whereby, in all cases of future searches under warrant of the premises of senators and members, there would be a neutral “filtering” of the seized documents.

To formalise that procedure, a memorandum of understanding and Australian Federal Police Guidelines agreed to by the President of the Senate, the Speaker of the House of Representatives, the Attorney-General and the Minister for Justice and Customs, governing the execution of search warrants in the premises of senators and members, were tabled in the Senate in March 2005. The documents provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. The agreement underlying these documents was the result of several years of negotiations by the Senate, successive Presidents and the Privileges Committee, arising from the committee’s consideration of the cases referred to above.

The US case

In 2006 the congressional office of a member of the US House of Representatives was searched and documents seized under warrant by federal law enforcement agencies investigating alleged corruption. This is believed to be the first occasion of a search of a congressional office, and the congressman's challenge to the search provided the first occasion for the courts to consider whether the legislative immunity protected legislative documents from such seizure. The principal agency behind the search, the Department of Justice, appeared to accept that some legislative materials should be immune from seizure, and had put in place its own "filtering" process to ensure that legislative material was not seized. The congressman challenged the search on the basis that any seizure in a member's office is unconstitutional on separation of powers grounds. The House of Representatives did not support that wide claim, but maintained that the congressman should have been allowed to "filter" immune material before non-immune material was seized.

In making this submission, the House of Representatives drew upon the earlier cases about discovery, and also referred to the Australian Senate's precedents, and particularly the agreements entered into by the Senate and the police in relation to the conduct of searches. The precedents of the New South Wales Legislative Council, which has successfully asserted the immunity, were also referred to. Submissions were also made to the court by former members of Congress, one of whom specifically recommended the Australian procedures.

The court initially ordered that a "filtering" process be carried out. Then, in a judgment delivered in August 2007, the court held that the search and seizure violated the legislative immunity, that the congressman should have been allowed to claim immunity for particular documents before they were seized, and that that claim should have been determined by the court so that immune documents would not fall into the hands of the law enforcement agencies. The court thereby came to a position identical to that argued by the Australian Senate in its submissions to the Australian Federal Court in 2000.⁸

This judgment, if allowed to stand, will be persuasive if the question again comes before the Australian courts. With that proviso, that is not likely to happen, because of the agreement of our law enforcement agencies to the "filtering" process whereby documents claimed to be immune are withheld from seizure pending the determination of a claim. The only gap in the Australian law is that, due to the Federal Court's judgment, it is not finally decided whether the courts should be making that determination or whether the Senate itself should do so, as

in the past cases. It appears that, for the time being, the government is content to have the Senate making that determination through a neutral third party in future cases.

The US Department of Justice, however, has now petitioned the Supreme Court for a review of the judgment of the Court of Appeals, claiming that the judgment will seriously hamper the investigation of corruption offences on the part of legislators. The government position as expressed in the petition now seems to be that the parliamentary immunity confers no privilege against the seizure of documents under search warrant, and any “filtering” process is an act of voluntary restraint on the part of the executive. One basis of the petition is that the law is uncertain because of other judgments suggesting that the legislative privilege is only a use immunity, that is, it limits the use to which legislative documents may be put in legal proceedings, but does not prevent their disclosure through legal processes and search warrants. This interpretation ignores the requirement for members to protect their sources of information, and the debilitating effect on their legislative activities if they were not able to do so.

The US government submission, if accepted, would completely subvert the proper application of the parliamentary immunity to the execution of search warrants, which should prevent material coming into the possession of the executive government by means of a warrant before claims of privilege are independently determined.

The submission that the law reflected in the Court of Appeals judgment impedes or delays criminal investigations and prosecutions does not stand up to scrutiny. It is significant that this complaint has not been raised at any stage by Australian law enforcement agencies, state or federal. The appropriate process under this law is that documents potentially within the scope of a search warrant are sealed and the affected member given a reasonable but limited time to claim privilege in respect of any of the documents. A court-ordered and supervised filtering process is then put in place to determine the claims in relation to particular documents. Documents in respect of which the claim is not upheld are ordered to be delivered to the law enforcement agency. This procedure should not result in any unreasonable extension of the already lengthy time which can be spent on criminal investigations and prosecutions before they come to a conclusion. Given the time taken by investigations, and all the other possibilities for questions of law to be raised, determined and appealed in the course of such prosecutions, legislative privilege claims should not be a major concern.

It is not clear when, if ever, the Supreme Court will hear the case. It may decline to do so and allow the judgment of the Court of Appeals to stand.

The implication for Australia

If the Supreme Court were to support the government's case, such a judgment could be found persuasive by Australian courts if the question were ever to arise again here, and there could thereby be a feedback effect on the Australian law. Executive agencies, urged on by law enforcement organisations, which are always seeking to expand their investigative powers, would have an incentive to attempt to overthrow the current agreed arrangements. Those arrangements rest ultimately on one Federal Court judgment which in turn rests on the American law as it then appeared. If the US law, declared by the Supreme Court, were to release search warrants from the scope of the legislative immunity, the Australian courts could well be persuaded to follow. This would diminish the protection which Australian legislators currently have and open up a loophole for executive interference with parliamentary activities.

Harry Evans

NOTES

- 1 *cf US v Johnson* 1966 383 US 169; *Hamilton v Al Fayed* 1999 3 All ER 317.
- 2 The statute has been accepted by courts in both countries as an accurate statement of the earlier law and the content of article 9: *Amann Aviation v Commonwealth* 1988 19 FCR 223; *Rann v Olsen* 2000 172 ALR 395; *Hamsher v Swift* 1992 33 FCR 545; *Prebble v Television NZ Limited* 1994 3 NZLR 1.
- 3 For example, *US v Johnson* 1966 383 US 169; *US v Brewster* 1972 408 US 501; *Gravel v US* 1972 408 US 606.
- 4 *Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408.
- 5 *O'Chee v Rowley* 1997 150 ALR 199.
- 6 *Crane v Gething* 2000 169 ALR 727.
- 7 Senate Committee of Privileges, 114th Report, August 2003, *Parliamentary Paper* No. 175/2003.
- 8 *US v Rayburn House Office Building, Room 2113*, 2007, not yet reported.