ADVICE NO. 21

EXECUTION OF SEARCH WARRANTS IN SENATORS' OFFICES

Thank you for your letter of 8 December 1998, in which the Committee of Privileges asks whether I have anything to add to the briefing note provided to the Procedure Committee on this subject.

That note was perhaps not as clear as it could have been in setting out the background to the suggestion contained in it, and I think that I should attempt to clarify that statement of the background.

Some information relating to a recent case should also be provided to the committee.

Parliamentary privilege and search warrants

The law of parliamentary privilege, as largely codified in section 16 of the *Parliamentary Privileges Act 1987,* is mainly a use immunity and not a rule about admissibility of evidence: it restricts the use to which evidence of parliamentary proceedings may be put in proceedings before a court or tribunal. The purpose of that restriction is to ensure that there is no questioning or impeachment of parliamentary proceedings before a court or tribunal.

Parliamentary privilege also encompasses what the United States courts have called a "testimonial privilege": it provides a basis for a lawful refusal to provide evidence at all, without going to the use to which the evidence may be put.

It has always been clear that there is such a "testimonial" element in parliamentary privilege which could be invoked in certain circumstances. For example, if a senator were to be asked to give evidence in court about the content of the senator's speech in the Senate, the senator could refuse to answer any questions about the speech on the basis that answering in itself would facilitate a questioning of proceedings in Parliament, regardless of the use to which the answers might be put.

What was not clear was whether this "testimonial" element applied to documentary evidence, such that a senator could lawfully resist compulsory processes for the production of documents on the basis that production of those documents would, or would tend to, infringe parliamentary privilege.

Indeed, over many years senators have been advised that they have no immunity against compulsory processes for the production of documents, and, if they felt that the use immunity of parliamentary privilege provided them with insufficient protection of their parliamentary activities, in that the mere disclosure of documents could damage those activities, they should not keep documents which would be accessible by such processes. An example is the harm which might be caused to persons who have provided information to a senator by the disclosure of the information regardless of whether the information is used in any subsequent legal proceedings. Would-be litigants might be able to use information obtained from a senator to target by litigation

a senator's informants, and law enforcement bodies might be able to use such documents to launch investigations or prosecutions against other persons for unrelated matters. The provision of information to senators could thereby be discouraged.

The Parliamentary Privileges Act statutorily enacts a part of the "testimonial privilege": it provides in subsection 16(4) that in camera parliamentary evidence is not to be admitted as evidence in a court or tribunal for any purpose.

There may be other circumstances in which parliamentary privilege may provide a basis for resisting the production of documents. It has recently been made clear by the United States courts that production of documents may be resisted where interference with legislative activities is involved regardless of the use to which the documentary evidence is to be put (the *Brown and Williamson* case). Having had this judgment drawn to its attention, the Queensland Court of Appeal appeared to accept that parliamentary privilege could provide a basis for resisting an order for discovery of documents, depending on the nature of the documents, (the *O'Chee* case).

It is significant that both of these judgments concerned documents provided to members of the legislature by others; the American judgment is explicit that such documents may be protected by parliamentary privilege, the Queensland judgment at least leaves open that possibility.

It may be thought that the distinction between use immunity and the "testimonial privilege" is not very significant in practical terms. If a senator is presented with a subpoena or an order for production of documents from a court or tribunal, the senator can contest the legality of the process in the courts, and it may not matter whether that contesting of the process is done on the basis of the use to which the material may be put or the general principle of non-interference with parliamentary activities.

Search warrants, however, are different. The execution of a search warrant means that documents immediately fall into the hands of those seeking them, the law enforcement authorities. In the absence of some process whereby the question of parliamentary privilege can be raised, the recipient of a warrant has no opportunity to raise the question of whether material should be produced to those seeking it.

For that reason, it may be considered that a special procedure should be put in place in respect of search warrants.

I hope that this is a clearer summary of the background to this matter.

Recent case: attitude of law enforcement bodies

In a recent case of the execution of a search warrant in the offices of a senator (which has become a matter of public knowledge), the Australian Federal Police, with the apparent concurrence of the Director of Public Prosecutions, suggested that, as part of the procedure for the search under warrant, any material the senator claimed to be protected by parliamentary privilege should be sealed and delivered to a court until the claim of parliamentary privilege could be determined.

In making this proposal, those law enforcement authorities appear to accept that parliamentary privilege may provide a shield against the seizure of material under search warrant, and that there should be some procedure for determining whether the shield applies in a particular case. It also appears that they are ready to adopt such a procedure.

No doubt they were influenced by the agreed procedure already applying to warranted searches of legal practitioners' offices, whereby material claimed to be the subject of legal professional privilege is to be sealed and delivered to a court. They appear to see no reason, however, why the same procedure should not apply to parliamentary materials.

The Committee may wish to take this into consideration when determining whether it should recommend the adoption of the kind of procedure referred to.

Please let me know if the Committee would like any further information on this matter.