AUSTRALIAN SENATE

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hc/let/14287

9 June 2004

RECEIVED
9 JUN 2004
Senate Standing C'ttee
for the Scrutiny of Bills

Senator Trish Crossin
Chair
Standing Committee for the Scrutiny of Bills
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

PARLIAMENTARY PRIVILEGE — ENTRY AND SEARCH PROVISIONS

In the letter dated 16 February 2004 on this subject, I suggested that the committee include in any further report on entry and search provisions a section on the matters referred to in the letter.

It has been pointed out to me that there may be a technical difficulty in the committee doing so, because the letter predates the committee's current reference on entry and search provisions. I therefore formally request the committee to consider the letter of 16 February 2004 as a submission for the purpose of the committee's current inquiry.

It was also pointed out to me, at the estimates hearing for the Department of the Senate on 24 May 2004, that citizens other than parliamentarians are likely to be the victims of the practices mentioned in the reports of the Privileges Committee, particularly the "vacuum cleaner" approach to searches and the retention of material not covered by the terms of search warrants, and that consideration should be given to protecting other citizens and not just parliamentarians. I am sure that the committee has that point well in mind.

Yours sincerely

(Harry Evans)

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16 FEB 2004
Senate Standing C'ttee
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16 February 2004

Senator Trish Crossin
Chair
Standing Committee for the Scrutiny of Bills
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

PARLIAMENTARY PRIVILEGE — ENTRY AND SEARCH PROVISIONS

Thank you for your letter of 11 February 2004, in which the committee seeks advice on entry and search provisions that may impact on parliamentarians, and entry and search behaviour in respect of parliamentarians which may be contrary to the *Parliamentary Privileges Act 1987*. I hope that the following observations may be of some use to the committee.

A good deal of consideration, arising largely from two cases involving senators, has been given to the relationship between the immunity known as parliamentary privilege and the seizure of documents under warrant. So far, the focus of this consideration has been on the execution of search warrants by police in the course of investigations into alleged criminal offences, but the principles which have been enunciated apply equally to the use of other entry and search powers conferred on various bodies by provisions in statutes.

Parliamentary privilege and seizure of documents

Parliamentarians have no general immunity against the entry of their premises or the inspection or seizure of their documents under a search warrant or pursuant to a statutory authority. In recent years the Australian Federal Police have adopted the practice of notifying the relevant Presiding Officer, and in most instances the parliamentarian concerned, of any intention to execute a search warrant in the parliamentarian's premises. This practice is only a courtesy and it is not required by law.

The law of parliamentary privilege, as largely explicated in the Parliamentary Privileges Act, however, makes the seizure of some categories of documents, associated with proceedings in Parliament as defined in that act, unlawful.

The basis for this principle is set out in the written submission which was made on behalf of the Senate to the Federal Court in *Crane v Gething*. A copy of that submission is attached.

Briefly, while parliamentary privilege basically provides a use immunity, that is, it restricts the use to which material associated with parliamentary proceedings may be put in legal proceedings, it also contains what has been called a "testimonial" element. Under this element, not only is it unlawful to subject parliamentarians to questioning about proceedings in Parliament, it is also unlawful to compel the production of documents where this would have the same effect. This applies not only to legal processes for compelling the production of documents but also to the seizure of documents under search warrant by law enforcement agencies. This point has not been explicitly determined in any case before the courts, but there are very strong grounds for this conclusion.

In *Crane v Gething,* Justice French of the Federal Court held that the question of immunity of documents from seizure under search warrant was a matter for the Senate to determine in relation to a senator. Following that judgment, the Senate did, in effect, determine questions of immunity of documents from seizure in that case and in a subsequent case involving another senator. The French judgment, however, is not regarded as authoritative, and it is considered that, if the question is ever authoritatively determined in the courts, it is likely that questions of whether particular documents are immune from seizure will be determined by the courts as questions of law, as the Senate's submission to the Federal Court indicated that they should be determined.

The foregoing statement of the law of parliamentary privilege in relation to the seizure of documents has, in effect, been accepted by the Australian Federal Police and the Queensland Police in the two cases involving senators. In both cases, documents claimed by the senators to be immune from seizure were sealed and the claim of immunity was determined by the Senate through the medium of an independent arbitrator. In both cases documents were withheld from the police and returned to the senators as having been unlawfully seized under the search warrants. In one case some documents were identified as immune from seizure by virtue of parliamentary privilege, and in the other case all of the documents were held to be not authorised to be seized under the warrant.

The Australian Federal Police observe guidelines in conducting searches of parliamentarians' premises. Basically, those guidelines provide that any documents claimed to be immune from seizure are sealed and not accessed by the police until the claim of immunity is determined. The guidelines were originally based on those designed for dealing with claims of legal professional privilege, although it must be emphasised that that privilege does not possess the same absolute character as parliamentary privilege. The guidelines are currently under consideration for explicit endorsement by the President of the Senate, the Speaker of the House of Representatives and the Attorney-General, as recommended by the Senate Privileges Committee.

The background to these matters may be found in more detail in the 75th, 105th and 114th reports of the Senate Privileges Committee.

In the last of those reports, the committee pointed out that potential problems with parliamentary privilege and warranted searches are much more likely to arise because of the current practice of police, when executing a search warrant, of sweeping up every piece of information in an office and taking it away to ascertain whether it is relevant to the investigation (this may be called the "vacuum cleaner" approach to searches). This point is reinforced by the outcome of the case examined in that report, in which none of the senator's documents which were seized by the police were authorised for seizure by the search warrant.

The committee pointed out that the storage of vast amounts of information on computers may explain this approach, but this practice in most cases is not lawful.

Statutory entry and search provisions

As a preliminary point, it should be emphasised that a statutory provision which is otherwise of general application does not alter the law of parliamentary privilege unless the statutory provision so provides. In other words, a statutory provision which, for example, authorises the inspection and seizure of "any documents" relating to a particular matter does not authorise the inspection or seizure of documents which are immune from inspection and seizure by virtue of parliamentary privilege. The statutory provision has to be read as subject to parliamentary privilege unless the statute by its terms alters the law of parliamentary privilege. (The Parliament is authorised to alter the law of parliamentary privilege by section 49 of the Constitution.) This principle, that a statute does not alter the law of parliamentary privilege unless it so provides, was recently restated and reaffirmed in debate in the Senate (*Senate Debates*, 4/12/2003, p. 19442-3).

The exercise of statutory entry and search powers could affect parliamentarians, and invoke the law of parliamentary privilege, in two ways:

- the premises and documents of parliamentarians could be subject to entry, search, inspection and seizure

- documents in the possession of persons other than parliamentarians and relating to proceedings in Parliament could be subject to inspection and seizure.

It may be best to explain the possible impact by means of an example. This example is couched in purely hypothetical terms, so that it will not be thought to cast reflections on any particular body.

An organisation which administers a statutory grants scheme has power to enter premises and inspect records for the purpose of ensuring that grant moneys are properly applied. The organisation exercises these powers and inspects the documents of a number of grantees. This inspection reveals correspondence between the grantees and a senator in which the grantees complain about malfeasance in the administration of the scheme by the organisation concerned. The correspondence indicates that the senator is preparing to initiate a Senate inquiry into the conduct of the organisation. By gaining access to the documents, the organisation is alerted to the complaints of the grantees, the evidence they possess in support of those complaints, the information they have provided to the senator, and the intention of the senator to initiate a Senate inquiry. The organisation is thereby in a position to frustrate the forthcoming inquiry, including by way of putting pressure on the grantees by threats of prosecution or other means. If the Senate inquiry is not entirely frustrated it may be severely hampered. Other grantees, and other persons subject to entry and search provisions, are given a message that they cannot rely on the confidentiality and security of any communications they make with a senator, so that the parliamentary avenue for redress of wrongs is narrowed if not closed. It is possible to construct any number of other scenarios demonstrating the same potential.

In short, the exercise of entry and search powers may have, to use the term favoured in some legal circles, a "chilling" effect on the legitimate attempts by parliamentarians and their

Houses to pursue matters in the public interest and to ensure accountability on the part of public organisations or organisations performing public purposes. In the words of a judge in a relevant case before the United States Court of Appeals, allowing compulsory processes to gain access to material provided to the legislature in pursuit of legislative inquiries would not only "chill" such inquiries, but would cripple them. It is the basic rationale of parliamentary privilege, including this aspect of parliamentary privilege, to ensure that parliamentary inquiries and other necessary parliamentary activities are not "chilled" or crippled.

It may be considered unlikely that statutory entry and search powers will be exercised in such a way as to affect parliamentary privilege, but, given the enormous range and number of these powers, it is only a matter of time before some case, perhaps a case very damaging to legislative activities, arises.

If bodies with specialised entry and search powers adopt the "vacuum cleaner" approach to searches adopted by police, the likelihood of a case is greatly increased.

It would therefore be prudent to consider what steps should be taken to prevent such an instance.

Proposed measures

It is suggested that all Commonwealth organisations which have powers of entry and search, or as many of them as can be contacted, be advised in writing that there are categories of documents which are immune from examination and seizure because of parliamentary privilege and that, in exercising such powers, they should not gain access to those kinds of documents. They could also be advised that, should a question of parliamentary privilege arise in relation to documents, they should take steps to have the question determined, along the lines of the procedures adopted by the Australian Federal Police.

If the committee makes a further report on entry and search provisions, the committee could consider including a section on parliamentary privilege in that report so as to alert parliamentarians to the potential problem.

Please let me know if the committee would like to have any elaboration of any of these matters, or any further information.

Yours sincerely

(Harry Evans)

hc/pap/13024

PARLIAMENTARY PRIVILEGE: SEIZURE OF DOCUMENTS UNDER SEARCH WARRANT

CRANE V GETHING

SUBMISSION ON BEHALF OF THE SENATE TO THE FEDERAL COURT OF AUSTRALIA

1. The law of parliamentary privilege, as it is relevant to this matter, is largely codified in section 16 of the *Parliamentary Privileges Act 1987*. 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, and that parliamentary proceedings are not used to support a cause of action. It is not unlawful for evidence of parliamentary proceedings to be adduced to prove a relevant matter of pure fact without any inferential element. Parliamentary privilege is thus basically a use immunity, a rule relating to the use to which evidence may be put, rather than a rule relating to the admissibility of evidence.

2. Proceedings in Parliament include not only words spoken and acts done in the course of proceedings in the Houses of the Parliament and their committees, but also words and acts "for purposes of or incidental to" such proceedings (Parliamentary Privileges Act, s16(2)).

3. Apart from the use immunity, 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. Thus, if a senator were to be asked to give evidence in court about the sources of information contained in the senator's speech in the Senate, the senator could refuse to answer any such questions about the speech on the basis that answering in itself would facilitate a questioning of proceedings in Parliament, regardless of any other use to which the answers might be put.

4. This testimonial privilege applies to documentary evidence, such that a party may lawfully resist compulsory processes for the production of documents on the basis that production of those documents would infringe parliamentary privilege.

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

6. There may be other circumstances in which parliamentary privilege provides a basis for resisting process for the production of documents. It has 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 (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408). The Queensland Court of Appeal accepted that parliamentary privilege could provide a basis for resisting an order for discovery of documents, depending on the nature of the documents (*O'Chee v Rowley,* 1997 150 ALR 199). (In the United States law parliamentary privilege is regarded as a product of *function* rather than a product of *status* as in the Australian and United Kingdom law. In determining whether parliamentary privilege adheres to a matter the question posed by the United States courts is: is this matter part of, or connected with, the performance of the legislative function? In Australia and the United Kingdom the question is: is this matter part of, or connected with, proceedings in Parliament? The underlying principle of parliamentary privilege, however, is the same in all the jurisdictions.)

7. Both of these judgments concerned documents provided to members of the legislature by others; the United States judgment is explicit that such documents may be protected by parliamentary privilege, the Queensland judgment at least leaves open that possibility.

8. The judgments related to the production of documents by subpoena and orders for discovery of documents, respectively, but the same principle would apply to seizure of documents under search warrant by law enforcement bodies.

9. In order to invoke the immunity against production of documents, the documents in question would have to be closely related to proceedings in Parliament such that they would fall within the expression used in the Parliamentary Privileges Act, "for purposes of or incidental to" proceedings in Parliament.

10. In order to ascertain whether any particular document is immune from production by virtue of parliamentary privilege, the document's relationship with proceedings in Parliament must be assessed. If this assessment cannot be made on the basis of a description of the document, the court should examine the document to determine whether privilege is attracted by the nature of the document and its connection with proceedings in Parliament.

11. The foregoing refers only to parliamentary privilege. The production of documents may, of course, be affected by other forms of privilege.

12. Attached are copies of:

- the Parliamentary Privileges Act, with section 16 highlighted
- the judgments in:
  - *Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408
  - *O'Chee v Rowley*, 1997 150 ALR 199