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PARLIAMENTARY PRIVILEGE AND THE EXECUTION OF SEARCH WARRANTS

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INTRODUCTION

Parliamentary privilege reflects the constitutional principal that Parliaments require a degree of autonomy to enable them to function effectively and in the public interest. This need for autonomy raises a potential for conflict with the search powers of police. So, what is the effect of parliamentary privilege on the operation by police and other investigative bodies of their search powers?

Parliaments in many jurisdictions have grappled with this question. A number have now put in place arrangements between themselves and their relevant police forces to govern the exercise of search powers in respect of their members and the buildings they occupy. The approaches taken in these arrangements vary. This variety of approach is illustrative of the diverse approaches taken to parliamentary privilege in these jurisdictions.

The arrangements themselves rarely set out or explain their relationship to the operation of privilege. This paper seeks to evaluate and identify the approaches taken to parliamentary privilege in these arrangements.

This paper will focus on the New Zealand Parliament's arrangements with New Zealand Police. It will then compare the New Zealand approach with the United Kingdom and Australian Federal experience to analyse how those jurisdictions differ in approach.

SEARCH WARRANT AGREEMENT IN NEW ZEALAND

The New Zealand Parliament has two separate agreements with the New Zealand Police. There is a general agreement governing policing functions within the Parliamentary precincts (the "Policing Agreement"),[1] as well as a specific agreement governing the execution of search warrants on premises occupied or used by members of Parliament (the "Search Warrant Agreement").[2]

The Policing Agreement provides guidelines for the exercise of police powers in investigating offences and maintaining the law within the parliamentary precincts. The Search Warrant Agreement sets out a process to be followed where the New Zealand Police propose to execute a search warrant on premises occupied or used by members of Parliament. This process includes, for example, requiring

[1] *Policing Functions Within the Parliamentary Precincts - an agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police*, June 2017, available at: https://www.parliament.nz/media/4071/2017-06-01-signed-policing-protocol-between-the-speaker-and-the-commissioner-of-police.pdf (accessed 16 December 2017).

[2] *Agreement for the execution of search warrants on premises occupied or used by members of Parliament* (NZ), June 2017, available at: https://www.parliament.nz/media/3990/signed-search-warrant-agreement-170601.pdf (accessed 16 December 2017).

consultation with the Speaker prior to executing a warrant and allowing the Clerk to be present when a search is being undertaken within the parliamentary precincts.[3]

Parliamentary Practice in New Zealand describes these agreements in the following way:[4]

> *These documents record the mutual understandings about the checks and balances that apply regarding the protection of the privileges of the House and about the ability of enforcement and surveillance agencies to undertake their duties. These agreements do not confer new powers on the agencies or protections on the House but they do provide a framework for the agencies to go about their lawful functions without breaching parliamentary privilege.*

Each of these agreements arose from an incident in which a member of Parliament was being investigated by police in respect of a criminal offence. The Policing Agreement came first and was initially entered into in 2004 following a report by the Privileges Committee that reviewed a draft of the agreement.[5] John Carter MP, moving that the House take note of the 2004 Privileges Committee report noted:[6]

> *One comment in the report that is worthwhile repeating is that when parliamentary business is being transacted the buildings take on a unique constitutional status, and parliamentary privilege applies to the transaction of that business, and that is important.*

The Policing Agreement covers policing functions very generally but it does not deal specially with the execution of search warrants. The Search Warrant Agreement was adopted as an interim agreement in 2006 when the police executed a search warrant as part of the investigation into the activities of Taito Phillip Field MP.[7] As the search involved material held in parliamentary and electorate offices, the Speaker and the Commissioner of Police entered into an interim agreement prior to the search being undertaken. The Speaker later stated that:[8]

> *The interim agreement was designed to ensure that the search warrant was executed without improperly interfering with the functioning of Parliament, and that any claim of parliamentary privilege in relation to physical or electronic documents that the police may have wanted to seize could be raised and properly resolved. Such a situation had not arisen before, and an interim agreement was required to provide for the immediate circumstance.*

The interim agreement was presented to the House in November 2006 with a view to it being considered by the Privileges Committee once the matter regarding Mr Field was finally resolved. In the event, this did not occur until 3 September 2012.

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[3] See note 2, paragraph 6 and 7.

[4] See McGee, D *Parliamentary Practice in New Zealand*, 4th ed., Harris, M and Wilson, D (eds), Oratia Books, Auckland, 2017, page 749.

[5] Privileges Committee (NZ), *Draft agreement on policing functions within the parliamentary precincts,* 2004, I.17E.

[6] (24 Mar 2004), Vol 616, NZPD, 11937.

[7] Mr Field was later convicted by a jury in the High Court at Auckland of 11 charges of bribery and corruption as a MP, and 15 charges of perverting the course of justice.

[8] (7 November 2006), Vol 635, NZPD, 6201.

On 18 September 2012, the Speaker referred the interim Search Warrant Agreement, together with the Policing Agreement and a further agreement regarding the collection and retention of information by the New Zealand Security and Intelligence Service to the Privileges Committee for review.[9]

The Privileges Committee finally reported on the three agreements in 2014[10], having first released an interim report in 2013.[11] During its consideration of this reference, the committee had a further matter of privilege referred to it, regarding the use of intrusive powers within the parliamentary precinct more generally.[12] That reference arose out of the conduct of a ministerial inquiry into the leak of a classified report.[13] The reports arising from that reference, combined with the reports on the three agreements, comprehensively set out the New Zealand Parliament's Privileges Committee views on the use of search powers in respect of Parliament.

These reports contain a number of statements which identify how the New Zealand Parliament considers privilege operates in respect of the use of search powers.

The most extensive comment made by the Privileges Committee regarding the operation of privilege on the use of search powers is in its interim report regarding use of intrusive powers within the parliamentary precinct:[14]

> *The right of the House to control its own operations is a key strand of parliamentary privilege. It ensures that the Parliament operates free of external interference, so that the House, its committees, and its members can carry out its proper functions, including scrutiny of the Executive. Any investigation involving access to information held in the parliamentary precinct and involving members of Parliament, and others who interact with them, must as a first step involve an assessment of whether parliamentary proceedings are being called into question by an outside authority. Proceedings of Parliament are subject to absolute privilege. Select committee or House documents which have not been made available publicly must remain completely confidential to the House or relevant committee, and their release entirely under the House or relevant committee's control. The content, or status, of these documents cannot be impugned elsewhere.*

This comment appears to reference two separate, but connected, privileges. The opening sentence seems to refer to the exclusive cognisance privilege; that is, the power of the House to have exclusive control of its own proceedings. The committee appears to be suggesting that the operation of search powers in respect of Parliament needs to take account of that privilege and ensure that the use of those powers does not interfere with the House carrying out its functions. Specifically towards the end of this comment, the committee highlights the need to ensure that

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[9] (18 September 2012), Vol 684, NZPD, 5265.

[10] Privileges Committee (NZ), *Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS,* 2014.

[11] Privileges Committee (NZ), *Interim report on Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS,* 2013.

[12] Note 10, page 21.

[13] Privileges Committee (NZ), *Interim report on Question of privilege regarding use of intrusive powers within the parliamentary precinct,* 2013, I.17B, page 7.

[14] Ibid, page 21.

House and committee documents that have not already been publicly released, should be entirely under the House's, or relevant committee's, control.

However, elsewhere in the comment, the committee refers instead to the free speech privilege, stating that an investigation: "…must as a first step involve an assessment of whether parliamentary proceedings are being called into question by an outside authority." The free speech privilege is reflected in article 9 of the Bill of Rights 1688,[15] which provides (in modern spelling):

> *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.*

It is worth noting that the reference to 'any place outside parliament' is not read literally. In *Jennings v Buchanan*, the Privy Council noted, quoting the following statement from the UK Joint Committee on Parliamentary Privilege:[16]

> *To read the phrase ['place out of Parliament'] as meaning literally anywhere outside Parliament would be absurd. It would prevent the public and media from freely discussing and criticizing proceedings in Parliament. That cannot be right, and this meaning has never been suggested. Freedom for the public and the media to discuss parliamentary proceedings outside Parliament is as essential to a health democracy as the freedom of members to discuss what they choose within Parliament.*

The committee's comment therefore refers to "an outside authority" calling into question parliamentary proceedings. It is not clear whether that authority is the New Zealand Police in conducting the search, or the court that may later consider the case to which the search relates.

What is clear from this comment, however, is the New Zealand approach reflects the operation of two separate privileges. The relative weight that is attached to them is explored further below.

When the Policing Agreement was being developed in 2004, the committee's commentary appeared much more focused on the exclusive cognisance privilege. That report states:[17]

> *A legislative body must be able to conduct the business of the governance of the country without disruption or hindrance by the police.*

The committee's amendments to the draft agreement reinforced that approach. They proposed an amendment to the opening paragraph to explicitly emphasise the constitutional role of the Speaker in exercising control over Parliament buildings.[18] That amendment is carried over into other paragraphs in the draft agreement

[15] Since these reports were completed New Zealand enacted the Parliamentary Privilege Act 2014, which clarifies the application of Art 9 in New Zealand, but does not replace it.
[16] [2005] 2 NZLR 577, paragraph 9.
[17] Note 5, page 3.
[18] Note 5, page 6.

inserted by the committee to highlight the need to protect members from outside interference in the transaction of the House's business.[19]

The Search Warrant Agreement, when adopted in its interim form in 2006, indicates a reliance on the free speech privilege:[20]

> *The seizure of documents and materials under the execution of a search warrant that are "proceedings in parliament" may amount to a breach of privilege. The seizure and subsequent use of material that is protected by parliamentary privilege and its subsequent use may be found to be unlawful.*

Despite this focus of the interim agreement, the 2014 Privileges Committee report on a *Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS* appears to focus on the exclusive cognisance privilege in respect of the operation of the Search Warrant Agreement.

In that report, the committee raised particular concerns regarding the use of search warrants to access electronic documents. The committee noted that enforcement agencies often adopt the approach of seizing hard drives or cloning them in order to access information held on them; an approach that was not specifically addressed in the interim agreement. In considering the privilege risk associated with such an approach, the committee stated:[21]

> *While the mere act of seizure would not necessarily amount to questioning parliamentary proceedings, it is difficult to reconcile such an approach with the principle that the House has the exclusive right to control its own proceedings.*

The committee goes on to state: "For the House's authority to be upheld, there needs to be an opportunity to identify any matters which might be covered by parliamentary privilege, and to make a claim of privilege."[22] This statement suggests that the committee considers that it is the exclusive cognisance privilege, and not the free speech privilege, that is the essential concern behind the agreement. However, this approach is an amalgam as the committee is asserting the exclusive cognisance privilege in respect of protecting 'privileged material' from being seized under a warrant. 'Privileged material' appears to be a reference to the free speech privilege protection of 'proceedings in Parliament'. The committee's concern appears to be that allowing privileged material to be seized under a legal process, external to Parliament, would undermine the authority of Parliament over its own proceedings. This overlapped approach to the two privileges is continued throughout the committee's report.

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[19] Note 5, page 7.

[20] *Execution of search warrants on premises occupied or used by Members of Parliament—An agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police,* October 2006, clause 2.5 available at: https://www.parliament.nz/resource/mi-nz/00DBSCH_PRIV_11639_1/07fe6dcdaf7c628ef9349268159847428856504e (accessed 16 December 2017).

[21] Note 10, page 10.

[22] Note 10, page 10.

Later in the report, the committee states:[23]

> *We consider the agreement should be clearer about the consequences of the application of parliamentary privilege during the execution of a search warrant. The procedure in the interim agreement suggests that seizing material covered by parliamentary privilege may amount to a contempt, but it does not clearly state that material cannot be seized if it is covered by parliamentary privilege. We consider this should be addressed in the final agreement by stating that material covered by parliamentary privilege cannot be seized, and that any material taken that is later found to be covered by parliamentary privilege must be returned to the member in question.*

This statement suggests that the exclusive cognisance privilege, by way of the operation of the House's contempt jurisdiction, would prevent the seizure of privileged material that would otherwise be protected by the free speech privilege. Later in the report, the committee explicitly recommends that the agreement contain further information regarding the types of material that may constitute 'proceedings in Parliament', a term used primarily in respect of the free speech privilege.[24]

Following the 2014 Privileges Committee report on a *Question of privilege concerning the agreements for policing, execution of search warrants, and collection and retention of information by the NZSIS* a number of changes were made to the interim agreement and the Search Warrant Agreement was adopted in final form. The Search Warrant Agreement reflected most of the committee's recommendations, but does not contain any indication of the committee's consideration of the privilege the agreement is intended to protect. The agreement does not explicitly mention the exclusive cognisance privilege, but, at clause 4.1 of the agreement refers explicitly to the free speech privilege:[25]

> *Parliamentary privilege prevents proceedings in Parliament from being questioned in any court.*

That clause then goes on to refer to privilege operating to prevent "actions that directly or indirectly impede or obstruct the House and its committees, and members when participating in proceedings."[26] That wording is related to the exclusive cognisance privilege, but is just one aspect of that privilege. That statement appears instead to be a reference to the contempt provisions of the Standing Orders.[27]

Notably, the Search Warrant Agreement does not contain any statement that privileged material cannot be seized under a warrant. The final agreement instead contains a clause providing that the material must be clearly identified as protected by parliamentary privilege and must not be used in any way that would breach parliamentary privilege.[28] The approach provided for in that clause is more closely aligned with the free speech privilege, which would prevent the material being

[23] Note 10, page 11.
[24] Note 10, page 13.
[25] Note 2, clause 4.1.
[26] Note 2, clause 4.1.
[27] See Standing Orders of the House of Representatives 2017, SO 409(1).
[28] Note 2, paragraph 8.2.

questioned or impeached, rather than the exclusive cognisance privilege which could operate to protect Parliament's exclusive control over that material.

Conclusion in respect of New Zealand approach

While the exclusive cognisance privilege is not expressly referred to in the Search Warrant Agreement, it appears from the commentary and much of the content of the agreement that exclusive cognisance is at the heart of that agreement.

The Search Warrant Agreement effectively operates to govern the manner in which the Police may exercise their statutory powers within the scope of the agreement. The authority of the Speaker to enter into an agreement of that nature, and the acceptance of the terms of the agreement by the Commissioner of Police, clearly reflects a recognition of that privilege.

On balance, therefore, the New Zealand approach is based on the exclusive cognisance privilege, and through the recognition of that privilege, also operates to protect the free speech privilege.

UNITED KINGDOM SPEAKER'S PROTOCOL

The use of search powers in the precincts of the House of Commons is governed by a protocol issued by the Speaker on 8 December 2008 (the "Speaker's Protocol").[29]

The Speaker's Protocol is not an agreement with the Metropolitan Police and the Metropolitan Police were not involved, or even consulted, in its development.[30] The Speaker's Protocol was adopted very quickly, following an incident in which a search was undertaken of a member's office without a warrant as part of an investigation into the leak of official information. The Protocol is largely based on an earlier internal memorandum, issued by the Clerk of House in 2000, about the procedure to adopt should a member's office be searched.[31]

The unilateral nature of the Protocol is highlighted by the fact that it does not set out a process for the police to follow in obtaining a warrant that relates to the precincts of Parliament. The Protocol is instead intended to be a set of instructions to parliamentary staff as to the appropriate procedure to adopt should a search warrant be presented.

The Protocol requires that a warrant be obtained whenever the police wish to search within Parliament.[32] It then reserves to the Speaker the decision as to whether a

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[29] *Mr Speaker's Protocol on the Execution of a Search Warrant in the Precincts of the House Of Commons* (UK), 2008, available at: https://publications.parliament.uk/pa/cm200910/cmselect/cmisspriv/62/62we03.htm (accessed 16 December 2017).

[30] Carpenter, M *Assisting police with their inquiries?*, Association of Parliamentary and Legislative Counsel in Canada, 2013, available at: http://img.scoop.co.nz/media/pdfs/1311/UKSpeaker%27sCounselSubmission.pdf (accessed 16 December 2017), paragraph 4.

[31] Bradley, A *The Damien Green Affair—all's well that ends well?* [2012] Public Law 396, 402.

[32] Note 29, paragraph 5.

warrant may be executed.[33] It goes on to specify how the Speaker will take such decisions:[34]

> *I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere.*

The Protocol's approach is unique among the jurisdictions considered in this paper as it suggests that the Speaker is able to prevent a lawfully issued warrant being exercised within the parliamentary precincts. This approach appears to reflect a very strict interpretation of the exclusive cognisance privilege.

The Clerk of the House, in a memorandum presented to the Committee on the Issue of Privilege that reviewed the processes operating in respect of searches in the precincts, highlights the Speaker's authority over the precincts:[35]

> *The principle of privilege most relevant to the matter of precincts is that of exclusive cognisance which gives Parliament control over all aspects of its own affairs and, inter alia, the power to punish anyone for behaviour interfering substantially with the proper conduct of parliamentary business. It also confers upon the Speaker authority to act in the precincts, for example over matters of security.*

The Metropolitan Police have criticised the Speaker's control over the execution of warrants, as provided in the Protocol, arguing that it removes from the courts the determination of whether the material being searched is subject to parliamentary privilege.[36] However these criticisms appear to misunderstand the nature of the privilege being reflected in the Protocol. As highlighted by the Clerk, the Protocol reflects the protection of the exclusive cognisance privilege and not the free speech privilege.

The strength of the United Kingdom's reliance on exclusive cognisance is perhaps due to the unique genesis of that Parliament's privileges. As has been recognised by the United Kingdom Supreme Court:[37]

> *The exclusive cognisance of Parliament was originally based on the premise that the High Court of Parliament had its own peculiar law which was not known to the courts. The 17th edition (1814) of Blackstone's Commentaries on the Laws of England observed at pp 158-159:*
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> > *"It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim; 'that whatever matter arises*

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[33] Note 29, paragraph 5.
[34] Note 29, paragraph 6.
[35] Memorandum by the Clerk of the House, *Arrest of Members and Searching of Offices in the Parliamentary Precincts,* July 2009, available at: https://publications.parliament.uk/pa/cm200910/cmselect/cmisspriv/62/62we02.htm (accessed 16 December 2017), paragraph 8.
[36] Committee on Issue of Privilege (UK House of Commons), *Police Searches on the Parliamentary Estate*, 2010, HC 62, paragraphs 148 and 149.
[37] *R v Chaytor and others* [2010] UKSC 52, paragraph 64.

> *concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates and not elsewhere'."*

This can be contrasted with both the Australian and New Zealand parliaments, which were colonial legislatures created by United Kingdom legislation. Such bodies did not have inherent privileges[38] but were determined by the Privy Council in London to be competent to confer on themselves privileges equivalent to those of the House of Commons.[39] In general, the New Zealand and Australian parliaments chose to confer privileges on themselves by statute.[40]

The United Kingdom's unique position in respect of the origins of its privileges may also explain the remaining uncertainty as to the operation of certain statute law within the precincts of that Parliament, which does not exist in either the New Zealand or Australian parliaments.

There is no uncertainty in the United Kingdom regarding the application of the criminal law to the activities of members, even where they take place in the precincts of Parliament.[41] However, there is some uncertainty that other statutes may not apply within the precincts. In particular, the Protocol's recognition that the Speaker could refuse to allow a warrant to be executed is likely due to the uncertainty in the United Kingdom as to whether the legislation governing the execution of search warrants applies within the precincts of that Parliament. As highlighted by Lord Phillips in *R v Chaytor and others*:[42]

> *The powers of the police in respect of these activities are contained in the Police and Criminal Evidence Act 1984. I am not aware that any court has had to consider the extent to which, if at all, the provisions of this Act apply within the Palace of Westminster. What occurs is that Parliament permits the police to carry out their investigations within the precincts.*

This statement is not seen as a determination by the Supreme Court that the legislation does apply in all cases.[43] However, it is acknowledged that this uncertainty means that without a clear statement in that legislation that it does apply to the Houses of Parliament, the interaction between the Protocol and the legislation is clear only to the extent that the Speaker agrees to the execution of a warrant in any particular case.[44]

The Committee on the Issue of Privilege sought specific advice regarding what would happen if the Speaker refused to permit a warranted search; this advice was inconclusive:[45]

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[38] *Kielley v Carson* (1842) 4 Moo PC 63.

[39] *Dill v Murphy* (1864) 1 Moo PC (NS) 487.

[40] See Parliamentary Privileges Act 1865 (NZ), Commonwealth of Australia Constitution Act, section 49.

[41] See, for example, House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Parliamentary Privilege,* Report of Session 1998-1999, HL Paper 43-I, HC 214-I, paragraph 242.

[42] Note 37, paragraph 83.

[43] Note 31, at 403.

[44] Horne, A et al. (eds) *Parliament and the Law*, Hart Publishing, Oxford, 2013, page 78.

[45] Note 36, paragraph 147.

> *When we invited Speaker's Counsel to speculate on what might happen if the Speaker declined to permit execution of the warrant, he replied "Then you might have an undignified scuffle at the door"; he thought that the police would either exercise reasonable force, or go away and consider bringing charges of obstruction against those who had refused the officers entry to the premises specified in the warrant.*

In contrast to the strict approach taken to the exclusive cognisance privilege in the Protocol, its reflection of the free speech privilege is more limited. The Protocol requires only that, where material may be privileged, the police must sign an undertaking to maintain the confidentiality of that material.[46]

Conclusion in respect of United Kingdom approach

The Protocol reflects a strict interpretation of the exclusive cognisance privilege, to the extent that could be used to restrict the Police executing a warranted search in the parliamentary precincts.

Conversely, the Protocol's reflection of the free speech privilege is more limited, requiring only that privileged material to be identified and for the Police to agree to treat that material as confidential. The United Kingdom Parliament therefore appears to interpret the free speech privilege as not preventing privileged information from being seized by Police, instead limiting its impact to whether that information may be used in evidence.

The Protocol's strict interpretation of the exclusive cognisance privilege can be usefully contrasted with the New Zealand approach. The Search Warrant Agreement clearly envisages a guiding role for the Speaker in ensuring that Police have particular regard to the nature of the Parliament, and the importance of ensuring that its functions are not interfered with. It does not, however, suggest that once a court has issued a search warrant the Speaker would be able to prevent a warrant being executed.

AUSTRALIAN FEDERAL MEMORANDUM OF UNDERSTANDING

The execution of search warrants in the Australian Federal Parliament is governed by a Memorandum of Understanding between the presiding officers of the Federal Parliament and the Attorney-General and Minister for Justice and Customs (the "Memorandum").[47] The Memorandum effectively approves the process set out in the Australian Federal Police's national guideline for the execution of search warrants when parliamentary privilege may be involved (the "AFP National Guideline")[48] in

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[46] Note 29, paragraph 8.

[47] *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of Parliament between the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives, and the President of the Senate*, 2005.

[48] Australian Federal Police, *AFP National Guideline for Execution of Search Warrants when Parliamentary Privilege may be involved*, 2005, available at: https://www.parliament.nz/resource/en-NZ/50SCPR_EVI_00DBSCH_PRIV_12317_1_A368581/024975bd31dad995f3202085e67b34d099946f77 (accessed 17 December 2017).

respect of searches undertaken on premises occupied or used by members of the Federal Parliament.

The AFP National Guideline requires, for example, that before executing a warrant in respect of a parliamentary office, the officer should contact the relevant Presiding Officer and notify them of the search.[49] It also requires that the police notify the Attorney-General, in his or her capacity as First Law Officer in any case where a claim of parliamentary privilege has been made by or on behalf of a member of Parliament.[50]

The Memorandum was entered into in 2005 to overcome concerns arising from the judgment of the Federal Court in *Crane v Gething,*[51] where French J held that the courts did not have jurisdiction to determine whether parliamentary privilege prevented the seizure of material under a warrant as that was a matter for Parliament and the Executive to resolve.[52]

At the time of writing, the Memorandum and the AFP National Guideline are the subject of an inquiry by the Senate Standing Committee for Privileges, which is looking more generally into matters regarding parliamentary privilege and the use of intrusive powers.[53] The committee was due to issue its final report on 14 August 2017, but was granted an extension of time until the second sitting Tuesday of 2018.[54]

The AFP National Guideline, in explaining the legal background to its operation, suggests that the protection afforded to parliamentary proceedings from being impeached or questioned in a court, as provided for in the Parliamentary Privileges Act 1987, "may also have the effect that documents and others things which attract parliamentary privilege cannot be seized under a search warrant."[55] This statement reflects the approach that appears to have been adopted in Australia to the operation of the free speech privilege.[56]

In comparison with the approaches taken in New Zealand and the United Kingdom, this approach reflects a very wide interpretation of two key elements of the free

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[49] Note 48, paragraph 5.4.
[50] Note 48, paragraph 5.14.
[51] [2000] FCA 45 (18 February 2000).
[52] Standing Committee of Privileges (Federal Senate*), Disposition of documents seized under search warrants*, Preliminary Report, 2016, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Documents_seized/Preliminary%20Report/c01 (accessed 16 December 2017), paragraphs 1.7 and 1.8.
[53] Standing Committee of Privileges (Federal Senate), *Background paper: Inquiry into parliamentary privilege and the use of intrusive powers,* D17/13116.
[54] See Standing Committee of Privileges (Federal Senate), *Inquiry into parliamentary privilege and the use of intrusive powers* webpage: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/intrusivepowers (accessed 16 December 2017).
[55] Note 48, page 1.
[56] See for example, Frappell, S *Members' Documents, Parliamentary Privilege and Search Warrants,* 2009, available at: http://retired.anzacatt.org.au/parliament/general/Anzacatt/Anzacatt.nsf/key/library.html?OpenView&Start=1&Count=1000&Expand=3.7#3.7 (accessed 16 December 2017).

speech privilege: what actions constitute 'impeaching or questioning' and what is a 'place out of Parliament'. The AFP National Guideline, however, provides no further insight into how these matters are considered.

This reliance on a very broad interpretation of the free speech privilege may be due to the uncertainty in Australia about the continued existence of the exclusive cognisance privilege. It has been argued that developments in Australia have fundamentally altered the exclusive cognisance privilege in that jurisdiction.[57] Indeed, *Odgers' Australian Senate Practice* barely acknowledges the existence of that privilege in Australia.[58]

While the Memorandum and the AFP National Guideline do not explain why the free speech privilege would prevent privileged material from being seized under a warrant, that approach appears to reflect the findings of an earlier report of the New South Wales Legislative Council Standing Committee on Parliamentary Privilege and Ethics (the "NSW Report"). The NSW Report analysed the impact of the free speech privilege on the seizure of material and adopted the view that Article 9 of the Bill of Rights prevents the seizure of a document where the consequence of that seizure is the questioning or impeaching of parliamentary proceedings in a place out of Parliament.[59]

The NSW Report contains a detailed analysis of the key elements of Article 9. The committee in that case was considering the seizure of documents by officers of the Independent Commission Against Corruption. The committee concluded that a 'place out of Parliament' can include "…an executive commission of inquiry, such as a royal commission."[60] It pointed to a provision in the commission's governing statute that explicitly preserved parliamentary privilege to conclude that the commission was a 'place out of Parliament'.[61] As this analysis related specifically to a statutory commission, it is difficult to see how this approach has been read across to general police searches and no subsequent reports or commentary have addressed this point.

The NSW Report also concluded that 'impeaching or questioning' included any of the activities listed in section 16(3) of the Federal Parliamentary Privileges Act 1987, despite the fact that Act did not apply in respect of the NSW Parliament.[62] These activities include seeking to determine the truth or motive of those proceedings, or a person, or drawing inferences from anything in those proceedings.[63]

In adopting the approach that Article 9 prevented the seizure of privileged material, the NSW Report acknowledged the lack of judicial authority on the point, and the

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[57] Laing, R, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?', *Australasian Parliamentary Review*, Vol 30, No 2, 2015, pp. 58-72.

[58] Laing, R (ed) *Odgers' Australian Senate Practice* (14th ed, Department of the Senate, Canberra, 2016), pages 68 and 100 only.

[59] Standing Committee on Parliamentary Privilege and Ethics (NSW, Legislative Council), *Parliamentary privilege and the seizure of documents by ICAC,* 2003, Report 25, paragraph 3.54.

[60] Ibid, paragraph 2.61.

[61] Ibid, paragraph 2.62.

[62] Ibid, paragraph 2.67-2.68.

[63] See Parliamentary Privileges Act 1987 (Cth), section 16(3).

contrary view that the free speech privilege does not prevent seizure, only subsequent use.[64] However, the committee preferred their conclusion on the basis that it was in keeping with the approach adopted in the Federal Senate and the Australian Capital Territory.[65]

It is notable, however, that the committee considered that the effect of their conclusion was likely to be limited by their interpretation of 'proceedings in Parliament'. They considered that the prohibition on seizing material would be restricted to:[66]

> *…material sought by an investigative body* [that] *has a sufficiently close link with the formal transaction of business in the House or a committee such as to bring the material within the scope of 'proceedings in Parliament'.*

Recent cases have, however, shown that this may not have had the limiting effect that the committee envisaged.

The Australian Federal approach explicitly provides for a member to seek a ruling from a court or the relevant House to determine whether a claim for privilege can be sustained.[67] In reality, it has usually been a parliamentary committee on behalf of the relevant House that has determined such a claim. This approach appears to have led to a very wide interpretation being applied to the definition of 'proceedings in Parliament'.

For example, in 2016 the Federal House of Representatives Privileges and Members' Interests Committee concluded that all the material seized under a warrant were 'proceedings in Parliament' as they related to the subject matter of the member's role as Shadow Minister for Communications and could be considered reasonably incidental to transacting the business of the House.[68] That committee went on to determine, without providing reasoning, that the material could not therefore be seized under the warrant as it would amount to questioning or impeaching that material.[69]

A similar approach was adopted by the Federal Senate Standing Committee of Privileges in respect of a claim of privilege raised by a senator regard the execution of a search warrant against him in the same underlying matter.[70] The committee again concluded the parliamentary duties of the target of the warrant coincided with the scope of the warrant and therefore the material seized under it was protected by the free speech privilege.[71] The committee recommended that the documents be withheld from the Australian Federal Police and returned without further discussion

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[64] Note 59, paragraph 3.55.
[65] Note 59, paragraph 3.59.
[66] Note 59, paragraph 3.57.
[67] Note 48, para 5.11.
[68] Privileges and Members' Interests Committee (Federal House of Representatives), *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, November 2016, paragraphs 1.39-1.41.
[69] Ibid, paragraph 1.43.
[70] Standing Committee of Privileges (Federal Senate), *Search warrants and the Senate*, 2017, report 164.
[71] Ibid, paragraph 2.23.

as to why this action was required other than by reference back to the House of Representatives report.[72]

Conclusion in respect of Australian Federal approach

The Australian Federal approach is based exclusively on the free speech privilege. In doing so, that jurisdiction has adopted a very wide application of the free speech privilege to determine that material that is subject to privilege (which has been interpreted very broadly) cannot be seized under a warrant in order to ensure that the ability of Parliament and its members to carry out their functions is protected.[73]

This approach to the operation of the free speech privilege is quite different to that adopted in both New Zealand and the United Kingdom.

Further, again in contrast to both the New Zealand and United Kingdom approaches, there appears to be no acknowledgement of exclusive cognisance as a basis for the approach adopted. It is likely that Australia's lack of reliance on the exclusive cognisance privilege arises due to questions regarding the continued existence of that privilege in that jurisdiction.

CONCLUSION

The arrangements between Parliaments and their relevant police forces regarding the exercise of search powers in respect of their members and the buildings they occupy provide insight into the how those Parliaments view the operation of privilege.

The New Zealand Parliament's agreements with Police primarily reflect the operation of the exclusive cognisance privilege. It is through that privilege that the agreements seek to protect material that is also protected by the free speech privilege. This reflects the New Zealand approach to the relative importance of the exclusive cognisance privilege.

The New Zealand approach to the scope of the exclusive cognisance privilege is, however, fairly muted in comparison with the United Kingdom. The Speaker's Protocol, which operates in respect of the House of Commons, retains to the Speaker greater authority to refuse to allow a search to be carried out. That approach reflects the strength of the United Kingdom's exclusive cognisance privilege, which likely stems from the unique heritage of its privileges.

The Australian approach relies exclusively on the operation of the free speech privilege and, to do so, it has adopted a very wide interpretation of the three main elements of that privilege. This need to rely on the free speech privilege appears to have arisen due to questions regarding the continued existence of the exclusive cognisance privilege in Australia.

[72] Ibid, paragraphs 2.22-2.24.

[73] Ibid, paragraph 2.26 and note 68, paragraph 1.43.

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