

# Report

## Introduction

1.1 On 16 October 2018 the Senate referred to the Committee of Privileges the disposition of material over which a claim of privilege had been made by Senator Pratt. The motion followed the President's statement on 15 October indicating Senator Pratt had notified him that she was seeking the Senate's ruling on the claim of privilege on the material that had been seized by the Australian Federal Police (AFP) in the execution of search warrants on 11 October 2018 on the office of an Australian Border Force (APF) employee. Senator Pratt, in making the claim, followed the process set out in the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.

1.2 The National Guideline outlines processes to be followed by the AFP in the execution of search warrants on premises used by parliamentarians and in other circumstances in which privilege might arise. It sits together with the MOU signed in 2005 by the executive and the presiding officers as a settlement about the processes that are to apply in executing search warrants in relevant circumstances. It provides for claims of parliamentary privilege to be made and determined in relation to material seized. This intention is clearly explained in the preamble to both the MOU and the National Guideline:

The process is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and so its Members and their staff are given a proper opportunity to raise claims for parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises<sup>1</sup>.

1.3 The interpretation and application of the National Guideline was explained in the committee's 163rd and 164th reports in which the committee addressed the claims of parliamentary privilege made by the then Senator Conroy over documents seized from his Melbourne office, the home of a staffer and the Department of Parliamentary Services computer system (the Conroy papers).

## Background

1.4 Senator Pratt's claim of parliamentary privilege over documents seized in the execution of search warrants is the second such claim the Senate has asked this

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1 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 and the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, see Preambles (Appendix 1).

committee to evaluate. It arises from her role as Chair of the Legal and Constitutional Affairs References Committee. In her submission Senator Pratt indicates that her contact with the ABF officer commenced when she, as Chair of the references committee, was copied into an email to the committee's secretariat asking about the process of making a submission'.<sup>2</sup>

1.5 The references committee undertook an inquiry into allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs, and related matters. The Senate referred the matter on 23 August 2018 and the committee reported on 19 September 2018, following the Senate granting an extension. In conducting the inquiry the references committee held one public hearing on 5 September 2018.

1.6 On 11 October 2018 warrants were executed on the office of an ABF employee located on Constitution Avenue in Canberra and the home of the same officer. The AFP arrived at the Constitution Avenue office around 9.35 am. Senator Pratt made a claim of parliamentary privilege over the material seized during the search around 12.14 pm having been notified of the execution of the warrant by the ABF employee on whom it was served. Senator Pratt later extended her claim to documents seized from the ABF officer's home.

1.7 The President of the Senate, Senator Ryan advised the committee that he was notified of the execution of the warrants by the AFP at approximately 12 noon on 11 October. This was around the time Senator Pratt made the claim of privilege over the initial material. Later on the same day, the AFP notified Senator Pratt that the documents over which she had made her claim of parliamentary privilege had been sealed and provided to the Clerk of the Senate in accordance with the National Guideline.

1.8 In conducting the inquiry the committee invited the AFP and Senator Pratt to make submissions, and both responded to the invitation. The AFP submission included copies of two warrants and a list of the documents seized. The warrants required three conditions to be met (in total or part) in order for information to be seized. The first condition went to the format of the information. The second condition outlined subject matter covered by the information sought and included the Office of the Minister for Immigration and Border Protection; Senator Kitching; the Australian Senate Legal and Constitutional Affairs References Committee; and the Inquiry into allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs and related matters. The third condition provided that the information 'will afford evidence as to the commission of the following indicatable offence(s)' and listed possible offences.

1.9 Senator Pratt's submission explained the nature of her contact with the ABF officer and the exchanges that took place between them.

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2 Senator Pratt, *Submission*, p 1.

1.10 Before turning to the documents themselves, the report sets out the processes the committee has developed for determining claims of privilege.

### Assessing privilege claims

1.11 The committee, in its examination of the Conroy papers, established a three question test as the basis for determining whether documents warranted the protection of parliamentary privilege. It explored the basis for using this test to establish whether documents come within the definition of parliamentary proceedings and the reasons for it:

This is the test for the scope of privilege in legal proceedings, which turns on the connection between the material in question and parliamentary business. Generally, proceedings in parliament may not be questioned in legal proceedings<sup>3</sup> and the national guideline imports similar protections in relation to the execution of search warrants.<sup>4</sup>

1.12 The test is summarised as follows:

STEP 1: Were the documents *brought into existence* in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 2.

STEP 2: Have the documents been *subsequently used* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 3.

STEP 3: Is there any contemporary or contextual evidence that the documents were *retained or intended for use* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → report that there are documents which fail all three tests.

Note: Individual documents may be considered in the context of other documents.

1.13 The committee also notes the House Privileges Committee's consideration of a parallel matter arising from the execution of the same warrants but seizing documents over which the Member for Blaxland, Mr Clare MP, made a claim of parliamentary privilege. The House Privileges Committee did not examine the seized material but concluded that, because the subject of the warrant coincided with the

3 See section 16(3) of the *Parliamentary Privileges Act 1987*.

4 Committee of Privileges, *Search Warrants and the Senate*, 164<sup>th</sup> Report, March 2017, p. 6.

responsibilities of Mr Clare as Shadow Minister for Communications, 'it is likely that the records of the member seized under the search warrant, which are specified as relating to the NBN, would relate to his parliamentary responsibilities.' This fact is referred to as a 'critical circumstance' and the House Privileges Committee went on to find that:

...[a] reasonable presumption then arises that the material would be included in the term 'proceedings in Parliament'... In reflecting on this presumption, the committee accepts as validation of that presumption, the word of the Member for Blaxland, as a member of the House, in his initial and sustained claims to the AFP that parliamentary privilege attaches to the records seized.<sup>5</sup>

1.14 The committee in its consideration of the Conroy papers acknowledged the work of the House committee and expressed the view that the approach warranted further consideration.<sup>6</sup>

### **Classifying the documents**

1.15 The documents seized and listed on the property seizure record are print outs of emails, primarily from the private email account of Senator Pratt, with the subject heading of either Senate inquiry into allegations concerning the inappropriate exercise of ministerial powers, with respect to the visa status of au pairs and related matters, or witnesses. The dates of the emails are 28 August 2018 and 6 September 2018. There is one additional document which is described as an email from 2015.

1.16 In its submission the AFP put to the committee that an examination of the search warrants and or submissions alone could not determine whether the claim of privilege should be upheld. They argued that, in order to determine the claim of privilege, 'an examination of the material should be conducted by an agreed and appropriately qualified third party'.<sup>7</sup> The Senate, in referring the matter, provided the option to the committee of appointing, with the President's approval, an appropriate person to examine the material. The resolution also provided for the committee to examine the material itself, if it was unable to determine the matter without doing so.

1.17 Senator Pratt was not provided by the AFP with a list, or a copy, of the information seized, although she made the claim of parliamentary privilege. She informed the committee that:

I expect that the seized material will include email correspondence and evidence of other communication brought into existence entirely for the

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<sup>5</sup> House of Representatives Privileges and Members' Interests Committee, *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, November 2016, p. 11.

<sup>6</sup> Committee of Privileges, *Status of material seized under warrant Preliminary Report*, 163<sup>rd</sup> Report, p. 4.

<sup>7</sup> Australian Federal Police, *Submission*, p. 3.

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purpose of transacting business with the Senate Legal and Constitutional Affairs References Committee.<sup>8</sup>

1.18 She also indicates that 'some of the content of the emails was also used as background for the inquiry and to inform the development of questions'. The dates of the emails she listed correspond to the seized emails.

1.19 Further, Senator Pratt suggests that other documents that may have been seized were 'subsequently used in the course of, or for the purposes of or incidental to, the committee's inquiry'.<sup>9</sup> Her views as to the use of some seized documents would seem to be supported by the AFP who informed the committee that:

Prior to the execution of those search warrants, the AFP became aware that during the public hearing .... Senator Kitching had referred to information obtained from the leaked email during the course of the committee proceedings.<sup>10</sup>

1.20 In describing how the seized material may have originated or been used Senator Pratt applies the test developed and used by the committee in relation to the Conroy papers.

1.21 Senator Pratt, without the benefit of a list of the documents, was able to identify documents that either met step one of the test or step two and would thus fall within the definition of proceedings in parliament.

1.22 Given the assertions made by the AFP that the descriptions of the material would not be sufficient to establish the claim of parliamentary privilege, and as Senator Pratt had not been provided with a list of the material seized, the committee resolved to examine the documents in accordance with paragraph (6)(b) of its terms of reference.

## **Conclusion and Recommendation**

1.23 The committee's examination of the seized material focused on that seized at the office address. The material revealed email exchanges related to the reference committee inquiry, and the work of committee members. The committee considered this to reflect the critical circumstance identified in the House Privileges Committee's consideration of the claim of parliamentary privilege made by Mr Clare MP. The committee concluded that Senator Pratt, as she attested, had liaised with the ABF officer in the course of, or for the purposes of or incidental to, her work on the references committee.

1.24 The committee also notes the discussion in the reference committee hearing about the documents available to inform that committee in its inquiry. In particular, it notes the discussion about leaked documents and documents released under FOI and

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8 Senator Pratt, *Submission*, p. 2.

9 Senator Pratt, *Submission*, p 2.

10 Australian Federal Police, *Submission*, Annexure A, p. 3.

whether questions based on information variously described as 'leaked' or the 'unlawful disclosure of information'<sup>11</sup> required a response. This discussion further supports the contention that the seized material had the requisite connection to that committee's business.

1.25 The committee is satisfied that the material seized during the execution of search warrants on 11 October meets the tests developed in the examination of the Conroy papers that establish whether or not the material can be regarded as 'proceedings in Parliament'. On this basis, the committee concludes that the claim of privilege should be upheld.

1.26 The committee therefore **recommends** that the Senate adopt its findings that the claim of privilege be upheld, and the documents be withheld from the AFP investigation and provided to Senator Pratt.

### **Protections against improper interference**

1.27 The committee notes the assurances by the AFP that the National Guideline has been followed in executing the warrants, but expresses concern as to how well the stated purposes of the guideline and MOU were met in the execution of the warrants. As stated in its 164th Report the committee 'considers that the purpose of the guideline – safeguarding against improper interference and ensuring that privilege claims may be properly raised and determined – should inform its interpretation and implementation.'<sup>12</sup>

1.28 The broader question identified in that report goes to the question of whether the execution of the warrants may have amounted to an improper interference with the authority or functions of senators or the committee, more specifically a possible contempt.

1.29 In this matter, the subject matter of the information sought by the warrants not only identified a senator but a Senate committee and a specific inquiry and yet the Commissioner of the AFP confidently asserted that the circumstances 'did not automatically, in our minds, give rise to an obvious claim of parliamentary privilege.'<sup>13</sup> This is despite the discussion in the House Privileges Committee's report on the claim of parliamentary privilege by Mr Clare which identified a 'critical circumstance' between the terms of the warrant and the work of the parliamentarian.

1.30 The Commissioner also argued that legal advice was sought and that the expectation that parliamentary privilege would be claimed informed 'every step of that

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11 Legal and Constitutional Affairs References Committee, *Proof Committee Hansard*, 5 September 2018, p 15.

12 Committee of Privileges, *Search Warrants and the Senate*, 164<sup>th</sup> Report, March 2017, p. 9.

13 Legal and Constitutional Affairs Legislation Committee, *Proof Supplementary Estimates Hansard*, 22 October 2018, p 41.

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investigation'.<sup>14</sup> However, the senator named in the warrant was not advised that the warrant would be executed and was told after the fact and after another senator had made a claim of privilege. Nor was the President of the Senate notified until after the claim of privilege had been made. If the ABF officer had not called Senator Pratt it is difficult to see how a claim of privilege could have been made until after the contents of the seized material had been examined by the AFP.

1.31 On the evidence the committee has before it, it is difficult to assess how the MOU and the processes set out in the National Guideline operated to ensure there was no improper interference with the functioning of Parliament and its members were provided with a proper opportunity to raise claims of parliamentary privilege.

1.32 Further, the committee notes that its finding on the Conroy papers was that 'the execution of the Melbourne warrants may have had the effect of interfering with the duties of a senator, and with the functions of the parliament more broadly, by undermining the national guideline and diminishing the protection that should be available to parliamentary material during the execution of search warrants'. In that matter the committee decided not to make a contempt finding, preferring instead to acknowledge that a contempt should 'not generally be found "where public officers are fulfilling their lawful public duties in good faith and for a proper purpose ..."'.<sup>15</sup> Given the circumstances of the execution of the warrants on 11 October, the committee questions whether the same circumstances apply.

1.33 The committee therefore will call the AFP Commissioner, Mr Andrew Colvin, Assistant Commissioner Debbie Platz and the Acting Commander Joanne Cameron before it to provide further evidence and clarification.

Senator the Hon Jacinta Collins

**Chair**

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14 Legal and Constitutional Affairs Legislation Committee, *Proof Supplementary Estimates Hansard*, 22 October 2018, p 41.

15 Committee of Privileges, *Search Warrants and the Senate*, 164<sup>th</sup> Report, March 2017, p. 18.

