

The Senate

Committee of Privileges

Disposition of material seized under warrant

172nd Report

November 2018

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Terms of Reference

- (1) The disposition of the material over which a claim of privilege has been made by Senator Pratt, namely, the material delivered to the Clerk of the Senate on 11 October 2018 by the Australian Federal Police (AFP) following the execution of search warrants on that day, and other copies of the same material.
- (2) In carrying out its inquiry, the committee shall have regard to the law of parliamentary privilege, and the powers and practices of the Commonwealth Houses.
- (3) The committee shall be provided by the AFP with a list and a description of the seized material but the list and description to be provided by the AFP must not contain any information that could identify any person subject to investigation by the AFP in connection with the execution of the search warrants referred to in paragraph (1).
- (4) The committee shall provide to affected parties the opportunity to make submissions on the claim of parliamentary privilege and may seek submissions on the application of the law of parliamentary privilege.
- (5) If the committee is able to determine the matter without examining the material, it shall report accordingly to the Senate, making recommendations for the disposition of the material.
- (6) If the committee is unable to determine the matter without an examination of the material, it may:
 - (a) with the approval of the President, appoint an appropriate person to examine the material and report to it on the claim of parliamentary privilege, or
 - (b) examine the material itself.
- (7) The material shall remain in the custody of the Clerk at all times until its disposition is determined by the Senate, except that the Clerk may provide access for the committee, or for a person appointed by the committee, to examine the material in accordance with paragraph (6).

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 premises¹.

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

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'.²

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.

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 proceedings³ and the national guideline imports similar protections in relation to the execution of search warrants.⁴

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*, 164th 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.⁵

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.⁶

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'.⁷ 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

⁵ 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.

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

⁷ Australian Federal Police, *Submission*, p. 3.

purpose of transacting business with the Senate Legal and Constitutional Affairs References Committee.⁸

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'.⁹ 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.¹⁰

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

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'¹¹ 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.'¹²

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.'¹³ 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

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

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

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

investigation'.¹⁴ 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 ...".¹⁵ 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

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*, 164th Report, March 2017, p. 18.

Appendix 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**

1 Preamble

This Memorandum of Understanding records the understanding of the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate on the process to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'), including the Parliament House office of a Member, the electorate office of a Member and the residence of a Member.

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.

2 Execution of search warrants & parliamentary privilege

The agreed process is spelt out in the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* ('National Guideline'). This National Guideline establishes the procedures that AFP officers shall follow when executing search warrants on premises occupied or used by a 'Member'. The National Guideline is set out at Annexure A to this Memorandum of Understanding and covers the:

- Legal background to parliamentary privilege;
- Purpose of the guideline;
- Application of the guideline;
- Procedure prior to obtaining a search warrant;
- Procedure prior to executing a search warrant;
- Execution of the search warrant;
- Procedure to be followed if privilege or immunity is claimed; and
- Obligations at the conclusion of a search.

3 Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the AFP by publishing the Memorandum of Understanding on the AFP Hub, together with an electronic message addressed to all AFP employees or special members affected by the Memorandum of Understanding to bring it to their attention.

This Memorandum of Understanding will be tabled in the House of Representatives and the Senate by the Speaker of the House of Representatives and the President of the Senate respectively.

4 Variation of the National Guideline

Subsection 37(1) of the *Australian Federal Police Act 1979* (AFP Act) provides that the Commissioner of the AFP has the general administration and control of the operations of the AFP. Section 38 of the AFP Act provides that when exercising his powers under section 37, the Commissioner may issue orders about the general administration and control of the operations of the AFP in writing. The Commissioner has delegated this power in relation to the issuing of national guidelines to National Managers.

The AFP will consult with the Speaker of the House of Representatives and the President of the Senate when revising and reissuing the National Guideline.

The most current National Guideline applies to this Memorandum of Understanding. The version attached at Annexure A is current at the time this Memorandum of Understanding is signed.

5 Conflict Resolution

Any issues or difficulties which arise in relation to the interpretation or operation of this Memorandum of Understanding are to be discussed, at first instance, by the parties to the Memorandum of Understanding. If necessary, the Attorney-General or the Minister for Justice and Customs will raise those issues or difficulties with the Commissioner of the AFP.

6 Variation of this Memorandum of Understanding

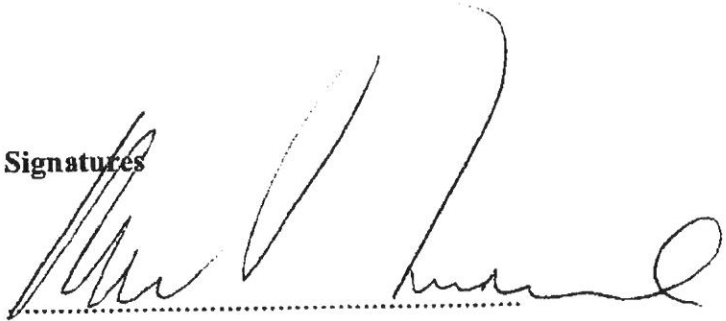
This Memorandum of Understanding can be amended at any time by the agreement of all the parties to the Memorandum of Understanding.

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants in the premises of Members of Parliament is concluded between the parties holding the positions of the Minister for Justice and Customs, the Attorney-General, the Speaker of the House of Representatives and the President of the Senate.

7 Revocation of agreement to this Memorandum of Understanding

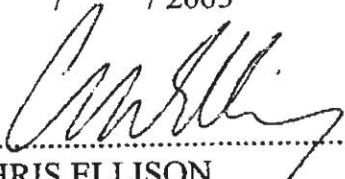
Any party to this Memorandum of Understanding may revoke their agreement to the Memorandum of Understanding. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures



PHILIP RUDDOCK
Attorney-General

1 / 2005



CHRIS ELLISON
Minister for Justice and Customs

9 / 2 / 2005



DAVID HAWKER
Speaker of the House of Representatives

21 / 3 / 2005



PAUL CALVERT
President of the Senate

18 / 2 / 2005



Australian Federal Police
— *To fight crime together and win* —

**AFP National Guideline for
Execution of Search Warrants
where Parliamentary Privilege
may be involved**

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AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved

1. Preamble

This guideline sets out procedures to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'). The guideline applies to any premises used or occupied by a Member, including the Parliament House office of a Member, the electorate office of a Member and the residence of a member.

The guideline is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that 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.

2. Legal background

A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member. Evidential material cannot be placed beyond the reach of the AFP simply because it is held by a Member or is on premises used or occupied by a Member.

However, it can be a contempt of Parliament for a person to improperly interfere with the free performance by a Member of the Member's duties as a Member. The Houses of Parliament have the power to imprison or fine people who commit contempt of Parliament.

Some of the principles of parliamentary privilege are set out in the Parliamentary Privileges Act 1987. They are designed to protect proceedings in Parliament from being questioned in the courts but they may also have the effect that documents and other things which attract parliamentary privilege cannot be seized under a search warrant.

Parliamentary privilege applies to any document or other thing which falls within the concept of "proceedings in parliament". That phrase is defined in the Parliamentary Privileges Act to mean 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. It includes evidence given before a committee, documents presented to a House or a committee, documents prepared for the purposes of the business of a House or committee and documents prepared incidentally to that business. It also includes documents prepared by a House or committee. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.

It is not always easy to determine whether a particular document falls within the concept of "proceedings in parliament". In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.

It is also possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995) 127ALR159).

Public interest immunity can apply to any document if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Among other things, public interest immunity can apply to documents if disclosure could damage national security, defence, international relations or relations with the States, or if the document contains details of deliberations or decisions of the Cabinet or Executive Council, or if disclosure could prejudice the proper functioning of the government of the Commonwealth or a State.

Public interest immunity can arise in any situation, but it is more likely to arise in relation to documents held by a Minister than by a Member who is not a Minister.

Further information in relation to the legal principles which apply in these cases can be found in the DPP Search Warrants Manual. That document is not a public document but has been provided to the AFP by the DPP and is available to AFP officers on the AFP Intranet.

3. Purpose of the guideline

This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.

4. Application of the guideline

4.1 The guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a Member including:

- the Parliament House office of a Member
- the electorate office of a Member; and
- any other premises used by a Member for private or official purposes on which there is reason to suspect that material covered by parliamentary privilege may be located.

4.2 The guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.

4.3 If a Member raises a claim for Legal Professional Privilege (sometimes called client legal privilege) in respect of a document, the executing officer should follow the normal procedure that applies in cases where a claim for Legal Professional Privilege is made in respect of a document that is on premises other than those of a lawyer, law society or like institution. The fact that Legal Professional Privilege has been claimed by a person who is a Member does not alter the normal rules that apply in such cases.

5. The Substantive Guideline

Procedure prior to obtaining a search warrant

5.1 An AFP officer who proposes to apply for a search warrant in respect of premises used or occupied by a Member should seek approval at a senior level within the AFP (the relevant National Manager if available, otherwise a Manager) before applying for the warrant.

5.2 If approval is given, the officer should consult the office of the appropriate DPP before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against ACT law, the appropriate DPP is the ACT DPP. The appropriate DPP can provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant.

5.3 Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation.

Procedure prior to executing a search warrant

5.4 If the premises that are to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If a Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee.

5.5 The executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise the potential interference with the performance of the Member's duties.

Executing the search warrant

5.6 If possible, the executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:

- (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day;
- (b) a search warrant should be executed at a time when the Member, or a senior member of his/her staff, will be present; and
- (c) the Member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed.

5.7 If the Member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the Member, or member of staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

5.8 There is a public interest in maintaining the free flow of information between constituents and their Parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

5.9 As part of that process, the executing officer should consider inviting the Member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

Procedure to be followed if privilege or immunity is claimed

5.10 If the Member, or a member of staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the Member, or member of staff, to identify the basis for the claim. The executing officer should then follow the procedure in paragraph 5.11 unless the executing officer considers a claim to be arbitrary, vexatious or frivolous. In the latter circumstances, the procedure in paragraph 5.13 should be followed.

5.11 The executing officer should ask the Member, or member of staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in audit bags in accordance with the AFP national guideline on exhibits. A list of the documents should be prepared by the executing officer with assistance from the Member or member of staff;
- The Member, or member of staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;
- The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party;
- The Member has five working days (or other agreed period) from the delivery of the items to the third party to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. In this respect, it is a matter for the Member to determine whether he/she should seek that ruling from a Court or the relevant House;
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling; and
- If the Member has not contacted the executing officer within five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.

5.12 If the Member, or member of staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the circumstances of the case to minimise the extent to which the members of the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

5.13 In some cases a Member, or member of staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and that, therefore, the proposed search should not proceed in any form. If that occurs, the executing officer should consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the Member, or member of staff, that he/she intends to proceed to execute the search warrant unless the Member, or member of staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.

5.14 The AFP will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister responsible for the AFP (if different) in any case where a claim of parliamentary privilege has been made by or on behalf of a Member.

Obligations at the conclusion of a search

5.15 The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the Member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

5.16 The executing officer should inform the Member that the AFP will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

5.17 The AFP will comply with any law including the requirements set out in the legislation under which the relevant search warrant was issued.