

## Chapter 2

### The privilege matter

2.1 There is uncertainty at law about the extent to which parliamentary material is protected from seizure under search warrant. In the Commonwealth jurisdiction, the matter is currently governed by a settlement between the Parliament and the Executive Government, embodied in the AFP National Guideline for the execution of search warrants where parliamentary privilege may be involved, which draws upon the traditional scope of parliamentary privilege in the courts.

2.2 That settlement has been tested for the first time in the investigation of a suspected leak from NBN Co, involving the execution of search warrants at Senator Conroy's Melbourne office, at the home of one of his staff, and at Parliament House, Canberra (directed at seizing material from the servers managed by the Department of Parliamentary Services). The matter was referred to the committee on 31 August 2016, and was the subject of the committee's [163rd report](#), which contains the necessary background. This chapter sketches the legal and procedural background which protects parliamentary material, before turning to the committee's examination of the seized documents.

#### Search warrants and parliamentary privilege

2.3 There are two ways in which participants in Senate proceedings are protected by parliamentary privilege. The first involves the use of the Senate's contempt powers. The Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. The purpose of this contempt jurisdiction is to protect the ability of the Senate, its committees and senators to carry out their functions without improper interference. This purpose is articulated in the statutory threshold for contempt in section 4 of the *Parliamentary Privileges Act 1987* and in the Senate resolutions that guide the committee's work.

2.4 The other way participants may be protected is by a legal immunity, commonly known as freedom of speech in parliament. This is what people tend to mean when they say that something is 'covered' by privilege. Generally, participants in Senate proceedings are immune from legal liability for things said or done in the course of those proceedings; evidence may not be tendered before courts or tribunals for prohibited purposes (traditionally, for the purposes of 'questioning or impeaching' those proceedings). This immunity is descended from Article 9 of the Bill of Rights 1688 and recited in section 16 of the *Parliamentary Privileges Act 1987*. The interpretation and application of these provisions is not a matter for the Senate, but for the courts.

2.5 What is at issue here, however, is the extent of the protection which attaches to parliamentary material seized under search warrant. There is no statutory provision, and little by the way of Australian authority, dealing with the intersection between parliamentary privilege and search warrants.

2.6 A [background paper](#) by the former Clerk of the Senate<sup>1</sup> notes the recognition in Australian law that parliamentary privilege may provide a basis for resisting compulsory production of documents in *court-supervised* discovery processes. The same principles might be expected to apply in relation to the seizure of material under search warrant, however, the position is somewhat uncertain following the federal court judgment in *Crane v Gething*. In that case it was held that the court did not have jurisdiction to determine whether parliamentary privilege prevented such a seizure, as the execution of search warrants is an executive act and not a judicial proceeding, and that only the House concerned and the executive may resolve such an issue.

### **The National Guideline**

2.7 In 2005, as a practical response to the court's disavowal of jurisdiction in *Crane*, the then Presiding Officers and Attorney-General entered into a Memorandum of Understanding about the execution of search warrants on the premises of members, or where parliamentary privilege may be involved. The AFP adopted a national guideline setting out processes its officers would be required to follow in executing such warrants.

2.8 In its [preliminary report](#), the committee noted that the guideline fills a gap in the law:

1.11 ...It represents a settlement between the Legislature and the Executive about the processes that are to apply in executing search warrants in relevant circumstances, including a process for members to make claims of parliamentary privilege over material seized. It also, in setting out the legal background, prescribes the applicable test for determining those claims; that is, by reference to the definition of 'proceedings in parliament' in the Parliamentary Privileges Act.

2.9 The committee also made clear its view that the purpose of the guideline – from its preamble, 'to ensure that search warrants are executed without improperly interfering with the functioning of Parliament' – should inform its interpretation and implementation.<sup>2</sup> It is worth repeating that part of the guideline in full:

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

---

<sup>1</sup> Tabled by the President on 30 August 2016 and reproduced in Appendix A of the 163rd report.

<sup>2</sup> 163rd report, paragraph 1.10.

---

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.

2.10 In the NBN matter, then Senator Conroy made a claim of privilege over all of the material seized, in accordance with the processes set out in the guideline, and elected to have the status of the documents determined by the Senate, which referred the matter to this committee. The purpose of the inquiry is to determine whether some or all of the documents over which former Senator Conroy has claimed privilege ought be protected from seizure.

### **The House inquiry**

2.11 The preliminary report also noted proceedings in the House of Representatives, which upheld a parallel claim made by a member over a subset of the seized material. The relevant House committee had recommended that the claim be upheld, principally because the subject of the search warrant coincided with the responsibilities of the member as a shadow minister. For the reasons set out in its 163rd report, the Senate committee determined it would continue its inquiry and examine the subject material before forming its own conclusions.

2.12 Claims of privilege made by members of different Houses raise interesting questions, for instance, whether a claim of privilege may be sustained by a member of one House in relation to proceedings of the other, and whether a finding by one House that documents are privileged effectively binds the other. The committee’s preliminary report touched on these matters without forming a concluded view.<sup>3</sup>

### **Examination of documents**

2.13 On 1 December 2016, the Senate authorised the committee to examine the documents. In its preliminary report the committee indicated that there would be two aspects to its examination of the material. First, determining (as a matter of fact) whether material comes within the definition of ‘proceedings in parliament’; and, secondly, considering a broader question connected to the purpose of privilege, and the stated purpose of the guideline, about protecting the parliament against improper interference. In this sense, the examination touches on both of the methods by which participants in proceedings are protected, as described above. These are taken in turn, below.

---

<sup>3</sup> 163rd report, paragraphs 1.15 – 1.21.

***‘proceedings in parliament’***

2.14 As indicated in its preliminary report,<sup>4</sup> the committee has adopted a three-question test for determining whether the seized documents come within the definition of ‘proceedings in parliament’ and therefore warrant protection. 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>5</sup> and the national guideline imports similar protections in relation to the execution of search warrants.

2.15 The test may be 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.

2.16 The committee sought and received submissions from former Senator Conroy and from the AFP in relation to the disposition of the documents. The nature and context of the inquiry – particularly the ongoing AFP investigation – militates against the publication of those submissions at this time. However, the submissions usefully informed the committee’s decision to examine the documents, the formulation of the above test, and the application of that test to the documents.

2.17 The submissions are outlined in the preliminary report at paragraphs 1.24 to 1.35. For present purposes, the most relevant material is the attachment to former Senator Conroy’s submission, a 35 page table setting out the various ways in which documents seized under the warrants have been incorporated into parliamentary proceedings.

<sup>4</sup> 163rd report, paragraphs 1.36 – 1.38, and the Clerk’s advice in Appendix B of that report.

<sup>5</sup> See section 16(3) of the *Parliamentary Privileges Act 1987*.

---

## Classifying documents

2.18 The documents seized in Melbourne comprised numerous hard copy documents sealed individually in audit bags. There were also compilations of notes and digital storage media. The documents seized in Canberra were primarily printouts of material retrieved from the DPS servers in Parliament House, many of which were copies of documents seized in Melbourne and, again, digital storage media.

2.19 The committee's examination focused mainly on the documents seized in Melbourne, given that the documents seized in Canberra are copies of documents already determined by the House to be immune from seizure and subsequently returned to the Member for Blaxland. Although, in theory, the determination by the House ought not conclusively determine the Senate's position, it would in practice be surprising for the Senate to make a different finding in relation to those documents and to release them to the AFP investigation despite the findings of the House. The committee considers that, given there were parallel privilege claims made in each House, it would have been highly desirable for the Privileges Committees of the two Houses to confer in their consideration of those claims. The committee **recommends** this approach be adopted should similar circumstances arise again.

### *The Melbourne documents*

2.20 Based on the extensive table in former Senator Conroy's submission, which contains links to transcripts of House, Senate and committee proceedings, the committee was satisfied that the various sealed, hard copy documents met Step 2 of its test; that is, they are documents '*subsequently used* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee'. The committee notes that copies of many of these documents were also seized in Canberra.

2.21 Of the documents on digital storage media:

- All of the documents seized in Canberra have been determined to be protected by privilege by the House of Representatives.
- The Conroy submission details the contents and purpose of numerous separately identified emails and email chains, explaining their connection to proceedings, with details drawn from the copies of seized documents provided to staff members during the execution of the warrants. Based on the described connection to proceedings, the committee considered that those emails met Step 1 of the test (that is, they are 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) or Step 2 (as above). Some of the emails and other communications seized also fulfil the function, formulated in step 3 of the test, of standing as evidence that certain documents were *retained or intended for use* in connection with proceedings.
- In relation to other material contained on the digital storage media, former Senator Conroy submitted:

This material was seized in an indiscriminate manner. The vast bulk would clearly fall outside the scope of the warrant and ought be returned to

Senator Conroy on that basis. Senator Conroy refers to the 114th report of the Committee of Privileges 20/08/2003, pp 175/2003 as authority for documents being returned to a senator where they are found to be outside the scope of the search warrant.

To the limited extent that these electronic copies/records capture any metadata, documents or communications that are relevant to this investigation, these metadata, documents and communications that material is derived from and incidental to the above proceedings in the Parliament (see all references above).

The committee considers it is able to accept these propositions.

### ***Conclusion and recommendation***

2.22 The House Committee did not examine the seized documents. It made its judgement about whether documents were ‘proceedings in parliament’ by examining the scope of the (Canberra) warrant. Its intersection with the parliamentary responsibilities of the shadow minister making the claim of privilege provided the basis on which the committee concluded that the documents seized under the warrant were sufficiently closely connected to his parliamentary business to warrant protection. The approach is evidently intended to operate as a presumption that may be dislodged in appropriate circumstances when contrary information comes to light. The usefulness and limitations of that approach will be a matter the committee returns to in its ongoing inquiry into the use of intrusive powers.

2.23 The Senate committee notes that the same argument is made by former Senator Conroy, whose parliamentary duties similarly coincide with the scope of the warrants. The committee considers that Senator Conroy’s claim in this regard is substantially strengthened by his submission, particularly where it demonstrates the use of seized material in connection to the transaction of the business of the Houses and the NBN Select Committee. On the basis of that submission and its examination the committee considers that the documents seized are relevantly covered by the definition of ‘proceedings in parliament’. On this ground, the committee concludes that the claim of privilege should be upheld.

2.24 The committee therefore **recommends** that the Senate adopt its finding that the claim of privilege be upheld, and that the documents be withheld from the AFP investigation and returned to former Senator Conroy.

### **Protections against improper interference**

2.25 In keeping with the committee’s observations about the purpose of the guideline, the other aspect of the examination of the documents involves a broader question going to the impact of the execution of the warrants, and the question whether that process may have amounted to an improper interference with the authority or functions of the Senate or senators.

2.26 This aspect of the inquiry is a reminder that – quite apart from the statutory formulations applied by the courts – the underlying purpose of privilege is to protect the ability of the parliament, its committees and members to carry out their functions and duties, and exercise their authority. Considerations such as the protection of

---

members' sources and the possible chilling effect on the provision of information to members are relevant to the committee's inquiries here. Those same considerations strongly influenced the House Committee's conclusion that the documents seized in Parliament House should be immune from seizure.

2.27 Some other considerations here include the committee's concerns that there are no particular protocols applying to the sort of pre-warrant inquiries undertaken in this matter, even though the information sought by those inquiries related to members' offices, and information held by senators and members and their staff;<sup>6</sup> the fact that no particular protocols appear to apply in requesting or approving a warrant where privilege might be involved; and the very wide scope of the warrants.

2.28 The particular focus for the committee, however, has been considering how well the stated purposes of the guidelines were met in the execution of the warrants. As has been noted, the committee considers that the purposes of the guideline – safeguarding against improper interference and ensuring that privilege claims may be properly raised and determined – should inform its interpretation and implementation.

2.29 The way in which the search warrants were executed allowed investigators to examine the documents to determine whether they fell within the scope of the warrants prior to their being seized and sealed, and prior to investigators necessarily recognising that a privilege claim was made over the documents in question. It is relevant in the second matter – the contempt matter – that this approach may have enabled information gleaned from this process to be communicated to, and used by, persons in a manner not authorised by the warrant.

2.30 These matters are addressed in the consideration of the contempt matter, which is detailed in the next chapter.

---

<sup>6</sup> See 163rd report, paragraphs 1.22 – 1.23.

