

## Chapter 3

### Possible interference with the execution of warrants

3.1 This chapter concerns possible improper interference and adverse actions arising from the execution of the warrants. As noted in the previous chapter, the underlying facts also connect to the committee's consideration of the question whether the impact of the execution of the search warrants may have amounted to an improper interference with the functions of the parliament, and whether the seized material ought be protected on that basis.

3.2 The matter was referred on 1 September 2016 in the following terms:

In relation to the execution of search warrants by the Australian Federal Police (AFP) on the Melbourne office of Senator Conroy and the home of an Opposition staff member on 19-20 May 2016, and on the Department of Parliamentary Services at Parliament House, Canberra, on 24 August 2016 or subsequent actions allegedly undertaken by the AFP and NBN Co Limited, as specified in Senator Conroy's letter to the President of the Senate of 30 August 2016 raising a matter of privilege:

- a) whether there was any improper interference, or attempted improper interference with, the free performance by Senator Conroy of his duties as a senator;
- b) whether disciplinary or other adverse action was taken against any person in connection with the alleged provision of information to Senator Conroy; and
- c) if so, whether any contempts were committed in respect of those matters.<sup>1</sup>

#### 'improper interference'

3.3 The Senate's contempt jurisdiction is intended to protect the ability of the Senate, its committees and its members to carry out their functions and exercise their authority without improper interference. This overarching principle informs any inquiry into a possible contempt. In Commonwealth law, contempt is assessed by reference to a statutory test in section 4 of the *Parliamentary Privileges Act 1987*:

#### 4 Essential element of offences

Conduct (including the use of words) does not constitute an offence against a House [that is, a contempt] unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

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1 The letter from Senator Conroy to the President raising the matter and the statement made by the President before the matter was referred provide background to the inquiry. These appear in Appendix A.

3.4 Any conduct may constitute an offence if it satisfies this test. However, the threshold for a finding of contempt is a high one, requiring evidence of an improper act intended or likely to substantially interfere with the functions or duties of the Senate or senators. In determining whether this threshold is reached the committee must take into account the criteria in Privilege Resolution 3. To summarise those requirements, the committee must consider:

- a) whether the use of the contempt jurisdiction is necessary to protect the Senate, its committees and senators against improper acts that may obstruct them in the performance of their functions;
- b) whether there is an alternative remedy; and
- c) whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so.

3.5 It is, in particular, this last criteria, going to the intentions of those against whom allegations are made, which guides the committee in determining whether an act should be considered to be ‘improper’ and whether a contempt should be found. The committee also has regard to Privilege Resolution 6, which contains a non-exhaustive list of possible contempts.

### **Possible contempts**

3.6 Paragraph (a) of the reference deals with the contempt of interference with the duties of a senator. In this regard, the Senate has resolved that:

A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a senator of the senator’s duties as a senator.<sup>2</sup>

3.7 Paragraph (b) deals with possible adverse actions against a person providing information to a senator. As the committee has previously noted:

Where there is a sufficiently direct link between the provision of information [to a senator] and ‘proceedings in parliament’, the Senate may treat the imposition of a penalty on a person who provides information to a senator as a contempt.<sup>3</sup>

3.8 Accordingly the Senate may, in relevant circumstances, use its contempt powers to protect the provision of information to a senator even where that occurs outside of the formal transaction of Senate or committee business. This power rests on the same principles as the Senate’s power to protect witnesses and other participants in parliamentary proceedings, as to which the Senate has resolved:

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.<sup>4</sup>

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<sup>2</sup> Privilege Resolution 6(1).

<sup>3</sup> [160th report](#), paragraph 1.28.

<sup>4</sup> Privilege Resolution 6(11).

3.9 Conduct that offends against these prohibitions may be dealt with by the Senate as a contempt. It is the committee's task in this inquiry to establish the facts and to determine whether any contempt may have occurred.

### **Contempt submissions**

3.10 The committee noted in its preliminary report that 'the underlying facts of the contempt inquiry – apparent misuse of seized material which should, according to the terms of the national guideline, have been sealed and unavailable – also raise concerns ... about the effectiveness of the processes in the guideline and, in particular, concerns that the guideline does not sufficiently protect members' information.'<sup>5</sup>

3.11 In this regard, former Senator Conroy submits that he made a claim of privilege over all of the subject material, and that all documents and information seized should therefore have been sealed and delivered to an agreed third party – the Clerk of the Senate. However, he submits that information which should have been quarantined in this way was used in a manner contrary to the national guideline. There are two elements to these allegations. The first involves photographs being taken during the execution of the search warrant at his CPO office, and being sent to NBN officers off-site. The second involves an allegation that information 'subject to a privilege claim' may have been used in disciplinary action against NBN employees who were alleged to have provided information to him.

3.12 On the first matter, the former senator submits that an NBN employee assisting with the execution of the warrant copied documents over which privilege had been claimed and 'improperly disseminated them to other NBN Co employees'. The base facts here were confirmed in the AFP submission to the privilege inquiry. The officers executing the warrant were accompanied by an NBN employee appointed as a 'constable assisting' who, on occasion, 'took a mobile phone snapshot of the front page of the NBN document in question before transmitting it to another NBN investigator for advice' about the provenance of some NBN-branded documents.

3.13 The Conroy submission goes on to allege that the AFP warrant holder 'improperly authorised' this activity 'despite the fact that those documents ought to have been quarantined in the office of the Clerk of the Senate', and makes similar comments about the officer in command of the execution of the warrants.

3.14 In relation to the second matter, it is alleged that NBN Co also acted on information obtained during the execution of the warrants at Senator Conroy's office and the home of a staff member which, again, ought to have been quarantined in the Clerk's office; including by taking adverse action against two NBN Co staff.

3.15 The submission suggests that these actions demonstrate contempt for the Senate and also violated the MOU and National Guideline for the execution of search warrants, and it concludes that the Privileges Committee should make findings of contempt against persons involved, and that persons and organisations may also be

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<sup>5</sup> 163rd report, paragraph 1.22.

guilty of a criminal offence under the Privileges Act. The committee makes no comment on this last point, which would be a matter for the courts.

### **Dealing with contempt allegations**

3.16 In conducting inquiries, the Privileges Committee follows procedures set down by the Senate. These are chiefly contained in Privilege Resolution No. 1 (procedures for the protection of witnesses to be followed by Senate committees generally) and No. 2 (additional protections for witnesses before the Privileges Committee in contempt matters). In particular, Resolution 2 requires the committee to ensure that a person against whom allegations are made:

- is informed of the nature of the allegations
- is informed of the particulars of any evidence given in respect of the person and
- is extended a reasonable opportunity to respond to such allegations and evidence.

3.17 The committee therefore wrote to the AFP and to NBN Co, informing them of the nature of the allegations and the underlying evidence, and providing them an opportunity to respond.

### **AFP submission**

3.18 The allegations made by former Senator Conroy centre on: (a) photographs being taken during the execution of the search warrant at the CPO and (b) information ‘subject to a privilege claim’ being used against NBN employees alleged to have provided information to him. The AFP submission disclaims involvement in any disciplinary or other adverse action as described in paragraph (b), assumes that paragraph therefore to be directed at NBN Co, and does not otherwise address that matter.

3.19 The submission accepts that privilege requires that, in executing search warrants, the AFP ‘must ensure that parliamentarians are not subject to improper interference with their performance of their parliamentary duties’ but argues that contempt findings should ‘be reserved for the most serious cases demonstrably interfering with the processes of Parliament and the responsibilities of members’; should not ‘lightly be made’; and moreover should not be made ‘where public officers are fulfilling their lawful public duties in good faith and for a proper purpose, as occurred in this case’.

3.20 On the question of improper interference, in relation to the photographing of records and their transmission ‘to a third party NBN Co officer’, the submission contends that ‘it is not established that the Senator’s free performance of his duties was in fact interfered with. If it was, any interference was transient and minor’. The submission goes on to argue that:

- if there was interference, it was not improper interference ‘but arose as a consequence of the execution of a valid warrant, conducted within the existing

legal and policy framework and in a manner consistent with accepted and usual practice’

- ‘any such interference occurred in good faith and for a proper lawful purpose, with the express intention of avoid and minimising interference with parliamentary duties’.

3.21 Generally, it is submitted that a finding of contempt should not be made, having regard to the criteria the committee must consider.

### **Committee’s comments**

3.22 The AFP suggests that ‘[e]xecution of search warrants and seizure of documents may “interfere” with the free performance of a senator’s duties where it limits the ability of a senator to discharge their parliamentary business’. The submission quotes a 1995 House Privileges Committee report, suggesting that ‘clashing or coming into opposition to the normal or ordinary operation or workings of the office’ could constitute interference. This is a narrow interpretation of interference, but the committee agrees that, in this narrow sense, the execution of the search warrants did not impede the senator or his office in any meaningful way.

3.23 In this case, however, there is a broader question, which is also addressed in the submission: whether the search and seizure was properly undertaken in accordance with the National Guideline. The AFP submits that ‘there was no breach of the undertaking to deal with documents in the manner agreed in the MoU and National Guideline’ and describes the processes followed in the execution of the warrant to narrow the range of the documents seized. Photographing and transmitting copies of the records was intended to reduce the size and scope of the seizure. (‘The impugned conduct was intended, and only intended, to minimise any disruption’.)

3.24 However, the committee considers that the problem is one of the potential leakage of information that should be protected. The execution of the search warrants here involved examination of documents to determine whether they were in scope (and so seized and sealed, to be withheld from any investigation until their status is resolved) or out of scope and therefore put aside. Information gleaned during this filtering process is problematic. The transmission of such information to a third party increases the risk that it may be used for purposes beyond those authorised by the warrant.

3.25 That is what NBN Co is alleged to have done in this case. Of this, the AFP says that the images transmitted to NBN Co were used only to ‘identify the records which were relevant to the investigation... They were not otherwise used to the AFP’s knowledge’. However, the second allegation, considered below in the context of the NBN Co submission, demonstrates the risk.

### **NBN Co submission**

#### ***The photography allegations***

3.26 On the allegations concerning the transmission of photographs during the execution of the search warrant at the CPO, the NBN Co submission repeats the

explanation given by the AFP that only the front covers were photographed, and they were disseminated for a very limited purpose, arguing that the conduct ‘cannot sensibly be said to have improperly interfered with’ Senator Conroy’s duties. The submission points out that, in any case, the NBN employee/constable assisting acted at all times under the direction of the AFP, and argues that the requisite intention for a contempt was not there.

*Alleged use of information against employees*

3.27 The second allegation made by Senator Conroy is that information that was subject to a privilege claim may have been used against NBN employees who were alleged to have provided information to him. The only evidence before the committee in relation to this matter arises from the execution of the second warrant, in Brunswick.

3.28 NBN Co submitted that a contempt could only be found if the documents were actually privileged, rather than merely subject to a claim of privilege. This is not correct. The Senate may find that any improper interference amounts to a contempt, if the requisite criteria are met. Given that the purpose of the guideline is to enable claims of privilege to be made and determined, conduct which interferes with this purpose may certainly be treated as a contempt.

3.29 NBN Co concedes that disciplinary action was, in fact, taken against two employees, but submits that it occurred independently of the AFP investigation, that it was taken solely as identified through its own internal investigation and that ‘the breaches relied upon did not include any communications with parliamentarians, their offices or their staff’.

3.30 However, elsewhere in its submission, NBN Co states that, during the execution of the warrant at the Brunswick residence, ‘certain emails were seen that appear to show that two **nbn** employees had been communicating with [the staffer] about matters pertaining to **nbn**’. The submission does not address who it was that saw the emails, nor how this information was communicated to NBN Co.

3.31 The committee asked NBN Co to confirm whether the two employees had been identified for investigation prior to, or after, the information referred to above came to the attention of NBN Co, and whether that identification was attributed solely, or even partly, to the emails discovered during the execution of the warrants. In its response, NBN Co confirmed that one employee had already been under active investigation, while the other ‘had previously been identified as having had access to one of the stolen documents [but] **nbn** had not yet commenced an active investigation’ at the time the information came to their attention.

3.32 These matters concern the committee. They demonstrate the risk that information which – to use Senator Conroy’s phrase – ought be quarantined may be used for purposes which are not authorised by the warrant and are inconsistent with the purpose of the guideline.

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### *AFP response*

3.33 The committee sought the AFP's views on this matter, which had not been raised in the AFP's initial submission. The AFP response stated:

As part of the role of the constable assisting in the execution of the Brunswick warrant, the NBN Co officer visually inspected emails on a computer. The purpose of that inspection was to provide advice to the warrant holder about the relevant [sic] of those emails to the investigation, with a view to seizing them (subject to any claim of parliamentary privilege). No photographs of the documents were taken by the constable assisting. As far as the AFP is aware, there was no information transmitted from the site of the Brunswick warrant to NBN Co.

The AFP is not able to comment on any use NBN Co may have made of information seen at the Brunswick warrant. The AFP can confirm that the AFP did not authorise the use of information from the warrant premises for any purpose other than the execution of the warrant.

3.34 The fact that unauthorised use may have been made of such information demonstrates that the processes provided for under the guidelines may not adequately protect members' information. The guideline is intended to enable claims of privilege to be made and determined, with seized material sealed away with a third party until that question is resolved. Any practice which, in the meantime, allows the use of material discovered at the scene of a search warrant undermines that purpose. Two practices in particular seem, in this case, to have risked undermining that purpose: the appointment as 'constables assisting' of persons employed by the entity which referred the matter to the AFP; and allowing information from the warrant sites to be communicated offsite despite claims of privilege being made.

3.35 The committee was also interested to consider a process question related to this: the question of the timing of the privilege claim. Both the AFP and NBN Co submissions make something of the fact that certain actions (for example, the filtering of documents to narrow the scope of what was to be seized) occurred before a final claim of privilege was made. This appears to be in aid of an argument that documents examined for this purpose (and information gleaned during this process) are not protected (or, is not protected unless and until those documents are seized and sealed). This may be defensible from a procedural point of view, but again would seem to undermine the purpose of the protocol.

### **Should any contempt be found?**

3.36 In determining whether a contempt should be found, the committee is required to have regard to the criteria in Privilege Resolution 3. To again summarise those requirements, the committee must consider:

- a) whether the use of the contempt jurisdiction is necessary to protect the Senate, its committees and senators against improper acts that may obstruct them in the performance of their functions;
- b) whether there is an alternative remedy; and

- c) whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so.

3.37 The committee considers 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 operation of the national guideline and diminishing the protection that should be available to parliamentary material during the execution of search warrants. The committee also notes that information which warranted protection may have been used to the detriment of a person with a connection to parliamentary proceedings. These are concerns which clearly meet the first of these criteria.

3.38 On that basis, the committee considers that an improper interference has occurred on this occasion. The committee is always reluctant, however, to recommend that a contempt be found in the absence of the requisite intent, and does not do so here. In particular, the committee must consider whether a person who committed an act which might be held to be a contempt did so knowingly, or had a reasonable excuse for doing so.

3.39 In considering the question of intent, the committee notes the argument, put in various forms by both the AFP and NBN Co, that any interference ‘arose as a consequence of the execution of a valid warrant, conducted within the existing legal and policy framework and in a manner consistent with accepted and usual practice’ and agrees that contempt should not generally be found ‘where public officers are fulfilling their lawful public duties in good faith and for a proper purpose...’. The committee also notes that the constables assisting in the warrants were acting under the direction of AFP officers and may not, themselves, have appreciated the strictures which ought to have applied to the use of information discovered during the execution of the warrants.

3.40 The guideline is silent on matters such as the appointment of constables assisting, which the committee understands to be a routine matter where the AFP requires local or expert knowledge in the execution of warrants, and the involvement of third parties connected to the allegations being investigated. It seems to the committee that this practice may be worthy of being brought within the national guideline. The risk that information which ought to be quarantined may be used for other purposes is heightened where third parties are involved off site. These are matters the committee will return to in its broader inquiry into the adequacy of privilege in the use of intrusive powers.

### **Conclusions and recommendation**

3.41 In relation to the first allegation, the committee is satisfied that the dissemination of photographs of material was ultimately conducted with appropriate regard to restricting their use. An alternative remedy (in the terms of criterion 3(b)) was effectively put in place with an agreement that the photographs be deleted. Similar safeguards appear not to have been in place in relation to the second allegation. The second allegation therefore presents more difficulty.



3.42 The committee notes that information discovered during the execution of the Brunswick warrant may have assisted in identifying persons of interest in the investigation. However there is conjecture as to the extent to which that material may have been used, and as to whether those persons would in any case have been identified without that information. NBN Co has assured the committee that, to the extent that any action was taken against employees, the information acted upon was identified through its own internal investigations and ‘the breaches relied upon did not include any communications with parliamentarians, their offices or their staff’.

3.43 The committee remains concerned at the potential that unauthorised use of this information may have adversely affected an NBN Co employee. The committee has previously held that the threshold for a finding of contempt is a high one, requiring cogent evidence of an improper act or motive. The committee recognises the difficulty of conclusively establishing the requisite intent in this case, noting the matters mentioned in paragraph 3.39, above. This difficulty is compounded because the guideline allows the practices mentioned in paragraph 3.40, which the committee considers may be incompatible with its purposes. An alternative remedy in this matter, however, may lie in the resolution of the privilege claim dealt with in the previous chapter.

3.44 The committee therefore refrains from recommending that a contempt be found, but reinforces its recommendation that the claim of privilege over the seized material should be upheld. The committee, in chapter 2, recommended that the claim of privilege made over the documents be upheld, because they met the test formulated by the committee to demonstrate the requisite connection to parliamentary business. In finding that an improper interference has occurred, as set out in this chapter, the committee has also concluded that the seized material warrants protection on those grounds.

3.45 One of the effects of the recommendation that the claim of privilege be upheld is that the subject material would be withheld from the investigation and, therefore, incapable of being used in any prosecution or other legal proceedings against any person, thereby limiting any detriment to any persons involved. The committee considers this to be an acceptable outcome, given the difficulty of further establishing the facts of the matter.

3.46 The committee also emphasises the need for remedial action in relation to the guideline itself. In particular, if it is to meet its stated purpose, the guideline must be revised to ensure that all persons involved in the execution of warrants understand and respect the requirement to quarantine information while claims of privilege are determined. This is a matter the committee will consider in its inquiry on the adequacy of parliamentary powers in the face of intrusive powers.

3.47 The committee therefore **recommends** that the Senate:

- (a) adopt the committee’s conclusion that the seized material warrants protection on the grounds set out in this chapter,

- (b) adopt the committee's conclusion that an improper interference occurred but refrain from making a finding of contempt in respect of the matters referred,
- (c) note the requirement for remedial action in relation to the national guideline for the execution of search warrants where parliamentary privilege may be involved, which the committee will address in its inquiry into intrusive powers.

(Senator the Hon. Jacinta Collins)

**Chair**