The Senate

Committee of Privileges

Status of material seized under warrant
Preliminary Report

163rd Report

December 2016

ISSN 1038-9857 (Print)

ISSN 1447-1396 (Online)

This document was produced by the Committee of Privileges, and printed by the Senate Printing Unit, Parliament House, Canberra

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Preliminary report

Introduction

1.1 The committee makes this preliminary report to the Senate on the disposition of documents seized under search warrants over which claims of parliamentary privilege have been made. The matter was referred to the committee on 31 August 2016. The resolution referring the matter to the committee appears at Appendix A, together with the President's statement putting the matter before the Senate and documents tabled with that statement.[1]

1.2 The inquiry concerns documents seized during the execution of three search warrants. The resolution referring the matter identifies the documents as:

(a) the material delivered to the Clerk of the Senate on 20 May 2016 by Australian Federal Police (AFP) following the execution of search warrants on 19-20 May 2016 at the office of Senator Conroy at Treasury Place, Melbourne, and at the Brunswick home of an Opposition staff member;

(b) the material delivered to the Clerk of the Senate on 24 August 2016 by the AFP following the execution of search warrants on that day at the premises of the Department of Parliamentary Services, Parliament House, Canberra.[2]

1.3 The purpose of the inquiry is to determine whether some or all of the documents over which former Senator the Hon. Stephen Conroy has claimed privilege ought to be protected from seizure by the AFP because of parliamentary privilege.

1.4 This report does the following:

- it notes the findings of a parallel privilege inquiry undertaken by the House of Representatives Committee of Privileges and Members Interests (the House Privileges Committee)
- it explains the reasons for the Senate Privileges Committee resolving to take a different path in continuing its inquiry

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1 The committee is also considering another matter, referred on 1 September 2016, requiring the committee to consider whether information gained in the execution of the warrants was used in ways that might amount to contempt of the Senate. That matter will be dealt with in future reports of the committee.

2 The resolution also refers to a third category of documents:

(c) the material referred to in a letter from Senator Conroy to the Clerk of the Senate, dated 12 August 2016, being copies of material seized from his office and the home of a staff member on 19-20 May 2016 that had been acquired by the AFP in searching any other premises.

At this stage it is not apparent to the committee that there are any documents which fall into this last category.

- it sets out the next steps the committee intends to take and
- it asks the Senate to empower the committee to take those steps.

1.5 Before turning to those matters, however, the report sketches the background of its inquiry and the state of the law with respect to parliamentary privilege and the execution of search warrants.

Privilege and the execution of search warrants

1.6 There is uncertainty at law about the extent to which parliamentary material is protected from seizure under search warrant. The relevant background is described in the paper from the Clerk of the Senate, reproduced in Appendix A.

1.7 Much of the uncertainty stems from 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 issue 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.

1.8 In 2005, to bridge this uncertainty, 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.

1.9 The preamble to the national guideline states:

> 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.

1.10 The committee considers that this important purpose should inform the interpretation and implementation of the guideline. It is worth quoting further the legal background to claims of parliamentary privilege, as set out in the guideline:

> 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.

1.11 As has been noted, the guideline fills a gap in the law. 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.

1.12 More broadly, the processes set out in the national guideline includes the following elements:

- the documents over which privilege is claimed are placed in audit bags;
- a list of the documents is prepared;
- the member is given an opportunity to take copies of the documents;
- the secured items are delivered to a neutral third party ("who may be the warrant issuing authority or an agreed third party");
- the member has five working days to notify the executing officer whether the claim is abandoned or to commence action to seek a ruling on whether the claim can be sustained;
- it is a matter for the member to determine whether to seek a ruling from a court or the relevant House;
- the items remain in the possession of the neutral third party until the claim is determined.

1.13 In the current matter, former Senator Conroy made and confirmed his claims of privilege over the seized documents in accordance with these processes, and the documents were sealed and provided to the Clerk of the Senate, as indicated at paragraph 1.2. As indicated in the President's statement, former Senator Conroy elected to have the Senate determine his claims of privilege.

1.14 The execution of warrants in this matter present the first occasion on which the processes set out in the national guideline have come before the Senate and, with this reference, before the committee. The inquiry also takes place in the context of a parallel inquiry by the House of Representatives.

The House Privileges Committee inquiry

1.15 The committee notes the intersection of its work with an inquiry of the House of Representatives Committee on Privileges and Members Interests. On Monday, 28 November 2016, the House of Representatives Committee on Privileges and Members Interests (the House Privileges Committee) reported on its own investigation

into the search warrants matter. The House inquiry related to the claim of privilege made by the Member for Blaxland, the Hon. Jason Clare MP over the documents seized in the execution of the warrant on the DPS servers in Parliament House on 24 August 2016. Copies of those documents were sealed and provided to the Clerk of each House. The House Privileges Committee recommended that the claim of privilege should be upheld:

> The committee recommends that the House rule to uphold the claim of parliamentary privilege by the Member for Blaxland in relation to material seized under a search warrant executed by the Australian Federal Police on 24 August 2016, that the Australian Federal Police be advised of the ruling by the House and that the material held by the Clerk of the House be returned to the Member for Blaxland.

1.16 The committee concluded that, because the subject of the search warrant coincided with the 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.' [para. 1.40] Referring to this fact as a 'critical circumstance', 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.

1.17 The Senate committee notes the similarity in the circumstances of the two matters, and particular the duties of Mr Clare as a shadow minister on the one hand and those of then Senator Conroy as shadow minister representing Mr Clare and as member and sometime chair of the Senate NBN Select Committee. The committee intends to consider the extent to which the approach taken by the House Privileges Committee ought also be applied in the Senate inquiry.

1.18 The approach of the House committee relies on a presumption that documents connected to a member's portfolio responsibilities are likely to be proceedings in parliament. This committee intends to consider how this approach might be further developed, including the sorts of factors that might be taken into account in determining whether and when such a presumption may be established, and what sorts of factor or evidence ought override it.

Claims of privilege made in both Houses

1.19 On 1 December 2016, the House of Representatives adopted its committee's recommendation, and resolved that the copy of the documents held by the Clerk of the House be returned to Mr Clare and withheld from the AFP investigation. This circumstance requires the committee to consider what, if any, effect a finding of privilege by the House ought to have in relation to copies of the same documents held by the Senate.

1.20 The interaction between claims of privilege made by members of different Houses raises interesting questions. One is whether a claim of privilege may be sustained by a member of one House in relation to proceedings of the other. Another is whether one House is bound to recognise the findings of the other where each considers claims of privilege made over the same documents. In the current matter it might be concluded that, if *neither* House upheld the claim of privilege in relation to particular documents, they could be provided to the AFP. However, if one House found that seized documents were privileged that finding might be thought to, in effect, prevent the other House providing them. To do otherwise may involve one House both questioning and interfering with the proceedings of the other.

1.21 The Senate committee has not formed a concluded view on these matters.

The conduct of the inquiry

1.22 The House Privileges Committee reached its conclusions without examining the seized material. The Senate Privileges Committees considers that it should take a different approach. In part this is so that the committee can consider the matters set out above. The committee has also commenced the process of gathering information to inform its determination about the disposition of the documents, and considers it appropriate to properly consider that information. The committee also has before it a contempt inquiry arising from the execution of the warrants, which will be better informed by further consideration of this matter. 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 for the committee about the effectiveness of the processes in the guideline and, in particular, concerns that the guideline does not sufficiently protect members' information. In this vein, the committee has this week received a new reference about the adequacy of parliamentary privilege as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies. Further consideration of the current matter will, again, better inform that inquiry.

1.23 Finally, and of particular concern to the committee, is evidence provided by the AFP as background to this inquiry, which indicates that the investigation of the matter initially involved 'pre-warrant' enquiries made to departments and private entities about members' offices and staff. The evidence to the committee indicated that there are no particular protocols applying in relation to making and answering such enquiries, so that the sort of protections required in the execution of search warrants may be entirely absent here. Again, these matters will be investigated as part of the matter referred this week.

Next steps

1.24 The resolution referring the matter empowers the committee to make recommendations to the Senate about the seized documents, if it can satisfy itself about their status without examining them. The committee is prohibited, at this stage, from examining them, although it could do so by seeking authorisation from the Senate. The resolution referring the matter also indicates that the committee may seek the Senate's approval to appoint an independent third party to examine the documents and make recommendations about their status.

1.25 Recalling that the committee has two connected references (including the contempt inquiry mentioned above), the committee has before it:

- Documents tabled by the President, including correspondence from former Senator Conroy and a background paper from the Clerk of the Senate about the execution of search warrants
- A submission from former Senator Conroy on each matter
- A submission from the AFP on the 'disposition' matter, but including background relevant to both matters
- A list from the AFP of the documents seized, though in general terms, argued (in the AFP submission) to be insufficient to assist in determining their status
- Copies of the three search warrants and the affidavits sworn by AFP officers seeking the warrants, with redactions

1.26 The committee has considered submissions on the first matter from the parties involved, and has also received a private briefing from the AFP. The committee considers it would be inappropriate, at this stage, to publish that material, particularly as much of it also relates to the ongoing contempt inquiry.

1.27 Submissions from both parties indicate acceptance of the process set out in the national guideline, although their interpretation of its requirements varies.

1.28 The submission from former Senator Conroy begins:

> These submissions establish that all material seized under search warrant is protected under parliamentary privilege and therefore ought to be returned to Senator the Hon. Stephen Conroy (retired) forthwith. (paragraph 1)

1.29 The submission states that the claim is founded in article 9 of the bill of rights – the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament – as incorporated into Australian law by section 49 of the Constitution and the Parliamentary Privileges Act. The submission directs attention to former Senator Conroy's contempt submission for a "demonstration of how allowing this material to be seized under search warrant would impeach the proceedings in the Parliament."

1.30 The bulk of the submission, however, is a 35 page table setting out the various ways in which documents seized under the warrants have been incorporated into parliamentary proceedings. The background to the table notes the relevant parliamentary roles of Senator Conroy and Mr Clare MP connected to the Senate NBN committee; estimates hearings and holding shadow ministries connected to the communications portfolio.

1.31 The AFP submission describes the legal background to privilege considerations and the national guideline and comments on the "procedures and outcomes prescribed by" the guideline, which it suggests "represent a significant concession in favour of parliamentary privilege" (para. 25). The Clerk's advice to the

committee, discussed further below, notes that "This somewhat surprising claim is not supported by any authorities."

1.32 While the AFP submission does not contest the application of the procedures set out in the guideline, the committee considers that it approaches them from a narrow and relativistic perspective. It notes that the relevant test is "whether the documents are 'for the purposes of or incidental to' proceedings in Parliament" but argues that, for a privilege claim to be made out, there must be a:

> …close and direct connection between the particular document and proceedings in Parliament. In particular, it is not sufficient for use in parliamentary proceedings to be merely one of several possible uses motivating the preparation of a document to attract privilege. Such use must be the clear and dominant purpose in preparing the document. (para. 27)

1.33 By contrast the advice from the Clerk advocates the use of the precise statutory language of established privilege law:

> In my view, any test must be based on the terms of the statutory expression of the immunity, rather than on selective propositions possibly derived from secondary sources. This is my concern with the AFP's suggested approach. For example, the "close and direct connection" argued by the AFP is not based on a statement of the law but on an argument for an interpretation of it. [*Odgers' Australian Senate Practice*] posits the possibility of "an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings" (p. 59). This claim summarises an element of the Senate's submission to the Federal Court in the case of *Crane v Gething* (2000) 169 ALR 727 to the effect that:
>
> > In order to invoke the immunity against production of documents, the documents in question would have to be closely related to proceedings in Parliament ***such that they fall within the expression used in the Parliamentary Privileges Act, "for purposes of or incidental to" proceedings in Parliament.*** (emphasis added).
>
> The closeness of the relationship, therefore, must be assessed by reference to the words of the statute rather than by some subjective or additional measure ("close **and** direct").

1.34 The AFP concludes that the enquiry "cannot properly be conducted without an examination of the material in question" and submits that "…the engagement of an agreed independent arbiter, on sufficiently specified terms, would be the most appropriate course of action for the committee to adopt for the assessment of the claims of parliamentary privilege in this matter." (p. 3). This approach appears to draw on the language of the background paper tabled by the President in initially putting this matter before the Senate.

1.35 The committee considers that the material before it, including the warrants and the submissions made by each party, provide a sufficient basis for determining whether the seized documents ought to be privileged. The next consideration for the committee is the test that should be applied in making that determination. There are

two aspects to this. First, developing and applying an appropriate test to determine whether material comes within the definition of 'proceedings in parliament', and secondly, consideration of a broader question connected to the purpose of privilege, that is, whether the execution of the search warrants in itself may amount to an improper interference.

'proceedings in parliament'

1.36 The committee sought advice from the Clerk of the Senate about formulating an appropriate test for determining whether documents fall within the definition of 'proceedings in parliament'. The correspondence from the committee to the Clerk, and the Clerk's advice, appear in the appendix to this report.

1.37 The Clerk has recommended an approach derived from the test used by the New South Wales Legislative Council in a case involving the Hon. Peter Breen in 2003-04, and adapted to encompass the definition of ***proceedings in parliament*** in section 16(2) of the Parliamentary Privileges Act. The derivation of the test is detailed in the Clerk's advice. 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 to the committee that there are documents which fail all three tests.

Notes: Individual documents may be considered in the context of other documents;

The assessor should divide the documents into those that satisfy any of the tests and those that satisfy none of the tests.

1.38 The committee notes the Clerk's observation, in both her advice to the committee and in the background paper, that any assessment of documents in matters such as this be "carried out as closely as possible to a judicial manner, to replicate as far as possible the task that a court might be expected to perform in determining the facts, should courts accept this jurisdiction in future matters." This recommendation

principally arises from concerns about the methodology used in earlier matters outsourced by the Senate to independent examiners.

1.39 However, in the current matter the committee has reached a different view about the steps it should take to progress its inquiry.

Examining the seized material

1.40 In determining its next steps in the current matter the committee notes that the NSW Privileges Committee examined the documents in the Breen matter itself, rather than appointing an independent assessor. The committee proposes, with the approval of the Senate, to follow that example and examine the documents itself. It is well-established that the Privileges Committee, underpinned by the resolutions which guide its work, has the capacity to operate in a quasi-judicial manner, well-suited to assessing the documents at issue in this matter against the test outlined above. The committee recognises that there may be a need to engage persons with specialist knowledge to assist it in this task, and therefore seeks the same authority to engage specialist support on the same basis as other standing and select committees.

1.41 To that end, the committee **recommends** that the Senate adopt the following resolution:

> That, in relation to the matter referred to the Privileges Committee on 31 August 2016, relating to the disposition of documents over which claims of parliamentary privilege have been made, the Senate:
>
> (a) empowers the committee to access and examine the material identified in paragraph (1) of the resolution referring the matter, which is in the custody of the Clerk of the Senate, for the purposes of its inquiry; and
>
> (b) empowers the committee to appoint persons with specialist knowledge for the purposes of the inquiry, with the approval of the President.

Improper interference

1.42 The committee also notes the observation in the Clerk's advice that, quite apart from the test whether documents fall within the definition of proceedings in parliament, the committee has an overarching responsibility to consider:

> …whether there may be a basis for a claim of privilege and possibly for resisting compulsory process, such as seizure under search warrant, if the impact of the seizure would involve improper interference with legislative activities, regardless of the use to which such documents may be put. The concept at stake is the protection of members' sources and the chilling effect on the provision of information to members of Parliament recognised by McPherson JA in *Rowley v O'Chee*:
>
> > Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a

> state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.[3]

1.43 As part of its inquiry, the committee intends to consider whether the seizure of the documents may itself have involved an improper interference in this sense. The committee will take into account the stated purpose of the national guideline and the views of other parliamentary committees which have undertaken such inquiries. In doing so, the committee will also be guided by the purpose of parliamentary privilege, which is to protect the ability of the Houses, their committees and members to carry out their functions and exercise their authority.

3 *O'Chee v Rowley* (1997) 150 ALR 199 at 215

Appendix A

Statement by the President, 30 August 2016

Background paper, *Parliamentary privilege and the execution of search warrants on members' premises—Determination of claims of privilege*

MOU and AFP National Guideline on the execution of search warrants

Letters from Senator Conroy to the Clerk of the Senate

STATEMENT BY THE PRESIDENT

CLAIM OF PARLIAMENTARY PRIVILEGE OVER SEIZED DOCUMENTS – SENATOR CONROY

As President of the Senate, my role includes watching out for the institutional rights of the Senate and senators. I therefore wish to make a statement on a question of parliamentary privilege that has important ramifications for all senators and their capacity to function in this place.

Senators may be aware that on 19 May 2016 and 24 August 2016, officers of the Australian Federal Police executed search warrants at the Melbourne office of Senator Conroy, at the home of an Opposition staff member and on the Department of Parliamentary Services here at Parliament House, and seized certain material.

In accordance with the *AFP Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, Senator Conroy claimed parliamentary privilege over the seized material which was delivered into the custody of the Clerk of the Senate, where it remains in sealed packages in the Clerk's safe. As required by the Guideline, Senator Conroy notified the AFP that he was maintaining his claim of parliamentary privilege over the documents.

As the Senate had been dissolved, Senator Conroy wrote to the Clerk in respect of both occasions, asking for her to arrange to have the matter placed before the Senate when it was reconstituted.

Senator Conroy also wrote to the Clerk, extending his claim of parliamentary privilege over any copies of material seized from his office and the home of a staff member that had been acquired by the AFP in searching other premises.

A background paper on the determination of claims of privilege following the execution of search warrants has been prepared by the Clerk for the information of senators. The paper includes analysis of the important institutional role played by the Privileges Committee in such matters.

I table copies of the correspondence from Senator Conroy, the AFP Guideline and covering memorandum of understanding, and the background paper by the Clerk.

It is now for the Senate to consider how to determine the disposition of the documents. As a first step, unless the Senate determines otherwise, I propose to facilitate discussions on a way forward and will confer with party leaders and other senators on a suitable time for those consultations to occur.

BACKGROUND PAPER

PARLIAMENTARY PRIVILEGE AND THE EXECUTION OF SEARCH WARRANTS ON MEMBERS' PREMISES—DETERMINATION OF CLAIMS OF PRIVILEGE

Parliamentary privilege and compulsory production of documents – the legal background

Members are subject to the law of the land and have no explicit immunity against subpoenas, orders for discovery issued by courts or tribunals, or search warrants, all of which may be used to obtain access to documents held by members. However, the law of parliamentary privilege limits the use that may be made of such material by a court or tribunal (the "use immunity").

In the United States, the courts have also found that parliamentary privilege encompasses a "testimonial" privilege which provides a basis for lawful refusal to produce documents or evidence without going to the use to which the evidence may be put. For example, if a senator were to be asked to give evidence about the sources for a speech in the Senate, the senator could refuse to answer any such questions about the speech on the basis that answering would in itself constitute questioning of proceedings in parliament, regardless of any other use to which the answers might be put. Testimonial privilege is recognised in the *Parliamentary Privileges Act 1987* which provides, in subsection 16(4), that a record of evidence taken by a House or committee in camera is not to be admitted in evidence before a court or tribunal for any purpose. The use to which the evidence might be put is immaterial. It is the fact that the material constitutes in camera evidence that determines its immunity from production.

There may be an effective immunity against processes for the compulsory production of documents where the documents are so closely connected with proceedings in parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings (see *Brown and Williamson Tobacco Corp v Williams*, 1995, 62 F 3d 408). This US case influenced the Queensland Court of Appeal in *O'Chee v Rowley* (1997) 150 ALR 199 in holding that parliamentary privilege could provide a basis for resisting an order for discovery of documents, although there was some uncertainty about whether this extended to documents created by persons other than the senator concerned. Since then, courts have accepted that certain documents were immune from production because they were matters done for purposes of or incidental to proceedings in parliament (for details, see *OASP*, 13th edition, p. 60).

Determination of the Crane matter

Most of the jurisprudence relates to cases involving subpoenas or orders for discovery of documents, but the same principles apply to seizure of documents under search warrant by law enforcement bodies. In one such case, *Crane v Gething* (2000) 97 FCR 9, submissions made on behalf of the Senate argued that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could

determine as a matter of fact whether particular documents were so protected. However, a single judge of the Federal Court found that the court did not have jurisdiction to determine the question because the execution of a search warrant was an executive act, not a judicial proceeding, and that only the House concerned and the executive could resolve the issue. The court ordered that the documents be forwarded to the Senate for determination of their status. As the judgment was not appealed, the Senate, by resolution, proceeded to do so. It appointed a person to examine the documents and determine whether any were protected from seizure by parliamentary privilege, to return any so protected to the senator, and to provide the remainder to the police.

Other cases

In both Houses, the execution of search warrants in members' offices has been examined as a possible contempt. In a 1995 case (*Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP*), the Privileges Committee of the House of Representatives recommended that the Speaker initiate discussions with the relevant minister about developing guidelines for use by the AFP. In a 2002 case in the Senate involving the execution of a search warrant by the Queensland Police, the Senate Committee of Privileges found that the police had taken appropriate steps to allow the senator to claim privilege. Following continuing disagreement between the senator and the police about the treatment of the documents, the committee then facilitated a similar arrangement to that used in the Crane matter and an independent arbiter examined the material, finding that none of it was covered by the terms of the warrant.

AFP Guideline

Experience of members of both Houses subjected to search warrants (or their staff as in the Brereton/Dorling case in 2000) led to the finalisation in 2005 of a memorandum of understanding between the Presiding Officers, the Attorney-General and Minister for Justice, underpinned by an *AFP Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*. The guideline includes a procedure to be followed where a claim of parliamentary privilege is made ("unless the executing officer considers a claim to be arbitrary, vexatious or frivolous" in which case another procedure is followed). The procedure includes the following elements:

- the documents are placed in audit bags;
- a list of the documents is prepared;
- the member is given an opportunity to take copies of the documents;
- the secured items are delivered to a neutral third party ("who may be the warrant issuing authority or an agreed third party");
- the member has five working days to notify the executing officer whether the claim is abandoned or to commence action to seek a ruling on whether the claim can be sustained;
- it is a matter for the member to determine whether to seek a ruling from a court or the relevant House;

- the items remain in the possession of the neutral third party until the claim is determined.

The question for determination

On 19 May 2016, officers of the AFP executed search warrants at the office of Senator Conroy in Treasury Place, Melbourne, and at the Brunswick home of a staff member. It was widely reported that the seized material related to unauthorised disclosure of documents from NBN concerning the rollout of the network. In accordance with the relevant Guideline, Senator Conroy claimed parliamentary privilege over the seized documents which were delivered into the custody of the Clerk. Senator Conroy maintained his claim of privilege and has asked for the question to be placed before the Senate for determination.

For parliamentary privilege to prevent the seizure of documents by a law enforcement agency in a case where the matter has been placed before a House for determination, the question to be answered is whether the documents fall within the meaning of "proceedings in Parliament" and, in particular, the expression used in the Parliamentary Privileges Act, "for purposes of or incidental to" the transaction of parliamentary business.

In order to ascertain whether any particular document is immune from production by virtue of parliamentary privilege, the document's relationship with proceedings in Parliament must be assessed. For example, was a document given to a senator to:

- provide source material for a speech to made in the Senate?
- provide information for the formulation of questions on notice or without notice?
- inform questions asked either at a specific committee inquiry or at estimates hearings?

If that relationship is not clear from a description of the document, or from its face, the assessor may require evidence of the connection with proceedings in Parliament, and it is important that any such evidence be gathered in a fair and transparent manner.

In the Crane matter, the process for obtaining such evidence, and the manner in which the assessment was to be carried out, were not sufficiently specified in the resolution appointing the arbiter. Although the resolution directed the person to have regard to the *Parliamentary Privileges Act 1987*, relevant court judgments relating to the interpretation and application of the Act and relevant sections of Privileges Committee reports dealing with protection of documents of senators, it was not specifically provided that the task should be carried out in a judicial manner, to replicate as far as possible the task that the court had been expected to perform in determining the facts.

A strong reason for appointing an independent arbiter to make an assessment was to keep the process at arm's length from any partisan involvement. However, private consultations occurred between the independent arbiter and stakeholders, including party representatives, the senator concerned and the AFP. Without ground rules for such consultations, arm's length detachment was not able to be demonstrated, regardless of whether it had occurred. As a model for future processes, it was open to criticism on this basis.

A better process?

These problems could be overcome if the process were conducted with more formality, as befits the significance of the matter, and less outsourcing of the Senate's responsibility to make the determination. The obvious option would be to involve the Privileges Committee, at least in the initial definition of the task to be performed and in recommending a further process.

The Privileges Committee is accustomed to operating in a quasi-judicial manner in contempt inquiries and to making findings on questions of fact. Any evidence-gathering by the committee would be done in the context of known parliamentary powers and immunities, and in accordance with its usual procedures. These are documented in the Committee's *125th Report* and involve seeking submissions from any person whom it believes may be able to assist with its inquiry, and exchanging submissions between the parties to seek responses to the extent it considers necessary. At that point, if the committee were in a position to do so, it could make a recommendation to the Senate about the status and disposition of the documents.

Alternatively, the committee could recommend that a further assessment occur. Such an assessment might involve the engagement of a third party to examine the matter further (including authorising that person to examine the documents if that were considered necessary). The committee could make recommendations about the procedures to be followed in the further assessment and the identification of any such third party. The appointed assessor would report to the committee. After deliberating on the assessor's report, the committee could then make a recommendation to the Senate about the status and disposition of the documents. Adoption of the committee's recommendation, with or without amendment, would constitute determination by the Senate of the matter, as envisaged by the AFP Guideline.

Clerk's Office
August 2016

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

/ / 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

15 / 2 / 2005

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

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Authorised by:	NMESO
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Date Issued:	2005-02-25
Date of Next Review:	2007-02-01
Document Identifier:	ON00032
Registry File Number:	

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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.

SENATOR THE HON STEPHEN CONROY
SENATOR FOR VICTORIA

24 May 2016

Dr Rosemary Laing
Clerk of the Senate
Parliament House
CANBERRA ACT 2600

By email: Clerk.Sen@aph.gov.au

Dear Clerk

I refer to material seized by the Australian Federal Police following the execution of search warrants on 19 May 2016 at my office in Treasury Place, Melbourne and at the home of a staff member, which material I understand is securely held in your office pending the determination of the claim.

For the purpose of paragraph 6.11 of the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, I have notified the AFP that I am maintaining my claim for parliamentary privilege over the seized material and that I intend to seek a ruling from the Senate on the claim.

As the Senate is currently dissolved and the office of President vacated, please accept this letter to you as the commencement of action to seek a ruling from the Senate on the claim of privilege. I would be grateful if you could arrange to have this matter placed before the Senate when it is reconstituted.

Yours sincerely

Stephen Conroy

Senator the Hon. Stephen Conroy
Shadow Minister for Defence
Deputy Leader of the Opposition in the Senate
Senator for Victoria

Electorate Office 17 Mason Street Newport VIC 3015 Tel 03 9391 4952 Fax 03 9391 5451 Toll Free 1300 131 546
Email Senator.Conroy@aph.gov.au Postal Address PO Box 3162 Newport West VIC 3015

SENATOR THE HON STEPHEN CONROY
SENATOR FOR VICTORIA

12 August 2016

Dr Rosemary Laing
Clerk of the Senate
Parliament House
CANBERRA ACT 2600

By email: clerk.sen@aph.gov.au

Dear Rosemary Clerk

I refer to material seized by the Australian Federal Police following the execution of search warrants on 19-20 May 2016 at my office in Treasury Place, Melbourne, and at the home of a staff member, which is held in your office pending the determination of my privilege claim.

In addition to executing those warrants, it has been reported that the AFP searched the offices of NBN Co Limited and interviewed several of its employees. I believe that the AFP may have acquired copies of the material seized from my office and the home of a staff member, over which a privilege claim has been made, as a result of these additional searches. It has also been speculated that the AFP accessed telecommunications data and intercepted other telecommunications in relation to this investigation.

I believe that these additional inquiries may have captured words spoken, and acts done, in the course of, or for the purposes of, or incidental to, parliamentary proceedings. Accordingly, I claim parliamentary privilege in relation to all material obtained by either the AFP or NBN Co Limited as a result of those inquiries. I wish to seek a ruling from this Senate on this claim, in addition to the matter I brought to your attention on 24 May 2016.

As the new Senate is yet to meet and the office of President is vacant, I ask you to please accept this letter to you as the commencement of action to seek a ruling from the Senate on my privilege claim. I would be grateful if you could arrange to have this matter placed before the Senate when it next meets.

Yours sincerely,

Stephen Conroy

Senator the Hon. Stephen Conroy
Deputy Leader of the Opposition in the Senate
Shadow Special Minister of State
Shadow Minister for Sport
Senator for Victoria

Electorate Office 17 Mason Street Newport VIC 3015 Tel 03 9391 4952 Fax 03 9391 5451 Toll Free 1300 131 546
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SENATOR THE HON STEPHEN CONROY
SENATOR FOR VICTORIA

26 August 2016

Dr Rosemary Laing
Clerk of the Senate
Parliament House
CANBERRA ACT 2600

By email: Clerk.Sen@aph.gov.au

Dear Clerk

I refer to the claim of parliamentary privilege made in relation to material the Australian Federal Police seized from the Department of Parliamentary Services at Parliament House on Wednesday 24 August 2016, which I understand is securely held in your office pending the determination of the claim.

For the purpose of paragraph 6.11 of the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, I have notified the AFP that I am maintaining my claim for parliamentary privilege over the seized material and that I intend to seek a ruling from the Senate on the claim.

As the Senate is currently dissolved and the office of President vacated, please accept this letter to you as the commencement of action to seek a ruling from the Senate on the claim of privilege. I would be grateful if you could arrange to have this matter placed before the Senate when it is reconstituted.

Yours sincerely

Stephen Conroy

Senator the Hon. Stephen Conroy
Deputy Leader of the Opposition in the Senate
Shadow Special Minister of State
Shadow Minister for Sport
Senator for Victoria

Appendix B

Committee chair's letter to the Clerk of the Senate, 24 October 2016

Clerk of the Senate's advice, 1 November 2016

AUSTRALIAN SENATE

COMMITTEE OF PRIVILEGES

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3360
FAX: (02) 6277 3199
E-mail: priv.sen@aph.gov.au

D16/157127

24 October 2016

Dr Rosemary Laing
Clerk of the Senate

Dear Dr Laing

As you know, the committee is inquiring into two matters connected to claims of parliamentary privilege made by former Senator Conroy over documents seized and sealed during the execution of search warrants in May and August this year. The committee has resolved to write to you seeking your advice in relation to the matter concerning the disposition of the documents.

As background, the committee has secured from the AFP a list and description of the seized material, in accordance with paragraph (3) of its terms of reference. There are 50 seized documents or storage devices (USBs; computer hard drives) listed. The list is drawn from the Property Seizure Record completed in respect of each warrant, whose purpose is related to the admissibility of evidence. The letter suggests that such a list "…is not well suited to aiding the committee's assessment of the relationship between documents referred to in the list and proceedings in Parliament." The AFP appended a list of six NBN documents, "provided voluntarily by NBN Co.", which are the subject of the unlawful disclosure investigation. The letter states "We believe that copies of the unlawfully disclosed documents were found during the execution of the warrants...".

The AFP has also provided the committee with a submission, which concludes that "…the engagement of an agreed independent arbiter, on sufficiently specified terms, would be the most appropriate course of action for the committee to adopt for the assessment of the claims of parliamentary privilege in this matter." (para. 14). The submission expands on this point under the heading *C. The Claim for Parliamentary Privilege* on pp. 4-7, which describes the legal background to privilege considerations and the *AFP Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* under which these searches have been executed.

The submission comments on the "procedures and outcomes prescribed by" the guideline, which it suggests "represent a significant concession in favour of parliamentary privilege" (para. 25). However, the submission does not contest the application of those procedures. It notes that the relevant test is "whether the documents are 'for the purposes of or incidental to'

proceedings in Parliament" and argues that, for a privilege claim to be made out, there must be a:

> …close and direct connection between the particular document and proceedings in Parliament. In particular, it is not sufficient for use in parliamentary proceedings to be merely one of several possible uses motivating the preparation of a document to attract privilege. Such use must be the clear and dominant purpose in preparing the document. (para. 27)

Relevant extracts of the material provided by the AFP are attached for your information.

Former Senator Conroy has provided the committee with submissions on both matters of privilege. In relation to the disposition of the documents he submits:

> These submissions establish that all material seized under search warrant is protected under parliamentary privilege and therefore ought to be returned to Senator the Hon. Stephen Conroy (retired) forthwith. (para. 1)

The submission states that the claim is founded in article 9 of the bill of rights, as incorporated into Australian law by section 49 of the Constitution and the *Parliamentary Privileges Act 1987*. The submission on the disposition of the documents (the ***privilege submission***) directs attention to his ***contempt submission*** (paragraphs 30 to 33 and 36 to 57) for a "demonstration of how allowing this material to be seized under search warrant would impeach the proceedings in the Parliament."

The bulk of the privilege submission – Attachment A – is a 35 page table setting out the various ways in which documents seized under the warrants have been incorporated into parliamentary proceedings. The background to the table notes the relevant parliamentary roles of Senator Conroy and Mr Clare MP connected to the Senate NBN committee; estimates hearings and holding shadow ministries connected to the communications portfolio.

A copy of these submissions has also been attached for your information.

Although it has not formed a concluded view on the matter, the committee may not be able to determine the matter itself in accordance with paragraph (5) of the committee's terms of reference – that is, without examining the material. The committee is therefore considering the development of arrangements for the appointment (with the further approval of the Senate) and supervision of a person to examine the material and report to the committee on the claim of privilege, in accordance with paragraph (6).

The committee would welcome your advice on the appropriate test to be applied in the examination of the material and the claim of privilege, and would also welcome your views on identifying an appropriate person to undertake that task.

Yours sincerely

(Senator the Hon. Jacinta Collins)
Chair

AUSTRALIAN SENATE

CLERK OF THE SENATE

PARLIAMENT HOUSE
CANBERRA ACT 2600
TEL: (02) 6277 3350
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E-mail: clerk.sen@aph.gov.au

D16/160598

1 November 2016

Senator the Hon Jacinta Collins
Chair
Committee of Privileges
Parliament House
Canberra ACT 2600

Dear Senator Collins

DISPOSITION OF MATERIAL SEIZED UNDER SEARCH WARRANT

The committee has sought my advice on the appropriate test for assessing whether material seized by the Australian Federal Police (AFP) during the execution of search warrants on premises in Melbourne on 19-20 May 2016 and on the Department of Parliamentary Services on 24 August 2016 is covered by parliamentary privilege.

The committee has also sought my views on identifying an appropriate person to examine the seized material and the claim of privilege, should the committee decide to recommend that course of action to the Senate.

The seized material

The seized material falls into two batches as follows:

(1) Material seized from a designated Opposition Office Holder suite in the Commonwealth Parliamentary Offices, East Melbourne on 19 May 2016 and from a private address in Brunswick, Melbourne on 19-12 May 2016, over which Senator Conroy has claimed parliamentary privilege.

(This material was delivered to me on the afternoon of Friday, 20 May 2016 and remains secured in my office.)

(2) Material seized from the Department of Parliamentary Services on 24 August 2016, over which Senator Conroy ***and a member of the House of Representatives*** have claimed parliamentary privilege.

(A copy of this material was delivered to me on the evening of Wednesday, 24 August 2016 and remains secured in my office. I was advised by the AFP officers who

> delivered the material to me that a copy had already been delivered to the Clerk of the House of Representatives.)

While Senator Conroy has claimed parliamentary privilege over the entirety of the seized material, part of the material is also subject to a claim of parliamentary privilege by a member of the House of Representatives and I understand that the House has referred the question of the disposition of that material to its Committee of Privileges and Members' Interests for advice.

This may be of no immediate concern to the committee but on my reading of the material provided so far by former Senator Conroy and by the AFP, there is largely no specification of which items were seized on which occasion, and Mr Conroy's submission includes reference to proceedings of the House of Representatives as well as proceedings of the Senate in substantiating the claim for privilege. The question that arises is whether the Senate can determine a claim of privilege by a senator if the proceedings in respect of which privilege is claimed are proceedings of another House? If, as appears likely, the matters have been prosecuted in both Houses by a senator and a member working in concert, this question may not need to be addressed, but the committee may wish to give it some thought in formulating the task for an independent assessor and considering whether it should seek formal permission from the Senate, under standing order 40, to confer with the House of Representatives committee on the question of the disposition of the material seized from DPS computer facilities.

The test

This is the first case since the Memorandum of Understanding was entered into, and the AFP Guideline came into effect, in which the Senate has been asked to determine a claim of privilege. It is therefore very important for the committee to recommend an appropriate test. Unlike other cases involving the execution of search warrants on the premises of members of Parliament, the AFP investigation does not involve an inquiry into the individual conduct of members of Parliament potentially leading to charges against those members. Rather, it touches on the provision of information to members of Parliament, including to inform their parliamentary activities.

As you note in your letter of 24 October 2016, the AFP argues that, for a privilege claim to be made out, there must be a:

> … close and direct connection between the particular document and proceedings in Parliament. In particular, it is not sufficient for use in parliamentary proceedings to be one of several possible uses motivating the preparation of a document to attract privilege. Such use must be the clear and dominant purpose in preparing the document.

The AFP also suggests that the procedures prescribed in the guideline "represent a significant concession in favour of parliamentary privilege". This somewhat surprising claim is not supported by any authorities.

On the other hand, Mr Conroy's submission explains how his claim is based on Article 9 of the 1689 Bill of Rights, as incorporated into Australian law by section 49 of the Constitution, under which authority the *Parliamentary Privileges Act 1987* was enacted (see the "contempt submission", paragraphs 30 – 33 and, for an explanation of how seizure would impeach – or involve impermissible inquiry into – proceedings in Parliament, see paragraphs 36 – 57).

Section 16 of the Parliamentary Privileges Act is a statutory declaration of the formerly established scope of the traditional interpretation of Article 9. A detailed account of the terms of section 16 is given in *Odgers' Australian Senate Practice* (*OASP*), 13th edition, Chapter 2, Parliamentary privilege, under the heading Effect of the 1987 Act (pp. 49-53), an extract of which is attached for the committee's convenience.

In my view, any test must be based on the terms of the statutory expression of the immunity, rather than on selective propositions possibly derived from secondary sources. This is my concern with the AFP's suggested approach. For example, the "close and direct connection" argued by the AFP is not based on a statement of the law but on an argument for an interpretation of it. *OASP* posits the possibility of "an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings" (p. 59). This claim summarises an element of the Senate's submission to the Federal Court in the case of *Crane v Gething* (2000) 169 ALR 727 to the effect that:

> In order to invoke the immunity against production of documents, the documents in question would have to be closely related to proceedings in Parliament ***such that they fall within the expression used in the Parliamentary Privileges Act, "for purposes of or incidental to" proceedings in Parliament.*** (emphasis added).

The closeness of the relationship, therefore, must be assessed by reference to the words of the statute rather than by some subjective or additional measure ("close **and** direct"). The Crane matter involved allegations about use of charter flight entitlements. That parliamentary privilege should only extend to proceedings in Parliament rather than to such tangential administrative matters as those associated with members' expenses claims or entitlements was noted by French J. in *Crane v Gething* (2000) 169 ALR 727, at paragraph 43 and has been consistently upheld by courts in recent times (for example, *Slipper v Magistrates Court of the Australian Capital Territory* [2014] ACTSC 85; *R v Chaytor* [2010] UKSC 52).

Similarly, the argument for a "clear and dominant purpose" is not an established test in this context but a proposition. See, for example, *OASP*, p. 62: "The 'dominant purpose' test applied by the courts in respect of legal professional privilege would probably also be applied to documents to determine their immunity under parliamentary privilege." For a further explication of this proposition, see evidence given by the former Clerk of the Senate to the NSW Legislative Council Privileges Committee in 2003 and quoted in the committee's report, *Parliamentary privilege and seizure of documents by ICAC*, December 2003, pp. 11-12:

□ YES → falls within 'proceedings in Parliament'.

□ NO → does not fall within 'proceedings in Parliament'.

(*Parliamentary privilege and seizure of documents by ICAC No. 2*, March 2004, p. 8.

The NSW Privileges Committee did not engage an independent assessor, but applied the test itself, finding that while none of the documents met the first test and only some met the second test, all of the documents that had been identified by the member as attracting privilege did meet the third test and were therefore privileged, conclusions adopted by the Legislative Council. For commentary on the method, see *New South Wales Legislative Council Practice*, Lynn Lovelock and John Evans, Federation Press, 2008, pp. 73-75. In particular, the authors observe that the procedure in this case:

> … included steps to enable the particular documents in dispute to be identified, allowing undisputed documents to be returned to the Commission at an early stage, and provided for the question of the immunity from seizure to be determined by the House itself rather than an agent. (p. 74)

There are two significant points of difference between the NSW case and the task before the committee. The most obvious one is that the Senate has instructed that the committee shall not examine the documents itself. The second is the different basis of parliamentary privilege in NSW, albeit one that still relies on Article 9 of the bill of rights. Although I am commending the NSW test for consideration, it will be necessary to ensure that the NSW test, if proposed by the committee and adopted by the Senate, would be appropriate for the more detailed terms of section 16 of the Parliamentary Privileges Act and, specifically, subsection (2) which defines "proceedings in Parliament". It is clear from the language used in the test, however, that regard was had to the language of the Commonwealth Act in formulating it.

Subsection 16(2) of the Parliamentary Privileges Act is in the following terms:

> For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all 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, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

It may be useful to note at this point that section 16 is widely regarded as a correct codification of the existing law. Its validity was affirmed by the Federal Court in *Amman Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223, in which the judge found the Act to be a valid and clear declaration of the previous law, a view supported in a South Australian case, *Rann v Olsen* (2000) 72 SASR 450, and by the Judicial Committee of the Privy Council of the United Kingdom in a New Zealand case, *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1. Section 16 has been closely followed by the New Zealand Parliament in that country's Parliamentary Privilege Act 2014. The United Kingdom Parliament has vacillated on its own need for a partial codification of parliamentary privilege but two separate joint committees on the subject in 1999 and 2013 have broadly affirmed the Australian approach (although the two committees took opposite views on whether the UK should proceed immediately to enact such legislation).

Importantly, although neither Article 9 nor section 16 is confined to documents, documents will be a significant medium of many proceedings in Parliament. Whether documents were created for that purpose is a conclusive test of privilege only in the affirmative. The status of documents in this category is determined by an affirmative answer to question 1 of the NSW test, adapted to reflect the language of subsection 16(2):

> 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?

A document that was not ***brought into existence*** in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee may nonetheless attract privilege as a proceeding in Parliament. In order to ascertain whether any particular document is immune from production by virtue of parliamentary privilege, the document's relationship with proceedings in Parliament must be assessed, noting that "proceedings in Parliament" means:

> … all 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 a committee.

Question 2 of the NSW test provides one way of answering the question, "If this document was not brought into existence in the course of or for purposes of or incidental to the transacting of the business of a House or a committee, what is its connection with parliamentary proceedings, if any?" Question 2 could be adapted as follows to give full expression to the formulation of section 16(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 question 3.

The most problematic element of the test is question 3. It is problematic because it enters the realms of hypothesis. The NSW committee justified the question on the basis of its analysis

of the case law which led it to conclude that a link may also be established by the ***retention*** of a document for purposes of or incidental to the transaction of parliamentary business (see *O'Chee v Rowley* (1997) 150 ALR 199 at 209; and *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28, at paragraph 22). It was a point on which the NSW committee differed with ICAC (see the No. 2 report, cited above, pp. 6-7).

In my view, a more objective test would be whether there is contemporary or contextual evidence about the intended use of the documents. From the point of view of the assessor's task, the answer must be sought within the body of the seized material (for example, within the seized emails and/or email trails). If there is no such evidence within the context of the seized material then the assessor should report that finding to the committee.

The final question would therefore be:

> 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 to the committee that there are documents which fail all three tests.

The committee may then wish to consider seeking any further evidence that might cast light on a possible connection between proceedings in Parliament and any documents not satisfying any of these three tests.

There is also an overarching question for the committee to consider and that is whether there may be a basis for a claim of privilege and possibly for resisting compulsory process, such as seizure under search warrant, if the impact of the seizure would involve improper interference with legislative activities, regardless of the use to which the documents may be put. The concept at stake is the protection of members' sources and the chilling effect on the provision of information to members of Parliament recognised by McPherson JA in *Rowley v O'Chee*:

> Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.
>
> (*O'Chee v Rowley* (1997) 150 ALR 199 at 215)

As the NSW Legislative Council Privileges Committee observed in its first report on the ICAC matter (*Parliamentary privilege and seizure of documents by ICAC*, December 2003, p. 36) in coming to the conclusion that seizure by ICAC could amount to "impeaching or questioning" of proceedings in Parliament:

> … the committee is also mindful of the overriding purpose of Article 9, as expressed in the advice provided to the Clerk of Parliaments by Mr Walker, viz "to enhance

> deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of members, particularly against threats or reprisals from the Executive". Further, the Committee is mindful of the potentially "chilling effect" on the flow of information to members in future which may result from the seizure of privileges documents in the course of Executive investigations – a flow of information on which members substantially depend to participate in the deliberative democracy and responsible government to which Mr Walker refers.

This is an issue on which the committee may wish to seek further submissions in due course.

There are also other issues that the committee may wish to give guidance on to any assessor.

First, there is the issue of the status of the staff member from whose home material was seized. The definition of "proceedings in Parliament" does not place limits on the status or identity of those to whom the privilege applies but focuses on the acts done or words spoken, including by witnesses and parliamentary staff preparing committee reports, for example. Thus, documents do not have to be in the possession of a senator to attract the immunity. Material prepared by an adviser or provided to a senator for purposes of parliamentary proceedings and in the possession of the adviser would be immune from seizure from the adviser on the same basis.

Secondly, Mr Conroy's "privilege submission" alludes at several points to the publication of information in the press, apparently based on pre-existing NBN documents, copies of which were later seized by the AFP. While I have not examined the matter exhaustively, there would appear to be occasions when publication in the press pre-dated the proceedings in Parliament to which the documents in question are claimed to be for purposes of or incidental to.

The question which arises is whether such other uses negate or diminish the claimed privilege. On the one hand, parliamentary privilege is absolute. Once words spoken or acts done are demonstrated as coming within the definition of "proceedings in Parliament", then ***those*** words spoken or acts done are covered by absolute privilege. On the other hand, if documents obtained were used for several purposes, only one of which relates to proceedings in Parliament, then those other uses cannot attract parliamentary privilege. The AFP's submission includes the proposition (in paragraph 28) that any immunity from seizure of a pre-existing document should be determined by a dominant purpose test. This is also a matter on which the committee may wish to seek further submissions in due course. As noted above, in Mr Evans' evidence to the NSW committee inquiry on ICAC, he was referring to the possibility of a dominant purpose test in the context of the creation of a document, not its use.

Finally, the committee may also wish to charge the assessor with examining whether the seized material was within the terms of the warrants, and I note that the AFP has provided copies of the three search warrants.

To summarise, the test which I propose for the committee's consideration is 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 to the committee that there are documents which fail all three tests.

Note:

- individual documents may be considered in the context of other documents;
- the assessor should divide the documents into those that satisfy any of the tests and those that satisfy none of the tests.

Identifying an assessor

In this advice, I do not propose specific names for the committee's consideration but make suggestions about the types of assistance that might be provided from various sources.

From the background paper that was tabled by the President on 31 August 2016 (copy attached), it will be apparent to the committee that I favour the task being carried out as closely as possible to a judicial manner, to replicate as far as possible the task that a court might be expected to perform in determining the facts, should courts accept this jurisdiction in future cases. It is therefore my view that an assessor should be a retired judge, rather than a senior legal practitioner or counsel. I am more persuaded of the benefits of having a retired judge by the fact that this is the first occasion on which the Senate has been asked to make a determination of privilege and the process adopted will have valuable lessons for future cases, as well as for other jurisdictions facing similar issues in future.

I have also suggested above that, in view of the need for both Houses to separately determine the status of the material seized from DPS, consultation might be desirable, including on the possibility of following the same process and appointing the same person as assessor.

There have been a few cases where different models of assessment were tried. In a British case involving a member of Parliament and a civil servant in a "leak" inquiry, disputed documents were examined in the course of a single day by two House of Commons officers in the presence of the member's solicitor. A US case, involving serious charges for which the congressman was later imprisoned, involved a "filter team" including justice department lawyers and an FBI officer not involved in the specific investigation checking the material to ensure that it was within the warrant and assessing whether it fell within the "speech or debate" clause in the US Constitution.

I mention these examples in case the committee is minded to consider whether the task would benefit from any expertise that could be provided by AFP investigators (not connected to the case) or parliamentary officers as advisers, either to the assessor or the committee. A retired parliamentary officer, for example (long, not recently, retired, I hasten to add), could provide technical assistance.

On the issue of ICT technical assistance, the committee may also wish to consider whether it should seek the assistance of DPS or AFP technical staff to print out or otherwise assist the assessor with access to the USB sticks and hard drives mentioned in the AFP's list of seized items.

Please let me know if I can be of any further assistance.

Yours sincerely

(Rosemary Laing)