
The Parliament of the Commonwealth of Australia

Claim of parliamentary privilege by a Member in relation to material seized under a search warrant

House of Representatives
Privileges and Members' Interests Committee

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Canberra

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Membership of the Committee

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Deputy Chair Mr Pat Conroy MP

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Ms Michelle Landry MP

Mr Tony Pasin MP

Hon Warren Snowdon MP (nominee of the Deputy Leader of the Opposition)

Hon Wayne Swan MP

Committee Secretariat

Secretary Ms Claressa Surtees

Research Officer Mr Stuart Woodley

Administrative Officers Ms Laura Gillies

Ms Gillian Drew



Terms of reference

- (1) the House Standing Committee of Privileges and Members' Interests consider the claim for privilege in relation to the material seized by the Australian Federal Police under a search warrant executed on the Department of Parliamentary Services at Parliament House on 24 August 2016 and which is subject of a claim of parliamentary privilege by the Member for Blaxland under paragraph 6.11 of the "AFP National Guideline for execution of search warrants where parliamentary privilege may be involved" and make a recommendation to the House about its ruling on the claim;
- (2) in considering the claim, the Committee shall have regard to the law of parliamentary privilege, including the *Parliamentary Privileges Act 1987* and any case law relevant to the interpretation of the Act;
- (3) the Committee shall provide affected parties with the opportunity to make submissions on the claim of parliamentary privilege, including on the application of the law of parliamentary privilege;
- (4) if the Committee is able to determine the matter without the material being examined, it shall accordingly make a recommendation to the House about its ruling on the claim;
- (5) if the Committee is unable to determine the matter without the material being examined, it may engage expert assistance to examine the material and report to it on the claim of parliamentary privilege. The Committee shall then make a recommendation to the House about its ruling on the claim; and
- (6) if the Committee approves the engagement of expert assistance to examine the material, the Clerk of the House shall make the material available to the expert/experts so engaged only for the purpose of their examination of the material, but otherwise the material shall remain in the custody of the Clerk of the House at all times until its disposition is determined by the House, and shall not be examined by the Committee.



List of recommendations

Recommendation 1

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.

Execution of a search warrant

- 1.1 This reference arose from the execution of a search warrant by the Australian Federal Police (AFP) on a parliamentary department at Parliament House on Wednesday, 24 August 2016. The search warrant authorised the search and seizure of evidential material which satisfied three conditions, the second of which related to, among other things, a named staff member of the Member for Blaxland, the Hon Jason Clare MP. The Member for Blaxland was not himself identified under the terms of the search warrant.
- 1.2 The Speaker of the House and the Member for Blaxland were each notified by separate letters, on 23 August, that the AFP intended to execute a search warrant the following day on the Department of Parliamentary Services. The Department of Parliamentary Services provides a wide range of services and facilities to the Parliament including, central computing facilities and services, and telecommunications. In AFP correspondence related to the search warrant the AFP characterised the search as an 'IT process'.
- 1.3 The AFP's letters of notification specified that the process to be followed, in execution of the search warrant, was to be in accordance with the *AFP National Guideline for execution of search warrants where parliamentary privilege may be involved*.
- 1.4 The relevant circumstances also include that at the time the search warrant was issued and executed the House was dissolved and the Hon Tony Smith MP was the deemed Speaker for certain purposes, in accordance with the *Parliamentary Presiding Officers Act 1965*, s. 6. The Opening of the 45th Parliament was scheduled for the following week, on Tuesday, 30 August 2016. A general election had been conducted the month before, on 2 July, and the government had been sworn in on 18 July. By the time

of the referral, the House had met more than once and all members of the committee had been appointed by the House.

Terms of the search warrant

- 1.5 The search warrant was issued under section 3E of the *Crimes Act 1914*, for a constable to enter and search the Department of Parliamentary Services for material which satisfied three conditions, and to seize such material. In general terms, the conditions are:
- **First condition:** any one of the following – computers, related devices and computer records;
 - **Second condition:** the things of the first condition which relate to any one or more of the following aspects – two named individuals (one of whom was a staff member of the Member for Blaxland), the NBN, certain computer networks and applications, certain media organisations; and
 - **Third condition:** reasonable grounds that the things and related aspects afford evidence of two specified indictable offences, under the *Crimes Act 1914* between 1 August 2014 and 15 March 2016, with an unidentified Commonwealth officer having communicated documents relating to the NBN, contrary to subsection 70(1), and one of the individuals named in the second condition having received documents, contrary to subsection 79(6).

Claim of parliamentary privilege by a member

- 1.6 On 23 August, after being notified by the AFP about the intended execution of the search warrant, the Member for Blaxland advised the AFP that he would be claiming parliamentary privilege for all material seized as a result of the execution of the search warrant. In acknowledging this claim the AFP responded that the seized material would be handled in accordance with the agreed procedures and secured with the Clerk of the House immediately after the search was completed.
- 1.7 In a statement to the House on 13 September, the now Speaker Smith set out the relevant facts in relation to the matter. The Speaker confirmed that the Member for Blaxland was claiming parliamentary privilege for all material seized and was now seeking a ruling from the House in relation to his claim for parliamentary privilege, an action anticipated by the AFP National Guideline.

- 1.8 The Speaker acknowledged that this would be the first occasion on which such a ruling had been sought from the House, following the execution of a search warrant under the AFP National Guideline. He stated further that he would undertake consultations to determine the way in which the claim could be considered.

Reference to the committee

- 1.9 In addition to complaints of breach of privilege or contempt which may be referred to the committee by the House (SO 51) or the Speaker (SO 52), the House may pass a resolution to ask the committee to ‘inquire into and report on ... any other related matter referred to it by or in accordance with a resolution of the House’ (SO 216(a)(i)).
- 1.10 On 11 October, the Speaker made a further statement informing the House that he had undertaken consultations on the matter relating to the Member for Blaxland. The Speaker also presented a paper prepared by the Clerk’s Office, *Notes on process to determine claims of parliamentary privilege in relation to the execution of search warrants on members’ premises*. The paper proposed that the House Standing Committee of Privileges and Members’ Interests could be tasked with considering the claim of parliamentary privilege made by the Member for Blaxland and making a recommendation to the House about its ruling on the claim.
- 1.11 The Speaker then gave precedence to a motion of referral and the House agreed to refer the matter to the committee in the following terms:
- (1) the House Standing Committee of Privileges and Members’ Interests consider the claim for privilege in relation to the material seized by the Australian Federal Police under a search warrant executed on the Department of Parliamentary Services at Parliament House on 24 August 2016 and which is subject of a claim of parliamentary privilege by the Member for Blaxland under paragraph 6.11 of the “AFP National Guideline for execution of search warrants where parliamentary privilege may be involved” and make a recommendation to the House about its ruling on the claim;
 - (2) in considering the claim, the Committee shall have regard to the law of parliamentary privilege, including the *Parliamentary Privileges Act 1987* and any case law relevant to the interpretation of the Act;
 - (3) the Committee shall provide affected parties with the opportunity to make submissions on the claim of parliamentary

privilege, including on the application of the law of parliamentary privilege;

(4) if the Committee is able to determine the matter without the material being examined, it shall accordingly make a recommendation to the House about its ruling on the claim;

(5) if the Committee is unable to determine the matter without the material being examined, it may engage expert assistance to examine the material and report to it on the claim of parliamentary privilege. The Committee shall then make a recommendation to the House about its ruling on the claim; and

(6) if the Committee approves the engagement of expert assistance to examine the material, the Clerk of the House shall make the material available to the expert/experts so engaged only for the purpose of their examination of the material, but otherwise the material shall remain in the custody of the Clerk of the House at all times until its disposition is determined by the House, and shall not be examined by the Committee.

Relevant law of parliamentary privilege

- 1.12 Parliamentary privilege encompasses the special legal rights which apply to each House of Parliament, its committees and its members. The powers and protections are in place to ensure that the Parliament can carry out its functions properly, including, debating matters of importance freely, discussing grievances and conducting investigations effectively without interference from government, the courts or anybody else.
- 1.13 The special rights and immunities of parliamentary privilege are not the prerogative of members in their personal capacities. They apply to members insofar as they are intended to allow members to carry out their responsibilities to the House and their constituents without obstruction or fear of prosecution.
- 1.14 The material covered by the search warrant includes a member's records and documents. The law of parliamentary privilege is relevant in relation to members' records and documents as some of them may enjoy the protection of parliamentary privilege. If certain records and documents are covered by parliamentary privilege there are restrictions on legal action that could be taken in relation to them. There also could be restrictions on the use of those records and documents in any court or other legal proceedings.

- 1.15 In order for the records or documents of a member to be covered by parliamentary privilege, they must fall within the definition of 'proceedings in Parliament' as provided in the *Parliamentary Privileges Act 1987*:

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...

(2) 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.

- 1.16 If members' records and documents are so covered this is not a prohibition on their disclosure or production in courts or tribunals, rather there are strict limits on the use that can be made of them in a court or tribunal. The protection to be given to 'proceedings in Parliament' is defined as follows:

16 Parliamentary privilege in court proceedings

...

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Case law

- 1.17 While section 16 gives some precision to the term ‘proceedings in Parliament’, the scope of the definition, in particular the expression ‘for the purposes of or incidental to’ the transacting of the business of a House or a committee, has not been determined. Some records and documents of members would seem more clearly to attract the protection of parliamentary privilege, for example, when they have been the subject of debate or a question in the House. On other occasions a judgement may be necessary as to whether material might be regarded as ‘for the purposes of or incidental to’ business of a House or a committee, and each individual set of circumstances requires careful consideration.
- 1.18 Case law takes the definition of ‘proceedings in Parliament’ a little further. Perhaps of most relevance to the current circumstances, is the case of *O’Chee v Rowley* [1997] 150 ALR 199. The case was an appeal from a Supreme Court order for a senator to produce certain documents. The documents were sought in relation to a defamation action brought against a senator by a fisherman following statements by the senator in a radio interview. The senator claimed ‘that such documents were created, prepared, brought into existence or came into my possession for the purposes of or incidental to the transacting of the business of the Senate of the Parliament of Australia’.
- 1.19 The Queensland Court of Appeal accepted that the documents did not need to be produced, although preferring not to decide the specific claim in relation to parliamentary privilege. A majority of the Court accepted that, in the words of Fitzgerald P, ‘Creating, preparing, bringing into existence or coming into possession of a document is an “act” within the meaning of sub-s. 16(2) of the Parliamentary Privileges Act’.
- 1.20 One member of the Court, McPherson JA, reasoned that in anticipation of imminent discussion or debate on a particular subject in Parliament, it would be expected that a member of Parliament would record and compile notes of information supplied and write letters on that subject. In his view, such documents could include, an internal memo to the senator, documents prepared on his behalf, documents which came into his possession and possibly unsolicited documents through the mail which a member elects to keep for the purposes of transacting business of a House.

- 1.21 McPherson JA made other relevant observations including, that requiring the senator to produce documents for which privilege is claimed had the 'obvious potential to deter him and other Parliamentarians from preparing or assembling documentary information for future debates and questions in the House'. He concluded that 'The privilege under s.16(2) attaches when, but only when, a member of Parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business'.
- 1.22 The Court held that the documents, which related to a subject the senator had raised in the Senate, did not need to be produced in response to the order because of the protection of subsection 16(2).

Threshold issues

- 1.23 In considering whether the records or documents of a member fall within the definition of 'proceedings in Parliament' two issues arise.
- 1.24 Firstly, whether an act has been done, in this instance by a member or someone acting on his behalf, in relation to the records or correspondence 'in the course of, or for purposes of or incidental to' the transacting of the business of a House or committee. Broadly speaking, if the records and correspondence in the possession of the member are used in some way to transact the business of a House or a committee, then parliamentary privilege would attach.
- 1.25 If the answer to that question is 'yes', then the next issue to be resolved is whether the use that is proposed to be made of the records amounts to 'impeaching' or 'questioning' those proceedings in Parliament.

Conduct of the inquiry

- 1.26 The committee is cognisant of the relevant material available in relation to this matter. Each paragraph in the terms of reference was carefully examined and discussed by the committee, as were the provisions of the AFP National Guideline, the search warrant and the related AFP documents available in the FOI Disclosure Log on the AFP website.¹
- 1.27 The two statements by the Speaker in the House, on 13 September and 11 October, and the notes from the Clerk's Office presented to the House

1 <https://www.afp.gov.au/about-us/information-publication-scheme/routinely-requested-information-and-disclosure-log> # 42-2016.

by the Speaker were also studied.² In addition, the law of parliamentary privilege was carefully considered³, and previous relevant reports of the committee's predecessor committee, the House of Representatives Standing Committee of Privileges, were reviewed.⁴

- 1.28 The committee acknowledges that the central issue of the inquiry, the status of the records of members, is one of fundamental importance to all members of the House. The committee notes also that this is the first occasion on which a ruling, on a member's claim of parliamentary privilege in relation to material seized under a search warrant, had been sought from the House, in acknowledgement of the process under the AFP National Guideline.
- 1.29 The committee deliberated on the referred matter over several meetings including whether there was a need to invite submissions from affected parties in relation to the inquiry. The committee determined first to see whether it might be able to reach a conclusion of the matter based on the material already available to it.

AFP National Guideline for execution of search warrants where parliamentary privilege may be involved

- 1.30 Together with a Memorandum of Understanding between the Presiding Officers and the Attorney-General and Minister for Justice, the AFP National Guideline has been in place since 2005. They provide for a process to be followed in the execution of search warrants in relation to premises used or occupied by members and senators, including their offices in Parliament House. In cases of offices in Parliament House the agreement requires that the relevant Presiding Officer be contacted before a search is executed.
- 1.31 The AFP National Guideline is designed to achieve two purposes:
- to ensure that search warrants are executed without improperly interfering with the functioning of Parliament; and

2 VP 2016/113 and 165.

3 See in particular, B C Wright ed, *House of Representatives Practice* Canberra 2012, chapter 19, and related references.

4 http://www.aph.gov.au/Parliamentary_Business/Committees

- that members and their staff are given a proper opportunity to raise claims for parliamentary privilege in relation to documents and other things that may be seized as a result of the execution of the warrant.⁵
- 1.32 The AFP National Guideline provides for a process which includes:
- a member or the staff member of a member making a claim of parliamentary privilege when the search warrant is executed;
 - the documents over which a claim is being made being placed in audit bags and a list of the documents being compiled;
 - the member or staff member being able to take copies of any documents that are to be secured;
 - the audit bags for documents being delivered to a neutral third party who may be the warrant issuing authority or an agreed third party;
 - the member having five working days in which to notify the executing officer that the claim of parliamentary privilege has been abandoned or to commence action to seek a ruling on whether the claim will be pursued; and
 - the member determining whether to seek a ruling on the claim of privilege from a court or from the relevant House.
- 1.33 It is apparent from the related AFP documents and the Speaker's two statements to the House that the process provided for under the AFP National Guideline has been applied. There has been no complaint in relation to the process itself and it appears to have operated to preserve the records and documents seized from the Member for Blaxland from disclosure to anyone else.

Critical circumstances

- 1.34 The AFP's letter of notification to the Member for Blaxland states that the search warrant was issued under s. 3E of the *Crimes Act 1914* in relation to an investigation into the unauthorised disclosure of Commonwealth information. The letter also characterised the investigation as one relating to the NBN.
- 1.35 The name of a member of staff of the Member for Blaxland was specified in the warrant (second condition).
- 1.36 The specific nature of the alleged offence(s) is of communicating and receiving documents relating to the NBN between 1 August 2014 and

5 Cited in the Notes from the Clerk's Office, 11 October 2016, as referred above.

15 March 2016 (third condition). The significance of these aspects of the allegation is that during this period, in addition to being a member of Parliament, the Member for Blaxland had certain parliamentary responsibilities as the Shadow Minister for Communications (18.10.13 to 23.07.16).⁶

1.37 In the Australian system of parliamentary government, it is in the nature of the role of shadow ministers that they contribute to the primary function of the whole House to exercise an oversight of the actions of the Government, with the Opposition having a critical role in this oversight function. In the current circumstances, the committee notes the following specific functions to which a shadow minister would contribute:

- scrutiny of, criticism of, and suggestion of improvements to, legislation and financial proposals;
- examination of expenditure and public accounts;
- seeking information on and clarification of government policy (principally questions in writing and without notice);
- surveillance, appraisal and criticism of government administration; [and]
- ventilating grievances ...⁷

1.38 In order to carry out this role of shadow minister, a member would need to prepare, including by adequately informing her/himself in relation to the matters within the scope of the specific portfolio. The Member for Blaxland made an initial claim that the material to be seized was protected by parliamentary privilege immediately prior to the execution of that search warrant. He then confirmed that claim after certain records and documents of his had been seized and followed this claim with the next step of seeking a ruling from the House as to the claim of parliamentary privilege.

Findings

1.39 In the committee's view, the terms of the search warrant are wide ranging and coincide with the nature of the Member for Blaxland's parliamentary responsibilities, including as shadow minister. As the NBN falls within the subject matter responsibilities of the communications portfolio, during the critical period defined in the search warrant the Member for Blaxland had

6 Detail in relation to dates of shadow ministry taken from Parliament of Australia website www.aph.gov.au Member for Blaxland's homepage, 16 November 2016.

7 B C Wright ed, *House of Representatives Practice* Sixth Edition, Canberra 2012.

parliamentary responsibilities in relation to this subject in the usual course of his role as Shadow Minister for Communications.

- 1.40 In these circumstances, the committee considers that 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. A reasonable presumption then arises that the material would be included in the term 'proceedings in Parliament', noting that this means 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee ...'. 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.
- 1.41 The committee considers that in this matter, material relating to the NBN was obtained by or provided to a member of the House and such material related to his specific parliamentary responsibilities, including as Shadow Minister for Communications. The committee finds that this material was for purposes of or incidental to the transacting of the business of the House, within the meaning of subsection 16(2) and agrees that the privilege articulated in section 16 has the effect that the material is protected from production under the terms of the search warrant.
- 1.42 The committee notes that the terms of reference contain further paragraphs setting out a procedure to be followed by the committee in conducting its inquiry, including paragraph 3 in relation to making submissions to the committee. In the circumstances, the committee has concluded that it need go no further with the available inquiry procedure as it is satisfied that it is able to make a unanimous recommendation to the House about how it should rule on the claim of parliamentary privilege by the Member for Blaxland.

Conclusion

- 1.43 The Member for Blaxland has claimed parliamentary privilege in relation to material, records and documents of the member, seized under a search warrant executed by the AFP. The committee concludes that the material falls within the definition of 'proceedings in Parliament' and so is not subject to impeachment or question, and that the search warrant amounts to such an impeaching or questioning. The committee considers that the operation of parliamentary privilege is of such fundamental importance to a member and her or his ability to perform duties as a member. The

committee agrees with the particular conclusions of McPherson JA in *O'Chee's case* in this regard:

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.

- 1.44 Finally, the committee acknowledges the success of the AFP National Guideline in providing members with the opportunity to raise claims of parliamentary privilege in accordance with an agreed formal process when a search warrant is executed in relation to their records, documents and other material. Indeed, to the extent that the seized material has been preserved from disclosure to anyone, without the agreement of the Member for Blaxland, the AFP National Guideline has been a successful safeguard for the member until the matter is finally resolved. The committee notes that this procedure has operated as envisaged and first recommended in October 1995 by its predecessor, the Committee of Privileges.⁸

Recommendation 1

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.

Mr Russell Broadbent MP

Chair

November 2016

⁸ House of Representatives Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP* October 1995.

