

**MEMORANDUM OF UNDERSTANDING ON THE
EXECUTION OF SEARCH WARRANTS
IN RELATION TO A MEMBER OF PARLIAMENT**

BETWEEN

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

THE PRESIDENT OF THE SENATE

THE ATTORNEY-GENERAL, AND

THE MINISTER FOR HOME AFFAIRS

1 Preamble

This Memorandum of Understanding (**MOU**) records the understanding of the Attorney-General, the Minister for Home Affairs, 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**) execute search warrants, in relation to a member of Federal Parliament (a **Member**).

This process is designed to ensure that law enforcement investigations are conducted without improperly interfering with the functioning of Parliament and that Members and their staff are given a proper opportunity to raise claims of parliamentary privilege in relation to material that is obtained through the execution of search warrants.

This MOU is to be read with the AFP National Guideline on Investigations where Parliamentary Privilege may be involved (the **Guideline**) at Annexure A to this MOU. The Guideline sets out procedures that the AFP will follow for the collection and quarantining of material that could be subject to privilege, and the processes for a Member or their staff to claim privilege. The parties to this MOU acknowledge that the MOU and Guideline are not intended to provide a shield to illegal activity. The Guideline is designed to ensure that the AFP can conduct investigations in a way that does not amount to a contempt of Parliament. It also allows Members to be confident that parliamentary privilege is being respected, and that they will have an opportunity to make a claim that material is protected by the privilege.

The parties to this MOU will seek to review and update this MOU and the Guideline to cover the AFP's covert investigative powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) in relation to Members. This work will be conducted during the 47th Parliament.

2 Replacement of previous AFP Memorandum of Understanding

This MOU replaces the *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* signed by the Speaker of the House of Representatives on 2 March 2005 (the **2005 MOU**).

This MOU and the Guideline provide more detailed procedures and also provides additional requirements on training, oversight and reporting.

3 Background

In 2005, the Presiding Officers, together with the Attorney-General and the then Minister for Justice and Customs signed the 2005 MOU relating to the process for the AFP to follow when executing search warrants on the premises of Members. The agreed process was spelt out in the AFP's *National Guideline for the Execution of Search warrants where Parliamentary Privilege may be involved* (the **2005 AFP Guideline**), which was Annexure A to the 2005 MOU. The 2005 MOU remained in force until the commencement of this MOU.

On 6 December 2018, the Senate passed a resolution on parliamentary privilege (the **Resolution**). The Resolution noted and affirmed, amongst other matters, that the powers, privileges and immunities of the Senate and House of Representatives are secured through section 49 of the Constitution and include the traditional freedoms formulated in Article 9 of the Bill of Rights 1688 and declared in the *Parliamentary Privileges Act 1987* (**Parliamentary Privileges Act**).

The Resolution referred to the 2005 AFP Guideline, and called on the Attorney-General to work with the Presiding Officers of Parliament to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers “which complies with the principles and addresses the short-comings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the House of Representatives Committee of Privileges and Members Interests”. This MOU responds to that Resolution.

The Minister for Home Affairs has portfolio responsibility for the AFP.

4 Parliamentary privilege

Nothing in this MOU or the Guideline can diminish, constrain or expand the scope of parliamentary privilege. In particular the parties note:

(1) A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member, or over other material held by, or on behalf of a Member – such as digital records. 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.

(2) 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.

(3) 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 is part of the law of Australia and refers to the powers, privileges and immunities of the Houses of Parliament, Members and committees. An important aspect of that privilege is that material which forms part of ‘proceedings in Parliament’ ought not be impeached or questioned in any Court or place out of Parliament. As defined in section 16 of the Parliamentary Privileges Act, ‘proceedings in Parliament’ means all words spoken and acts done in the course of, or incidental to, the transacting of the business of a House or of a committee. ‘Proceedings in Parliament’ includes, but is not limited to, evidence given before a committee, material presented to a House or a committee, material created for the purposes of a House or committee and material created incidentally to the transaction of that business. 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.¹ Under section 4 of the Parliamentary Privileges Act, conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member.

The AFP can execute search warrants on premises occupied by a Member and can exercise other powers involving a Member, in accordance with the law. Material is not beyond the reach of powers available to the AFP simply because it relates to, is held, or is accessed by a Member; or is on premises used or occupied by a Member. Equally however, the AFP must not improperly interfere with the free performance of a Member’s duties. There may be some circumstances where the

¹ *Rowley v O’Chee* [2000] 1 Qd R 207.

execution of a search warrant is impermissible because the act itself would amount to an improper interference with a House, a committee or a Member performing their duties. The attached Guideline details a set of procedures intended to ensure that law enforcement investigations do not improperly interfere with the business of Parliament or Members.

5 Execution of search warrants and parliamentary privilege

The execution of search warrants by the AFP is a legitimate criminal investigation methodology, however, like other statutory powers they are constrained by parliamentary privilege. Nevertheless, all parties to the MOU recognise that, subject to those constraints, the conduct of criminal investigations by the AFP is necessary in some cases to ensure the integrity of Parliament. However, under the Guideline it is open to any affected Member to make a claim for privilege, which may have the effect of constraining how information collected through the course of an AFP operation may be used, or may otherwise require that material's return or destruction. The agreed process is detailed in the Guideline. It establishes the procedures that AFP officers will follow when executing search warrants in relation to premises owned or used by, or material pertaining to, a Member. The Guideline is **Annexure A** to this MOU and sets out the following:

- The background to and purpose of the Guideline
- Oversight arrangements for investigations where parliamentary privilege may arise
- Training of law enforcement officers
- Execution of search warrants
- Reporting
- Review of the Guideline.

6 Distribution and availability of this MOU

This MOU 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.

The MOU will be published as part of the AFP's Governance Framework, and will be made available on the AFP intranet.

The AFP will ensure AFP members who are involved in investigations under the Guideline are trained in its use.

7 Creation and variation of the National Guideline

The Guideline will be issued by Deputy Commissioner Investigations under section 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegate of the Commissioner under section 69C of the Act.

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

8 Variation of this MOU

This MOU can be amended at any time by agreement of all the parties.

This MOU will continue to be in effect until any future agreement is signed by representatives of the Parliament and the Executive Government.

9 Revocation of agreement to this MOU

Any party to this MOU may revoke their agreement at any time. The other parties to this MOU must be notified in writing of the revocation.

10 Conflict Resolution

Any issues, difficulties or disagreements that arise in relation to the interpretation or operation of this MOU should be discussed, in the first instance, by the relevant parties. If required, the Minister for Home Affairs will raise issues arising with the Commissioner of the AFP.

11 Review of this MOU

This MOU will be reviewed by the parties, or otherwise by parties authorised by the Parliament and the Executive respectively, within 3 years of the signing of this MOU.

The parties to this MOU will continue to consider the AFP’s use of covert powers where parliamentary privilege may be involved, with a view to reviewing and updating this MOU during the sitting of the 47th Parliament.

Signatures

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Senator the Hon Michaelia Cash

Attorney-General

/ /2021

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The Hon Karen Andrews MP

Minister for Home Affairs

/ /2021

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The Hon Tony Smith MP

Speaker of the House of Representatives

/ /2021

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Senator the Hon Slade Brockman

President of the Senate

/ /2021

