

EXECUTION OF SEARCH WARRANTS IN SENATORS' OFFICES

The Privileges Committee should be advised of recent developments relating to search warrants.

On 22 April 2001 an item appeared in the *Sunday Herald Sun* headed "MPs tipped off on raids". On the same day the *Sunday Telegraph* had an item headed "Raid rules for MPs: Police must give warning of searches". Copies of these items are attached. They refer to a checklist used by the Australian Federal Police (AFP) for searches of offices of members of the Parliament under search warrant and to "training" undertaken by the AFP with the Clerk of the Senate. The items were based on an answer provided by the AFP to an estimates question on notice asked at the estimates hearing of the Legal and Constitutional Legislation Committee on 19 February 2001. Attached is a copy of the answer. The reference in the answer to AFP officers being "instructed in parliamentary privilege by Mr Harry Evans of the Senate" refers to arrangements for AFP officers to participate in one of the seminars, modified for their particular interest, on the subject of parliamentary privilege provided by the Department of the Senate.

At the seminar, it appeared that AFP officers present were involved in the task of revising AFP guidelines for the execution of search warrants in the offices of members of the Parliament. After some discussion of the issues involved, it was agreed that there would be some value in Senate officers, relevant AFP officers and relevant Attorney-General's Department officers meeting to discuss the preparation of the revised guidelines.

The need for guidelines was referred to in the 75th Report of the Senate Privileges Committee in March 1999 on the execution of search warrants in senators' offices, and the committee recommended that guidelines be prepared for discussion between the Presiding Officers and the Attorney-General. The report of the House of Representatives Privileges Committee of November 2000 on the status of the records and correspondence of members also recommended such guidelines.

I met accordingly with AFP and Attorney-General's Department officers on 7 May 2001. The Deputy Clerk of the House of Representatives also attended.

The discussions proceeded on the basis that the judgment of Mr Justice French in *Crane v Gething* represents the law on the subject for the time being, that a claim of privilege by a member has to be determined by the House concerned, and that the guidelines should be drawn up on that basis.

The Attorney-General's Department officers indicated that the development of the revised guidelines would now proceed with expedition, but the guidelines would need to be cleared by the Attorney-General. I suggested that, when the guidelines had been cleared by the Attorney-General, they should be sent to the Privileges Committees of the two Houses for examination.

The AFP would prefer that officers executing search warrants be allowed to look at documents for which privilege was claimed to determine whether the documents were of interest to the

searchers. This could allow documents to be excluded from consideration and avoid the necessity of some person appointed by the House concerned examining the documents, as was done with the documents seized from Senator Crane. The AFP and Attorney-General's Department officers are concerned, as am I, about the possibility of members claiming privilege for large quantities of documents and police investigations and prosecution decisions being inordinately delayed while the documents are examined by some neutral third party. I indicated that it would probably not be acceptable to members for documents the subject of a claim of privilege to be examined by the searchers, but that as part of the guidelines perhaps members should be required to provide a general description of the nature of documents for which privilege is claimed as well as the basis of the claim. I added that the Privileges Committees would not, of course, be bound by this suggestion.

It was agreed that the discussions had assisted the officers in the process of revising the guidelines.

Attachment A: Article in the Sunday Telegraph 22 April 2001

Raid rules for MPs Police must give warning of searches - EXCLUSIVE By national political writer SIMON KEANEY

POLITICIANS are being warned before police raid parliamentary offices so they can be prepared for the search, secret guidelines reveal.

An Australian Federal Police (AFP) checklist show MPs receive a range of special considerations when they are under investigation.

The checklist, obtained by The Sunday Telegraph, gives police specific "raiding instructions".

They include an order that AFP officers must give MPs time to get representation before the search.

MPs receive special treatment because police can be jailed for six months or fined \$5000 under the Parliamentary Privileges Act for impeding MPs in their duty.

"The proposed entry time . . . will allow the Member ready access to the Speaker of the House or the President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search," the checklist states.

"The usual practice should be followed of prior consultation with the presiding officer; (Speaker or President) before conducting inquiries or executing any process in the Parliamentary precincts."

The offices of dozens of MPs have been raided in the past. Former MPs Ma1 Colston, Michael Cobb and Bob Woods were all raided over travel rorts allegations in 1997.

The special powers have been called upon by MPs several times in the past 12 months, including most recently after unproven allegations of a fight at Canberra's Holy Grail nightspot between three MPs.

The checklist also instructs officers not to execute search warrants before 5pm to minimise disruption to MPs.

"Execution at the close of the business day is less likely to interfere with the Member's parliamentary duties and hence reduce the likelihood of contempt of Parliament being raised as an issue," the checklist says.

Police have also been ordered to try to minimise publicity of the raid to avoid embarrassment for the MP.

One of the main reasons cited in the checklist for searches after 5pm was "to ensure minimal exposure - particularly to media attention - in the execution of the warrant".

But Griffith University criminologist Tim Prenzler said the AFP guidelines went too far. While police do not publish figures on the number of raids conducted each year, Dr Prenzler said thousands of regular citizens were raided annually without any warning. "Politicians should be treated like any other citizen. A special immunity appears to be going too far," he said. "It could be protecting the guilty."

The AFP's entire head office investigations team completed training two weeks ago with the Clerk of the Senate, Harry Evans, on how to conduct raids without breaking the privileges law.

An appendix to the checklist says the special treatment is unlikely to be needed, if the MP is the chief suspect in a criminal matter.

Attachment B: Article in the Sunday Herald Sun (Melbourne) 22 April 2001, p. 18

MPs tipped off on raids
by Simon Kearney

POLITICIANS are warned before police raid parliamentary offices so they can be prepared for the search, secret guidelines reveal.

An Australian Federal Police checklist shows MPs receive a range of special considerations when they are under investigation.

The checklist gives police specific "raiding instructions".

They- include an order that AFP officers on the raid must give MPs time to obtain representation before the search.

"The proposed entry time ... will allow the member ready access to the Speaker of the House or the President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search," the checklist states.

"The usual practice should be followed of prior consultation with the presiding officers (Speaker or President) before conducting inquiries or executing any process in the parliamentary precincts."

The checklist, written by the AFP and presented to Parliament by AFP deputy commissioner Mick Keelty, also instructs officers not to execute search warrants before 5pm to minimise disruption to MPs.

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MPs receive special treatment because police can be jailed for six months, or fined \$5000 under the Parliamentary Privileges Act for impeding an MP in their duty.

The AFP has now called on the Clerk of the Senate, Harry Evans, to train officers on how to conduct raids without breaking the privileges law.

The special treatment during the search includes being able to make police photocopy documents the MP needs before they are seized.

MPs can also ask to have documents sealed to go before the Speaker to assess whether the police can have access to them.

The police must inform the presiding officers if they intend to carry out any raid in Parliament.

The offices of dozens of MPs have been raided in the past. Former MPs Mal Colston, Michael Cobb and Bob Woods were all raided over travel rorts allegations in 1997.

The special -powers have been called upon by MPs several times in the past 12 months, including most recently after unproven allegations of a fight at Canberra's Holy Grail nightspot between three MPs.

The checklist is given to every member of the AFP's head office investigations team when they begin investigating alleged crimes from the AFP's home base in Canberra.

An appendix to the checklist says the special treatment is unlikely to be needed if the MP is the chief suspect in a criminal matter.

**SENATE ESTIMATES COMMITTEE
AUSTRALIAN FEDERAL POLICE
QUESTIONS ON NOTICE**

Senator Bolkus asked the following question at the hearing of 19 February 2001.

Can the AFP provide any documents that might be available to officers doing the course or any notes that may be pertinent to this question [of parliamentary privilege]?

I am advised that the answer to the honourable Senator's question is as follows:

All investigators attached to the AFP's Head Office Investigations team are given an introductory package, which includes material on parliamentary privilege. The material is contained in a guideline and a checklist pertaining to the execution of search warrants and Members of Parliament. These extracts are attached. At the Additional Estimates hearing on 19 February 2001, Deputy Commissioner Keelty stated that federal agents attached to Head Office Investigations are instructed in parliamentary privilege by Mr Harry Evans of the Senate. In clarification, whilst such training was arranged with Mr Evans for 12 December 2000, it was postponed. Arrangements are currently being made to reschedule the training course.

EXTRACTS FROM THE EXECUTION OF SEARCH WARRANTS RELATING TO MEMBERS OF PARLIAMENT (A CHECK LIST)

1.5 Section 15 of the Parliamentary Privileges Act 1987 states that Police may exercise their ordinary powers within the Parliamentary precincts and the Team Leader should also have a good general knowledge of the workings of the Australian Parliament.⁷

2.2 AFP members should make themselves familiar with issues that may amount to an offence against Parliament or things that may render an item not seizable by virtue of statutory parliamentary privilege. These are mentioned in the 'Guidelines for execution of search warrants by the AFP on the Electorate offices of Members of Parliament'⁸ (hereinafter referred to as 'the guidelines') and should be raised in the affidavit as having been given due consideration. The document attached at Annex 'A' includes guidelines on:

⁷ Odgers Australian Senate Practice, 7th Edit 1995, edited by H Evans Clerk of the Senate and House of Representatives Practice 1997, edited by L. Barlin, Clerk of the House of Representatives, is a recommended reference

⁸ As of July 1997 the 'guidelines' are in DRAFT FORM ONLY and are yet to be formally adopted. However, the procedures set out in the guidelines should be adhered to in the meantime.

- Issues of obstructing a Member of Parliament in the execution of their duty
- Parliamentary Privilege
- Claims of Privilege by the Member of Parliament
- Dealing with Confidential material

2.3 AFP Legal Counsel provided an opinion in February 1997 in respect to possible offences against the Parliamentary Privileges Act 1987. This Act imposes sanctions for offences against the House such as Contempt of Parliament. A summary of this opinion is attached at Annex 'B'.

2.4 The Deputy Director, DPP Perth has given an opinion relative to 'Search and seizure on the Electorate Office of a Member of Parliament - Parliamentary Privilege.' dated August 1995. The substance of this opinion should be considered in the course of obtaining and executing a search warrant relating to Members of Parliament. A summary of this opinion discussing Parliamentary Precincts and Parliamentary Privilege is attached at Annex 'C'.

2.5 Members should also be aware of the provisions of Section 13 of the Parliamentary Privileges Act 1987, which prohibits the unauthorised disclosure of certain evidence. This disclosure relates to such things as:

- A document prepared for the purpose of submission and submitted to a House or Committee which has been directed by a House or committee to be treated as evidence taken in camera.
- The same relates to a document containing a record of oral evidence under the same circumstances.

5.4 The following paragraph has been included in approved affidavits relative to a possible claim of privilege, namely:

'If in the course of the execution of the search warrant the member or any person in authority on his behalf claims Parliamentary Privilege I hereby undertaken to adopt the following procedure:

- To inquire as to why privilege is claimed
- Regardless of the answer supply the member with a copy of the document(s)
- Seal the documents in containers in the presence of the member or interested party
- Deliver the containers, intact, to a person mutually agreed between me and the member or interested party) such as the Clerk of the Court at.....or a person of like office.⁹

⁹Tentative arrangements for the same should be made prior to the execution of the warrant without disclosing the individual subject of the warrant (although this may well be the issuing Judicial Officer in which case disclosure of the name will not be an issue).

E. Allow the documents to be so held by the independent party until such times as the Speaker of the House or President of the Senate determines what action is to be taken.

5.7 The following text has been included in an affidavit regarding the search of premises outside business hours, namely:

'The reasons I request to search the business premises outside normal business hours are as follows:

A. To insure the Members electorate office duties are not unduly hindered.

B. To ensure minimal exposure (particularly to media attention) in the execution of the warrant; and

C. The proposed entry time of around (insert relevant time) will allow the member ready access to the Speaker of the House/President of the Senate, his or her solicitors or any other party he or she wishes to consult in relation to the search.

6.1....

- It has been long established practice that the Presiding Officer has always been consulted in respect to matters within his or her jurisdiction. This includes intended investigations, arrests or the execution of process, including Section 3E warrants within the precincts of Parliament House. Checks should be conducted to insure the subject premises has not been declared by regulations as being part of Parliamentary precincts for the purpose of the Act. The 'Parliamentary precincts' is defined by section 4 of the Parliamentary Precincts Act 1988.

9.1 Where possible and providing the integrity of the investigation is not compromised efforts should be made to execute the warrant when the Member is in attendance at the subject premises or can readily be called to attend without hindering Parliamentary duties.....

9.3 Execution at the close of the business day is less likely to interfere with the Member's Parliamentary duties and hence reduce the likelihood of contempt of Parliament being raised as an issue.

11.2 The Member should be given the opportunity to identify documents of a private nature relating to himself or constituents. The warrant holder will make a decision whether those documents are relevant to the investigation.

11.3 Members should be particularly alert to sensitive documentation such as that relating to Cabinet or a Parliamentary Committee. To this end it should be established at an early stage if any such documents are held by the Member and the relevance of them to the inquiry. In practice the Team Leader (at least) should have an appropriate security clearance (Top Secret is desirable).

11.5 The Member should be asked to identify any documentation which is seized but is required by him to continue the performance of his Parliamentary functions e.g.; Electorate office diaries, personal diaries etc: Steps should be taken to accommodate the Members needs through photocopying as soon as possible.

EXTRACTS FROM GUIDELINES FOR EXECUTION OF SEARCH WARRANTS BY THE AFP ON THE ELECTORATE OFFICES OF MEMBERS OF PARLIAMENT

Preliminary

4. When a search warrant is executed upon the electorate office of a Member of Parliament one or more of the following issues could arise:-

a) the execution of the search warrant might amount to an offence against a House, for example because its effect is to obstruct performance of the member's duties as a member;

b) the disclosure of something seized in reliance on the warrant, or exposed to the police in the course of search, might amount of an offence against a House;

c) a thing otherwise seizable under the warrant might not be seizable because it is not admissible by a court in that it attracts statutory parliamentary privilege - a related issue being the possibility of a statutory offence of unauthorised disclosure; or

d) the execution of the search warrant might involve seizure or exposure to the police in the course of search, or subsequent disclosure, of confidential material that does not attract parliamentary privilege and without entailing an offence against a House or any other offence.

6. It should be noted that material of the kind referred to in s16(3) of the Parliamentary Privileges Act 1987 is not liable to seizure under warrant. If it is possible that material sought may be within the category, the AFP should consult the relevant Presiding Officer or the chair of the relevant committee.

Claim of privilege

. In paragraphs 9(a) to 9(g) 'claim of privilege' means a claim that proposed action in purported reliance on a search warrant should not take place because it would be a breach of privilege, either because it would amount to an offence against a House or because the warrant does not authorise seizure of a thing that attracts privilege.

9. The purpose of paragraphs 9(a) to 9(g) is to suspend police action until there has been some consideration by or on behalf of

Parliament of the claim. While in due course a court might also need to rule on the matter, that aspect can be left to later proceedings, or if necessary to a person affected seeking injunctive relief.

a) if the member (or a person acting on his/her behalf) identifies anything to be seized where a claim of privilege is likely to be raised the following procedure should be followed:-

b) the member (or representative), if raising a likely claim, should be asked to indicate the basis for the claim;

c) the item should be secured to the satisfaction of the executing officer and the member (or representative). The member should have reasonable opportunity to take copies of any document or other record secured in this way. A schedule of the items so secured should be prepared and agreed by the parties;

d) the things so secured should be delivered into the safekeeping of a third party as agreed between the parties (eg. warrant issuing officer or Clerk of Court) pending the resolution of the claim of privilege;

e) the claim of privilege should be referred by the member for, or otherwise brought to, the attention of the Presiding Officer of the relevant House for the purpose of obtaining an indication either:-

i. that there is no apparent basis for a privilege claim (in which event the item should be released to the AFP); or

ii. that the matter should be further considered by the relevant House.

f) this does not prevent the member or any other person from pursuing the claim of privilege in any other way. However, the intention is to provide only a reasonable opportunity for the claim to be pursued and to allow release of the item to the AFP if the claim is not pursued; and

g) the AFP will notify the Attorney-General [in his/her capacity as First Law Officer and Minister responsible for the AFP] in any case where the execution of a search warrant on the electorate office of a member is likely to be the subject of a claim of privilege.

11. In relation to paragraphs 9(a) to 9(c), it is assumed that a claim of privilege should not be made merely to delay or frustrate access for bona fide criminal justice purposes to material when, while confidential in the sense described above, could not properly be the subject of a claim of privilege. However, in such cases a claim of public interest immunity might arise.

a) even if no claim of privilege is raised, the executing officer should take all reasonable steps to conduct the search and obtain seizable material without unnecessarily examining or removing third-party confidential material that might be in the electorate office;

b) if, in respect of any material proposed to be seized, the member indicates that public interest immunity will be claimed, the AFP, unless it needs urgent access to the material, should treat that material as under paragraphs 9(a) to 9(d) to enable a reasonable opportunity for the claim to be resolved; and

c) if the AFP needs access to the material urgently for the purposes of an investigation, it should ensure that the material is not disclosed more widely than necessary for those purposes.

13. Where any document/record or thing is seized by police pursuant to the warrant the executing officer should inform the member that the AFP will, to the extent possible, provide or facilitate access by the member to any document/record or thing seized under the warrant which is necessary for the performance of the member's duties as a member.

Parliament House

14. If a search under warrant is proposed in relation to the offices of a member in Parliament House these guidelines should be treated as applicable and:-

a) it should be determined at a senior level within the AFP (General Manager) that the need for the search warrant is clear, and that it relates to a sufficiently serious matter; and

b) the usual practice should be followed of prior consultation with the Presiding Officers before conducting enquiries or executing any process in the parliamentary precincts.

ANNEX 'B'

CONTEMPT OF PARLIAMENT

The contempt provisions relating to the commonwealth Parliament were substantially revised in 1987 with the introduction of the *Parliamentary Privileges Act 1987* ('the Act'). Relevant to this issue are the provisions which enable a House of the Federal Parliament to impose sanctions on a person for 'an offence against the House'. Offences against the House include contempt by virtue of subsection 3(3) of the Act. The penalties for such an offence are set out at subsections 7(1) and 7(5) of the Act, being imprisonment not exceeding six months or a fine up to

\$5,000 for a natural person or \$25,000 in the case of a corporation.

Conduct which might amount to an offence is defined at section 4 of the Act as follows:

4. Essential element of offences

Conduct (including 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. To constitute a 'contempt' the conduct must amount or be intended or likely to amount to an improper interference with the authority of functions of the House or the member's duties as a member. By including the term 'improper', the Act contemplates that not all interference with the free exercise of the Members duties is prohibited.

The Office of General Counsel has previously advised that a search warrant executed in respect of a criminal offence is unlikely to amount to an improper interference with the member's duties as a member, at least where the member is a suspect having regard to the fact that the member is not immune from arrest for a criminal offence. Accordingly, where police are acting lawfully, in good faith, and with due regard to the sensitivities involved the investigations are unlikely to amount to an offence. If circumstances are such that any there is any doubt, investigators should seek advice at the earliest opportunity.

ANNEX 'C'

SUMMARY OF OPINION BY ATTORNEY-GENERAL'S DEPARTMENT IN RESPECT TO PARLIAMENTARY PRIVILEGE - SEPTEMBER 1995

In this instance a Member of Parliament had complained that the execution of a search warrant was a breach of parliamentary privilege. The matter was referred to the Privileges Committee of the House of Representatives.

The following relevant issues arose from the opinion of the Office of General Counsel, Attorney-General's Department:

The Electorate Office of a member is not part of the parliamentary precincts.

A Crimes Act 1914 search warrant can be executed on the Electorate office of a Member of Parliament (this would apply equally to the Member's residence etc.)

The fundamental principle is that action in respect of a member will not constitute a breach of privilege or contempt of Parliament unless it is action that 'amounts or is intended or

likely to amount, to an improper interference with the free exercise by a House or Committee of its authority of functions or with the free performance by a member of the member's duties as a member (See Parliamentary Privileges Act, S.4).

It is well recognised that 'where a member of parliament is accused of a criminal offence, it has never been suggested that his status as a member places him in any different position as regards the law of arrest or trial from that of an ordinary citizen'¹⁰

A search warrant 'might be a breach of privilege if the effect of the execution of the warrant was to constitute an improper interference with the member's duties as a member. If the search was in respect of a criminal offence (at least if the member is the suspect) having regard to the fact the member is not immune from criminal prosecution it is unlikely to be deemed improper interference.

Temporary inconvenience suffered by the member's constituents, if that were proved, would not amount to an improper interference.

Exposure of confidential or sensitive material (NOT protected by the Parliamentary Privileges Act) during the course of a search warrant is not different to the possession of similar material by other persons.

¹⁰ see Enid Campbell Parliamentary Privilege in Australia, p.60