

# Report

## Introduction

1.1 On 26 November 2018 the committee's 172<sup>nd</sup> report relating to the Senate's referral of the disposition of material over which a claim of privilege had been made by Senator Pratt, was tabled. The committee's consideration of the material referenced its earlier work, and that of its counterpart House of Representatives committee, on the NBN Co papers. In doing so, the committee concluded that the claim of privilege should be upheld and recommended to the Senate that its findings be adopted and the papers withheld from the AFP investigation. The Senate adopted the recommendation.

1.2 The question was also raised whether a possible contempt had occurred due to the content and manner of execution of the warrants. The committee found it difficult to make any assessment on the evidence before it and resolved to seek further evidence and clarification from the Commissioner of the AFP, Mr Andrew Colvin, Assistant Commissioner Debbie Platz and (at the time the warrants were executed) Acting Commander Joanne Cameron.

1.3 This reports sets out the committee's work and findings as to whether there is a possible contempt that should be further investigated and addresses other matters that arose during the committee's work on the inquiry.

## Background

1.4 In its 172<sup>nd</sup> report, the committee identified a number of matters that required clarification, including the Commissioner's statement at the Supplementary Estimates hearings that there was not 'an obvious claim of privilege' to be made in the execution of the search warrants. The committee queried how the statement could sit comfortably with the terms of the warrants which included the name of a senator, the name of a Senate committee and that of an inquiry that was being undertaken by the committee. It noted that its House of Representatives counterpart, when charged with the task of examining a claim of privilege made by the Member for Blaxland, Mr Clare, MP, had concluded that because the subject of the warrant coincided with the Mr Clare's responsibilities 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'. The House Privileges Committee argued that this 'critical circumstance' provided a 'reasonable

presumption ... that material would be included in the term "proceedings in Parliament" and accepted the member's claim as validation of the presumption.<sup>1</sup>

1.5 At the same Supplementary Estimates hearing the Commissioner explained that legal advice on the matter had been sought and the expectation that parliamentary privilege would be claimed informed 'every step of that investigation'. The committee questioned how and when it was envisaged that a claim of privilege could be made, when neither the President of the Senate, the senator nor committee named in the warrant were made aware that the warrants would be executed and also questioned the inclusion in the warrants terms directly related to the work of the Senate undertaken by one of its committees.

1.6 The claim of parliamentary privilege was made by Senator Pratt who is the Chair of the committee that had been cited in the warrant. The AFP did not inform the Chair of the warrant action – that information came from the person on whom the warrant was exercised. The senator named in the warrant was not informed of the warrant nor of the claim of privilege, until late in the evening on the day the warrant was executed in the morning. The President was advised by phone that a claim of privilege had been made over material that fell within the terms of the warrant, seemingly after the claim had been made.

1.7 Any question of contempt is likely to revolve around whether the execution of the warrants was done in a manner that was consistent with the purpose of the National Guideline and MOU.

### **The National Guideline and the MOU**

1.8 The Memorandum of Understanding and the National Guideline constitute the settlement reached in 2005 between the executive and the presiding officers about the processes to apply in executing search warrants in premises occupied or used by a member of the Federal Parliament or other relevant locations. The Memorandum of Understanding was signed by both Presiding Officers on behalf of the Parliament and the Attorney-General and the Minister for Justice and Customs for the executive. The MOU references the agreed processes which are set out in the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (the National Guideline). The purpose of the settlement is clearly stated in the preamble to both the MOU and the National Guideline:

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

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1 House of Representatives Privileges and Members' Interests Committee, *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, November 2016, p. 11.

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privilege or public interest immunity in relation to documents or other things that may be on the search premises.<sup>2</sup>

1.9 This sets out the balance that was sought between the executive and the parliament in conducting their responsibilities. If the Parliament is to effectively pursue its work in ensuring open and transparent government and executive accountability, it should be able to conduct its duties free from any improper interference, including from the executive.

1.10 In its 164<sup>th</sup> and 172<sup>nd</sup> Reports, the committee made clear its view that the preamble, in setting out the purpose of the MOU and National Guideline, informs the interpretation and implementation of both. In the 164<sup>th</sup> Report it stated:

...these purposes – safeguarding against improper interference and ensuring that privileges claims may be properly raised and determined – should inform the interpretation and implementation of the guideline. If these purposes are not met in the execution of warrants, then the protections available under parliamentary privilege are undermined.<sup>3</sup>

1.11 The processes set out in the National Guideline have been central to the committee's deliberations on the question of whether there are matters suggesting further investigation is required to establish if, in executing the warrants, a possible contempt has occurred by way of 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 their duties as a member'.<sup>4</sup> If the operation of the National Guideline is undermined so that it does not meet its stated purpose, the protection that should properly be afforded to parliamentary material may be diminished. This was the basis on which the committee found that an improper interference had occurred in the NBN Co matter. The committee followed a similar line of inquiry in this case. If the AFP did not follow the processes set out in the National Guideline in a manner that respected the terms of the MOU, then the committee may resolve to inquire into a possible contempt.

### **AFP's evidence**

1.12 The AFP represented by the Commissioner, Mr Andrew Colvin, the Deputy Commissioner Mr Neil Gaughan, Assistant Commissioner Debbie Platz and Superintendent Joanne Cameron attended the committee to provide a private briefing

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2 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 and the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, see Preambles (Appendix 1).

3 Committee of Privileges, *Search Warrants and the Senate*, 164<sup>th</sup> Report, March 2017, p. 3, para. 1.3.

4 *Parliamentary Privileges Act 1987*, s. 4.

on 6 December 2018. Additional written information was provided to the committee early January and again in February 2019.

### ***Claims of privilege***

1.13 In addressing the matter of why the warrants were issued and executed the Commissioner made it clear that there was no intention to locate material which was privileged but rather the AFP were conducting an investigation in a routine manner. The matter under investigation was a suspected criminal offence – 'the alleged unauthorised access and disclosure, by an employee of Australian Border Force, of information which was subsequently published by an Australian media outlet'.<sup>5</sup>

1.14 The purpose of the warrants was to obtain further information to progress the investigation and the expectation was that the evidence or material would show 'who, if anyone, had accessed the information, whether that access was authorised, and how the information came into the possession of a media outlet'. He advised the committee '[t]he search warrants were not conducted as a consequence of any evidence given to the legal and constitutional affairs references committee'.<sup>6</sup> The AFP reiterated their obligation in any investigation was to 'establish all the relevant facts, and obtain material evidence in relation to the alleged offending'.<sup>7</sup>

1.15 The AFP also informed the committee that, to ensure that any claim of privilege could be maintained the searching officers were instructed to quarantine any material over which the occupier made a claim of privilege or 'which on its face could give rise to a privilege claim, even if a claim was not made by the occupier'.<sup>8</sup> Prior to the execution of the warrants they had drafted letters to those members of Parliament who might be affected so that there would be no delay in notifying these senators that documents had been seized and provide them with an opportunity to make a privilege claim. These actions, they offered, demonstrated their respect for the principles articulated in the National Guideline.

### ***Prior notification***

1.16 In response to the committee's concerns that neither the President of the Senate, nor the senator or chair of the committee cited in the warrant were given prior notification of the terms of the warrant and that it was to be executed, the AFP expressed the view that the National Guideline required prior notification where warrants are executed on premises occupied by parliamentarians and that under the terms of clause 4.2 notification 'is triggered by a claim of privilege by the occupier'.<sup>9</sup> The AFP noted the need to take into consideration issues such as operational integrity and the privacy of individuals when contemplating prior notification.

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5 Opening statement, *Committee Hansard*, 6 December 2018, p. 2.

6 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

7 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

8 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

9 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

1.17 The AFP set out the preparations they had undertaken to ensure that those executing the warrants were aware of questions of privilege and the senators who may wish to make a claim of privilege were to be advised promptly. In the events of the day these preparations were not required as a claim of privilege was 'made early, during the execution of the search warrants.'<sup>10</sup>

1.18 The AFP confirmed evidence provided at the October Supplementary Estimates hearings that the Minister's office was advised in advance of the execution of the warrants. The committee was informed that two text messages were sent to the Chief of Staff in the Minister for Home Affairs' office in relation to the matter. The first was sent on 10 October by the National Manager Crime Operations (Assistant Commissioner Debbie Platz) indicating that the warrants issued on that day would be executed. When it was decided to proceed on the next day with the warrants, a further text message was sent by the Deputy Commissioner Operations (Neil Gaughan).

1.19 The AFP advised the committee that this was 'in accordance with the AFP's normal practices and the AFP's National Guideline on Politically Sensitive Investigations.'<sup>11</sup>

### ***Improper interference***

1.20 In their evidence the AFP squarely addressed the question of improper interference, referencing the National Guideline and indicating that it clearly anticipates that material may fall within the definition of parliamentary proceedings and may also be 'evidence of a criminal offence'.<sup>12</sup> They suggest that the likelihood that a claim of privilege would be made in relation to the material was 'not a barrier to a search warrant's execution, and nor is it a reason for a legitimate police investigation to be discontinued'.<sup>13</sup>

1.21 They draw a distinction between the execution of warrants in the NBN Co matter (the subject of the 164<sup>th</sup> report) and the current matter, pointing out that the warrant was not executed 'on the premises of a Member' and that the AFP had 'considered the Committee's comments in the 164<sup>th</sup> Report in preparing for the execution of the warrants'.<sup>14</sup> The Commissioner expressed confidence that the AFP were 'working within the parameters of the National Guideline'.<sup>15</sup>

1.22 In supplementary written evidence the AFP maintained that their actions and decisions were in accordance with their rights and duties. They reiterate the significance of the warrant premises not being occupied or used by a Member of

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10 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

11 Answers to questions on notice, 6 December 2018 (received 14 January 2019).

12 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

13 Opening statement, *Committee Hansard*, 6 December 2018, p. 3.

14 Opening statement, *Committee Hansard*, 6 December 2018, p. 4.

15 Opening statement, *Committee Hansard*, 6 December 2018, p. 4.

Parliament, and therefore the National Guideline would only be activated if the occupant made a claim of privilege.

1.23 The committee was also advised that the AFP's right to execute a search warrant is unimpeded 'even if certain material located during the search is subject to parliamentary privilege', as the warrant does not only result in 'the seized evidential material being produced to a court in a manner that would infringe the protections of the Parliamentary Privileges Act 1987'. Arguing the National Guideline was informed by the conclusions of the House Committee of Privileges *Inquiry into the status of the records and correspondence of members* the AFP suggest that the Parliament has relinquished the rights of privilege in certain cases and also has decided that there should be 'no additional confidentiality' bestowed on parliamentary records and correspondence.<sup>16</sup>

1.24 In addressing the committee's concerns that the warrants named a senator, a Senate committee and a committee inquiry the AFP responded by indicating that:

the Federal Court has held there is a duty to demonstrate good faith in disclosing all material matters in the application for a search warrant – and there is a consequent risk of a warrant being invalid if this good faith is not demonstrated. The AFP takes these responsibilities seriously, and this is why the AFP included additional material in the affidavit of 11 October 2018, ...<sup>17</sup>

### **Assessing the evidence**

1.25 The committee notes the AFP's cooperation in providing further information both in person and in writing in a relatively brief period. In calling the AFP before it, the committee was clear that it was not investigating a contempt matter. The Privilege Resolutions set out specific processes to be followed by the committee in conducting an inquiry 'which may involve, or gives rise to any allegation of, a contempt'.<sup>18</sup> The committee did not engage these processes, but undertook a preliminary inquiry as to whether the actions taken by the AFP might amount to an improper interference with the functions of the Senate, its committees or a senator.

1.26 There were two aspects to this:

- whether interference may have arisen through the inclusion in the scope of the warrants the name of a senator, a Senate committee and a Senate committee inquiry; and

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16 Answer to supplementary question on notice, 6 December 2018 (received 14 January 2019).

17 Answer to supplementary question on notice, 6 December 2018 (received 14 January 2019), (internal citations omitted).

18 Privilege resolution 2.

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- whether the processes set out in the National Guideline were followed appropriately in this matter.

### **The warrants – possible interference?**

1.27 The first question the committee posed was did the terms of the warrants and execution interfere with the work of the Legal and Constitutional Affairs References Committee, a senator or the Senate.

1.28 In relation to the use of the name of a senator, a Senate committee and a senate committee inquiry in the warrants the committee notes the AFP's response in referencing the Federal Court and the demonstration of good faith required by disclosing all material evidence in the application of a warrant. The AFP further offered that including the material relating to the Senate, its committee and members alerted the issuing authority '... that there was a possibility of locating privilege material at the warrant premises'.<sup>19</sup>

1.29 In this context the committee observes the provisions of paragraph 5.3 of the National Guideline which states:

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.

1.30 The committee is concerned this advice from the National Guideline was not considered by the AFP, as the AFP's view is that it does not come into play if the warrant is served on premises that are not a member's office or another premises occupied or used by a member, until the occupant of any other space makes a claim of privilege in relation to documents.

1.31 The AFP's argument, that the inclusion of a committee inquiry in the warrants is an alert to the issuing authority of the potential of the warrant securing material that is protected by parliamentary privilege, does not justify the extension of the warrant to matters that go to the work of a committee. The committee notes the argument put at paragraph 6.4v of the affidavit which should have been sufficient to alert the issuing authority that a question of privilege may arise in the execution of the warrants. The committee acknowledges the AFP's inclusion of the name of a senator, a Senate committee and a senate committee inquiry in the terms of the warrant may have been a misconstrued attempt to recognise parliamentary privilege. However, it is possible that the AFP could have obtained all the documents they sought to further their investigation from the place against which the warrant was issued had they not included reference in the warrant and supporting affidavit to an individual senator, a Senate committee and senate committee inquiry.

1.32 The committee also reminds all senators of their duty as parliamentarians to avoid any activity which could hamper investigations by the AFP into unlawful activities or to assist in the commission of any illegal activities.

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19 Answer to supplementary question on notice, 6 December 2018 (received 14 January 2019).

1.33 The AFP's justification of their actions seems to be at odds with the purpose of the MOU and National Guideline which seeks to balance the possibly competing responsibilities of the executive and the Parliament. It remains the committee's view that the terms of the warrant should have been more tightly cast so that the AFP could not examine or seize documents related to the work of a Senate committee in an investigation related to documents that were accessed in a Government department and leaked to the media.

1.34 In further considering the question of possible interference, the timeline of the References Committee inquiry was significant. The Senate referred the inquiry on 23 August 2018, with a reporting date of 11 September 2018. The References Committee held one public hearing on 5 September 2018 and reported on 19 September 2018, following the Senate granting an extension.

1.35 The AFP's initial evidence indicates that the warrants executed on 11 October 2018 were the second set of warrants issued on the matter. The first set, issued on 5 September 2018, were allowed to expire as the AFP became aware that the References Committee was to hold a hearing on that date. The investigation team recognised that privilege issues added complexities and sought further advice. Either by good management or good fortune the advice appears to have resulted in a delay that saw the execution of the warrants taking place following the completion of the References Committee inquiry, reducing the risk of interference with the inquiry. Had warrants targeting inquiry documents been executed while the inquiry was on foot, it would be difficult to avoid the conclusion that this amounted to an improper interference with the committee's work.

1.36 The Committee notes that a residual risk from the warrant activity may impinge on future inquiries and the work of the Senate. This risk relates to the possible chilling effect that the warrant activity may have on the free flow of information which enables the Senate and its committees to undertake their duties. The Committee acknowledges that the effect of such a risk would be difficult to determine in any possible contempt inquiry, but should inform discussions on enhancing the future operation of the MOU and National Guideline.

1.37 The committee next considers whether the processes set out in the National Guideline were appropriately followed by the AFP.

### **Adherence to the National Guideline**

1.38 The National Guideline provides procedures for the AFP's interface with the Parliament. The substantive guideline sets out the procedures to be followed prior to and during the execution of the warrant, and then sets out the processes to be followed when claims of privilege have been made. The procedures have been designed to assist the AFP in navigating parliamentary matters in a manner that should avoid any possible improper interference 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



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be on the search premises'.<sup>20</sup> It is the first set of procedures that is relevant in examining whether the AFP deliberately transgressed on the work of the Parliament and therefore their actions warrant further investigation as a possible contempt.

1.39 Throughout the inquiry the AFP have maintained that they were responsibly exercising their duty to investigate a criminal matter (which the committee does not dispute) and have abided by the terms of the MOU.

1.40 The AFP provided a detailed list of how their compliance with the National Guideline was manifest, but, with one exception, all the cited actions occurred after the claim of privilege was made. The exception relates to the planning for the possibility that a claim of privilege might be made. The AFP's position relies on their interpretation of paragraph 4.2 of the National Guideline, which provides:

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. (emphasis added)

1.41 The committee acknowledges that a narrow reading of the National Guideline could result in an interpretation which held that the processes set out in the National Guideline were only triggered once a claim of privilege was made, if the location of the search premises was not occupied or used by a Member. However, that interpretation does not give any consideration to the clearly stated purpose of the MOU and the National Guideline. This narrow interpretation has the potential to compromise the protections established in the National Guideline both for the AFP in undertaking their duties and for the functioning of Parliament. It creates a susceptibility that could result in a possible contempt.

1.42 The committee notes the AFP's actions following the claim of privilege made by Senator Pratt adhered to the processes set out in the National Guideline, but remains concerned over the actions taken prior to the warrants execution. The planning for the execution of the warrant did not seem to include briefing the executing officers about the provisions of the National Guideline, as clarification about the processes was sought from the President of the Senate at the time the warrant was executed and a copy of the National Guideline was obtained from Senator Pratt following her claim of privilege. None the less the committee is of the view that there is sufficient ambiguity in the structure of paragraph 4.2 that it would be difficult to find any intent on behalf of the AFP as required by the Senate's Privilege Resolutions, if any further inquiry were to be conducted.

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20 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 and the AFP *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, see Preambles (Appendix 1).

1.43 The committee has formed a view that the matter does not warrant further investigation. The inquiry highlights the ambiguity of some of the language of the National Guideline and some misunderstanding of it by the AFP. In the committee's view, the argument that it is standard or a routine approach in any investigation is not appropriate where the search warrant in the investigation lists the work of a Senate committee, specifying the inquiry and the name of a committee member. Using this argument highlights the ambiguity in the language and a genuine inadequacy in the AFP's understanding of matters of parliamentary privilege. A narrow, procedural approach is not an appropriate approach and the AFP should have taken the MOU and National Guideline into consideration earlier in their investigation.

1.44 The committee concerns are amplified by the AFP's assertions that it is 'not precluded from conducting a search warrant even if certain material located during the search is subject to parliamentary privilege. A search warrant is an aid to a criminal investigation, and does not necessarily result in the seized material being produced to a court in a manner that would infringe the protections of the Parliamentary Privileges Act 1987.'<sup>21</sup>

1.45 The committee notes that the execution of the warrants took place prior to the Senate passing a resolution (on 6 December 2018) reiterating the powers of the Parliament and therefore draws it to the AFP's attention. This resolution is a clear statement of the powers, privileges and immunities of the parliament, and places a requirement on the executive and executive agencies 'to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege' and should form the starting point for the AFP's consideration of its processes in relation to the National Guideline.

1.46 The 2018 resolution also calls on the Attorney-General and the Presiding Officers to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers.

### **The MOU and National Guideline**

1.47 The National Guideline has been used in the execution of search warrants in two matters, the first concerning the NBN Co; and this matter concerning the Pratt papers. In both cases, it is the committee's view that the National Guideline has failed in its stated purpose. In the NBN Co matter (finalised in its 164<sup>th</sup> Report) the committee found that while an improper interference had occurred, it refrained from recommending to the Senate that a contempt be found. At the same time it noted a requirement for remedial action in relation to the National Guideline. This issue was further considered in the committee's 168<sup>th</sup> report on the use of intrusive powers resulting in a recommendation that 'the Presiding Officers, in consultation with the executive, develop protocols that will set out agreed processes to be followed by law

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21 Answer to supplementary question on notice, 6 December 2018 (received 14 January 2019).

enforcement and intelligence agencies' when intrusive powers are exercised<sup>22</sup>. The committee's recommendations in both reports were adopted by the Senate.

1.48 In conducting this inquiry, the committee has confirmed its view that the best outcome is to propose further amendments to the current MOU and National Guideline so that it can better deliver its stated purpose.

### **Notification of the President**

1.49 There are two matters that the committee considers important to be incorporated into any revised MOU or National Guideline. The first relates to advising the relevant Presiding Officer of the warrant activity relating to a Member of Parliament, either House or its committees. This should occur at the same time as the relevant minister is notified. In this current matter, the President was not notified until after the warrant activity had commenced. The AFP in discussion have cautioned that the 'Additional notification procedures would be likely to jeopardise operational integrity.'<sup>23</sup> The committee notes that the office of the Minister for Home Affairs was kept up to date with the plans in relation to the execution of the search warrants, even though he was the relevant minister. This notification appears to be in contradiction of the AFP National Guideline on politically sensitive investigations which outlines how any conflict of interest in briefing the Minister should be addressed. It is the committee's opinion that advice to the Presiding Officers could be handled in a similar manner if any concrete threat to the operational integrity is identified. As warrants relating to Parliamentarians or their work are not executed frequently this could not be regarded as imposing an onerous task on the AFP.

### **Parliamentary privilege training**

1.50 The second matter relates to the AFP's knowledge of parliamentary privilege.

1.51 Despite the Legal background section of the National Guideline stating that 'Some of the principles of parliamentary privilege are set out in the Parliamentary Privileges Act 1987.', the AFP's consideration of privilege matters seem to focus on a very limited view of the concept of 'proceedings in parliament'. Rather than accepting that documents prepared in relation to a committee inquiry were incidental to the transacting of the business of a committee, they argued that the purpose of the MOU and National Guideline was not to 'alter the existing law of privilege'.<sup>24</sup> The committee accepts, indeed it is stated in the National Guideline, that 'It is not always easy to determine whether a particular document falls within the concept of "proceedings in parliament"...'. Therefore it is of the view that the Commissioner alone should have the authority to authorise the execution of search warrants, where

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<sup>22</sup> Committee of Privileges, *Parliamentary privilege and the use of intrusive powers*, 168<sup>th</sup> Report, March 2018, p. 29

<sup>23</sup> Answer to question on notice, 6 December 2018 (received 8 February 2019).

<sup>24</sup> Commissioner of the Australian Federal Police, *Submission*, p. 5; Answer to question on notice, 6 December 2018 (received 8 February 2019).

matters of privilege might be involved and that whoever holds the position should have regular training on parliamentary privilege. The Commissioner would then be in a position to advise as to whether the National Guideline should be brought into play in any operation. This advice would be reinforced if the review of the National Guideline incorporated a mandatory requirement for officers executing a search warrant where privilege might be involved to have a copy of the National Guideline at the time of execution.

1.52 In the committee's view amendments to the National Guideline and the MOU to incorporate these new practices and ensure the committee's concerns expressed in other recent reports on the matter would assist the AFP in their duties and prevent other possible contempts resulting from the execution of warrants.

## **Conclusion**

1.53 The committee's work in this report has focussed on the processes used prior to and during the execution of the search warrants where papers relating to a Senate committee inquiry were seized and sealed by the AFP following the Chair of the relevant committee making a claim of privilege. It has concluded that the best course of action is further amendments to the current MOU and National Guideline.

1.54 It remains of concern to the committee that the National Guideline appears to be an afterthought in AFP investigations. In taking this course, it fails to recognise and respect the work of the Parliament. The Clerk's advice to the committee's predecessor in 1997 remains true today:

The provision of information to a senator may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in Parliament are protected by parliamentary privilege and why the Houses have the power to deal with interference with their proceedings.<sup>25</sup>

1.55 Without the protection of privilege the Parliament cannot perform its work and any action to diminish privilege erodes its work. It is for this reason that the Senate passed the 2018 resolution which requires all executive agencies to observe the rights of the parliament. The resolution states:

That the Senate—

(a) notes that:

(i) the law of parliamentary privilege is intended to protect the ability of legislative Houses, their members and committees, to exercise their authority and perform their duties without undue external interference, and

(ii) an aspect of that law is the protection of the legislature against improper interference by the judiciary and the executive;

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25 Committee of Privileges, *Possible threats of legal proceedings against a Senator and other persons*, 67<sup>th</sup> Report, September 1997, p. 14.

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(b) further notes and affirms that:

(i) the powers, privileges and immunities of the Senate and the House of Representatives are secured through s.49 of the Constitution, and include the traditional freedoms formulated in Article 9 of the Bill of Rights 1688, protecting speech and debates in Parliament against being impeached or questioned in any court or place out of Parliament,

(ii) the protection of privileged material in proceedings of courts and tribunals, descended from Article 9, is declared and enacted in s.16 of the *Parliamentary Privileges Act 1987*,

(iii) the protections recited in Article 9 and secured through s.49 are not confined to courts and tribunals, but also encompass the protection of privileged material against incursion by the executive and executive agencies,

(iv) the protection of privileged material against seizure by executive agencies under warrant is acknowledged and secured by a settlement between the legislature and the executive, whose purpose is to ensure that search warrants are executed without improperly interfering with the functioning of Parliament, and

(v) the National AFP Guideline developed under this settlement is intended to enable informed claims of privilege to be made and determined, with seized material sealed with a third party until those claims are resolved;

(c) declares, for the avoidance of doubt:

(i) that the right of the Houses to determine claims of privilege over material sought to be seized or accessed by executive agencies adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed, and

(ii) in particular, that these rights adhere against the covert use of intrusive powers, by which agencies may seek to seize or access information connected to parliamentary proceedings without the use or presentation of warrants;

(d) requires the executive and executive agencies to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege; and

(e) calls on the Attorney-General, as a matter of urgency, to work with the Presiding Officers of the 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 shortcomings 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.

Senator Deborah O'Neill  
**Chair**