

Appendix 2

Opening statement

Mr Colvin: No, I appreciate that, and we should have thought to do that. I understand that the hearing is an opportunity for the AFP to provide further evidence and clarification in response to the committee's concerns. Further, there is no particular allegation of contempt in relation to the AFP's conduct in executing the search warrants. Accordingly, we have prepared for the hearing on that basis.

The AFP has reviewed its conduct in regard to the areas of concern raised by the committee, and in my view the AFP can demonstrate that its actions were consistent with the purpose of the national guideline and relevant search warrant laws and that there was no improper interference with the functions of the Senate, its committees or senators.

As the committee is aware, the MOU and the associated National Guideline on the Execution of Search Warrants Where Parliamentary Privilege May Be Involved represent agreed procedures that were developed following very extensive and detailed negotiation between parliament and the executive. The terms of the agreement represent a balance of competing and important interests. The AFP recognises the importance of parliament being able to carry out its functions without improper interference and understands there are particular sensitivities arising from the execution of search warrants. The AFP recognises the concerns of the Privileges Committee, and I wish to assure the committee that the AFP also takes those agreed responsibilities very seriously.

The national guideline clearly contemplates that, in search for evidence of a criminal offence, the AFP search warrant may also gather up material forming part of proceedings in parliament—that is, the MOU and the national guideline contemplate the scope of documents falling within the terms of a search warrant, and it may include documents over which a claim of privilege may be made. Even if this is the case, the execution of a search warrant is not precluded.

If I turn to the execution of the search warrants on 11 October 2018, in the report the committee has specifically raised the following issues regarding the AFP's conduct in the execution of those search warrants. Firstly, on the purpose of the warrant, the committee has expressed concern regarding the AFP's purpose in executing the search warrants. In relation to examination, the committee is concerned a claim of privilege could not be made until after the contents of the seized material had been examined by the AFP. You raised concerns about notification—that neither the senator named in the warrant nor the President of the Senate was advised that the search warrant would be executed. On improper interference, the committee is concerned the terms of the search warrant identified a senator and a Senate committee inquiry, yet the AFP did not recognise an automatic claim of privilege. I'll address each of these issues briefly in turn and then answer any questions the committee may have on these matters or any other queries regarding the AFP's conduct in planning and executing these search warrants on 11 October 2018.

I'll turn the purpose of the warrants. The AFP is conducting an investigation into the alleged unauthorised access and disclosure, by an employee of the Australian Border Force, of information which was subsequently published by an Australian media outlet. The purpose of the search warrants was to locate evidence in relation to the suspected criminal offences. The search warrants were expected to locate any available electronic records that could enable the identification of the recipient or recipients and the relevant circumstances of the alleged unauthorised disclosure. The AFP expected to find evidence of material which showed who, if anyone, had access to information, whether access was authorised and how the information came into the possession of a media outlet.

The AFP was not in a position to determine the outcome of its investigation based on the limited material that was known or suspected at the time. Obtaining further information to progress the investigation was the purpose for executing the search warrant. This is no different to the conduct of any other investigation. The committee has indicated in the report that it is concerned that the purpose of the search warrant was to locate material that was covered by parliamentary privilege, specifically material that had a close relationship to a parliamentary committee. The search warrants were not conducted as a consequence of any evidence given to the legal and constitutional affairs review committee. The purpose of the search warrants was not to locate materials subject of parliamentary privilege.

As the AFP's written submission to this inquiry has outlined, the AFP was certainly alive to the possibility that privilege may apply over some material, but this was not certain. On the information available, it was not known how the LCAR committee came into the possession of a copy of the email, whether it was from the suspect or through another person, or whether any of those possible interactions were exclusively between the suspect and a

member of parliament. In conducting an investigation, the AFP is obliged to establish all relevant facts and obtain material evidence in relation to alleged offending. This was the purpose for the AFP in executing these search warrants, and this is no different to the course of action the AFP takes in other investigations.

Turning to the examination of the material: in examining material at the warrant premises, the AFP complied with the national guideline. The national guideline does not override the AFP's legal obligation to inspect material to the extent necessary to satisfy the conditions of the search warrant, and indeed this is always a requirement when conducting a search. The AFP never planned to read those documents in detail. The only examination the AFP undertook was to ensure the documents were within the terms of the search warrant and any seizure of the material would be lawful. The AFP nonetheless took particular care to ensure that any claim of privilege was preserved, including by instructing searching officers that they should quarantine any material located at the search over which the occupier claimed privilege or which, on its face, could give rise to a privilege claim, even if the claim was not made by the occupier.

The AFP prepared draft letters addressed to potentially affected members in advance of the warrant execution so that, on the day of the execution of the warrants, there would be no delay in providing those senators with that opportunity. These steps preserve the members' rights to make a claim and seek a ruling on the quarantine material. The examination of the material was limited to reviewing the documents in sufficient detail to determine that they were within the scope of the warrant conditions. This limited examination did not impede or have any detrimental effect on any subsequent privilege claim.

In relation to prior notification: the AFP maintains that it complied with all of the applicable terms of the national guideline. In considering prior notification to a senator or the Senate President, the AFP considered the relevant provisions of the national guideline and acted in accordance with the national guideline. The guideline provides for prior notification where warrants are executed on premises occupied by a member of the parliament. In circumstances where warrants are not executed on premises occupied by a senator or member, notification to a relevant senator or member, in accordance with clause 4.2 of the guideline, is triggered by a claim of privilege made by the occupier.

Operational integrity and the protection of the privacy of individuals concerned were also relevant considerations. Having more people aware of the investigation broadens the potential scope for compromise of security and the risks to the privacy of the persons involved. Nonetheless, the AFP had considered the possibility that privilege material would be located during the execution of the warrant and made specific plans to deal with that eventuality in a way that would preserve the integrity of the privilege claim. To that end, any document to which a privilege claim might conceivably apply was to be quarantined, and potentially affected senators, the committee and the Presiding Officer would be notified immediately following the execution of the warrant. No document which could attract a privilege claim would be inspected more than was required to determine if it fell within the scope of the warrant.

The AFP considers the steps it prepared to notify members of material over which they might wish to make a claim of privilege were appropriate and satisfied the terms and objectives of the national guideline. These steps would ensure there was no improper interference with those members' duties or compromise of the integrity of any privilege claim. In any event, these preparations proved unnecessary as, on the day, a claim of privilege over all material was made early, during the execution of the search warrants. After the claim for privilege was in fact made, the AFP immediately lodged all of the quarantined material with the presiding officer and did not take any copies. These steps were consistent with the requirements of the national guideline and the Crimes Act 1914. Cumulatively, they provided the privileged material with the same level of protection as if the member were present.

In relation to the improper interference, the national guideline clearly contemplates that, in searching for evidence of a criminal offence, the AFP search warrant may also gather up material forming a part of proceedings in parliament. That is, documents can concurrently be suspected to be evidence of a criminal offence and also subject to a member's claim of privilege. The likelihood of privileged material being located at a warrant premises and falling within the conditions of a search warrant is not a barrier to a search warrant's execution, nor is it a reason for a legitimate police investigation to be discontinued. In this matter, the search warrants were executed on premises that were not occupied or used by a member of parliament. This meant the AFP had to accommodate the possibility that privilege claims would be made by the occupier, triggering a process in the national guideline that required that material to be quarantined for later examination.

The committee's report makes comparisons to the execution of search warrants in the NBN matter—your 164th report. Although the factual circumstances are distinguishable from these circumstances, most significantly in that

the search warrants in this matter were not conducted on the premises of a member, the AFP considered the committee's comments of the 164th report in preparing for the execution of these warrants. As I explained earlier, the AFP made detailed preparations to recognise and preserve the integrity of any privilege claim which may have been applicable to material located at the warrant premises. In making these preparations and in the subsequent actions of the AFP during the execution of the search warrants, the AFP, again, acted in accordance with the purpose and requirements of the MOU and the national guideline.

The role of police is to independently investigate allegations that are referred to it, including allegations of unauthorised disclosure such as the ones being discussed today. Necessarily, in referral, the AFP does not consider the motivations that may be behind the disclosure—whether these may be good or bad—as motivations, in contrast to intention, are simply not relevant to the commission of the offence. The AFP conscientiously applies its statutory powers to determine the circumstances that have been referred to it and establish whether those facts reveal evidence of an offence. The committee has already recommended the national guideline needs to be updated to take account of modern technology used during search warrants and ensure it remains fit for purpose. I agree with those recommendations, and the AFP is liaising with the Department of Home Affairs as the responsible department to review the guideline and the MOU. Nonetheless, the AFP is confident we are working within the parameters of the national guideline. The warrant activity on 11 October 2018 is no exception. I'm confident my officers behaved entirely appropriately and were mindful of complying with the national guideline in the planning and execution of the warrant activity.

Chair, if I may reflect the comments that the good senator made before, we are conscious that this is a closed hearing. We are aware, however, of course, that, while this is in camera, you would be aware that there already has been significantly media about the matter, including the report that is public. I would like to seek the committee's views, not necessarily today, about the ability for me to publish my opening statement, at least internally, to members of the AFP, who obviously are aware of this matter from the media but have no context in which to understand the AFP's position. I'll leave it at that.