

The Senate

Committee of Privileges

Parliamentary Privilege and the use of search
warrants

174th Report

April 2019

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Report

Introduction

1.1 On 26 November 2018 the committee's 172nd 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 172nd 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.¹

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

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.

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

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 164th and 172nd 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 164th 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.³

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'.⁴ 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

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*, 164th 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'.⁵

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'.⁶ 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'.⁷

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'.⁸ 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'.⁹ The AFP noted the need to take into consideration issues such as operational integrity and the privacy of individuals when contemplating prior notification.

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.'¹⁰

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.'¹¹

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'.¹² 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'.¹³

1.21 They draw a distinction between the execution of warrants in the NBN Co matter (the subject of the 164th 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 164th Report in preparing for the execution of the warrants'.¹⁴ The Commissioner expressed confidence that the AFP were 'working within the parameters of the National Guideline'.¹⁵

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

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.¹⁶

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, ...¹⁷

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'.¹⁸ 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

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'.¹⁹

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.

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

be on the search premises'.²⁰ 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.

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.'²¹

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 164th 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 168th 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

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

enforcement and intelligence agencies' when intrusive powers are exercised²². 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.'²³ 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'.²⁴ 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

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

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

²⁴ 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.²⁵

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;

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

(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

Appendix 1



**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**

1 Preamble

This Memorandum of Understanding records the understanding of the Attorney-General, the Minister for Justice and Customs, 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') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'), including the Parliament House office of a Member, the electorate office of a Member and the residence of a Member.

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 privilege or public interest immunity in relation to documents or other things that may be on the search premises.

2 Execution of search warrants & parliamentary privilege

The agreed process is spelt out in the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* ('National Guideline'). This National Guideline establishes the procedures that AFP officers shall follow when executing search warrants on premises occupied or used by a 'Member'. The National Guideline is set out at Annexure A to this Memorandum of Understanding and covers the:

- Legal background to parliamentary privilege;
- Purpose of the guideline;
- Application of the guideline;
- Procedure prior to obtaining a search warrant;
- Procedure prior to executing a search warrant;
- Execution of the search warrant;
- Procedure to be followed if privilege or immunity is claimed; and
- Obligations at the conclusion of a search.

3 Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the AFP by publishing the Memorandum of Understanding on the AFP Hub, together with an electronic message addressed to all AFP employees or special members affected by the Memorandum of Understanding to bring it to their attention.

This Memorandum of Understanding 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.

4 Variation of the National Guideline

Subsection 37(1) of the *Australian Federal Police Act 1979* (AFP Act) provides that the Commissioner of the AFP has the general administration and control of the operations of the AFP. Section 38 of the AFP Act provides that when exercising his powers under section 37, the Commissioner may issue orders about the general administration and control of the operations of the AFP in writing. The Commissioner has delegated this power in relation to the issuing of national guidelines to National Managers.

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

The most current National Guideline applies to this Memorandum of Understanding. The version attached at Annexure A is current at the time this Memorandum of Understanding is signed.

5 Conflict Resolution

Any issues or difficulties which arise in relation to the interpretation or operation of this Memorandum of Understanding are to be discussed, at first instance, by the parties to the Memorandum of Understanding. If necessary, the Attorney-General or the Minister for Justice and Customs will raise those issues or difficulties with the Commissioner of the AFP.

6 Variation of this Memorandum of Understanding

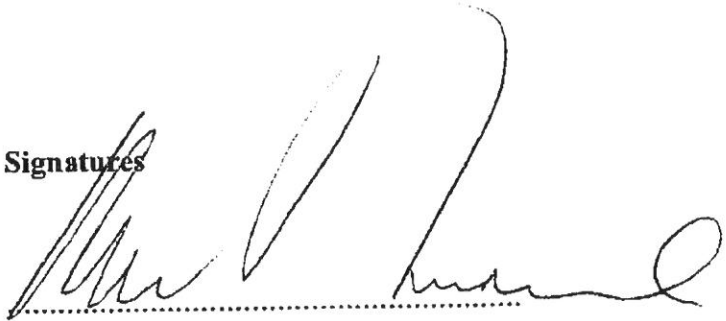
This Memorandum of Understanding can be amended at any time by the agreement of all the parties to the Memorandum of Understanding.

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants in the premises of Members of Parliament is concluded between the parties holding the positions of the Minister for Justice and Customs, the Attorney-General, the Speaker of the House of Representatives and the President of the Senate.

7 Revocation of agreement to this Memorandum of Understanding

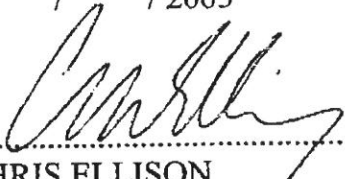
Any party to this Memorandum of Understanding may revoke their agreement to the Memorandum of Understanding. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures



PHILIP RUDDOCK
Attorney-General

1 / 2005



CHRIS ELLISON
Minister for Justice and Customs

9 / 2 / 2005



DAVID HAWKER
Speaker of the House of Representatives

21 / 3 / 2005



PAUL CALVERT
President of the Senate

18 / 2 / 2005



Australian Federal Police
— *To fight crime together and win* —

**AFP National Guideline for
Execution of Search Warrants
where Parliamentary Privilege
may be involved**

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AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved

1. Preamble

This guideline sets out procedures to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'). The guideline applies to any premises used or occupied by a Member, including the Parliament House office of a Member, the electorate office of a Member and the residence of a member.

The guideline is designed to ensure that search warrants are executed without improperly interfering 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 be on the search premises.

2. Legal background

A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member. 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.

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.

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 applies to any document or other thing which falls within the concept of "proceedings in parliament". That phrase is defined in the Parliamentary Privileges Act to mean 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. It includes evidence given before a committee, documents presented to a House or a committee, documents prepared for the purposes of the business of a House or committee and documents prepared incidentally to that business. It also includes documents prepared by a House or committee. 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.

It is not always easy to determine whether a particular document falls within the concept of "proceedings in parliament". In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.

It is also possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995) 127ALR159).

Public interest immunity can apply to any document if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Among other things, public interest immunity can apply to documents if disclosure could damage national security, defence, international relations or relations with the States, or if the document contains details of deliberations or decisions of the Cabinet or Executive Council, or if disclosure could prejudice the proper functioning of the government of the Commonwealth or a State.

Public interest immunity can arise in any situation, but it is more likely to arise in relation to documents held by a Minister than by a Member who is not a Minister.

Further information in relation to the legal principles which apply in these cases can be found in the DPP Search Warrants Manual. That document is not a public document but has been provided to the AFP by the DPP and is available to AFP officers on the AFP Intranet.

3. Purpose of the guideline

This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.

4. Application of the guideline

4.1 The guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a Member including:

- the Parliament House office of a Member
- the electorate office of a Member; and
- any other premises used by a Member for private or official purposes on which there is reason to suspect that material covered by parliamentary privilege may be located.

4.2 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.

4.3 If a Member raises a claim for Legal Professional Privilege (sometimes called client legal privilege) in respect of a document, the executing officer should follow the normal procedure that applies in cases where a claim for Legal Professional Privilege is made in respect of a document that is on premises other than those of a lawyer, law society or like institution. The fact that Legal Professional Privilege has been claimed by a person who is a Member does not alter the normal rules that apply in such cases.

5. The Substantive Guideline

Procedure prior to obtaining a search warrant

5.1 An AFP officer who proposes to apply for a search warrant in respect of premises used or occupied by a Member should seek approval at a senior level within the AFP (the relevant National Manager if available, otherwise a Manager) before applying for the warrant.

5.2 If approval is given, the officer should consult the office of the appropriate DPP before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against ACT law, the appropriate DPP is the ACT DPP. The appropriate DPP can provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant.

5.3 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.

Procedure prior to executing a search warrant

5.4 If the premises that are to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If a Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee.

5.5 The executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise the potential interference with the performance of the Member's duties.

Executing the search warrant

5.6 If possible, the executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:

- (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day;
- (b) a search warrant should be executed at a time when the Member, or a senior member of his/her staff, will be present; and
- (c) the Member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed.

5.7 If the Member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the Member, or member of staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

5.8 There is a public interest in maintaining the free flow of information between constituents and their Parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

5.9 As part of that process, the executing officer should consider inviting the Member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

Procedure to be followed if privilege or immunity is claimed

5.10 If the Member, or a member of staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the Member, or member of staff, to identify the basis for the claim. The executing officer should then follow the procedure in paragraph 5.11 unless the executing officer considers a claim to be arbitrary, vexatious or frivolous. In the latter circumstances, the procedure in paragraph 5.13 should be followed.

5.11 The executing officer should ask the Member, or member of staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in audit bags in accordance with the AFP national guideline on exhibits. A list of the documents should be prepared by the executing officer with assistance from the Member or member of staff;
- The Member, or member of staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;
- The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party;
- The Member has five working days (or other agreed period) from the delivery of the items to the third party to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. In this respect, it is a matter for the Member to determine whether he/she should seek that ruling from a Court or the relevant House;
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling; and
- If the Member has not contacted the executing officer within five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.

5.12 If the Member, or member of staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the circumstances of the case to minimise the extent to which the members of the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

5.13 In some cases a Member, or member of staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and that, therefore, the proposed search should not proceed in any form. If that occurs, the executing officer should consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the Member, or member of staff, that he/she intends to proceed to execute the search warrant unless the Member, or member of staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.

5.14 The AFP will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister responsible for the AFP (if different) in any case where a claim of parliamentary privilege has been made by or on behalf of a Member.

Obligations at the conclusion of a search

5.15 The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the Member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

5.16 The executing officer should inform the Member that the AFP will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

5.17 The AFP will comply with any law including the requirements set out in the legislation under which the relevant search warrant was issued.

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.