

Preliminary report

Introduction

1.1 The committee makes this preliminary report to the Senate on the disposition of documents seized under search warrants over which claims of parliamentary privilege have been made. The matter was referred to the committee on 31 August 2016. The resolution referring the matter to the committee appears at Appendix A, together with the President's statement putting the matter before the Senate and documents tabled with that statement.¹

1.2 The inquiry concerns documents seized during the execution of three search warrants. The resolution referring the matter identifies the documents as:

- (a) the material delivered to the Clerk of the Senate on 20 May 2016 by Australian Federal Police (AFP) following the execution of search warrants on 19-20 May 2016 at the office of Senator Conroy at Treasury Place, Melbourne, and at the Brunswick home of an Opposition staff member;
- (b) the material delivered to the Clerk of the Senate on 24 August 2016 by the AFP following the execution of search warrants on that day at the premises of the Department of Parliamentary Services, Parliament House, Canberra.²

1.3 The purpose of the inquiry is to determine whether some or all of the documents over which former Senator the Hon. Stephen Conroy has claimed privilege ought to be protected from seizure by the AFP because of parliamentary privilege.

1.4 This report does the following:

- it notes the findings of a parallel privilege inquiry undertaken by the House of Representatives Committee of Privileges and Members Interests (the House Privileges Committee)
- it explains the reasons for the Senate Privileges Committee resolving to take a different path in continuing its inquiry

1 The committee is also considering another matter, referred on 1 September 2016, requiring the committee to consider whether information gained in the execution of the warrants was used in ways that might amount to contempt of the Senate. That matter will be dealt with in future reports of the committee.

2 The resolution also refers to a third category of documents:

- (c) the material referred to in a letter from Senator Conroy to the Clerk of the Senate, dated 12 August 2016, being copies of material seized from his office and the home of a staff member on 19-20 May 2016 that had been acquired by the AFP in searching any other premises.

At this stage it is not apparent to the committee that there are any documents which fall into this last category.

- it sets out the next steps the committee intends to take and
- it asks the Senate to empower the committee to take those steps.

1.5 Before turning to those matters, however, the report sketches the background of its inquiry and the state of the law with respect to parliamentary privilege and the execution of search warrants.

Privilege and the execution of search warrants

1.6 There is uncertainty at law about the extent to which parliamentary material is protected from seizure under search warrant. The relevant background is described in the paper from the Clerk of the Senate, reproduced in Appendix A.

1.7 Much of the uncertainty stems from the federal court judgment in *Crane v Gething*. In that case it was held that the court did not have jurisdiction to determine whether parliamentary privilege prevented such a seizure, as the issue of search warrants is an executive act and not a judicial proceeding, and that only the House concerned and the executive may resolve such an issue.

1.8 In 2005, to bridge this uncertainty, the then Presiding Officers and Attorney-General entered into a Memorandum of Understanding about the execution of search warrants on the premises of members, or where parliamentary privilege may be involved. The AFP adopted a national guideline setting out processes its officers would be required to follow in executing such warrants.

1.9 The preamble to the national guideline states:

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.

1.10 The committee considers that this important purpose should inform the interpretation and implementation of the guideline. It is worth quoting further the legal background to claims of parliamentary privilege, as set out in the guideline:

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.

1.11 As has been noted, the guideline fills a gap in the law. It represents a settlement between the Legislature and the Executive about the processes that are to apply in executing search warrants in relevant circumstances, including a process for members to make claims of parliamentary privilege over material seized. It also, in setting out the legal background, prescribes the applicable test for determining those claims; that is, by reference to the definition of ‘proceedings in parliament’ in the Parliamentary Privileges Act.

1.12 More broadly, the processes set out in the national guideline includes the following elements:

- the documents over which privilege is claimed are placed in audit bags;
- a list of the documents is prepared;
- the member is given an opportunity to take copies of the documents;
- the secured items are delivered to a neutral third party (“who may be the warrant issuing authority or an agreed third party”);
- the member has five working days to notify the executing officer whether the claim is abandoned or to commence action to seek a ruling on whether the claim can be sustained;
- it is a matter for the member to determine whether to seek a ruling from a court or the relevant House;
- the items remain in the possession of the neutral third party until the claim is determined.

1.13 In the current matter, former Senator Conroy made and confirmed his claims of privilege over the seized documents in accordance with these processes, and the documents were sealed and provided to the Clerk of the Senate, as indicated at paragraph 1.2. As indicated in the President’s statement, former Senator Conroy elected to have the Senate determine his claims of privilege.

1.14 The execution of warrants in this matter present the first occasion on which the processes set out in the national guideline have come before the Senate and, with this reference, before the committee. The inquiry also takes place in the context of a parallel inquiry by the House of Representatives.

The House Privileges Committee inquiry

1.15 The committee notes the intersection of its work with an inquiry of the House of Representatives Committee on Privileges and Members Interests. On Monday, 28 November 2016, the House of Representatives Committee on Privileges and Members Interests (the House Privileges Committee) reported on its own investigation

into the search warrants matter. The House inquiry related to the claim of privilege made by the Member for Blaxland, the Hon. Jason Clare MP over the documents seized in the execution of the warrant on the DPS servers in Parliament House on 24 August 2016. Copies of those documents were sealed and provided to the Clerk of each House. The House Privileges Committee recommended that the claim of privilege should be upheld:

The committee recommends that the House rule to uphold the claim of parliamentary privilege by the Member for Blaxland in relation to material seized under a search warrant executed by the Australian Federal Police on 24 August 2016, that the Australian Federal Police be advised of the ruling by the House and that the material held by the Clerk of the House be returned to the Member for Blaxland.

1.16 The committee concluded that, because the subject of the search warrant coincided with the responsibilities of Mr Clare 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.’ [para. 1.40] Referring to this fact as a ‘critical circumstance’, the House Privileges Committee went on to find that:

...[a] reasonable presumption then arises that the material would be included in the term ‘proceedings in Parliament’... In reflecting on this presumption, the committee accepts as validation of that presumption, the word of the Member for Blaxland, as a member of the House, in his initial and sustained claims to the AFP that parliamentary privilege attaches to the records seized.

1.17 The Senate committee notes the similarity in the circumstances of the two matters, and particular the duties of Mr Clare as a shadow minister on the one hand and those of then Senator Conroy as shadow minister representing Mr Clare and as member and sometime chair of the Senate NBN Select Committee. The committee intends to consider the extent to which the approach taken by the House Privileges Committee ought also be applied in the Senate inquiry.

1.18 The approach of the House committee relies on a presumption that documents connected to a member’s portfolio responsibilities are likely to be proceedings in parliament. This committee intends to consider how this approach might be further developed, including the sorts of factors that might be taken into account in determining whether and when such a presumption may be established, and what sorts of factor or evidence ought override it.

Claims of privilege made in both Houses

1.19 On 1 December 2016, the House of Representatives adopted its committee’s recommendation, and resolved that the copy of the documents held by the Clerk of the House be returned to Mr Clare and withheld from the AFP investigation. This circumstance requires the committee to consider what, if any, effect a finding of privilege by the House ought to have in relation to copies of the same documents held by the Senate.

1.20 The interaction between claims of privilege made by members of different Houses raises interesting questions. One is whether a claim of privilege may be sustained by a member of one House in relation to proceedings of the other. Another is whether one House is bound to recognise the findings of the other where each considers claims of privilege made over the same documents. In the current matter it might be concluded that, if *neither* House upheld the claim of privilege in relation to particular documents, they could be provided to the AFP. However, if one House found that seized documents were privileged that finding might be thought to, in effect, prevent the other House providing them. To do otherwise may involve one House both questioning and interfering with the proceedings of the other.

1.21 The Senate committee has not formed a concluded view on these matters.

The conduct of the inquiry

1.22 The House Privileges Committee reached its conclusions without examining the seized material. The Senate Privileges Committees considers that it should take a different approach. In part this is so that the committee can consider the matters set out above. The committee has also commenced the process of gathering information to inform its determination about the disposition of the documents, and considers it appropriate to properly consider that information. The committee also has before it a contempt inquiry arising from the execution of the warrants, which will be better informed by further consideration of this matter. The underlying facts of the contempt inquiry – apparent misuse of seized material which should, according to the terms of the national guideline, have been sealed and unavailable – also raise concerns for the committee about the effectiveness of the processes in the guideline and, in particular, concerns that the guideline does not sufficiently protect members' information. In this vein, the committee has this week received a new reference about the adequacy of parliamentary privilege as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies. Further consideration of the current matter will, again, better inform that inquiry.

1.23 Finally, and of particular concern to the committee, is evidence provided by the AFP as background to this inquiry, which indicates that the investigation of the matter initially involved 'pre-warrant' enquiries made to departments and private entities about members' offices and staff. The evidence to the committee indicated that there are no particular protocols applying in relation to making and answering such enquiries, so that the sort of protections required in the execution of search warrants may be entirely absent here. Again, these matters will be investigated as part of the matter referred this week.

Next steps

1.24 The resolution referring the matter empowers the committee to make recommendations to the Senate about the seized documents, if it can satisfy itself about their status without examining them. The committee is prohibited, at this stage, from examining them, although it could do so by seeking authorisation from the Senate. The resolution referring the matter also indicates that the committee may seek the Senate's approval to appoint an independent third party to examine the documents and make recommendations about their status.

1.25 Recalling that the committee has two connected references (including the contempt inquiry mentioned above), the committee has before it:

- Documents tabled by the President, including correspondence from former Senator Conroy and a background paper from the Clerk of the Senate about the execution of search warrants
- A submission from former Senator Conroy on each matter
- A submission from the AFP on the ‘disposition’ matter, but including background relevant to both matters
- A list from the AFP of the documents seized, though in general terms, argued (in the AFP submission) to be insufficient to assist in determining their status
- Copies of the three search warrants and the affidavits sworn by AFP officers seeking the warrants, with redactions

1.26 The committee has considered submissions on the first matter from the parties involved, and has also received a private briefing from the AFP. The committee considers it would be inappropriate, at this stage, to publish that material, particularly as much of it also relates to the ongoing contempt inquiry.

1.27 Submissions from both parties indicate acceptance of the process set out in the national guideline, although their interpretation of its requirements varies.

1.28 The submission from former Senator Conroy begins:

These submissions establish that all material seized under search warrant is protected under parliamentary privilege and therefore ought to be returned to Senator the Hon. Stephen Conroy (retired) forthwith. (paragraph 1)

1.29 The submission states that the claim is founded in article 9 of the bill of rights – the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament – as incorporated into Australian law by section 49 of the Constitution and the Parliamentary Privileges Act. The submission directs attention to former Senator Conroy’s contempt submission for a “demonstration of how allowing this material to be seized under search warrant would impeach the proceedings in the Parliament.”

1.30 The bulk of the submission, however, is a 35 page table setting out the various ways in which documents seized under the warrants have been incorporated into parliamentary proceedings. The background to the table notes the relevant parliamentary roles of Senator Conroy and Mr Clare MP connected to the Senate NBN committee; estimates hearings and holding shadow ministries connected to the communications portfolio.

1.31 The AFP submission describes the legal background to privilege considerations and the national guideline and comments on the “procedures and outcomes prescribed by” the guideline, which it suggests “represent a significant concession in favour of parliamentary privilege” (para. 25). The Clerk’s advice to the

committee, discussed further below, notes that “This somewhat surprising claim is not supported by any authorities.”

1.32 While the AFP submission does not contest the application of the procedures set out in the guideline, the committee considers that it approaches them from a narrow and relativistic perspective. It notes that the relevant test is “whether the documents are ‘for the purposes of or incidental to’ proceedings in Parliament” but argues that, for a privilege claim to be made out, there must be a:

...close and direct connection between the particular document and proceedings in Parliament. In particular, it is not sufficient for use in parliamentary proceedings to be merely one of several possible uses motivating the preparation of a document to attract privilege. Such use must be the clear and dominant purpose in preparing the document. (para. 27)

1.33 By contrast the advice from the Clerk advocates the use of the precise statutory language of established privilege law:

In my view, any test must be based on the terms of the statutory expression of the immunity, rather than on selective propositions possibly derived from secondary sources. This is my concern with the AFP’s suggested approach. For example, the “close and direct connection” argued by the AFP is not based on a statement of the law but on an argument for an interpretation of it. [*Odgers’ Australian Senate Practice*] posits the possibility of “an effective immunity from such processes for compulsory production of documents where the documents are so closely connected with proceedings in Parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings” (p. 59). This claim summarises an element of the Senate’s submission to the Federal Court in the case of *Crane v Gething* (2000) 169 ALR 727 to the effect that:

In order to invoke the immunity against production of documents, the documents in question would have to be closely related to proceedings in Parliament ***such that they fall within the expression used in the Parliamentary Privileges Act, “for purposes of or incidental to” proceedings in Parliament.*** (emphasis added).

The closeness of the relationship, therefore, must be assessed by reference to the words of the statute rather than by some subjective or additional measure (“close **and** direct”).

1.34 The AFP concludes that the enquiry “cannot properly be conducted without an examination of the material in question” and submits that “...the engagement of an agreed independent arbiter, on sufficiently specified terms, would be the most appropriate course of action for the committee to adopt for the assessment of the claims of parliamentary privilege in this matter.” (p. 3). This approach appears to draw on the language of the background paper tabled by the President in initially putting this matter before the Senate.

1.35 The committee considers that the material before it, including the warrants and the submissions made by each party, provide a sufficient basis for determining whether the seized documents ought to be privileged. The next consideration for the committee is the test that should be applied in making that determination. There are

two aspects to this. First, developing and applying an appropriate test to determine whether material comes within the definition of 'proceedings in parliament', and secondly, consideration of a broader question connected to the purpose of privilege, that is, whether the execution of the search warrants in itself may amount to an improper interference.

‘proceedings in parliament’

1.36 The committee sought advice from the Clerk of the Senate about formulating an appropriate test for determining whether documents fall within the definition of ‘proceedings in parliament’. The correspondence from the committee to the Clerk, and the Clerk’s advice, appear in the appendix to this report.

1.37 The Clerk has recommended an approach derived from the test used by the New South Wales Legislative Council in a case involving the Hon. Peter Breen in 2003-04, and adapted to encompass the definition of *proceedings in parliament* in section 16(2) of the Parliamentary Privileges Act. The derivation of the test is detailed in the Clerk’s advice. The test may be summarised as follows:

STEP 1: Were the documents *brought into existence* in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 2.

STEP 2: Have the documents been *subsequently used* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → move to step 3.

STEP 3 Is there any contemporary or contextual evidence that the documents were *retained or intended for use* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES → falls within “proceedings in Parliament”.

NO → report to the committee that there are documents which fail all three tests.

Notes: Individual documents may be considered in the context of other documents;

The assessor should divide the documents into those that satisfy any of the tests and those that satisfy none of the tests.

1.38 The committee notes the Clerk’s observation, in both her advice to the committee and in the background paper, that any assessment of documents in matters such as this be “carried out as closely as possible to a judicial manner, to replicate as far as possible the task that a court might be expected to perform in determining the facts, should courts accept this jurisdiction in future matters.” This recommendation

principally arises from concerns about the methodology used in earlier matters outsourced by the Senate to independent examiners.

1.39 However, in the current matter the committee has reached a different view about the steps it should take to progress its inquiry.

Examining the seized material

1.40 In determining its next steps in the current matter the committee notes that the NSW Privileges Committee examined the documents in the Breen matter itself, rather than appointing an independent assessor. The committee proposes, with the approval of the Senate, to follow that example and examine the documents itself. It is well-established that the Privileges Committee, underpinned by the resolutions which guide its work, has the capacity to operate in a quasi-judicial manner, well-suited to assessing the documents at issue in this matter against the test outlined above. The committee recognises that there may be a need to engage persons with specialist knowledge to assist it in this task, and therefore seeks the same authority to engage specialist support on the same basis as other standing and select committees.

1.41 To that end, the committee **recommends** that the Senate adopt the following resolution:

That, in relation to the matter referred to the Privileges Committee on 31 August 2016, relating to the disposition of documents over which claims of parliamentary privilege have been made, the Senate:

- (a) empowers the committee to access and examine the material identified in paragraph (1) of the resolution referring the matter, which is in the custody of the Clerk of the Senate, for the purposes of its inquiry; and
- (b) empowers the committee to appoint persons with specialist knowledge for the purposes of the inquiry, with the approval of the President.

Improper interference

1.42 The committee also notes the observation in the Clerk's advice that, quite apart from the test whether documents fall within the definition of proceedings in parliament, the committee has an overarching responsibility to consider:

...whether there may be a basis for a claim of privilege and possibly for resisting compulsory process, such as seizure under search warrant, if the impact of the seizure would involve improper interference with legislative activities, regardless of the use to which such documents may be put. The concept at stake is the protection of members' sources and the chilling effect on the provision of information to members of Parliament recognised by McPherson JA in *Rowley v O'Chee*:

Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a

state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.³

1.43 As part of its inquiry, the committee intends to consider whether the seizure of the documents may itself have involved an improper interference in this sense. The committee will take into account the stated purpose of the national guideline and the views of other parliamentary committees which have undertaken such inquiries. In doing so, the committee will also be guided by the purpose of parliamentary privilege, which is to protect the ability of the Houses, their committees and members to carry out their functions and exercise their authority.

3 *O'Chee v Rowley* (1997) 150 ALR 199 at 215