

The Senate

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Committee of Privileges

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Search warrants and the Senate

164th Report

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# Chapter 1

## Search warrants and the Senate

1.1 When Australian Federal Police (AFP) officers execute a search warrant where parliamentary privilege may be involved, they are required to do so in accordance with a national guideline adopted in 2005 as the result of a memorandum of understanding between the then Presiding Officers and Attorney-General.

1.2 The preamble to the national guideline states that it:

... 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.

1.3 The committee considers that these purposes – safeguarding against improper interference and ensuring that privilege 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.

1.4 The guideline has been tested for the first time in the investigation of a suspected leak from NBN Co, involving the execution of three search warrants. The background is set out in the committee's [163rd report](#). The committee now reports on two inquiries arising from the matter, which in turn deal with:

- the disposition of seized material over which privilege has been claimed; that is, whether the privilege claim should be upheld (the privilege matter) and
- allegations of possible contempts arising from the way warrants were executed (the contempt matter).

1.5 Although referred separately, the committee reports on these matters together, partly because of their common factual bases, but also because the committee's recommendations on the two matters are interlinked.

### Documents available to the committee

1.6 The main evidence before the committee comprises:

- Documents tabled by the President, including correspondence from former Senator the Hon. Stephen 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
- Correspondence from the AFP and from NBN Co responding to the contempt allegations.

1.7 The committee is for now reserving its decision about the publication of these documents, other than those published with its preliminary report. A number of them contain details of the AFP investigation, which is ongoing, as well as details of the seized material.

### **Structure of the report**

1.8 Under the guideline, former Senator Conroy made a claim of parliamentary privilege over the seized material. The committee must recommend to the Senate whether that claim ought be upheld. Documents held to be privileged would be withheld from the AFP investigation. These matters are dealt with in chapter 2.

1.9 Part of the committee's assessment of the privilege claim addresses the question whether the impact of the execution of the search warrants may have amounted to an improper interference with the Parliament. The facts underlying the contempt matter are relevant to determining this question. The contempt matter is dealt with in chapter 3.



## Chapter 2

### The privilege matter

2.1 There is uncertainty at law about the extent to which parliamentary material is protected from seizure under search warrant. In the Commonwealth jurisdiction, the matter is currently governed by a settlement between the Parliament and the Executive Government, embodied in the AFP National Guideline for the execution of search warrants where parliamentary privilege may be involved, which draws upon the traditional scope of parliamentary privilege in the courts.

2.2 That settlement has been tested for the first time in the investigation of a suspected leak from NBN Co, involving the execution of search warrants at Senator Conroy's Melbourne office, at the home of one of his staff, and at Parliament House, Canberra (directed at seizing material from the servers managed by the Department of Parliamentary Services). The matter was referred to the committee on 31 August 2016, and was the subject of the committee's [163rd report](#), which contains the necessary background. This chapter sketches the legal and procedural background which protects parliamentary material, before turning to the committee's examination of the seized documents.

#### Search warrants and parliamentary privilege

2.3 There are two ways in which participants in Senate proceedings are protected by parliamentary privilege. The first involves the use of the Senate's contempt powers. The Senate may determine that conduct which obstructs or impedes its work, or that of its members, amounts to a contempt — that is, an offence against the Senate — and may punish a person for undertaking such conduct. The purpose of this contempt jurisdiction is to protect the ability of the Senate, its committees and senators to carry out their functions without improper interference. This purpose is articulated in the statutory threshold for contempt in section 4 of the *Parliamentary Privileges Act 1987* and in the Senate resolutions that guide the committee's work.

2.4 The other way participants may be protected is by a legal immunity, commonly known as freedom of speech in parliament. This is what people tend to mean when they say that something is 'covered' by privilege. Generally, participants in Senate proceedings are immune from legal liability for things said or done in the course of those proceedings; evidence may not be tendered before courts or tribunals for prohibited purposes (traditionally, for the purposes of 'questioning or impeaching' those proceedings). This immunity is descended from Article 9 of the Bill of Rights 1688 and recited in section 16 of the *Parliamentary Privileges Act 1987*. The interpretation and application of these provisions is not a matter for the Senate, but for the courts.

2.5 What is at issue here, however, is the extent of the protection which attaches to parliamentary material seized under search warrant. There is no statutory provision, and little by the way of Australian authority, dealing with the intersection between parliamentary privilege and search warrants.

2.6 A [background paper](#) by the former Clerk of the Senate<sup>1</sup> notes the recognition in Australian law that parliamentary privilege may provide a basis for resisting compulsory production of documents in *court-supervised* discovery processes. The same principles might be expected to apply in relation to the seizure of material under search warrant, however, the position is somewhat uncertain following 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 execution 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.

### **The National Guideline**

2.7 In 2005, as a practical response to the court's disavowal of jurisdiction in *Crane*, 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.

2.8 In its [preliminary report](#), the committee noted that the guideline fills a gap in the law:

1.11 ...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.

2.9 The committee also made clear its view that the purpose of the guideline – from its preamble, 'to ensure that search warrants are executed without improperly interfering with the functioning of Parliament' – should inform its interpretation and implementation.<sup>2</sup> It is worth repeating that part of the guideline in full:

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

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<sup>1</sup> Tabled by the President on 30 August 2016 and reproduced in Appendix A of the 163rd report.

<sup>2</sup> 163rd report, paragraph 1.10.

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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.

2.10 In the NBN matter, then Senator Conroy made a claim of privilege over all of the material seized, in accordance with the processes set out in the guideline, and elected to have the status of the documents determined by the Senate, which referred the matter to this committee. The purpose of the inquiry is to determine whether some or all of the documents over which former Senator Conroy has claimed privilege ought be protected from seizure.

### **The House inquiry**

2.11 The preliminary report also noted proceedings in the House of Representatives, which upheld a parallel claim made by a member over a subset of the seized material. The relevant House committee had recommended that the claim be upheld, principally because the subject of the search warrant coincided with the responsibilities of the member as a shadow minister. For the reasons set out in its 163rd report, the Senate committee determined it would continue its inquiry and examine the subject material before forming its own conclusions.

2.12 Claims of privilege made by members of different Houses raise interesting questions, for instance, whether a claim of privilege may be sustained by a member of one House in relation to proceedings of the other, and whether a finding by one House that documents are privileged effectively binds the other. The committee’s preliminary report touched on these matters without forming a concluded view.<sup>3</sup>

### **Examination of documents**

2.13 On 1 December 2016, the Senate authorised the committee to examine the documents. In its preliminary report the committee indicated that there would be two aspects to its examination of the material. First, determining (as a matter of fact) whether material comes within the definition of ‘proceedings in parliament’; and, secondly, considering a broader question connected to the purpose of privilege, and the stated purpose of the guideline, about protecting the parliament against improper interference. In this sense, the examination touches on both of the methods by which participants in proceedings are protected, as described above. These are taken in turn, below.

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<sup>3</sup> 163rd report, paragraphs 1.15 – 1.21.

***‘proceedings in parliament’***

2.14 As indicated in its preliminary report,<sup>4</sup> the committee has adopted a three-question test for determining whether the seized documents come within the definition of ‘proceedings in parliament’ and therefore warrant protection. This is the test for the scope of privilege in legal proceedings, which turns on the connection between the material in question and parliamentary business. Generally, proceedings in parliament may not be questioned in legal proceedings<sup>5</sup> and the national guideline imports similar protections in relation to the execution of search warrants.

2.15 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 that there are documents which fail all three tests.

Note: Individual documents may be considered in the context of other documents.

2.16 The committee sought and received submissions from former Senator Conroy and from the AFP in relation to the disposition of the documents. The nature and context of the inquiry – particularly the ongoing AFP investigation – militates against the publication of those submissions at this time. However, the submissions usefully informed the committee’s decision to examine the documents, the formulation of the above test, and the application of that test to the documents.

2.17 The submissions are outlined in the preliminary report at paragraphs 1.24 to 1.35. For present purposes, the most relevant material is the attachment to former Senator Conroy’s submission, a 35 page table setting out the various ways in which documents seized under the warrants have been incorporated into parliamentary proceedings.

<sup>4</sup> 163rd report, paragraphs 1.36 – 1.38, and the Clerk’s advice in Appendix B of that report.

<sup>5</sup> See section 16(3) of the *Parliamentary Privileges Act 1987*.

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## Classifying documents

2.18 The documents seized in Melbourne comprised numerous hard copy documents sealed individually in audit bags. There were also compilations of notes and digital storage media. The documents seized in Canberra were primarily printouts of material retrieved from the DPS servers in Parliament House, many of which were copies of documents seized in Melbourne and, again, digital storage media.

2.19 The committee's examination focused mainly on the documents seized in Melbourne, given that the documents seized in Canberra are copies of documents already determined by the House to be immune from seizure and subsequently returned to the Member for Blaxland. Although, in theory, the determination by the House ought not conclusively determine the Senate's position, it would in practice be surprising for the Senate to make a different finding in relation to those documents and to release them to the AFP investigation despite the findings of the House. The committee considers that, given there were parallel privilege claims made in each House, it would have been highly desirable for the Privileges Committees of the two Houses to confer in their consideration of those claims. The committee **recommends** this approach be adopted should similar circumstances arise again.

### *The Melbourne documents*

2.20 Based on the extensive table in former Senator Conroy's submission, which contains links to transcripts of House, Senate and committee proceedings, the committee was satisfied that the various sealed, hard copy documents met Step 2 of its test; that is, they are documents '*subsequently used* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee'. The committee notes that copies of many of these documents were also seized in Canberra.

2.21 Of the documents on digital storage media:

- All of the documents seized in Canberra have been determined to be protected by privilege by the House of Representatives.
- The Conroy submission details the contents and purpose of numerous separately identified emails and email chains, explaining their connection to proceedings, with details drawn from the copies of seized documents provided to staff members during the execution of the warrants. Based on the described connection to proceedings, the committee considered that those emails met Step 1 of the test (that is, they are 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) or Step 2 (as above). Some of the emails and other communications seized also fulfil the function, formulated in step 3 of the test, of standing as evidence that certain documents were *retained or intended for use* in connection with proceedings.
- In relation to other material contained on the digital storage media, former Senator Conroy submitted:

This material was seized in an indiscriminate manner. The vast bulk would clearly fall outside the scope of the warrant and ought be returned to

Senator Conroy on that basis. Senator Conroy refers to the 114th report of the Committee of Privileges 20/08/2003, pp 175/2003 as authority for documents being returned to a senator where they are found to be outside the scope of the search warrant.

To the limited extent that these electronic copies/records capture any metadata, documents or communications that are relevant to this investigation, these metadata, documents and communications that material is derived from and incidental to the above proceedings in the Parliament (see all references above).

The committee considers it is able to accept these propositions.

### ***Conclusion and recommendation***

2.22 The House Committee did not examine the seized documents. It made its judgement about whether documents were ‘proceedings in parliament’ by examining the scope of the (Canberra) warrant. Its intersection with the parliamentary responsibilities of the shadow minister making the claim of privilege provided the basis on which the committee concluded that the documents seized under the warrant were sufficiently closely connected to his parliamentary business to warrant protection. The approach is evidently intended to operate as a presumption that may be dislodged in appropriate circumstances when contrary information comes to light. The usefulness and limitations of that approach will be a matter the committee returns to in its ongoing inquiry into the use of intrusive powers.

2.23 The Senate committee notes that the same argument is made by former Senator Conroy, whose parliamentary duties similarly coincide with the scope of the warrants. The committee considers that Senator Conroy’s claim in this regard is substantially strengthened by his submission, particularly where it demonstrates the use of seized material in connection to the transaction of the business of the Houses and the NBN Select Committee. On the basis of that submission and its examination the committee considers that the documents seized are relevantly covered by the definition of ‘proceedings in parliament’. On this ground, the committee concludes that the claim of privilege should be upheld.

2.24 The committee therefore **recommends** that the Senate adopt its finding that the claim of privilege be upheld, and that the documents be withheld from the AFP investigation and returned to former Senator Conroy.

### **Protections against improper interference**

2.25 In keeping with the committee’s observations about the purpose of the guideline, the other aspect of the examination of the documents involves a broader question going to the impact of the execution of the warrants, and the question whether that process may have amounted to an improper interference with the authority or functions of the Senate or senators.

2.26 This aspect of the inquiry is a reminder that – quite apart from the statutory formulations applied by the courts – the underlying purpose of privilege is to protect the ability of the parliament, its committees and members to carry out their functions and duties, and exercise their authority. Considerations such as the protection of

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members' sources and the possible chilling effect on the provision of information to members are relevant to the committee's inquiries here. Those same considerations strongly influenced the House Committee's conclusion that the documents seized in Parliament House should be immune from seizure.

2.27 Some other considerations here include the committee's concerns that there are no particular protocols applying to the sort of pre-warrant inquiries undertaken in this matter, even though the information sought by those inquiries related to members' offices, and information held by senators and members and their staff;<sup>6</sup> the fact that no particular protocols appear to apply in requesting or approving a warrant where privilege might be involved; and the very wide scope of the warrants.

2.28 The particular focus for the committee, however, has been considering how well the stated purposes of the guidelines were met in the execution of the warrants. As has been noted, the committee considers that the purposes of the guideline – safeguarding against improper interference and ensuring that privilege claims may be properly raised and determined – should inform its interpretation and implementation.

2.29 The way in which the search warrants were executed allowed investigators to examine the documents to determine whether they fell within the scope of the warrants prior to their being seized and sealed, and prior to investigators necessarily recognising that a privilege claim was made over the documents in question. It is relevant in the second matter – the contempt matter – that this approach may have enabled information gleaned from this process to be communicated to, and used by, persons in a manner not authorised by the warrant.

2.30 These matters are addressed in the consideration of the contempt matter, which is detailed in the next chapter.

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<sup>6</sup> See 163rd report, paragraphs 1.22 – 1.23.





## Chapter 3

### Possible interference with the execution of warrants

3.1 This chapter concerns possible improper interference and adverse actions arising from the execution of the warrants. As noted in the previous chapter, the underlying facts also connect to the committee's consideration of the question whether the impact of the execution of the search warrants may have amounted to an improper interference with the functions of the parliament, and whether the seized material ought be protected on that basis.

3.2 The matter was referred on 1 September 2016 in the following terms:

In relation to the execution of search warrants by the Australian Federal Police (AFP) on the Melbourne office of Senator Conroy and the home of an Opposition staff member on 19-20 May 2016, and on the Department of Parliamentary Services at Parliament House, Canberra, on 24 August 2016 or subsequent actions allegedly undertaken by the AFP and NBN Co Limited, as specified in Senator Conroy's letter to the President of the Senate of 30 August 2016 raising a matter of privilege:

- a) whether there was any improper interference, or attempted improper interference with, the free performance by Senator Conroy of his duties as a senator;
- b) whether disciplinary or other adverse action was taken against any person in connection with the alleged provision of information to Senator Conroy; and
- c) if so, whether any contempts were committed in respect of those matters.<sup>1</sup>

#### 'improper interference'

3.3 The Senate's contempt jurisdiction is intended to protect the ability of the Senate, its committees and its members to carry out their functions and exercise their authority without improper interference. This overarching principle informs any inquiry into a possible contempt. In Commonwealth law, contempt is assessed by reference to a statutory test in section 4 of the *Parliamentary Privileges Act 1987*:

#### 4 Essential element of offences

Conduct (including the use of words) does not constitute an offence against a House [that is, a contempt] unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

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1 The letter from Senator Conroy to the President raising the matter and the statement made by the President before the matter was referred provide background to the inquiry. These appear in Appendix A.

3.4 Any conduct may constitute an offence if it satisfies this test. However, the threshold for a finding of contempt is a high one, requiring evidence of an improper act intended or likely to substantially interfere with the functions or duties of the Senate or senators. In determining whether this threshold is reached the committee must take into account the criteria in Privilege Resolution 3. To summarise those requirements, the committee must consider:

- a) whether the use of the contempt jurisdiction is necessary to protect the Senate, its committees and senators against improper acts that may obstruct them in the performance of their functions;
- b) whether there is an alternative remedy; and
- c) whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so.

3.5 It is, in particular, this last criteria, going to the intentions of those against whom allegations are made, which guides the committee in determining whether an act should be considered to be ‘improper’ and whether a contempt should be found. The committee also has regard to Privilege Resolution 6, which contains a non-exhaustive list of possible contempts.

### **Possible contempts**

3.6 Paragraph (a) of the reference deals with the contempt of interference with the duties of a senator. In this regard, the Senate has resolved that:

A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a senator of the senator’s duties as a senator.<sup>2</sup>

3.7 Paragraph (b) deals with possible adverse actions against a person providing information to a senator. As the committee has previously noted:

Where there is a sufficiently direct link between the provision of information [to a senator] and ‘proceedings in parliament’, the Senate may treat the imposition of a penalty on a person who provides information to a senator as a contempt.<sup>3</sup>

3.8 Accordingly the Senate may, in relevant circumstances, use its contempt powers to protect the provision of information to a senator even where that occurs outside of the formal transaction of Senate or committee business. This power rests on the same principles as the Senate’s power to protect witnesses and other participants in parliamentary proceedings, as to which the Senate has resolved:

A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.<sup>4</sup>

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<sup>2</sup> Privilege Resolution 6(1).

<sup>3</sup> [160th report](#), paragraph 1.28.

<sup>4</sup> Privilege Resolution 6(11).

3.9 Conduct that offends against these prohibitions may be dealt with by the Senate as a contempt. It is the committee's task in this inquiry to establish the facts and to determine whether any contempt may have occurred.

### **Contempt submissions**

3.10 The committee noted in its preliminary report that '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 ... about the effectiveness of the processes in the guideline and, in particular, concerns that the guideline does not sufficiently protect members' information.'<sup>5</sup>

3.11 In this regard, former Senator Conroy submits that he made a claim of privilege over all of the subject material, and that all documents and information seized should therefore have been sealed and delivered to an agreed third party – the Clerk of the Senate. However, he submits that information which should have been quarantined in this way was used in a manner contrary to the national guideline. There are two elements to these allegations. The first involves photographs being taken during the execution of the search warrant at his CPO office, and being sent to NBN officers off-site. The second involves an allegation that information 'subject to a privilege claim' may have been used in disciplinary action against NBN employees who were alleged to have provided information to him.

3.12 On the first matter, the former senator submits that an NBN employee assisting with the execution of the warrant copied documents over which privilege had been claimed and 'improperly disseminated them to other NBN Co employees'. The base facts here were confirmed in the AFP submission to the privilege inquiry. The officers executing the warrant were accompanied by an NBN employee appointed as a 'constable assisting' who, on occasion, 'took a mobile phone snapshot of the front page of the NBN document in question before transmitting it to another NBN investigator for advice' about the provenance of some NBN-branded documents.

3.13 The Conroy submission goes on to allege that the AFP warrant holder 'improperly authorised' this activity 'despite the fact that those documents ought to have been quarantined in the office of the Clerk of the Senate', and makes similar comments about the officer in command of the execution of the warrants.

3.14 In relation to the second matter, it is alleged that NBN Co also acted on information obtained during the execution of the warrants at Senator Conroy's office and the home of a staff member which, again, ought to have been quarantined in the Clerk's office; including by taking adverse action against two NBN Co staff.

3.15 The submission suggests that these actions demonstrate contempt for the Senate and also violated the MOU and National Guideline for the execution of search warrants, and it concludes that the Privileges Committee should make findings of contempt against persons involved, and that persons and organisations may also be

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<sup>5</sup> 163rd report, paragraph 1.22.

guilty of a criminal offence under the Privileges Act. The committee makes no comment on this last point, which would be a matter for the courts.

### **Dealing with contempt allegations**

3.16 In conducting inquiries, the Privileges Committee follows procedures set down by the Senate. These are chiefly contained in Privilege Resolution No. 1 (procedures for the protection of witnesses to be followed by Senate committees generally) and No. 2 (additional protections for witnesses before the Privileges Committee in contempt matters). In particular, Resolution 2 requires the committee to ensure that a person against whom allegations are made:

- is informed of the nature of the allegations
- is informed of the particulars of any evidence given in respect of the person and
- is extended a reasonable opportunity to respond to such allegations and evidence.

3.17 The committee therefore wrote to the AFP and to NBN Co, informing them of the nature of the allegations and the underlying evidence, and providing them an opportunity to respond.

### **AFP submission**

3.18 The allegations made by former Senator Conroy centre on: (a) photographs being taken during the execution of the search warrant at the CPO and (b) information ‘subject to a privilege claim’ being used against NBN employees alleged to have provided information to him. The AFP submission disclaims involvement in any disciplinary or other adverse action as described in paragraph (b), assumes that paragraph therefore to be directed at NBN Co, and does not otherwise address that matter.

3.19 The submission accepts that privilege requires that, in executing search warrants, the AFP ‘must ensure that parliamentarians are not subject to improper interference with their performance of their parliamentary duties’ but argues that contempt findings should ‘be reserved for the most serious cases demonstrably interfering with the processes of Parliament and the responsibilities of members’; should not ‘lightly be made’; and moreover should not be made ‘where public officers are fulfilling their lawful public duties in good faith and for a proper purpose, as occurred in this case’.

3.20 On the question of improper interference, in relation to the photographing of records and their transmission ‘to a third party NBN Co officer’, the submission contends that ‘it is not established that the Senator’s free performance of his duties was in fact interfered with. If it was, any interference was transient and minor’. The submission goes on to argue that:

- if there was interference, it was not improper interference ‘but arose as a consequence of the execution of a valid warrant, conducted within the existing

legal and policy framework and in a manner consistent with accepted and usual practice’

- ‘any such interference occurred in good faith and for a proper lawful purpose, with the express intention of avoid and minimising interference with parliamentary duties’.

3.21 Generally, it is submitted that a finding of contempt should not be made, having regard to the criteria the committee must consider.

### **Committee’s comments**

3.22 The AFP suggests that ‘[e]xecution of search warrants and seizure of documents may “interfere” with the free performance of a senator’s duties where it limits the ability of a senator to discharge their parliamentary business’. The submission quotes a 1995 House Privileges Committee report, suggesting that ‘clashing or coming into opposition to the normal or ordinary operation or workings of the office’ could constitute interference. This is a narrow interpretation of interference, but the committee agrees that, in this narrow sense, the execution of the search warrants did not impede the senator or his office in any meaningful way.

3.23 In this case, however, there is a broader question, which is also addressed in the submission: whether the search and seizure was properly undertaken in accordance with the National Guideline. The AFP submits that ‘there was no breach of the undertaking to deal with documents in the manner agreed in the MoU and National Guideline’ and describes the processes followed in the execution of the warrant to narrow the range of the documents seized. Photographing and transmitting copies of the records was intended to reduce the size and scope of the seizure. (‘The impugned conduct was intended, and only intended, to minimise any disruption’.)

3.24 However, the committee considers that the problem is one of the potential leakage of information that should be protected. The execution of the search warrants here involved examination of documents to determine whether they were in scope (and so seized and sealed, to be withheld from any investigation until their status is resolved) or out of scope and therefore put aside. Information gleaned during this filtering process is problematic. The transmission of such information to a third party increases the risk that it may be used for purposes beyond those authorised by the warrant.

3.25 That is what NBN Co is alleged to have done in this case. Of this, the AFP says that the images transmitted to NBN Co were used only to ‘identify the records which were relevant to the investigation... They were not otherwise used to the AFP’s knowledge’. However, the second allegation, considered below in the context of the NBN Co submission, demonstrates the risk.

### **NBN Co submission**

#### ***The photography allegations***

3.26 On the allegations concerning the transmission of photographs during the execution of the search warrant at the CPO, the NBN Co submission repeats the

explanation given by the AFP that only the front covers were photographed, and they were disseminated for a very limited purpose, arguing that the conduct ‘cannot sensibly be said to have improperly interfered with’ Senator Conroy’s duties. The submission points out that, in any case, the NBN employee/constable assisting acted at all times under the direction of the AFP, and argues that the requisite intention for a contempt was not there.

*Alleged use of information against employees*

3.27 The second allegation made by Senator Conroy is that information that was subject to a privilege claim may have been used against NBN employees who were alleged to have provided information to him. The only evidence before the committee in relation to this matter arises from the execution of the second warrant, in Brunswick.

3.28 NBN Co submitted that a contempt could only be found if the documents were actually privileged, rather than merely subject to a claim of privilege. This is not correct. The Senate may find that any improper interference amounts to a contempt, if the requisite criteria are met. Given that the purpose of the guideline is to enable claims of privilege to be made and determined, conduct which interferes with this purpose may certainly be treated as a contempt.

3.29 NBN Co concedes that disciplinary action was, in fact, taken against two employees, but submits that it occurred independently of the AFP investigation, that it was taken solely as identified through its own internal investigation and that ‘the breaches relied upon did not include any communications with parliamentarians, their offices or their staff’.

3.30 However, elsewhere in its submission, NBN Co states that, during the execution of the warrant at the Brunswick residence, ‘certain emails were seen that appear to show that two **nbn** employees had been communicating with [the staffer] about matters pertaining to **nbn**’. The submission does not address who it was that saw the emails, nor how this information was communicated to NBN Co.

3.31 The committee asked NBN Co to confirm whether the two employees had been identified for investigation prior to, or after, the information referred to above came to the attention of NBN Co, and whether that identification was attributed solely, or even partly, to the emails discovered during the execution of the warrants. In its response, NBN Co confirmed that one employee had already been under active investigation, while the other ‘had previously been identified as having had access to one of the stolen documents [but] **nbn** had not yet commenced an active investigation’ at the time the information came to their attention.

3.32 These matters concern the committee. They demonstrate the risk that information which – to use Senator Conroy’s phrase – ought be quarantined may be used for purposes which are not authorised by the warrant and are inconsistent with the purpose of the guideline.

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### *AFP response*

3.33 The committee sought the AFP's views on this matter, which had not been raised in the AFP's initial submission. The AFP response stated:

As part of the role of the constable assisting in the execution of the Brunswick warrant, the NBN Co officer visually inspected emails on a computer. The purpose of that inspection was to provide advice to the warrant holder about the relevant [sic] of those emails to the investigation, with a view to seizing them (subject to any claim of parliamentary privilege). No photographs of the documents were taken by the constable assisting. As far as the AFP is aware, there was no information transmitted from the site of the Brunswick warrant to NBN Co.

The AFP is not able to comment on any use NBN Co may have made of information seen at the Brunswick warrant. The AFP can confirm that the AFP did not authorise the use of information from the warrant premises for any purpose other than the execution of the warrant.

3.34 The fact that unauthorised use may have been made of such information demonstrates that the processes provided for under the guidelines may not adequately protect members' information. The guideline is intended to enable claims of privilege to be made and determined, with seized material sealed away with a third party until that question is resolved. Any practice which, in the meantime, allows the use of material discovered at the scene of a search warrant undermines that purpose. Two practices in particular seem, in this case, to have risked undermining that purpose: the appointment as 'constables assisting' of persons employed by the entity which referred the matter to the AFP; and allowing information from the warrant sites to be communicated offsite despite claims of privilege being made.

3.35 The committee was also interested to consider a process question related to this: the question of the timing of the privilege claim. Both the AFP and NBN Co submissions make something of the fact that certain actions (for example, the filtering of documents to narrow the scope of what was to be seized) occurred before a final claim of privilege was made. This appears to be in aid of an argument that documents examined for this purpose (and information gleaned during this process) are not protected (or, is not protected unless and until those documents are seized and sealed). This may be defensible from a procedural point of view, but again would seem to undermine the purpose of the protocol.

### **Should any contempt be found?**

3.36 In determining whether a contempt should be found, the committee is required to have regard to the criteria in Privilege Resolution 3. To again summarise those requirements, the committee must consider:

- a) whether the use of the contempt jurisdiction is necessary to protect the Senate, its committees and senators against improper acts that may obstruct them in the performance of their functions;
- b) whether there is an alternative remedy; and

- c) whether a person who committed an act which might be held to be a contempt did so knowingly, or had any reasonable excuse for doing so.

3.37 The committee considers that the execution of the Melbourne warrants may have had the effect of interfering with the duties of a senator, and with the functions of the parliament more broadly, by undermining the operation of the national guideline and diminishing the protection that should be available to parliamentary material during the execution of search warrants. The committee also notes that information which warranted protection may have been used to the detriment of a person with a connection to parliamentary proceedings. These are concerns which clearly meet the first of these criteria.

3.38 On that basis, the committee considers that an improper interference has occurred on this occasion. The committee is always reluctant, however, to recommend that a contempt be found in the absence of the requisite intent, and does not do so here. In particular, the committee must consider whether a person who committed an act which might be held to be a contempt did so knowingly, or had a reasonable excuse for doing so.

3.39 In considering the question of intent, the committee notes the argument, put in various forms by both the AFP and NBN Co, that any interference ‘arose as a consequence of the execution of a valid warrant, conducted within the existing legal and policy framework and in a manner consistent with accepted and usual practice’ and agrees that contempt should not generally be found ‘where public officers are fulfilling their lawful public duties in good faith and for a proper purpose...’. The committee also notes that the constables assisting in the warrants were acting under the direction of AFP officers and may not, themselves, have appreciated the strictures which ought to have applied to the use of information discovered during the execution of the warrants.

3.40 The guideline is silent on matters such as the appointment of constables assisting, which the committee understands to be a routine matter where the AFP requires local or expert knowledge in the execution of warrants, and the involvement of third parties connected to the allegations being investigated. It seems to the committee that this practice may be worthy of being brought within the national guideline. The risk that information which ought to be quarantined may be used for other purposes is heightened where third parties are involved off site. These are matters the committee will return to in its broader inquiry into the adequacy of privilege in the use of intrusive powers.

### **Conclusions and recommendation**

3.41 In relation to the first allegation, the committee is satisfied that the dissemination of photographs of material was ultimately conducted with appropriate regard to restricting their use. An alternative remedy (in the terms of criterion 3(b)) was effectively put in place with an agreement that the photographs be deleted. Similar safeguards appear not to have been in place in relation to the second allegation. The second allegation therefore presents more difficulty.



3.42 The committee notes that information discovered during the execution of the Brunswick warrant may have assisted in identifying persons of interest in the investigation. However there is conjecture as to the extent to which that material may have been used, and as to whether those persons would in any case have been identified without that information. NBN Co has assured the committee that, to the extent that any action was taken against employees, the information acted upon was identified through its own internal investigations and ‘the breaches relied upon did not include any communications with parliamentarians, their offices or their staff’.

3.43 The committee remains concerned at the potential that unauthorised use of this information may have adversely affected an NBN Co employee. The committee has previously held that the threshold for a finding of contempt is a high one, requiring cogent evidence of an improper act or motive. The committee recognises the difficulty of conclusively establishing the requisite intent in this case, noting the matters mentioned in paragraph 3.39, above. This difficulty is compounded because the guideline allows the practices mentioned in paragraph 3.40, which the committee considers may be incompatible with its purposes. An alternative remedy in this matter, however, may lie in the resolution of the privilege claim dealt with in the previous chapter.

3.44 The committee therefore refrains from recommending that a contempt be found, but reinforces its recommendation that the claim of privilege over the seized material should be upheld. The committee, in chapter 2, recommended that the claim of privilege made over the documents be upheld, because they met the test formulated by the committee to demonstrate the requisite connection to parliamentary business. In finding that an improper interference has occurred, as set out in this chapter, the committee has also concluded that the seized material warrants protection on those grounds.

3.45 One of the effects of the recommendation that the claim of privilege be upheld is that the subject material would be withheld from the investigation and, therefore, incapable of being used in any prosecution or other legal proceedings against any person, thereby limiting any detriment to any persons involved. The committee considers this to be an acceptable outcome, given the difficulty of further establishing the facts of the matter.

3.46 The committee also emphasises the need for remedial action in relation to the guideline itself. In particular, if it is to meet its stated purpose, the guideline must be revised to ensure that all persons involved in the execution of warrants understand and respect the requirement to quarantine information while claims of privilege are determined. This is a matter the committee will consider in its inquiry on the adequacy of parliamentary powers in the face of intrusive powers.

3.47 The committee therefore **recommends** that the Senate:

- (a) adopt the committee’s conclusion that the seized material warrants protection on the grounds set out in this chapter,

- (b) adopt the committee's conclusion that an improper interference occurred but refrain from making a finding of contempt in respect of the matters referred,
- (c) note the requirement for remedial action in relation to the national guideline for the execution of search warrants where parliamentary privilege may be involved, which the committee will address in its inquiry into intrusive powers.

(Senator the Hon. Jacinta Collins)

**Chair**

# **Appendix**

**Statement by the President, 31 August 2016**

**Letter from Senator Conroy to the President, dated 30 August 2016**



**STATEMENT BY THE PRESIDENT****MATTER OF PRIVILEGE RAISED BY SENATOR CONROY**

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By letter dated 30 August 2016, Senator Conroy has raised as a matter of privilege aspects of the execution of search warrants by the Australian Federal Police (AFP) on his Melbourne office and the home of an Opposition staff member on 19-20 May 2016, and on the Department of Parliamentary Services at Parliament House, Canberra, on 24 August 2016, and related actions allegedly undertaken by the AFP and NBN Co Limited.

Senator Conroy claims that various actions of the AFP and NBN Co staff may have constituted an improper interference with his capacity as a senator to carry out his functions. These include:

- the possibility that the AFP intercepted and made use of his telecommunications and associated data or those of Opposition staff members;
- the alleged capture and dissemination by an NBN Co officer accompanying the AFP on 19-20 May 2016 of images of material over which Senator Conroy had claimed parliamentary privilege, contrary to the Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of Parliament, and associated AFP Guideline;
- the possibility that NBN Co may have acted on information obtained during the execution of the warrants, over which parliamentary privilege had been claimed, to penalise NBN CO staff alleged to have been connected to the provision of information to enable him to carry out his functions as a senator.

Additionally, the alleged penalisation of NBN CO staff alleged to have been connected to the provision of information to enable Senator Conroy to carry out his functions as a senator is raised as a separate potential contempt.

In determining whether to give precedence to a motion to refer a matter to the Privileges Committee I am required to have regard only to the criteria listed in Privilege Resolution 4 (Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business). These are as follows:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in

24 respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and

- (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

The purpose of these criteria is to ensure that a matter which meets them is given an appropriate opportunity to be dealt with as an item of business so that the Senate may then make a decision on the merits of the case. The decision by the President to grant precedence is not a recommendation that the matter *should* be referred to the Privileges Committee for inquiry, simply that the Senate should be given the earliest opportunity to make that decision for itself.

In this case, the Senate has declared in Privilege Resolution 6 (1) that:

A person shall not improperly interfere with ... the free performance by a senator of the senator's duties as a senator.

The Senate has also in the past regarded the penalisation of persons who provide information to senators as warranting the contempt jurisdiction of the Senate, although the protection of persons who provide information to members of parliament to assist them in carrying out their functions is not absolute. Parliamentary privilege will only protect such transactions when there is a clear connection to the use of the information by senators in the course of proceedings in parliament

I am satisfied, therefore, that the matters raised by Senator Conroy fall into that category of matters to which precedence has been granted in the past. I therefore grant precedence to a motion to refer the matters to the Privileges Committee. I table the correspondence and now invite Senator Conroy to give notice of such a motion.



30 August 2016

**Senator the Hon Stephen Parry**  
President of the Senate  
Parliament House  
CANBERRA ACT 2600

*To clerk for  
advice please.  
S.  
31/8/16*



Dear Mr President

I wish to raise a matter of privilege in accordance with standing order 81.

The matter of privilege I wish to raise pertains to whether any contempt has been committed in relation to the execution of search warrants by the Australian Federal Police on 19-20 May 2016 at my office at Treasury Place, East Melbourne, and at the home of a staff member, and at Parliament House on 24 August 2016, and related actions and inquiries undertaken by the Australian Federal Police and NBN Co Limited.

There are several aspects of the investigation which I believe may have involved the commission of a contempt through improper interference with my capacity as a senator to carry out my functions, and by penalising NBN Co staff alleged to have been connected to the provision of information to enable me to carry out my functions as a senator.

**Interception of telecommunications**

I am concerned that the AFP may have accessed telecommunications data and intercepted other telecommunications in the course of its investigation. I have asked the AFP to advise whether my telephone calls or the calls of any Opposition staff member have been intercepted, however they have refused to respond.

I believe intercepting the telecommunications of parliamentarians, members of staff, witnesses and others communicating with parliamentarians in connection with parliamentary proceedings, such as journalists, may constitute a contempt.

**Dissemination of material subject to privilege claim**

Prior to the commencement of the search on 19 May 2016, the AFP officers present at the raids were advised that I claimed parliamentary privilege over all documents in my office.

Further, I made it clear that I expected anything taken from my office to be sealed in audit bags and quarantined in the office of the Clerk of the Senate pending determination of my

privilege claim, in accordance with the *Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of Parliament (the 'MOU')*.

However, during a conference with my legal representatives after the raids on Friday 20 May 2016, the AFP revealed that an NBN Co officer participating in the search of my office, Mr Simon Lee-Steere, had taken images of documents seized at my office and shared them with other NBN Co employees.

Mr Lee-Steere's dissemination of these images was contrary to the MOU and, in my submission, demonstrated contempt for my privilege claim.

### **Acting on privileged information**

I am also concerned that NBN Co may have acted on information obtained during the raids, over which I had claimed privilege, to penalise NBN Co staff alleged to have been connected to the provision of information to enable me to carry out my functions as a senator.

On 23 May 2016 technology website *IT News* reported that NBN Co had utilised information obtained during the raids on 19-20 May 2016 as part of its internal investigations:

#### *TWO NBN STAFF STOOD DOWN IN AFP LEAK INVESTIGATION*

*Raids lead network builder to alleged culprits*

*NBN Co has stood down two employees over their alleged involvement in the leaking of damaging internal documents following an Australian Federal Police raid last week.*

*An NBN spokesperson confirmed the two staff had been stood aside while an investigation is underway, as first reported by The Australian.*

*Information gathered as part of the AFP's raids on the office of Labor Senator Stephen Conroy and the home [of a staff member] late last week helped lead NBN to the two workers...*

Acting on information which is subject to a privilege claim and should be quarantined in the office of the Clerk of the Senate demonstrates contempt for that privilege claim, in my view.

Any adverse action against an employee of NBN Co because of a suspicion that they provided a Senator with information in relation to proceedings in the Parliament may also constitute a contempt.

### **Referral to Senate Standing Committee on Privileges**

I ask you to grant precedence to a motion to refer these matters to the Senate Standing Committee of Privileges to inquire into and report on the possible commission of a contempt in relation to the above concerns.



I believe it may also be a timely opportunity for the Privileges Committee to make recommendations in relation to any revisions to the MOU which may be desirable, noting that the MOU is now over 11 years old.

Yours sincerely,



**Senator the Hon Stephen Conroy**

Deputy Leader of the Opposition in the Senate

Shadow Special Minister of State

Shadow Minister for Sport

Senator for Victoria

