

**Submission  
No 7**

**INQUIRY INTO EXECUTION OF SEARCH WARRANTS BY  
THE AUSTRALIAN FEDERAL POLICE NO. 3**

**Name:** The Clerk of the House of Representatives

**Date Received:** 11 March 2021

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10 March 2021

Hon. Peter Primrose MLC  
Chair, Privileges Committee  
Legislative Council  
Parliament of New South Wales

Via email: [privilege@parliament.nsw.gov.au](mailto:privilege@parliament.nsw.gov.au)

Dear Mr Primrose

**Submission to the inquiry into the execution of search warrants by the  
Australian Federal Police (No. 3)**

Thank you for your invitation to make a submission to the Legislative Council Privileges Committee's inquiry into the execution of search warrants by the Australian Federal Police (No. 3). I note your request that I address paragraphs (a) to (d) of the terms of reference specifically, and I will address each of these paragraphs in turn, in particular in terms of their application or relevance to the House of Representatives.

(a) the rights available to a staffer to make a claim of privilege over documents

The *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (the Guideline), to which the Committee refers in its previous reports on this matter, acknowledges that staff of a member (along with the member) should be given reasonable opportunity to raise claims for parliamentary privilege in relation to documents and other things that may be seized as a result of the execution of a search warrant. The 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 (the MOU), in its preamble, similarly refers to members and their staff being given a proper opportunity to make a claim of parliamentary privilege.

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.'<sup>1</sup> The Guideline also indicates that the same provisions are to '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.'<sup>2</sup>

<sup>1</sup> *AFP national guideline for execution of search warrants where parliamentary privilege may be involved*, p. 1.

<sup>2</sup> *AFP national guideline for execution of search warrants where parliamentary privilege may be involved*, section 4.2, p. 2.

- (b) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer

The issue of the right of a member to make a claim of privilege over documents held by one of their staff has arisen once in the House of Representatives since the MOU and Guideline were established. On 24 August 2016 a search warrant was executed by the AFP on a parliamentary department at Parliament House. The search warrant related, among other things, to computers, related devices and computer records of a named staffer of the Member for Blaxland. The Member for Blaxland was not himself named in the search warrant.

On 23 August, the Speaker of the House and the Member for Blaxland were each notified by letter of the AFP's intention to execute a search warrant the next day. In these letters the AFP indicated that, in executing the search warrant, the process to be followed would be in accordance with the Guideline. Later that day, the Member for Blaxland advised the AFP that he would be claiming parliamentary privilege for all material seized as a result of the execution of the search warrant. The AFP confirmed that the seized material would be handled in accordance with the agreed procedures and secured with the Clerk of the House immediately after the search was completed.

The named staffer did not make a claim of parliamentary privilege. It is relevant to note that members are regarded as the employers of their staff under the *Members of Parliament (Staff) Act 1984*. Equipment, such as computers and email accounts, issued to staff of a member is regarded as being held by the member and any information contained therein belongs to the member. It is in this context that the Member for Blaxland rather than the named staffer made a claim of parliamentary privilege in relation to a search warrant in which the staffer was named and the member was not.

The outcome in this case was that the material seized under the search warrant was given to the Clerk of the House to hold, pending the outcome of the Member for Blaxland's claim of parliamentary privilege, which was then referred to the Committee of Privileges and Members' Interests for consideration. In its report to the House, the committee recommended that the House rule to uphold the claim of parliamentary privilege, and that the material held by the Clerk of the House be returned to the member.<sup>3</sup> On motion moved by the Chair of the committee, on 1 December, the House resolved to accept the committee's recommendation.<sup>4</sup>

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<sup>3</sup> House of Representatives Committee of Privileges and Members' Interests, *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, November 2016, p. 12.

<sup>4</sup> *Votes and Proceedings of the House of Representatives*, No. 27, 1 December 2016, [item 4](#), p. 428.

- (c) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege

I note the Committee's consideration of translations of proceedings in its second report, particularly its agreement that the Chinese translations in question were produced for the purpose of 're-publication', rather than for the purpose of usage in connection with the business of a House or committee. *House of Representatives Practice (7<sup>th</sup> ed.)* states: 'If a Member publishes his or her speech, this printed statement becomes a separate publication, a step removed from actual proceedings in Parliament and this is also the case in respect of the publication of Hansard extracts, or pamphlet reprints, of a Member's parliamentary speeches.'<sup>5</sup>

While not yet been tested in relation to the House of Representatives, a translation of proceedings might be treated as a separate publication from the original official record. The implication for members, as with any republication of Hansard extracts, is that the protections of parliamentary privilege might not be straightforward in such circumstances, and therefore caution should be exercised.

- (d) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (APF)

In the Australian Parliament, the MOU and the Guideline have been in place since 2005, and constitute the settlement reached 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 MOU references the agreed processes which are set out in the Guideline, and articulates how variations to the documents and conflict resolution are to be handled. The establishment of the MOU has been a positive development, and gives all parties an understanding of their respective rights, roles and responsibilities in circumstances where a search warrant is to be executed and parliamentary privilege may be involved.

The House of Representatives has only once been required to decide on a claim of parliamentary privilege over material seized under a search warrant—by the Member for Blaxland in 2016, as referenced above. In its report on this matter<sup>6</sup>, the House of Representatives Committee of Privileges and Members' Interests acknowledged the success of the Guideline in providing members with the opportunity to raise claims of parliamentary privilege in accordance with an agreed formal process in relation to the execution of a search warrant, noting that in this case, the Guideline had been a successful safeguard for the member until the matter was resolved. The committee observed that there had been no complaint about the process itself, and further noted that the procedure had operated as envisaged and first recommended in October 1995 by its predecessor, Committee of Privileges.

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<sup>5</sup> *House of Representatives Practice*, 7<sup>th</sup> ed., p. 741.

<sup>6</sup> House of Representatives Committee of Privileges and Members' Interests, *Claim of parliamentary privilege by a Member in relation to material seized under a search warrant*, November 2016.

The 1995 report of the committee related to the execution by the AFP of a search warrant on the Western Australian electorate office of a member.<sup>7</sup> The committee concluded that the execution of the search warrant amounted to disruption of the electorate office and interference in the free performance by the member of his duties as a member. The committee considered that the importance of ensuring the proper operation of electorate offices would justify the negotiation of a formal understanding in respect of the execution of search warrants.

The committee proposed that a procedure be developed such that a third party might be given custody of documents a member wished withheld, pending resolution of the member's claim. This would enable due recognition of the reasonable interests of members and their constituents, particularly in respect of sensitive or confidential information which was not related to the subject matter of the warrant.<sup>8</sup>

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There are certain areas where search powers have evolved, or where ambiguities might currently exist, and further clarification of some aspects of the existing MOU and Guideline could therefore prove beneficial. Your Committee may be aware of the resolution passed by the Senate in December 2018 which, among other things, asks the Attorney-General to work with the Presiding Officers to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers.<sup>9</sup> I understand that work on the renegotiation and redrafting of the MOU and the Guideline is in progress.<sup>10</sup>

I trust that this information will assist the Committee with its inquiry.

Yours sincerely

Claressa Surtees  
Clerk of the House of Representatives

<sup>7</sup> House of Representatives Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, October 1995.

<sup>8</sup> House of Representatives Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, October 1995, p. 10.

<sup>9</sup> *Journals of the Senate*, No. 137, 6 December 2018, [item 14](#), p. 4485.

<sup>10</sup> Senate, *Official Hansard*, 3 September 2020, p. 4968.