Submission No 9

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

Name: The Clerk of the Senate

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Dear Chair

Inquiry into the execution of search warrants by the AFP (No. 3)

Thank you for the invitation to submit to the Privileges Committee's inquiry into the execution of search warrants by the Australian Federal Police (AFP). I've been asked, in particular, to make some observations in relation to paragraphs (a) to (d) of the committee's terms of reference, which deal with:

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

(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,

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

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

I've also provided some material in relation to paragraph (f):

(f) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions.

I note the committee's reports on the execution of search warrants by the AFP, in relation to the office and home of the Hon. Shaoquett Moselmane MP as well as premises associated with his then staffer Mr John Zhang. Those reports summarise the Senate Committee of Privileges inquiries which have considered the execution of warrants by the AFP where there was a claim that material seized under a

warrant was protected by parliamentary privilege.[1] As your first report noted, not only were the claims, made by Senators Conroy and Pratt, ultimately upheld by the Senate but these cases also resulted in a 2018 Senate resolution requiring executive agencies 'to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege'.

'…rights available to…make a claim of privilege over documents'

The first topic to cover here is phrased in the committee's terms of reference as 'the rights available' to staffers and members, respectively, to claim privilege over documents.

In my view this framing risks elevating the AFP guideline on the execution of warrants[2] above the parliamentary powers and immunities it is – in part – intended to secure. While procedural guidance is useful in establishing ground rules for making and determining claims of privilege, applying too narrow an interpretation of that guidance shifts the focus away from the task of the House involved, which is to determine whether material seized in the execution of warrants ought be protected against compulsory production on the basis of its connection to the proceedings of that House.

To that end, the Senate Committee of Privileges has emphasised that the MOU and guideline are not the source of members' rights:

> The right to claim parliamentary privilege in relation to the execution of search warrants does not derive from the MoU and National Guideline. It adheres to material closely connected to parliamentary proceedings by reason of the Commonwealth Parliament's inheritance of the House of Commons powers, privileges and immunities. Therefore, the National Guideline should not be viewed as providing any particular authority to make such claims; rather it guides officers of the executive arm of government in their interactions with members of parliament.[3]

It can equally be taken as guidance for such officers in their interactions with participants in parliamentary proceedings other than members. This might include the staff of parliamentarians in their own right; independently of the employing member. At the Commonwealth level, this is apparent in the extended definition of *proceedings in parliament* in section 16 of the *Parliamentary Privileges Act 1987*, which encompasses 'all 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…' including, for example, the preparation of a document for such purposes. So, for instance, a staff member might be protected by privilege in compiling information for a speech to be delivered by the member in the House. The

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[1] Most recently the Senate Committee of Privileges in its 172nd Report: *Disposition of material seized under warrant* and 174th Report: *Parliamentary Privilege and the use of search warrants* considered the issues arising from the execution of warrants by the AFP where the warrants named a senator, a Senate committee and a particular committee inquiry.

[2] The *AFP National Guideline on the Execution of Search Warrants where Parliamentary Privilege may be involved*, made under a 2005 Memorandum of Understanding between the then Commonwealth Presiding Officers and Attorney-General. The MOU and AFP guideline were at the centre of the recent experiences of both the Commonwealth and New South Wales Parliaments in determining claims of privilege in relation to material seized during the execution of search warrants.

[3] Senate Committee of Privileges, 168th report, Parliamentary privilege and the use of intrusive powers, paragraph 2.7.

staff member's participation is protected (before a court, for instance) regardless of the actions of the member.

For the most part, references in the guideline to the staff of members are readily interpreted as indicating that the staff member will be taken to be acting on behalf of the member but, as noted, staff can themselves be participants in parliamentary proceedings. The guideline states that it applies to premises of members and their staff. There may be some utility in an interpretation that recognises that staff may particularly have grounds for independently making a claim of privilege where a warrant is executed on their own premises.

In any case, the guideline provides for claims of privilege to be made without reference to a member, in some circumstances. Under the heading ***Application***, in paragraph 4.2, it provides that 'the guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege'.

There is little guidance as to how the procedures set out in the guideline should be varied to accommodate for this circumstance. The Senate Privileges Committee was critical of aspects of the AFP's interpretation of this provision, particularly as that interpretation precluded any prior notification to the President and the opportunity for those involved to seek advice: see 174th report, under *Adherence to the National Guideline*.

In the end, the claim for privilege was made by a senator, rather than by the occupier of the premises on which the warrants were executed. However, it was common ground that the guideline allows for circumstances in which a person may make a claim of privilege on their own behalf, by reference to a claimed connection to proceedings. This is consistent with the three-step test developed to determine whether material seized under a search warrant is protected by privilege, which hinges not on who makes that claim (a parliamentarian, a parliamentary staff member or another party) but on the connection of the material to the business of the House or its committees.

Translations of proceedings in parliament

The terms of reference refer to the privileged status of translations of parliamentary proceedings and the implications for members if such translations are not protected. While it could be argued a translation is 'incidental to' the transaction of parliamentary business, in the Senate it has generally been accepted that events that occur after a senator has made his or her contribution are not 'proceedings in parliament'. By contrast, absolute privilege attaches to a publication that is ordered by the Senate.

The principles that should apply to translations of proceedings would seem to be similar to those applying to the publication of extracts of proceedings. These were dealt with in some detail in the Senate Procedure Committee's second report of 2013 on the question whether extracts of *Hansard* ought attract absolute privilege. In a paper attached to that report, the former Clerk of the Senate, Dr Rosemary Laing, noted:

> The publication of an extract is not a proceeding in Parliament and does not therefore enjoy the absolute privilege that protects the operations of Parliament as an institution. Publication of extracts is not necessary for the proper functioning of the institution. Protection for individual senators or members – or, indeed, any others – who choose to publish extracts of

> debates is not a question of parliamentary privilege, but there may be other protections available that are for the courts to apply, including qualified privilege.
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> For example, section 10 of the 1987 Act provides a defence in relation to defamation actions for all fair and accurate reports of proceedings in Parliament.
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> It is also possible, although not tested, that the publication by a member of extracts of debates or an individual speech might attract the implied freedom of political communication found by the High Court in the Constitution as a corollary of the system of representative government.

The committee concluded that:

> …the purpose of parliamentary privilege is to protect the ability of a House, its committees and members to carry out their functions. It noted that the republication of *Hansard* extracts is not essential to the carrying out of parliamentary functions and is therefore appropriately covered by qualified privilege.

That conclusion would seem applicable to the question before the committee.

An important consequence is that members seeking to issue translations of their speeches and other extracts of proceedings would be well advised to ensure they amount to a fair and accurate report of proceedings, to attract qualified privilege. Of course, there is nothing to prevent the Council ordering the publication of authorised translations of its proceedings, which would thereby attract absolute privilege.

Formal memorandum of understanding

While the current MOU and AFP National Guideline require updating, they have provided a framework for resolving claims of parliamentary privilege where executive agencies are exercising investigative powers. There is a very high likelihood of technology overtaking an MOU which deals with the interaction between privilege and investigative powers in specific terms. For example, the 2005 MOU refers to the process to be followed where a search warrant is to be executed on 'premises occupied or used by a member of Federal Parliament'. This approach, with its focus on documents in the physical custody of a member of parliament, has long been overtaken by the electronic storage and sharing of information.

An alternative approach would be to set out the general principles which should be applied to resolve these issues. These might include that:

- a purpose of the MOU is to ensure that investigative powers are exercised without improperly interfering with the functioning of Parliament;
- there should be a proper opportunity for parliamentarians, their staff and others to raise informed claims of parliamentary privilege in relation to documents or other information that are subject to the exercise of investigative powers; and
- those documents and information should be quarantined until the House can determine the claim.

An overarching agreement that articulates agreed principles for resolving claims of privilege could be supplemented by more detailed procedures for different law enforcement, security or integrity agencies to follow to ensure they do not improperly interfere with the work of a House, committee or member when exercising their respective investigative powers.

Of course, the Council might consider that the likelihood of a specific MOU with the AFP being called upon again in future is too remote to justify the administrative burden of negotiating the MOU and keeping it up to date. If that is so, options available to the New South Wales Parliament could include:

- resolving that the current or an updated MOU with ICAC will form the basis of managing any issues relating to parliamentary privilege that arise in relation to other law enforcement agencies, including agencies from other jurisdictions; or
- adopting the procedures set out in the Commonwealth Parliament's agreement with the AFP (noting that agreement is also subject to negotiations to update it).

The second option is essentially the approach the Legislative Council adopted in the recent case involving the Hon. Shaoquett Moselmane MP but it may be possible to formalise this understanding through a side agreement with the AFP.

Extending the MOU approach to other agencies and investigative powers

There are challenges in extending the procedures in the AFP National Guideline on search warrants to the use of other investigative powers, although it is difficult to see why the same principles shouldn't apply.

In June 2018, the Senate adopted the recommendation of the Privileges Committee in its report on the use of intrusive powers that:

> …to ensure claims of parliamentary privilege can be raised and resolved in relation to information accessed in the exercise of intrusive powers and other investigative powers, the Presiding Officers, in consultation with the executive, develop protocols that set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers.

That work is currently underway.

In that report, the Privileges Committee noted the inherent differences between the current AFP guideline, and the procedures required in relation to the exercise of powers where there is no obvious trigger for a claim of privilege to be made:

> 1.30 The procedures mandated in the National Guideline enable parliamentarians to raise claims of privilege in relation to seized material, and respect the rights of the relevant House to determine those claims. Material subject to a claim is temporarily withheld from investigation and material determined to be privileged is returned to the parliamentarian. The execution of the warrant provides the trigger for a member or senator to avail themselves of these protections and for the relevant House to conduct any necessary oversight.
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> 1.31 By contrast, covert intrusive powers are exercised without the knowledge of the target of the investigation. It is generally acknowledged that the integrity and efficacy of investigations by law enforcement and intelligence agencies often depend on the secrecy that surrounds the exercise of such powers. However, this inherent secrecy means it is unclear how

> a Member of Parliament might raise a claim of parliamentary privilege in such circumstances, or what assurance the Parliament might have that an investigating agency has had proper regard to privilege in exercising its powers.

Some of the matters considered by the committee were usefully summarised in a submission from the Senate President, Senator the Hon. Scott Ryan to an inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 undertaken by the Commonwealth Parliamentary Joint Committee on Intelligence and Security in 2018. The President noted that the Senate Privileges Committee had examined the intersection between parliamentary privilege and executive investigative powers:

> This included the question of how privilege may be secured when agencies are accessing and examining preserved metadata, which may be accessed without a warrant. The committee expressed its view that, where information which might attract privilege is seized or accessed law enforcement and intelligence agencies should follow processes which enable claims of privilege to be raised and resolved prior to the information being interrogated. The committee recommended that protocols be developed between the parliament and executive setting out agreed processes for those agencies to follow when exercising those powers.
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> … A particular concern to the Senate committee in relation to the covert use of such powers was the question how claims of parliamentary privilege can be raised and resolved when no-one with standing to make a claim is aware that such information is being accessed.

The Access and Assistance Bill proposed the expansion of agencies' search, seizure and access powers. The President noted the difficulties presented by some of those proposals:

> …the main issue with covert access in relation to privilege (whether through remotely accessing the device or concealing physical access to it) is that there would be no opportunity for a parliamentarian who considers that material is protected by privilege to raise such a claim. Similarly, while in some respects the amendments relate to existing powers, they are proposed to be exercisable by additional organisations that do not have MOU arrangements for the execution of warrants where parliamentary privilege may be engaged.
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> Unlike search warrants applying to premises, computer access warrants and warrants used to secure remote access to devices are not served on any party with an interest, if they are served at all. There is therefore no trigger for anyone within the parliamentary sphere to seek to raise privilege. Neither is there a clear path for the resolution of such claims if they are made. In that case, the Parliament has to rely on the agency seeking the warrant, and the authority approving it, to have proper regard to privilege. No-one within the parliamentary sphere is empowered to intervene. Clearly the purposes sought to be secured in the MOU and National Guideline are not met in the exercise of these powers. Although the bill does not create these difficulties, it extends them, at the same time as the Privileges Committees are seeking to rein them in.

The Privileges Committee had noted the views of various agencies on these matters in chapter 2 of its report. In doing so, it concluded that:

> …none of the current oversight mechanisms of the exercise of covert intrusive powers, including those examining the storage and access of information garnered in the use of those powers, consider the question of parliamentary privilege.[4]

It should be emphasised that one of the key themes for the committee was striking the right balance between the rights of senators and members, on the one hand, and the need to preserve the efficacy and integrity of investigations.[5]

The themes to be pursued in the renegotiation and extension of the MOU will draw on the work of the Privileges Committees of both Houses. No doubt different views will emerge about the extent to which parliamentary material should be protected against the use of such powers, and the appropriate means to secure that protection. An important principle that emerged from the work of the Senate Privileges Committee is that the stated purposes of the National Guideline – safeguarding against improper interference with the functions of the parliament and ensuring that privilege claims may be properly raised and determined – should inform its interpretation and implementation. No doubt that view will also inform the parliament's position in the current negotiations. In the absence of judicial determination of these issues – which seems as unlikely now as it did in the wake of the *Crane* decision[6] – a procedural agreement about the use of such powers, in the form of a revised or extended MOU, will again provide some certainty by setting out the ground rules for determining claims of parliamentary privilege against the exercise of broader executive investigative powers.

I would be happy to provide any further information which would assist the committee with its inquiry.

Yours sincerely

(Richard Pye)

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4 168th report, paragraph 2.46.

5 168th report, paragraph 2.34 – 2.41.

6 *Crane v Gething* (2000) 169 ALR 727.