

Standing Committee on
Parliamentary Privilege and Ethics



LEGISLATIVE
ASSEMBLY

Interim Report: Adequacy of Current Procedures to Protect Parliamentary Privilege (Law Enforcement and Investigative Bodies)



Report 2/58 – March 2024



Legislative Assembly

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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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Chair's foreword

The Independent Commission Against Corruption (**ICAC**) performs important functions of investigating, exposing and preventing corrupt conduct. To support those functions, the *Independent Commission Against Corruption Act 1988 (NSW)* (**the Act**) gives the ICAC the power to require individuals, including Members and former Members of Parliament and the Clerks, to provide it with “documents or other things” that will assist with its investigations, its carrying out compulsory examinations, or its conduct of public inquiries.

As part of its inquiry into the adequacy of the Legislative Assembly's current procedures to protect parliamentary privilege, in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers, the Committee has examined the ICAC's powers under ss. 22 and 35 of the Act to request “documents or other things” where those “documents or other things” may be immune from production because of parliamentary privilege.

The Committee's view is that there is a need for the Legislative Assembly to update and formalise its processes for dealing with s. 22 notices and s. 35 summonses. Appendix Three is a draft protocol which the Committee and the ICAC agree provides a sound basis for the determination of claims of immunity from production by reason of parliamentary privilege. The Committee recommends the House adopt it.

The proposed processes are not intended to shield Members from scrutiny. Rather, they are intended to ensure that “individuals, including Members and their staff, former Members, and the Clerk, are given proper opportunities to raise claims of parliamentary privilege for the House to determine”. Those opportunities, which are enhanced by the processes set out in the draft protocol for “screening” and “quarantining” large volumes of electronic material, are vital for representative government. As the High Court of Australia recently said:¹

Parliamentary privilege is a “bulwark of representative government”. It has long antecedents. It allows Parliament to perform its functions without obstruction. Parliamentary privilege shields certain areas of legislative activity from judicial or executive review, thereby giving “the legislative branch of government the autonomy it requires to perform its constitutional functions”. Parliamentary privilege operates to ensure that a person who participates in parliamentary proceedings can do so knowing, at the time of that participation, that what they say cannot “later be held against them in the courts”, thereby ensuring that such a person is not inhibited in providing information to the Parliament or in otherwise participating in parliamentary proceedings. This is the “basic concept underlying article 9” of the *Bill of Rights 1688*.

On behalf of the Committee, I wish to express our appreciation to the Chief Commissioner of the ICAC, the Hon. John Hatzistergos AM, for his cooperative approach in reaching agreement on the terms of the draft protocol, and to the officers of the ICAC for their assistance in this process. I thank Members of the Committee for their contributions to the development of the draft protocol. I am especially grateful to the Clerk of the Legislative Assembly, Ms Helen Minnican, for her advice on formalising the draft protocol, and for tirelessly reviewing vast

¹ *Crime and Corruption Commission v Carne* [2023] HCA 28; (2023) 97 ALJR 737 at [106] per Gordon and Edelman JJ (citations omitted).

amounts of material while it was pending. I also thank Ms Elspeth Dyer and Mr Alex O'Brien for their support to the Committee and their valuable contributions.

Alex Greenwich MP
Chair

Findings and recommendations

Recommendation 1 _____ 6

That the Legislative Assembly adopt the draft protocol in Appendix Three to this interim report as a resolution of the House, and that a message be sent to the Legislative Council advising of the same. The protocol should, as soon as practicable thereafter, be signed by the Speaker and the Chief Commissioner as an agreement between the Legislative Assembly and the ICAC.

Recommendation 2 _____ 6

Subject to the views of the Legislative Council's Privileges Committee on the draft protocol in Appendix Three, and the adoption by the Legislative Council of a protocol in the same or substantially similar terms, the Committee recommends that protocol be updated accordingly as a joint agreement to be entered into between the Legislature and the ICAC, signed by the President, the Speaker, and the Chief Commissioner.

Chapter One – Interim Protocol with the ICAC for dealing with s. 22 notices and s. 35 summonses

Background

- 1.1 The Independent Commission Against Corruption (**ICAC**) has powers under s. 22 and s. 35 of the *Independent Commission Against Corruption Act 1988 (the Act)* to compel individuals, including Members and former Members of Parliament, their staff, and the Clerks, to produce “documents or other things” for the purposes of its investigations, compulsory examinations, or public inquiries. Those powers do not apply, however, to documents or other things which are subject to parliamentary privilege,² which are not only immune from production to the ICAC or others within the Executive government, but must not otherwise be used or accessed by persons except according to law.³
- 1.2 On 23 August 2023, the House asked the Committee to consider the adequacy of the procedures that the Legislative Assembly currently uses to protect parliamentary privilege in circumstances where law enforcement and investigative bodies, including the ICAC, seek to use coercive, intrusive or covert investigatory powers.⁴ In particular, the Committee was asked to focus on the protocol currently observed in relation to notice to produce information under s. 22 of the Act “with a view to developing appropriate revised arrangements”. Given that power to summons and take evidence under s. 35 of the Act can also raise questions of parliamentary privilege in similar terms to s. 22, it was convenient for the Committee to consider the protocol relevant to summonses to produce information.⁵
- 1.3 The Committee’s full terms of reference are set out in **Appendix One**.
- 1.4 An overview of the background to this report, including two reports of the Committee during the 57th Parliament addressing similar issues, is set out at **Appendix Two**.⁶ The key outcome of those reports was the development of a draft

² Section 122(1) of the Act provides that nothing in the Act “shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament”. See Finding One of the Committee in its report entitled, “Further Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers”, Report 5/57, February 2023, p. 9 <[link](#)> (**Report 5/57**).

³ For example, s. 122(2) of the Act provides a limited exception to parliamentary privilege. The ICAC may use the register of pecuniary interests compiled and maintained by the House pursuant to the regulations made under s. 14A of the *Constitution Act 1902* (NSW).

⁴ Legislative Assembly, *Votes and Proceedings No. 20*, 23 August 2023, Item 5, pp. 240–241.

⁵ This was consistent with Recommendation 5 of Report 5/57, which provided that that “any quarantine and screening processes around parliamentary privilege applicable to section 22 notices should also be observed when dealing with potentially privileged material the subject of a summons under section 35 of the ICAC Act”.

⁶ “Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers”, Report 3/57, June 2022 <[link](#)>; Report 5/57.

protocol for s. 22 notices, and s. 35 summonses, and the determination of claims of immunity from production by reason of parliamentary privilege.⁷

Draft protocol

An updated, formal protocol is required

- 1.5 After careful scrutiny of the Committee's reports and the draft protocol developed during the 57th Parliament, the Committee's view is that the Legislative Assembly needs to update and formalise its processes for dealing with requests by the ICAC for "documents or other things" under ss. 22 or 35 of the Act that might be immune from production because of parliamentary privilege.
- 1.6 The Committee recommends that the House adopt the written protocol in **Appendix Three**, which builds on the work carried out by the previous Committee during the 57th Parliament towards developing an agreement with the ICAC. The attached revised protocol contains a number of important amendments intended to strengthen and clarify the operation of the agreement.⁸
- 1.7 The Chief Commissioner of the ICAC met with the Committee on 29 February 2024 and confirmed his agreement with the terms of the draft protocol in Appendix Three.⁹ Accordingly, it now falls to the House to consider the terms of the protocol which, when adopted, can be signed jointly by the Speaker of the Legislative Assembly and the Chief Commissioner.

Key provisions of the draft protocol

- 1.8 The full terms of the draft protocol are contained in Appendix Three. The Committee notes the following the key provisions which are intended to:
- **Clause 3:** Make clear to whom the ICAC should address and issue s. 22 notices or s. 35 summonses, namely, the Clerk (where material is held by the Department of Parliamentary Services, a notice or summons should be copied to the Chief Executive).¹⁰
 - **Clause 4:** Avoid doubt about the circumstances in which Members or former Members can be told about the existence of s. 22 notices under s. 114 of the Act, which prohibits disclosure of any information about the notice or summons that is likely to prejudice an investigation of the ICAC to which the notice relates.
 - **Clause 5:** Acknowledge the rights of Members and former Members, and the Clerk, to seek legal advice, and their ability to make applications to set aside s. 22 notices or s. 35 summonses in courts of law, including on the basis of privileges or immunities *other* than parliamentary privilege (for example, client legal privilege or public interest immunity).

⁷ See Appendix Two of Report 5/57.

⁸ The full terms of the Committee's recommendation are set out at [1.18] below.

⁹ See Extracts of Minutes in **Appendix Five**.

¹⁰ See Recommendations 8 of Report 5/57.

Interim protocol with the ICAC for dealing with s. 22 notices and s. 35 summonses

- **Clause 6:** Confirm that parliamentary privilege is incapable of waiver, except by legislation, and that any material inadvertently provided to the ICAC, which might be immune from production because of parliamentary privilege, must be returned to the Clerk as soon as practicable.¹¹
- **Clause 7:** Provide at least 14 days for the Clerk, or where the s. 22 notice or s. 35 summons is disclosable to a Member or former Member, the Member or former Member, to decide whether they intend to raise a claim of parliamentary privilege. The clause then provides for or the Clerk's authority to carry out a "screening process" for parliamentary privilege, which might involve a "quarantining process" for large volumes of electronic material. Because of the centrality of these processes to the operation of the protocol, the Committee describes them in more detail at [1.10] to [1.17] below.
- **Clause 9:** Provide that any material held by third parties on behalf of the Legislative Assembly, like cloud-service providers, is to be regarded as material in the possession of the Legislative Assembly and its officers.¹² Accordingly, s. 22 notices or s. 35 summonses should be issued to the Clerk and copied to the third party (except where the third party is a government Department, in which case the notice or summons should be issued to the Department and copied to the Clerk).
- **Clause 10:** Provide for the appointment of an Independent Arbiter for the determination of disputes with the ICAC about parliamentary privilege in circumstances where a s. 22 notice or s. 35 summons cannot be disclosed, including to Members and the House for a determination.
- **Clause 12:** Clarify that documents or other things obtained by the ICAC under s. 22 or s. 35 of the Act shall only be used or retained for the purposes of Part 4 of the Act (and any purposes reasonably incidental to the ICAC's functions under the Act); or investigations arising out of the investigation for which the notice or summons was issued.

"Screening" and "quarantining" processes under clause 7

- 1.9 As noted above, the "screening process" and "quarantining process" in clause 7 are central to the operation of the draft protocol. Accordingly, it is convenient to provide a further description of the intended purpose and effect of those provisions. The following description is intended to describe clause 7 in relatively plain language, meaning that it should not be treated as a substitute for the full text of the provision.
- 1.10 The Clerk has at least 14 days to review all the documents that will be formally "produced" to the ICAC under s. 22 or s. 35 of the Act.¹³ Any documents that are formally produced to the ICAC can be accessed and used by its investigators, which is why it is very important that they are first reviewed by the Clerk, and that any

¹¹ See Recommendation 2 of Report 5/57.

¹² See Recommendation 3 of Report 5/57.

¹³ The ICAC may agree to extend time in accordance with clauses 7.6 to 7.8.

documents that are subject to possible claims of parliamentary privilege are withheld or “excluded” by the Clerk.

- 1.11 If the Clerk withholds or excludes any documents as a result of the screening process,¹⁴ she is required to provide the ICAC with a list that identifies the nature of the documents and says why they are privileged.¹⁵ The Clerk’s decision about whether the document is privileged will be determined by her application of a three-step test used by the Australian Senate.¹⁶ For example, the Clerk might withhold an email to a Member where a person has made a submission to a committee, or correspondence that a Member later relied upon when raising a matter in the House. It would be open to the ICAC to review the excluded material and dispute the claim. If the s. 22 notice or s. 35 summons is confidential and cannot be disclosed, the dispute will be resolved by either the Speaker and Chief Commissioner reaching an agreement or, in the absence of an agreement, the Independent Arbiter.¹⁷ Where confidentiality is not an issue, questions of parliamentary privilege will be determined by the House.
- 1.12 If the Clerk is only required to review a small number of documents for privilege, the screening process is relatively quick and simple. However, the ICAC can use s. 22 notices and s. 35 summonses to compel the production of a much broader range of material and large amounts of data.¹⁸ For example, emails from a particular Member’s account covering several years may involve thousands of emails. Where the volume of material makes screening unmanageable or ineffective, or where the ICAC is concerned about the integrity of the dataset,¹⁹ the Clerk can *share* the emails with the ICAC “for the sole purpose of further or better processing”.²⁰
- 1.13 The Clerk’s sharing of the emails with the ICAC leads to what is known under the draft protocol as the “quarantining process”.²¹ At this stage, the material has still not been formally *produced* to the ICAC.
- 1.14 During the “quarantining process” the Clerk will work with the ICAC’s digital forensics officers to “tag” the dataset with keywords, search terms, or other criteria relevant to the ICAC’s investigation.²² The purpose of this is to narrow the

¹⁴ Clause 7.13.

¹⁵ Clause 7.14

¹⁶ Clauses 7.11 and 7.14.

¹⁷ If confidentiality *does not* apply to the s. 22 notice or s. 35 summons, the House will determine the dispute in accordance with clause 10.2. If confidentiality *does* apply, the Independent Arbiter will determine the dispute in accordance with clauses 10.6 to 10.12.

¹⁸ Subject to any legal challenge on the grounds set out in clause 5.1(b), namely, (i) failing to specify with reasonable clarity the documents sought; (ii) failing to sufficiently disclose the nature of the ICAC’s investigation, and how the documents or other things relate to that investigation; or (iii) seeking production of material in circumstances that is legally unreasonable, having regard to either the volume of the material sought, or the time specified for production in the notice.

¹⁹ Clause 7.15.

²⁰ Clause 7.16.

²¹ Defined in clause 7.16:

²² Clause 7.19(g), (i) and (j).

dataset, to a reasonable amount of material so that the Clerk's task of reviewing them for parliamentary privilege is manageable.²³

- 1.15 Importantly, the draft protocol would ensure that while the "quarantining process" is underway, the ICAC's investigators *cannot access or use* any of the data extracted.²⁴ Rather, the ICAC's investigators would only be able to access those emails that the Clerk has reviewed (based on the "tagged" data) and decided can be safely "produced" to the ICAC.²⁵
- 1.16 If the ICAC later tells the Clerk that it needs to use an additional set of keywords or search terms to "tag" the data, for example, because its investigation has revealed new lines of inquiry warranting the use of additional search terms to tag more data from the original extracted material, the ICAC does not need to issue a further s. 22 notice to the Clerk.²⁶ However, the protocol makes clear that the original material extracted and shared by the Clerk remains in the custody of the digital forensics officer before and after the additional screening occurs and, therefore, it cannot be accessed or used by the ICAC's investigators.
- 1.17 After the quarantining process has finally concluded, the ICAC is required to securely destroy any copies of the material, along with any copies or other records that might assist people with identifying or understanding the substance of the material.²⁷

Recommendation

- 1.18 The Committee's view is that the draft protocol in Appendix Three provides a sound basis for Members and former Members, and the Clerk, to deal with claims of parliamentary privilege where the ICAC seeks the production of documents and other things pursuant to s. 22 or s. 35 of the Act. As noted above, the ICAC shares this view.
- 1.19 The Committee sees the draft protocol as a highly practical agreement, which adequately balances the operational and investigatory requirements of the ICAC, and its powers under the Act, with the need for the Legislative Assembly to ensure with a relatively high degree of certainty that material subject to parliamentary privilege is being protected.²⁸ Given the potential for the ICAC to compel the production of large amounts of electronic data, and the demands this places on the Clerk's time and resources, the draft protocol is much needed and should be adopted by the House as soon as possible.

²³ The Clerk may also request under clause 7.19(f) that the digital forensics office remove duplicates, spam, or other superfluous results from the dataset; or that the ICAC's investigators provide additional keywords, search terms, or other criteria to the ICAC's digital forensics officer to narrow the dataset.

²⁴ Clause 7.19(h).

²⁵ Clauses 7.16 and 7.24.

²⁶ Clauses 7.20 and 7.21.

²⁷ Clause 7.24.

²⁸ Recommendation 1 of Report 5/57.

- 1.20 Accordingly, the Committee recommends that the House adopt the draft protocol as a resolution of the House, and that the Speaker and Chief Commissioner sign it as soon as practicable.

Recommendation 1

That the Legislative Assembly adopt the draft protocol in Appendix Three to this interim report as a resolution of the House, and that a message be sent to the Legislative Council advising of the same. The protocol should, as soon as practicable thereafter, be signed by the Speaker and the Chief Commissioner as an agreement between the Legislative Assembly and the ICAC.

Next steps

Joint protocol on s. 22 notices and s. 35 summonses

- 1.21 On 4 March 2024, a copy of the draft protocol in Annexure Three was sent to the Chair of the Legislative Council's Privileges Committee, the Honourable Stephen Lawrence, MLC, seeking the Committee's views of its terms. This was the first opportunity for the Legislative Council Committee to and the Clerk of the Parliaments, Mr David Blunt AM, to review the protocol and the Legislative Council's Privileges Committee may wish to propose further amendments. Should the Legislative Council agree to adopt the protocol, its terms would be amended to refer to both Houses and Clerks and the Presiding Officers.

Recommendation 2

Subject to the views of the Legislative Council's Privileges Committee on the draft protocol in Appendix Three, and the adoption by the Legislative Council of a protocol in the same or substantially similar terms, the Committee recommends that protocol be updated accordingly as a joint agreement to be entered into between the Legislature and the ICAC, signed by the President, the Speaker, and the Chief Commissioner.

- 1.22 For the avoidance of doubt, the Committee's view is that Recommendation 1 should be implemented by the Legislative Assembly as soon as practicable, and that Recommendation 2 could, if necessary, be implemented at a later time, following further correspondence between the relevant committees and receipt of a message from the Legislative Council.
- 1.23 A copy of this report including its recommendations will be sent to the Chair of the Legislative Council's Privileges Committee, and the Chief Commissioner of the ICAC, for information.

Revision of the 2009 Memorandum of Understanding with the ICAC

- 1.24 The Committee's terms of reference for this inquiry also require it to focus on the operation of "the 2009 Memorandum of Understanding (MoU) on search warrants between the Commissioner of the ICAC, the President of the Legislative Council

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and the Speaker of the Legislative Assembly and the revisions proposed but not adopted in 2014".²⁹

- 1.25 As noted in clause 2 of the draft protocol, the Committee's intention beyond this interim report is that the draft protocol in Appendix Three will be incorporated into a revised memorandum of understanding with the ICAC, which would provide a comprehensive framework for investigations concerning the Legislative Assembly and the Parliament. In addition to revising the processes relating to search warrants in the existing MoU; and incorporating the processes in the draft protocol for s. 22 notices and s. 35 summonses; the revised MoU is also intended to cover Digital Evidence Access Orders under the *Law Enforcement (Powers and Responsibilities) Act 2002*.³⁰
- 1.26 The Committee will continue with its inquiry in accordance with the terms of reference and report back to the House as soon as possible.

²⁹ *Memorandum of understanding on the execution of search warrants in the Parliament House office of Members of the New South Wales Parliament Between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly*, December 2009. See Legislative Council Privileges Committee, "A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises", Report 71, 11 November 2014, Appendix 1 <[link](#)>.

³⁰ Division 4A of Part 5.

Appendix One – Terms of reference

**EXTRACT FROM VOTES AND PROCEEDINGS NO. 20
WEDNESDAY, 23 AUGUST 2023, ITEM NO. 5**

Mr Ron Hoenig moved, by leave, That this House provide the Standing Committee on Parliamentary Privilege and Ethics with the following terms of reference:

- (1) The Standing Committee on Parliamentary Privilege and Ethics conduct an inquiry into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers.
- (2) The Committee's particular focus should be the operation of the agreements currently in place with the Independent Commission Against Corruption (ICAC), as they pertain to the Legislative Assembly, including:
 - (a) the 2009 Memorandum of Understanding (MoU) on search warrants between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly and the revisions proposed but not adopted in 2014; and
 - (b) the protocol currently observed in relation to notices to produce information under section 22 of the Independent Commission Against Corruption Act 1988 ('section 22 notices'); with a view to developing appropriate revised arrangements.
- (3) Without limiting the matters that the Committee should take into account in considering the appropriate revised arrangements between the Chief Commissioner of the ICAC and the Speaker of the Legislative Assembly, the Committee should pay specific regard to:
 - (a) the ICAC's powers in relation to search warrants; section 22 notices; and the power to summon witnesses and take evidence under section 35 of the Independent Commission Against Corruption Act 1988;
 - (b) any new powers of the ICAC under the Law Enforcement (Powers and Responsibilities) Act 2002 to seek digital evidence access orders alongside search warrants, which enable the ICAC to issue a direction to a person requiring that person to provide assistance to unlock a digital device connected to the search warrant in a given case;
 - (c) whether protocols and a memorandum of understanding remain appropriate mechanisms to protect parliamentary privilege given the scope of the ICAC's statutory powers to compel the production of material for its investigations and modern investigative techniques;
 - (d) any search warrant protocols of relevance to the Legislative Assembly, as recommended in the reports of the Legislative Council's Privileges Committee entitled: 'Execution of search warrants by the Australian Federal Police', dated

13 October 2020; 'Report No. 2', dated 18 November 2020; 'Report No. 3', dated 16 November 2022; and 'Report No. 4' dated 2 March 2023; and

- (e) the recommendations made by the Standing Committee on Parliamentary Privilege and Ethics in the 57th Parliament for an interim protocol, as reported in 'Further Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers', Report 5/57 – February 2023.
- (4) In conducting its inquiry the Committee should consider any other related matter.
- (5) A message be sent informing the Legislative Council of the terms of reference for the referred inquiry.

Question put and passed.

Appendix Two – Conduct of the inquiry

Background to the report

Reports of the Committee during the 57th Parliament

- 1.1 During the 57th Parliament, the Committee inquired into parliamentary privilege and the use of investigatory and intrusive powers. On 24 June 2022, the Committee tabled an interim report entitled *Parliamentary Privilege and the use of investigatory and intrusive powers*;³¹ and, on 14 February 2023, it tabled a further interim report with the same title.³²
- 1.2 The Committee encourages interested persons to read those reports, the full terms of which are unnecessary to summarise here, as their findings and recommendations have been incorporated into the draft protocol now proposed by the Committee in Appendix Three.
- 1.3 The key outcome of the Committee’s work during the 57th Parliament on these issues, for which the current Committee is grateful, was the publication of a “Draft Protocol” between “the NSW Legislative Assembly and the Independent Commission Against Corruption, for s 22 notices and the determination of claims of immunity from production by reason of parliamentary privilege”.³³ The Draft Protocol also applied to summonses under s 35 of the Act, in accordance with clause 33.

Steps taken during the 58th Parliament

- 1.4 From 27 February 2023 to 3 March 2023, the Legislative Assembly was prorogued.³⁴ During the pre-election period prior to the commencement of the new Parliament, the Clerk of the Legislative Assembly discussed the Draft Protocol with the Solicitor to the ICAC, Mr Roy Waldon, which resulted in a number of changes to the Draft Protocol being put before this Committee in the new Parliament.
- 1.5 On 10 May 2023, the Committee was re-established in the 58th Parliament and appointed by the House to, amongst other things, consider and report upon any matters relating to privilege which may be referred to it by resolution of the House.³⁵
- 1.6 On 23 August 2023, the House referred to the Committee terms of reference to inquire into the adequacy of current procedures to protect parliamentary privilege

³¹ “Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers”, Report 3/57 <[Link](#)>.

³² “Further Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers”, Report 5/57, February 2023 <[Link](#)>.

³³ Report 5/57, Appendix Two.

³⁴ *Government Gazette No. 96*, 23 February 2023 <[link](#)>.

³⁵ *Legislative Assembly, Votes and Proceedings No. 2*, 10 May 2023, Item 13, pp. 48–49 <[link](#)>.

in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers.³⁶

- 1.7 At its Meeting No. 8 on 15 September 2023, the Committee adopted the House’s referral and the terms of reference.
- 1.8 At Meeting No. 10 on 16 October 2023 and Meeting No. 12 on 9 February 2024, the Committee discussed the terms of the Draft Protocol, as proposed by the Committee during the 57th Parliament, and deliberated on possible amendments.
- 1.9 On 15 November 2023, the Chief Commissioner sent the Chair a letter reiterating that the ICAC was “open” to entering into a new agreement regarding the procedures for dealing with claims of parliamentary privilege where material is sought by the ICAC. On 21 November 2023, the Chair replied that the Committee was considering the terms of the Draft Protocol as reported upon by the Committee during the 57th Parliament, and that it would be interested in discussing the matter with the Chief Commissioner, including some possible amendments following recent deliberations of the Committee.
- 1.10 On 19 February 2024, the Chair sent the Chief Commissioner an amended version of the Draft Protocol, which proposed a number of amendments to strengthen and clarify elements of the Draft Protocol. Those amendments were subsequently incorporated into the version of the protocol in Appendix Three, and it is unnecessary to specifically list them here.
- 1.11 On 20 February 2024, the Chief Commissioner sent a letter in response to the amended Draft Protocol, expressing that the ICAC’s initial view was that it provided a “sound basis for dealing with the issue of parliamentary privilege with respect to material sought under a s 22 notice or s 35 summons”.
- 1.12 The Committee scheduled a meeting with the Chief Commissioner for 29 February 2024 to discuss the amended Draft Protocol.
- 1.13 On 29 February 2024, prior to the Committee’s meeting with the Chief Commissioner, a further amended Draft Protocol was sent to Chief Commissioner, incorporating a number of proposed amendments. Again, it is unnecessary to specifically list the amendments which were subsequently incorporated into the version of the protocol in Appendix Three.

Agreement with the Chief Commissioner

- 1.14 At Meeting No. 13 of the Committee on 29 February 2024, the Committee met with the Chief Commissioner of the ICAC and Ms Bernadette Dubois, Executive Director, Investigation Division, who agreed to the terms of the draft protocol in the form proposed earlier that morning.
- 1.15 On 4 March 2024, the Chair wrote to the Chief Commissioner to confirm the terms of the agreement and advise that a copy would be sent to the Chair of the

³⁶ Appendix One.

Legislative Council Privileges Committee, the Hon. Stephen Lawrence, MLC, seeking the Committee's views of its terms.

Legislative Council Privileges Committee

1.16 On 4 March 2024, the Chair sent a letter to the Chair of the Legislative Council Privileges Committee, enclosing a copy of the draft protocol agreed to by the Chief Commissioner. This was the first opportunity for the Legislative Council's Committee and the Clerk of the Parliaments, Mr David Blunt AM, to review the protocol. The Chair sought the views of the Legislative Council Privileges Committee and proposed, subject to the agreement of each House of Parliament, that the that the interim protocol could become a joint agreement between the President of the Legislative Council and Speaker of the Legislative Assembly and the Chief Commissioner on behalf of the Commission.

Appendix Three – Interim Protocol with the ICAC

Protocol between the NSW Legislative Assembly and the NSW Independent Commission Against Corruption in relation to s. 22 notices and s. 35 summonses and the determination of claims of immunity from production by reason of parliamentary privilege

1. PURPOSE AND INTENT

- 1.1. This protocol, agreed to by the Speaker of the NSW Legislative Assembly and the Chief Commissioner of the NSW Independent Commission Against Corruption (**ICAC**), sets out the processes to be followed where the ICAC seeks the production of documents and other things pursuant to ss. 22 or 35 of the *Independent Commission Against Corruption Act 1988 (NSW)* (**the Act**) where the documents or other things may be immune from production because of parliamentary privilege.
- 1.2. The processes are intended to ensure that the ICAC's investigations are conducted without improperly interfering with the functioning of the Legislative Assembly, including by ensuring that individuals, including Members and their staff, former Members, and the Clerk, are given proper opportunities to raise claims of parliamentary privilege for the House to determine.
- 1.3. Nothing in this protocol can diminish, constrain, or expand the scope of parliamentary privilege. That said, the parties recognise that:
 - a. Documents or other things which form part of proceedings in the Legislative Assembly, including in the House and committees, shall not be impeached or questioned in any court or place outside Parliament.
 - b. Improper interference with the free performance by Members of their duties as Members by the executive government or others may amount to contempt of Parliament.
 - c. Parliamentary privilege, unlike other privileges, is not capable of waiver.

Note: Nothing in the Act is taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament: s. 122(1).
- 1.4. The ICAC's access to documents or other things which may be immune from production because of parliamentary privilege is regulated under the Act as supplemented by this protocol.

Note: Nothing in this protocol in this protocol can affect the ICAC's duties under the Act, including the possible application of s. 24 to a s. 22 notice.
- 1.5. The ICAC must not access, or seek to access, documents or other things which may be immune from production because of parliamentary privilege except in accordance with this protocol or otherwise agreed by the parties.
- 1.6. The processes are not intended to provide a shield for corruption or illegality. The Legislative Assembly recognises that the ICAC's functions of investigating, exposing, and preventing corruption exist to ensure the democratic values which the

Legislative Assembly embodies, and from which its existence derives. Members of Parliament, and their staff, not only must comply with valid exercises of the ICAC's powers under the Act, but are expected to do so in a manner that promotes the public interest, including through the timely production of material:

- 1.7. To the extent possible, the parties shall work cooperatively to carry out these processes with the intention of providing Members of Parliament and their staff, former Members, and officers of the ICAC, with confidence that material subject to parliamentary privilege is being appropriately managed.
- 1.8. Nothing in this protocol prevents the parties from agreeing at any point in time to a different or modified process to be applied in any particular case, especially where such a process would better promote the above-stated purpose and intent.

2. 2009 MEMORANDUM OF UNDERSTANDING

- 2.1. While nothing in this protocol supersedes the Memorandum of Understanding between the ICAC and the Presiding Officers, entered into in December 2009 (**existing MoU**), in relation to the process to be followed where the ICAC proposes to execute a search warrant on the Parliament House office of a Member of the NSW Parliament, the intention of the Legislative Assembly and the ICAC is that the processes in this protocol will, soon, be incorporated into a revised Memorandum of Understanding (**revised MoU**).
- 2.2. The revised MoU is intended to provide a comprehensive framework for investigations by the ICAC under Part 4 of the Act and related legislation which concern the Legislative Assembly. In addition to revising the processes relating to search warrants in the existing MoU; and incorporating the processes in this protocol for s. 22 notices and s. 35 summonses; the revised MoU is also intended to cover Digital Evidence Access Orders under the *Law Enforcement (Powers and Responsibilities) Act 2002*.

[**For information:** Subject to the agreement of the President of the Legislative Council, the revised MoU may apply to the NSW Parliament as a whole or, alternatively, the ICAC and the Legislative Assembly may agree to a separate revised MoU.]

3. ADDRESSING AND ISSUING NOTICES

- 3.1. Section 22 notices which concern the Legislative Assembly or its Members or former Members shall be addressed and issued to the Clerk of the Legislative Assembly and, where relevant, copied to the Chief Executive, Department of Parliamentary Services (**DPS**).

Note: The Chief Executive is administratively responsible for the following parliamentary business units, Information Technology, Building Services, Finance, Human Resources, Security, the Parliamentary Library, Catering and Hansard.

- 3.2. Where documents or other things are held by the DPS, the Chief Executive (or their delegate) will arrange for the materials to be provided to the Clerk, who is solely responsible for producing them to the ICAC.
- 3.3. Where the Clerk is unavailable, the ICAC is to forward the s. 22 notice to the Deputy Clerk (or the officer of the Legislative Assembly acting in the capacity of the Clerk) who will act as the Clerk under this protocol.

4. DISCLOSURE

Where disclosure might prejudice the investigation

- 4.1. Where disclosure of any information about the s. 22 notice is likely to prejudice the investigation to which it relates, that should be explicitly identified by the ICAC in the non-disclosure box on page 2, in the following terms:

INFORMATION ABOUT THIS NOTICE INCLUDING THE EXISTENCE OF THE NOTICE MUST NOT BE DISCLOSED TO [NAME OF MP OR FORMER MP] AS TO DO SO MAY PREJUDICE THE ICAC'S INVESTIGATION.

Note: Under s. 114(4) of the Act, a reference to 'disclosure' includes a reference to:

- (a) a disclosure about the existence or nature of the notice or summons or of the investigation to which it relates, and
- (b) a disclosure of any information to a person from which the person could reasonably be expected to infer the existence or nature of the notice or summons or of the investigation to which it relates.

Where no issues of disclosure identified

- 4.2. Where no issues about disclosure have been identified in the s. 22 notice, and the Clerk has confirmed with the ICAC that no such issues exist, the Clerk will contact the Member or former Member to ascertain whether:

- a. There may be material potentially subject to a claim of parliamentary privilege captured by the s. 22 notice; and, if so,
- b. They intend to participate in the process of identifying those items and raising a claim of parliamentary privilege.

Note: Under s. 114(2) of the Act, the Clerk or any other person does not contravene the requirement against disclosure in s. 114(1) unless the notice specifies that information about the notice must not be disclosed.

5. LEGAL ADVICE AND OTHER PRIVILEGES AND IMMUNITIES

- 5.1. Nothing in this protocol affects the right of any person to:

- a. Obtain legal advice, including about the scope, validity, or effect of a s. 22 notice, and the ICAC shall afford Members and former Members with reasonable opportunities to obtain that advice.
- b. Initiate, or conduct, legal proceedings in relation to a s. 22 notice, including by exercising any right the person may have to make an application to a court to set aside the notice on the grounds that it:
 - i. Fails to specify with reasonable clarity the documents sought;
 - ii. Fails to sufficiently disclose the nature of the ICAC's investigation, and how the documents or other things relate to that investigation; or
 - iii. Seeks production of material in circumstances that is legally unreasonable, having regard to either the volume of material sought, or the time specified for production in the notice.

Note: A person does not contravene the requirement against disclosure in s. 114(1) of the Act if the disclosure is made to obtain legal advice or representation in relation

to the notice or summons (s. 114(3)(b)); or the disclosure is made for the purposes of, or in the course of, legal proceedings (s. 114(3)(c)).

- 5.2. Nothing in this protocol affects any other types of privileges or immunities which may attach to the documents or other things sought by the s. 22 notice (for example, client legal privilege and public interest immunity), nor prevents any person from simultaneously asserting those privileges or immunities in a court of law.

6. WAIVER

- 6.1. Parliamentary privilege is not capable of waiver, even by a resolution of the House. Accordingly, parliamentary privilege cannot be waived by the conduct of individuals, including Members of Parliament or former Members.
- 6.2. If notified by the Clerk that material which may be immune from production because of parliamentary privilege has been provided to the ICAC, inadvertently or otherwise, the ICAC shall return the material to the Clerk as soon as practicable (along with any copies) to be assessed for possible claims of parliamentary privilege in accordance with this protocol.
- 6.3. Clause 7.1 shall apply to any material referred to in clause 6.2. from the date of the Clerk's notification under that clause

7. SCREENING FOR PARLIAMENTARY PRIVILEGE

Time for raising a claim of parliamentary privilege

- 7.1. The ICAC shall afford the Clerk, and where the s. 22 notice is disclosable to the Member or former Member under clause 4.2, the Member or former Member, a reasonable opportunity, being at least 14 days from the date the s. 22 notice is issued, to decide, and to confirm with the ICAC, whether they intend to raise a claim of parliamentary privilege over documents or other things sought by the notice. Accordingly, determinations of parliamentary privilege should be made as expeditiously as possible.

Overview of screening process

- 7.2. Where the Member or former Member does not intend to raise a claim of parliamentary privilege, but they indicate to the Clerk that privileged material may fall within the scope of the notice, or the Clerk independently forms the view that this may be the case, the Clerk will review the material to identify any items that may be the subject of a potential claim for parliamentary privilege (**the screening process**).

Authority to carry out screening process

- 7.3. In deciding to carry out the screening process, and in carrying out that process, the Clerk (and any delegate of the Clerk) is acting with the authority of the House conferred by the resolution adopting this protocol.

Notification of screening process

- 7.4. The Clerk will notify the ICAC (through the Solicitor to the ICAC) of any decision to undertake the screening process and, as soon as practicable, provide an estimate of the time required to complete the process.

- 7.5. For the avoidance of doubt, the ICAC is not to access or use, or seek to access or use, any documents or other things which are the subject of the screening process while the screening process is underway.

Extensions of time

- 7.6. Where the Clerk estimates that the screening process will surpass the time specified for production in the s. 22 notice, or the 14 days referred to in clause 7.1, whichever is later, the Clerk will request an extension of time from the Chief Commissioner (through the Solicitor to the ICAC).
- 7.7. In considering whether to grant the request, the Chief Commissioner (or their delegate) will have regard to the:
- a. Scope of the s. 22 notice, in particular the volume of material the Clerk has identified as potentially immune from production because of parliamentary privilege;
 - b. Complexity of any issues which the Clerk has identified;
 - c. Extent to which part production of material has been, or will be, achieved; and
 - d. Time and resources available to the Clerk to complete the screening process within the time specified in the notice having regard, for example, to the scheduled sittings of the House or the Christmas Closedown Period or other public holidays.
- 7.8. If the Clerk's request for an extension of time is declined, the Clerk is to consult with the Speaker who, along with the Clerk, may discuss the matter with the Chief Commissioner. If an agreement as to the extension of time cannot be reached, the Speaker and the Chief Commissioner should consider whether the Independent Arbiter (referred to in clause 10.3) can resolve the dispute.
- 7.9. If confidentiality is not required, the Speaker may seek to have the House refer any questions of parliamentary privilege or matters relating to the s. 22 notice to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics (**the Committee**).
- 7.10. As noted above at clause 5.1, nothing in this protocol affects the right of any person to initiate, or conduct, legal proceedings in relation to a s. 22 notice, including if the time specified for production is legally unreasonable.

Relevant test for screening process

- 7.11. In undertaking the screening process, the Clerk shall apply the following test developed by the Australian Senate which involves an assessment of the purposes for which the document was created or retained by a Member:³⁷

‘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?’

³⁷ Senate Standing Committee of Privileges, Report 172, [Disposition of Material Seized Under Warrant](#), 26 November 2018, p. 5.

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.'

Material falling within these categories may be subject to parliamentary privilege and will not be produced to the ICAC.

Part production

7.12. Any document or other thing required by the s. 22 notice which is not subject to the screening process (i.e., any documents or other things which, based on the Clerk's preliminary review, are *not* subject to parliamentary privilege) shall, subject to any order a court may make, or any agreement reached with the ICAC, be produced to the ICAC at the time and place specified in the notice.

Excluded materials

7.13. Any documents or parts of documents, or other things, which, in the Clerk's view, are privileged or potentially privileged shall be excluded from any other materials produced to the ICAC and retained in the custody of the Clerk (**excluded materials**).

7.14. The Clerk will provide the ICAC with a schedule of any excluded materials, identifying the nature of any documents or parts of documents, or other things, that are privileged or potentially privileged, and specifying the circumstances under which the privilege is claimed to arise (for example, 'Document No. 1 – Correspondence between Member and person making submission to committee').

Screening large volumes of electronic data

7.15. Where a s. 22 notice requires production of large volumes of electronic data, the Parliament's Information Technology Services (ITS) section shall process the data in such a way that any materials that are privileged or potentially privileged are capable of being identified by the Clerk and excluded from production in accordance with clause 7.13.

The quarantining process

7.16. Where large volumes of electronic data cannot, in the Clerk's view, be satisfactorily processed in accordance with clause 7.15, or where the Chief Commissioner has concerns about the integrity of the data after processing by the Parliament's ITS

section, the data may be *shared* by the Clerk with the ICAC for the sole purpose of further or better processing. However, any such data is not to be considered as *produced* by the Clerk for the purposes of the s.22 notice, and it is to be quarantined by the ICAC from:

- a. Its investigators (meaning an ‘authorised officer’ or ‘member of staff of the Commission’ or ‘officer of the Commission’ whose principal role is to ‘investigate’ under the Act); and
- b. Any other materials held by the ICAC, including materials already produced by the Clerk to effect part production under clause 7.12.

(the quarantining process).

Note: The quarantining process is part of the broader screening process. It applies where the s. 22 notice requires production of large volumes of electronic data which cannot be satisfactorily processed by the Parliament’s ITS section under clause 7.15. The quarantining process is intended to facilitate the screening process through the ICAC making its more extensive Information Technology resources available to assist with, or enable, the screening process.

- 7.17. The quarantining process is effective until such time as the Clerk has identified, and excluded from any materials that are to be produced to the ICAC, any materials which may be immune from production because of parliamentary privilege.
- 7.18. The quarantining process is to consist of the measures in clause 7.20.
- 7.19. Before the extracted data or electronic device is produced to the ICAC in accordance with the s. 22 notice, the ICAC will ensure that the following tasks are undertaken by an ICAC digital forensics officer:
 - a. Two forensic images of the electronic device or copies of the extracted data will be made without reviewing the contents.
 - b. A copy of the forensic image of the device or the extracted data will be securely stored on the ICAC's digital forensics system, with general access by ICAC officers and investigators prohibited.
 - c. The extracted data or device will be secured and accessible only by the ICAC’s digital forensic officer, with access by that officer logged for the purposes of being audited.
 - d. If requested by the Clerk, the processes outlined at (i) to (iii) must be undertaken at the ICAC in the presence of the Clerk and/or a person nominated by the Clerk. A copy of the forensic image of the electronic device or the extracted data will be made available to the Clerk.
 - e. The ICAC’s digital forensics officer will identify material of relevance to the ICAC's investigation team by searching the forensic dataset for relevant keywords or search terms or criteria provided by ICAC investigators. It is the digital forensics officer who identifies the material relevant to the ICAC’s investigation.
 - f. The Clerk may request the ICAC’s:
 - i. Digital forensics officer to remove duplicates, spam, or other superfluous results from the forensic dataset—or

- ii. Investigators to provide additional keywords, search terms, or other criteria to the ICAC's digital forensics officer to narrow the forensic dataset—

thereby ensuring that determinations of parliamentary privilege can be made as expeditiously as possible.

- g. Any data which satisfies the keywords, search terms or criteria will be automatically tagged and the digital forensics officer will produce a report of all tagged data. If requested by the Clerk, this process must be undertaken in the presence of the Clerk and/or a person nominated by the Clerk. The volume of tagged data may necessitate further discussion with the ICAC concerning the timeframe for screening.
 - h. Other than in the above circumstances, the ICAC will not access or review any data or record which does not contain a relevant keyword or search term.
 - i. The Clerk will be provided with the forensic report of tagged data. This data would then comprise, for instance, emails relevant to the investigation that could be more manageably screened by the Clerk for potentially privileged items. The items of interest to the ICAC, as tagged by the digital forensics officer, will be quarantined from further access or use within the ICAC while the Clerk undertakes the screening process for potentially privileged material.
 - j. The Clerk may request the digital forensics officer to provide access to relevant software to enable the Clerk to use parliamentary keywords, search terms and other criteria in screening out potentially privileged material from the tagged data.
- 7.20. The screening process is to be repeated in circumstances where additional search terms within the same inquiry have been identified in light of new lines of enquiry and at different stages of an investigation. In such circumstances, new search terms or criteria is used by the digital forensics officer to tag further material for the Clerk to screen for parliamentary privilege.
- 7.21. Repeated screening using additional search terms to tag material does not require the issuing of a new s. 22 notice. The original material as shared by the Clerk following receipt of the notice remains quarantined in the custody of the digital forensics officer between each screening of newly tagged material.

Notification following the quarantining process

- 7.22. Within 14 days (or other agreed period) the Clerk will notify the ICAC whether the tagged data contains any items that may be subject to a claim for parliamentary privilege.
- 7.23. If any items are identified as potentially subject to a claim for parliamentary privilege, the relevant process for raising a claim of parliamentary privilege (according to whether confidentiality is required), in clause 10, is to be followed.
- 7.24. If the Clerk does not notify the ICAC within 14 days (or other agreed period) of a claim of parliamentary privilege, the relevant tagged material from the electronic device or extracted data will be produced by the Clerk to the ICAC. The remaining material that has not been tagged and screened for parliamentary privilege remains

quarantined with the digital forensics officer, for future screening using new search terms or criteria.

Destruction and return of material following the quarantining process

7.25. After the quarantining process has concluded (c.f. clause 7.21 which allows repeated screening to occur during the same screening process), any documents or other things that were provided to the ICAC to facilitate that process shall be securely destroyed or returned to the Clerk as soon as practicable, along with any copies of the material or other records which may assist persons in identifying or understanding the substance of the material.

7.26. For the avoidance of doubt, any materials provided by the Clerk to the ICAC for the purposes of the quarantining process shall *not* be made available to the ICAC's investigators at any stage during the process (clause 7.16(a)), nor indeed after it concludes.

8. ELECTRONIC PRODUCTION OF MATERIAL

8.1 For the purposes of effecting production generally, electronic copies of any documents may be produced by the Clerk provided that, in substance any copies are the same as the originals, and the ICAC can access the documents in a suitable form.

9. MATERIAL HELD BY THIRD PARTIES

9.1. Any material that is held by a third party on behalf of the Legislative Assembly is to be regarded as material in the possession of the Legislative Assembly and its officers.

Note: For example, the Legislative Assembly may engage cloud-service providers to hold electronic data at locations other than at Parliament House.

9.2. Third parties may be subject to agreements with the Legislative Assembly or Parliament which require them to notify the Clerk of notices from the ICAC requesting the production of material held on behalf of the Legislative Assembly or Parliament. However, nothing in those agreements affects any requirement that the third party not disclose information about the notice under s. 114(1) of the Act if, under s. 114(3)(a), the third party:

- a. Makes the disclosure to the Clerk in order to obtain information to comply with the notice; and
- b. Is directed by the Legislative Assembly in the agreement, or by the s. 22 notice, not to inform the person to whom the information relates about the matter.

Note: A person does not contravene s. 114(1) if, *inter alia*, the disclosure is made to an employee, agent or other person in order to obtain information to comply with the notice and the employee, agent or other person is directed not to inform the person to whom the information relates about the matter.

9.3. Where it appears to the ICAC that a third party holds, or might hold, documents or other things on behalf of the Legislative Assembly, of which the ICAC seeks

production pursuant to a s. 22 notice, the notice shall be issued and addressed to the Clerk in accordance with clause 3 and copied to the third party.

- 9.4. Where the third party referred to in clause 9.3 is 'Department', meaning a 'Department of the Public Service' listed in Part 1 of Schedule 1 of the *Government Sector Employment Act 2013*, the s. 22 notice shall be issued to the proper officer of the 'Department' and copied to the Clerk for information and assessment by the Clerk under clause 3. Where the Clerk or the proper officer of the Department indicate that there may be material subject to a potential claim of parliamentary privilege, consultation will occur with the ICAC as to how to best manage any screening for privilege and any particular processes that should apply in specific circumstances.
- 9.5. Any s. 22 notices which are copied to a third party shall declare that the notice cannot, and does not purport to, compel production of documents or other things that are subject to parliamentary privilege. If this declaration is unclear to the third party, the third party should raise the matter with the ICAC and the ICAC should discuss the matter with the Clerk.
- 9.6. If it appears to the ICAC at any time that:
 - a. A s. 22 notice requires, or is likely to require, the production of a document or other thing that may be immune from production by reason of parliamentary privilege—or
 - b. A document or other thing that may be immune from production by reason of parliamentary privilege has been provided to the ICAC—the ICAC will inform the Clerk and the Speaker as soon as is reasonably practicable.
- 9.7. Where it is not appropriate to advise the Clerk or the Speaker due to the circumstances of an investigation, the ICAC may advise the Deputy Clerk or the Deputy Speaker as necessary.
- 9.8. The ICAC is to ensure that there is a reasonable opportunity, being the 14 days referred to in clause 7.1, for the Clerk on behalf of the Legislative Assembly to decide, and to confirm with the ICAC, whether they intend to raise a claim of parliamentary privilege.

10. MAKING CLAIMS OF PRIVILEGE

Where claim not disputed

- 10.1. Where a claim of parliamentary privilege is raised and the ICAC does not dispute the claim, the ICAC will write to the Clerk to formally confirm that position.

Where confidentiality does not apply to the s. 22 notice

- 10.2. Where a s. 22 notice is not subject to confidentiality requirements (see clause 4), and the ICAC disputes the claim of parliamentary privilege raised by a Member or former Member, or the Clerk, on behalf of the House, the matter will be determined by the House.

Where confidentiality applies to the s. 22 notice and the claim is disputed

- 10.3. As soon as practicable after this protocol is agreed to, the House is to appoint by resolution an Independent Arbiter who is to be retained by the Legislative Assembly to resolve any disputes between the Clerk and the ICAC as to whether material is subject to parliamentary privilege in circumstances where confidentiality applies to the ICAC's investigation and questions of parliamentary privilege therefore cannot be determined by the House.
- 10.4. Any appointments proposed by the Speaker to the role of the Independent Arbiter must have the support of the Committee, which will consult with the Chief Commissioner before making its recommendation to the Speaker.
- 10.5. Any person appointed as the Independent Arbiter:
 - a. Must be an Australian lawyer of at least seven years' standing; and
 - b. Must not be a Member or former Member of an 'Australian Parliament' as defined in the *Evidence Act 1995*.
- 10.6. Where confidentiality applies to the s. 22 notice and the ICAC disputes a claim of parliamentary privilege, the Speaker will refer the matter to the Independent Arbiter and advise the Chief Commissioner of the referral.
- 10.7. The Clerk will provide the Independent Arbiter with copies of any materials necessary for the Independent Arbiter to resolve the dispute, including copies of the documents or other things over which the claim of parliamentary privilege is made and (where necessary) a schedule of those items.
- 10.8. The Independent Arbiter may make the same requests as the Clerk under clause 7.19(f)(i) and (ii), thereby reducing the amount of material the Independent Arbiter has to review and expediting determination of the claim.
- 10.9. The Independent Arbiter will assess and determine the claim within 14 days of receiving the relevant documents or things from the Clerk. Alternatively, if required, the Independent Arbiter will consult with the ICAC as to a time for compliance which is reasonable having regard to so many of the matters identified in clause 7.7 that may be relevant.
- 10.10. The Independent Arbiter is not required to give reasons for their decision.
- 10.11. The Independent Arbiter's decision is binding until such time as confidentiality ceases to apply to the ICAC's investigation and questions of parliamentary privilege can, therefore, if required, be determined by the House.
- 10.12. Any documents or things determined by the Independent Arbiter to be immune from production by reason of parliamentary privilege that are in the possession of the ICAC will be returned to the Clerk forthwith.

11. SUMMONSES UNDER SECTION 35 OF THE ACT

- 11.1. This protocol applies to summonses to produce documents or other things issued by the ICAC under s. 35(2) of the Act in the same way it applies to notices to produce issued under s. 22(1) of the Act. Accordingly, all references to s. 22 notices in this protocol shall be read as referring to s. 35(2) summonses as the context permits.

12. LIMITATIONS ON THE SUBSEQUENT USE OF MATERIALS

12.1. Any documents or other things obtained by the ICAC under ss. 22 or 35 of the Act shall only be used or retained by the ICAC for:

- a. The purposes outlined in Part 4 of the Act and any purposes reasonably incidental to the ICAC's functions under the Act; or
- b. Investigations arising out of the investigation for which the s. 22 notice or s. 35 summons was issued.

Note: The ICAC's incidental powers are outlined in s. 19 of the Act.

Note: 'Investigation' is defined in s. 3 of the Act to include (without limitation) a preliminary investigation referred to in s. 20A.

13. PROMULGATION

13.1 This protocol will be promulgated within the ICAC.

13.2. This protocol will be tabled in the Legislative Assembly by the Speaker.

14. VARIATION

14.1. This protocol can be varied at any time by agreement of the parties.

14.2. This protocol will continue until the revised MoU, referred to in clause 2, enters into force.

15. REVOCATION

15.1. Either party may revoke their agreement to this protocol by writing to the other party, notifying them of the decision to revoke.

16. NOTES AND HEADINGS

16.1. Notes and headings form part of this protocol and can be used to assist in its interpretation.

Appendix Four – Extracts from Minutes

MINUTES OF MEETING NO. 8

Friday 15 September 2023, 1:30pm

Room 1254, Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Ms Janelle Saffin MP (Deputy Chair)

Mr Jason Li MP

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:40pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Mr Li:

That the draft minutes of Meeting No. 7 on 21 August 2023 be confirmed.

3. ***

4. ***

5. ***

6. ***

7. Inquiry into the adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

On 23 August 2023, the House provided the Committee with terms of reference to inquire into the adequacy of current procedures to protect parliamentary privilege in circumstances where

law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers.

Resolved, on the motion of Ms Voltz:

That the Committee adopt the inquiry referred to it by the House on 23 August 2023.

8. ***

9. ***

10. ***

11. Next meeting

Committee Secretariat to contact Members' offices to confirm a suitable time and date for the next meeting.

The meeting was adjourned at 2:30pm.

MINUTES OF MEETING NO. 9

Friday 22 September 2023, 1:30pm

Clerk's meeting room (850B), Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Ms Janelle Saffin MP (Deputy Chair)

Mr Jason Li MP

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:45pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Ms Williams:

That the draft minutes of Meeting No. 8 on 15 September 2023 be confirmed.

3. ***

4. ***

5. ***

6. Next meeting

Committee secretariat to contact Members' offices to confirm a suitable time and date for the next meeting.

The meeting was adjourned at 2:36pm.

MINUTES OF MEETING NO. 10

Monday 16 October 2023, 9:00am

Room 1254, Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Ms Janelle Saffin MP (Deputy Chair)

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 9:08am.

1. Apologies

Mr Jason Li MP.

2. Confirmation of minutes

Resolved, on the motion of Ms Saffin:

That the draft minutes of Meeting No. 9 on 22 September 2023 be confirmed.

3. ***

4. Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

On 23 August 2023, the House provided the Committee with terms of reference to inquire "into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers". The Committee's immediate focus is on the "the protocol currently observed in relation to notices to produce information" under s 22 of the *Independent Commission Against Corruption Act 1988*.

On 27 September 2023, the Clerks of both Houses received a letter from Ms Kate Boyd, Deputy Secretary, General Counsel, Cabinet Office, in relation to the assertion of parliamentary privilege by State agencies and Ministerial offices.

The Clerk provided a verbal briefing to all Members present regarding changes to the proposed draft protocol with the Independent Commission Against Corruption (ICAC), guided by the memorandum which was circulated to the Committee on 15 October 2023. The key points of discussion were as follows:

- Clause 16 of the draft protocol ought to read: "The screening process will be repeated in circumstances where additional search terms within the same inquiry have been identified in light of new lines of enquiry and different stages of an investigation."
- The Parliament of Western Australia has in force a protocol with the Corruption and Crime Commission and a one-page Memorandum of Understanding with the WA Police Force. The secretariat to circulate copies of the Western Australian protocol and MOU, along with a marked-up copy of the draft protocol with the NSW ICAC to the committee.
- The NSW Parliament's current practice is to encrypt all data provided to third-party server operators, which ensures that material subject to parliamentary privilege is protected.

Ms Voltz joined the meeting at 9:27am.

The Committee will consider arranging a meeting with the Solicitor to the ICAC, Mr Roy Waldon, at a future meeting.

5. ***

6. ***

7. Next meeting

Committee secretariat to contact Members' offices to confirm a suitable date and time for the next meeting.

The Chair closed the meeting at 9:59am.

MINUTES OF MEETING NO. 11

Wednesday 15 November 2023, 3:00pm

Clerk's meeting room (850B), Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Ms Janelle Saffin MP (Deputy Chair)

Mr Jason Li MP

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 3:05pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Ms Voltz:

That the draft minutes of Meeting No. 10 on 16 October 2023 be confirmed.

3. ***

4. ***

5. Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

On 23 August 2023, the House provided the Committee with terms of reference "into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers". As discussed at the meeting on 16 October 2023, the Committee's present focus is on "the protocol currently observed in relation to notices to produce information" under s 22 of the *Independent Commission Against Corruption Act 1988*.

The Committee noted that the Clerk is currently seeking legal advice in relation to the Draft Protocol with the Independent Commission Against Corruption. An amended copy of the Draft Protocol will be provided to the Committee following receipt of that advice.

6. ***

7. ***

8. Next meeting

The Committee secretariat will contact Members' offices to find a suitable time and date for the next meeting, possibly in mid-December.

Chair closed the meeting at 4:10pm.

MINUTES OF MEETING NO. 12

Friday 9 February 2024, 10:00am

Clerk's meeting room (850B), Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Mr Jason Li MP

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 10:06am.

1. Apologies

Ms Janelle Saffin MP (Deputy Chair).

2. Confirmation of minutes

Resolved, on the motion of Ms Voltz:

That the minutes of Meeting No. 11 on 15 November 2023 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence.

Received:

1. Letter from the Hon. John Hatzistergos AM, Chief Commissioner of the Independent Commission Against Corruption (ICAC), dated 15 November 2023, reaffirming that the ICAC is “happy to work with the Clerk” to formalise an interim protocol for dealing with claims of parliamentary privilege.

2. Letter from the Hon. Stephen Lawrence, MLC, Chair of the Legislative Council Privileges Committee, dated 28 November 2023, noting the email sent to the Hon. John Hatzistergos AM, Chief Commissioner of the ICAC (Item 3.4 below), welcoming this Committee’s engagement with the ICAC, and expressing the desire that the two committees “make a coordinated response on this important issue”.

3. Letter from the Hon. Stephen Lawrence, MLC, Chair of the Legislative Council Privileges Committee, dated 28 November 2023, to the Hon. John Hatzistergos AM, Chief Commissioner of the ICAC (copied to the Chair of this Committee), welcoming this Committee’s engagement with the ICAC.

Sent:

4. Email to the Hon. John Hatzistergos AM, Chief Commissioner of the ICAC, dated 21 November 2023, in response to the letter dated 15 November 2023 (Item 3.1 above), confirming that the Committee would be interested in discussing the matter of the draft interim protocol, including possible amendments following recent deliberations of the Committee (copied to the Chair of the Legislative Council Privileges Committee, the Hon. Stephen Lawrence, MLC, for information).

4. Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

On 23 August 2023, the House provided the Committee with terms of reference to inquire "into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive or covert investigatory powers". As discussed at Meeting No. 10 on 16 October 2023, the Committee's present focus is on "the protocol currently observed in relation to notices to produce information" under s 22 of the *Independent Commission Against Corruption Act 1988*.

On 27 September 2023, the Clerks of both Houses received a letter from Ms Kate Boyd PSM, Deputy Secretary of the Cabinet Office, in relation to the assertion of parliamentary privilege by State agencies and Ministerial offices (see Minutes of Meeting No. 10).

As noted above, on 15 November 2023, the Chief Commissioner sent a letter to the Chair reaffirming that the ICAC is “happy to work with the Clerk” to formalise an interim protocol, in relation to which the Chair of the Legislative Council’s Privileges Committee has welcomed a “coordinated response”. On 21 November 2023, the Chair replied to the Chief Commissioner

confirming that the Committee would be interested in discussing the matter of the draft interim protocol.

On 3 December 2023, the Clerk received draft legal advice from solicitors at Herbert Smith Freehills on issues relevant to the draft interim protocol with the ICAC. Supplemental legal advice was received on 28 January 2024.

The Clerk provided a verbal briefing to the Committee, outlining key points of the draft interim protocol as stands (circulated as part of this meeting's papers). Members present were also provided with an annotated version of the draft interim protocol.

Discussion ensued.

Resolved, on the motion of Ms Voltz:

1. That the Clerk have leave to consult with the Clerks of the Parliament of Western Australia in relation to the draft interim protocol, including providing them with a confidential draft.
2. That the Chair provide the Chief Commissioner of the ICAC, and the Solicitor to the ICAC, with a copy of the draft interim protocol to review in advance of the meeting with the Committee suggested above.

The secretariat to canvass a suitable time for the Committee to meet with the Chief Commissioner of the ICAC and Solicitor to the ICAC to discuss the draft interim protocol (e.g., Meeting No. 13 on 29 February 2024 or Meeting No. 14 on 28 March 2024).

5. ***

6. ***

7. ***

8. ***

9. Next meeting

The Committee agreed that the draft minutes of the meeting would be circulated to ensure concurrence of the Committee prior to the next meeting, scheduled for 3:00pm, Thursday, 29 February 2024 (subject to change in accordance with specific matters arising).

The Chair closed the meeting at 11:03am.

MINUTES OF MEETING NO. 13

Thursday 29 February 2024, 3:00pm

Room 1254, Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)
Ms Janelle Saffin MP (Deputy Chair)
Mr Jason Li MP
Ms Lynda Voltz MP
Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly
Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly
Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms
Ms Manuela Sudic, Executive Manager, Office of the Clerk
Mr Alex O'Brien, Senior Advisor, Office of the Clerk
Ms Rickee Murray, Parliamentary Officer, Office of the Clerk
Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 3:15pm.

1. Apologies

None received.

2. Confirmation of minutes

Resolved, on the motion of Ms Voltz:

That the minutes of Meeting No. 12 on 9 February 2024 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Sent:

2. Letter to the Hon. John Hatzistergos AM, Chief Commissioner of the Independent Commission Against Corruption (ICAC), dated 19 February 2024, enclosing the latest draft of the protocol regarding the procedures for dealing with claims of parliamentary privilege where material is sought by the ICAC, and seeking a meeting with him and the Solicitor to the ICAC, Mr Roy Waldon, to discuss it.

Received:

6. Letter from the Hon. John Hatzistergos AM, Chief Commissioner of the ICAC, dated 20 February 2024, in response to the letter dated 19 February 2024 (Item 3.2 above), noting that the ICAC is "happy to work with the Committee to settle the protocol" and expressing the

preliminary view (subject to several reservations) that the draft protocol “provides a sound basis for dealing with the issue of parliamentary privilege”.

4. Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

On 3 December 2023, the Clerk received draft legal advice from solicitors at Herbert Smith Freehills on issues relevant to the draft interim protocol with the ICAC. Supplemental legal advice was received on 28 January 2024.

The Committee noted the latest version of the protocol as sent to the Chief Commissioner of the ICAC, on 19 February 2024, and previously circulated. The Committee further noted the response from the Chief Commissioner, dated 20 February 2024, expressing that the ICAC was “happy to work with the Committee to settle the protocol” and that the ICAC’s “initial view” was that the draft protocol “provides a sound basis for dealing with the issue of parliamentary privilege”. The Chair addressed the Committee and the Clerk explained the most recent changes made to the draft protocol as sent to the ICAC (copy attached).

Discussion ensued on the most recent changes to the latest version of the draft protocol and also on the terms of the protocol dealing with the quarantining of material during repeated screening for parliamentary privilege, and the retention and disposal of material provided under notices and summonses to produce.

In accordance with the Committee’s resolution at Meeting no. 12 on 9 February 2024, the Clerk sent a copy of the draft protocol to the Clerk of the Legislative Assembly of Western Australia, Ms Kirsten Robinson, and the Deputy Clerk, Mr Scott Nalder, who suggested further revisions to the draft protocol, which were emailed to the Committee and the Chief Commissioner on the morning of 29 February 2024.

Discussion ensued.

Ms Williams joined the meeting at 3:17pm.

Resolved, on the motion of Ms Voltz:

That the Hon. John Hatzistergos AM, Chief Commissioner of the ICAC, and Ms Bernadette Dubois, Director, Investigations Division, ICAC, be authorised to attend the Committee's meeting on 29 February 2024.

The Chief Commissioner and Ms Dubois were admitted to the meeting at 3:20pm.

Discussion ensued.

The Chief Commissioner agreed with the draft protocol, incorporating the tracked changes circulated on 29 February 2024, and noted the intention of the Committee to table the protocol in the House prior to its adoption by the Legislative Assembly during the March sitting period. The Chief Commissioner noted the intention of the Committee to formally advise the Legislative Council committee of the latest draft and forward a copy to the Committee Chair for consideration by the Legislative Council Privileges Committee with a view to the adoption of the protocol in similar terms by both Houses. The Chief Commissioner noted the advice from the Committee Chair that the Assembly's Committee would recommend the House adopt the draft protocol, as agreed between the Committee and the ICAC, if it transpired that the Legislative Council did not agree to the draft protocol.

The Chief Commissioner and Ms Dubois withdrew from the meeting at 3:30pm.

5. ***

6. ***

7. ***

8. ***

9. Next meeting

The Committee secretariat undertook to contact Members' offices seeking an earlier date on which to hold Meeting no. 14 (currently scheduled for Thursday 28 March, 3:00pm-4:00pm).

The Chair closed the meeting at 4:31pm.

UNCONFIRMED MINUTE EXTRACTS OF MEETING NO. 14

Tuesday 19 March 2024, 1:30pm

Clerk's meeting room, Parliament House, and via Webex

Members present

Mr Alex Greenwich MP (Chair)

Ms Janelle Saffin MP (Deputy Chair)

Ms Lynda Voltz MP

Ms Leslie Williams MP

Officers present

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Mr Todd Buttsworth, Director, House and Procedure, and Deputy Serjeant-at-Arms

Mr Alex O'Brien, Senior Advisor, Office of the Clerk

Ms Manuela Sudic, Director, Office of the Clerk

Miss Jessica Zhang, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:34pm.

1. Apologies

Mr Jason Li MP.

2. Confirmation of minutes

Resolved, on the motion of Ms Voltz:

That the minutes of Meeting No. 13 on 29 February 2024 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Sent:

2. Letter to the Hon. John Hatzistergos AM, Chief Commissioner of the Independent Commission Against Corruption (ICAC), dated 4 March 2024, confirming the terms of the Committee's agreement in relation to the draft interim protocol for dealing with s 22 notices and s 35 summonses; advising of the Chair's intention to write to the Hon. Stephen Lawrence, MLC, Chair of the Legislative Council Privileges Committee; and confirming the Chair of this Committee's intention to recommend to the House that draft interim protocol be adopted.

3. Letter to the Hon. Stephen Lawrence, MLC, Chair of the Legislative Council Privileges Committee, dated 4 March 2024, notifying him of this Committee's agreement with the ICAC in relation to the draft interim protocol for dealing with s 22 notices and s 35 summonses; seeking the Legislative Council Committee's views on the terms of the draft interim protocol; and advising of this Committee's intention to establish interim processes as soon as practicable.

4. Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)

The Chair referred to the Chair's draft interim report entitled *Interim Report: Adequacy of current procedures to protect parliamentary privilege (law enforcement and investigative bodies)*, circulated to Members by email on 18 March 2024.

The Committee agreed to consider the Chair's draft interim report circulated to Members by email on 18 March 2024 ('the Chair's draft interim report'), commencing with the body of the report and then moving to the recommendations.

Discussion ensued.

Resolved, on the motion of Ms Voltz:

That the Committee adopt the Chair's draft interim report without amendment.

Resolved, on the motion of Ms Saffin:

That the interim report be signed by the Chair and tabled in the House on Wednesday, 20 March 2024.

Resolved, on the motion of Ms Williams:

That the Secretariat be permitted to make appropriate final editing and stylistic changes to the interim report as required.

Resolved, on the motion of Ms Saffin:

That, once tabled, the interim report be published on the Committee's webpage.

5. ***

6. Next meeting

The next meeting of the Committee is scheduled for Friday 22 March at 12:00pm.

The Chair closed the meeting at 1:48pm.