Standing Committee on Parliamentary Privilege and Ethics

Parliamentary privilege and seizure of documents by ICAC

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Terms of Reference

That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the following matters:

(a) whether any breaches of the immunities of the Legislative Council or contempts were involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Honourable Peter Breen on 3 October 2003,

(b) what procedures should be established, such as the appointment of an independent arbiter, to examine and determine whether any of the documents and things seized by the Independent Commission Against Corruption are immune from seizure under the warrant by virtue of parliamentary privilege,

(c) any other matters that the Committee considers relevant.

Committee membership

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Australian Labor Party

The Hon Patricia Forsythe MLC *Deputy Chair*

Liberal Party

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The Hon Kayee Griffin MLC

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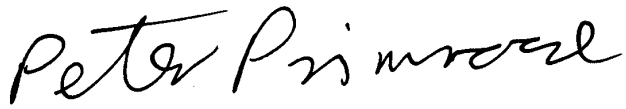
Table of Contents

Chair's foreword

I am pleased to present the report of the Committee's inquiry into parliamentary privilege and the seizure of documents by the ICAC.

The inquiry raises important questions concerning the powers of investigative bodies such as the ICAC to seize documents under search warrant in the light of the rights and immunities conferred by parliamentary privilege, and in particular Article 9 of the *Bill of Rights 1689*. These questions have not to date been considered by the Parliament, or by the courts. An outline of the report and the Committee's principal findings and recommendations is provided in the Executive Summary at p. ix.

I would like to thank my fellow Committee members for their constructive participation and contributions during the inquiry. I would also like to thank the Clerk of the Parliaments, Mr John Evans, and the Deputy Clerk and Clerk to the Committee, Ms Lynn Lovelock, for their invaluable advice and expertise during the inquiry, and direction of the research and drafting of the report. I would also like to thank the Committee secretariat, Mr David Blunt, Ms Velia Mignacca and Ms Janet Williams for their efforts.



The Hon Peter Primrose MLC
Chair

Executive Summary

This report concerns issues arising from the execution of a search warrant by officers of the Independent Commission Against Corruption (ICAC) at the Parliament House office of the Hon. Peter Breen MLC, on 3 October 2003. In particular, it concerns the question of whether documents covered by parliamentary privilege are immune from seizure under search warrant.

Chapter 1 outlines the background to the Committee's inquiry, and the way in which the inquiry was conducted.

Chapter 2 considers the nature and purpose of parliamentary privilege, and in particular Article 9, which is regarded as the central parliamentary privilege – the freedom of speech and debate in parliamentary forums, and the limitations which that freedom necessarily places on the powers of courts, and other extra-parliamentary bodies, to question and examine statements made in Parliament. The purpose of the privilege, that is to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information, goes to the very heart of representative democracy. Representative democracy can only flourish when citizens can communicate freely with a member of Parliament and in the knowledge that the actions of members in the conduct of proceedings in Parliament will go unchallenged by outside interference or intimidation. Section 122 of the *Independent Commission Against Corruption Act 1988* preserves parliamentary privilege in relation to the freedom of speech, and debates and proceedings, in Parliament.

Chapter 3 focuses specifically on the execution of the search warrant on Mr Breen's office. The Committee has found that in executing the search warrant the ICAC did in fact seize at least one document within the scope of proceedings in Parliament. The Committee is of the view that proceedings in Parliament will inevitably be hindered, impeded or impaired if documents forming part of proceedings in Parliament are vulnerable to compulsory seizure. In that context, the Committee has found that a breach of the immunities of the Legislative Council was involved in the execution of the search warrant in this case. However, as it does not appear that the ICAC acted with improper intent, or with reckless disregard as to the effect of its actions on the rights and immunities of the House and its members, no contempt of Parliament has been found. Nonetheless, the Committee is mindful that any subsequent attempt by the ICAC to use documents which fall within the scope of proceedings in Parliament in their investigations could amount to a contempt.

Chapter 4 examines the question of appropriate protocols and procedures relating to the execution of search warrants and the protection of documents subject to parliamentary privilege. While recognising the right of the ICAC to seize documents under the authority of the search warrant, the Committee considers that they had and have no authority to seize documents which fall within the scope of proceedings in Parliament. To facilitate the resolution of this matter without compromising the ability of the ICAC to legitimately investigate members of Parliament, and without undermining the very important principles embodied in the rights and immunities of the Parliament, the Committee has proposed that the documents be returned to the House, where the member, together with the Clerk and officers from the ICAC can inspect them, and the issue of privilege can be determined. In this way, the Parliament can uphold its privileges, as recognised by section 122 of the *Independent Commission Against Corruption Act 1988*, and the ICAC can continue its investigation of the matters in hand.

Chapter 5 discusses various issues which have emerged during the inquiry, which the Committee believes are important and should be addressed in a future inquiry, but which it was not practicable to deal with in detail in this inquiry.

Summary of Recommendations

10. That any documents which the House determines are privileged be returned to Mr Breen and any documents which the House determines are not privileged be returned to the ICAC.

Recommendation 2 **50**

That the House refer to the Committee for inquiry and report the development of protocols for the execution of search warrants on members' offices.

Recommendation 3 **53**

That the House refer to the Committee for inquiry and report:

- the desirability of clarification of aspects of parliamentary privilege through legislation,
- the need for the provision of education/training to investigative agencies in relation to parliamentary privilege, and
- the opportunity for the provision of further information to members about parliamentary privilege and the extent to which it applies to their documents.

(The Committee should have access to the submissions, correspondence and evidence received during the course of this inquiry.)

Recommendation 4 **55**

That the issue of the lawfulness of the practice of the "imaging" of computer hard disk drives in the execution of search warrants be drawn to the attention of the Attorney General (with the Attorney General having access to the submission of Mr Stephen Skehill and the transcript of evidence taken by this Committee on 10 November 2003.)

Recommendation 5 **55**

That the evidence taken by the Committee on 10 November 2003, submissions and relevant material/correspondence be made available to the Joint Committee on the Independent Commission Against Corruption.

Chapter 1 Introduction

Background to this inquiry

1.1 The present inquiry concerns issues arising from the execution of a search warrant by officers of the Independent Commission Against Corruption (ICAC) at the Parliament House office of the Hon Peter Breen MLC on 3 October 2003. During the execution of the warrant, the officers seized a quantity of documents, as well as two computer hard drives, and Mr Breen's laptop computer. The events surrounding the execution of the warrant, and the manner in which the seized material was subsequently handled, are outlined in Chapter 3. The events in the House which led to the establishment of the current inquiry are outlined below.

1.2 On 14 October 2003 the President made a statement in the House in relation to the execution of the search warrant (Appendix 1), and tabled correspondence which she had sent to the ICAC Commissioner in relation to that matter, and the Commissioner's reply (Appendix 2). The President also tabled an advice provided by Mr Bret Walker SC to the Clerk of the Parliaments concerning the execution of the warrant (Appendix 3).

1.3 Later the same day, the President made a further statement to the House, advising that Mr Breen had raised a matter of privilege under Standing Order 77 concerning the seizure of material under the warrant (Appendix 1). In the course of her statement, the President advised that Mr Breen had indicated in his letter, that although he could not identify all documents seized without inspecting them, some of the material in his office was outside the authorisation of the warrant and immune from seizure by virtue of parliamentary privilege.

1.4 The President went on to state:

> I am required under Standing Order 77 to determine whether this matter should have precedence of other business as a matter of privilege. I acknowledge that officers of the ICAC are aware of and sensitive to issues of parliamentary privilege. Nonetheless, I am concerned that the seizure of material which is not authorised by the warrant and which is subject to parliamentary privilege, and the continued possession of that material by the ICAC, is capable of being held to be a breach of the immunities of the House and a contempt.
>
> Furthermore, only the House can resolve a question of parliamentary privilege arising from the execution of a search warrant to seize documents and things in the possession of a member. I regard the seizure of material protected by parliamentary privilege seriously and am concerned to ensure that proper procedures are put in place to determine questions of parliamentary privilege arising from the execution of search warrants to seize documents and things in the possession of members. In this regard I note the work of the Senate Committee of Privileges in its reports Nos 75, 105 and 114 concerning the execution of search warrants in senators' offices. I have therefore determined that a motion to refer the matter of privilege raised by the Hon. Peter Breen to the Standing Committee on Parliamentary Privilege and Ethics should have precedence under Standing Order 77.[1]

[1] *Hansard* (weekly pamphlet), 14 October 2003, p. 3720.

1.5 At the conclusion of her statement, the President tabled Mr Breen's letter, and her reply (Appendix 4).

1.6 On 15 October 2003 the Legislative Council resolved, on the motion of Mr Breen, after some debate:

> That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the following matters:
>
> (a) whether any breaches of the immunities of the Legislative Council or contempts were involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Honourable Peter Breen on 3 October 2003,
>
> (b) what procedures should be established, such as the appointment of an independent arbiter, to examine and determine whether any of the documents and things seized by the Independent Commission Against Corruption are immune from seizure under the warrant by virtue of parliamentary privilege,
>
> (c) any other matters that the Committee considers relevant.[2]

Conduct of inquiry

Submissions and requests for information

1.7 On 20 October 2003, in accordance with a resolution of the Committee, the Chair wrote to the following persons inviting them to make a written submission in relation to the inquiry: Mr Harry Evans, Clerk of the Senate; Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jaques, Canberra; Mr Bret Walker, Senior Counsel; Ms Irene Moss, ICAC Commissioner; Mr John Evans, Clerk of the Parliaments and Clerk of the Legislative Council. All submissions sought were duly received, and were made public by the Committee on 10 November 2003.

1.8 The Committee also sent requests to the Clerks of the other Australian Parliaments, the British Parliament, and to the federal and provincial Parliaments in Canada, seeking information as to whether the relevant Houses had experience in dealing with any situations similar to that which is the subject of this inquiry. The substantive replies received are referred to in the table at Appendix 5.

1.9 On 7 November 2003 the Committee resolved that each member of the Legislative Council be invited to provide a written submission to the Committee addressing the issues raised by the terms of reference for the inquiry. In response to this invitation, only Mr Breen made a submission.

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[2] Legislative Council, *Minutes of Proceedings*, No. 25, 15 October 2003, entry no. 10.

Hearing

1.10 On 10 November 2003 the Committee held a public hearing at which the following witnesses gave evidence: Mr Harry Evans, Clerk of the Senate; Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jaques, Canberra; Mr Kieran Pehm, Deputy Commissioner, and Mr John Pritchard, Solicitor to the Commission, ICAC (attended by Mr Ian Knight, NSW Crown Solicitor, as adviser); and Mr Bret Walker, Senior Counsel. Following the hearing, the Committee resolved to make public the transcript of the hearing.

Scope of this report

1.11 The current inquiry raises a number of issues of a highly complex nature, involving areas of the law which are as yet untested in NSW, such as the nature of the relationship between parliamentary privilege and statutory powers of search and seizure. The range of issues raised is reflected in the structure of this Report.

1.12 **Chapter 2** considers the nature and purpose of parliamentary privilege, and in particular the application of Article 9 of the Bill of Rights, and the nature of contempt of Parliament.

1.13 **Chapter 3** focuses specifically on the execution of the search warrant on Mr Breen's office, and considers whether any breach of the immunities of the House, or contempts, were involved.

1.14 **Chapter 4** examines the question of appropriate protocols and procedures relating to the execution of search warrants and the protection of documents subject to parliamentary privilege.

1.15 **Chapter 5** discusses various issues which emerged during the inquiry, which the Committee believes are important and should be addressed by a further inquiry, but which it was not practicable to deal with in detail in this inquiry.

Chapter 2 Parliamentary privilege

Introduction

2.1 Under paragraph (a) of the terms of reference for this inquiry, the Committee is required to determine whether there has been any breach of the immunities of the Legislative Council or contempt in relation to the execution of the search warrant on the office of the Hon Peter Breen MLC. Under paragraph (b), the Committee must consider possible procedures for determining whether anything seized by the ICAC is immune from seizure by virtue of parliamentary privilege.

2.2 To do this the Committee must consider the meaning of breach of immunity and contempt, and assess whether any of the material seized by the ICAC is covered by parliamentary privilege.

2.3 Given the complexity surrounding parliamentary privilege, the meaning of parliamentary privilege is considered first, while the concepts of breach of immunity and contempt are addressed in the final section of the chapter.

2.4 The chapter relies to a large extent on the content of the submission provided to the Committee by the Clerk of the Parliaments, dated 7 November 2003.

Parliamentary privilege - definition and purpose

2.5 The term 'parliamentary privilege' refers to the powers and immunities possessed by individual Houses of Parliament, their members, and other participants in parliamentary proceedings, without which they could not perform their functions. The powers include the power of the House to conduct inquiries, and the power to deal with contempt. The most significant of the immunities is the immunity from legal liability for things said or done in the course of parliamentary proceedings (ie 'freedom of speech'), which is recognised by Article 9 of the Bill of Rights 1689.

2.6 The justification for the powers and immunities possessed by Houses of Parliament is that they are necessary for the Houses, their members, and officers, to function effectively. Without them, members would be severely hampered in their ability to carry out their parliamentary duties, and the Houses would be unable to properly scrutinise the actions of the executive.[3]

2.7 Parliamentary privilege essentially belongs to the House as a whole, and is not the privilege of any individual member. For example, in relation to the freedom of speech protected by Article 9, the Judicial Committee of the Privy Council stated in *Prebble v Television New Zealand Ltd*:

> The privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual member, even if he has an individual privilege of his own, cannot

[3] See UK Joint Committee on Parliamentary Privilege, First Report (HL 43 – I, HC 214 – I, Session 1998-99) para. 3.

> determine whether or not the privilege of parliament is to apply … The decision of an individual member cannot override the collective privilege of the House to be the sole judge of such matters.[4]

2.8 Individual members can claim privilege only to the extent that some action, proposed or otherwise, would impede them in carrying out their responsibilities and duties as a member of the House, or adversely affect the proper functioning of the House or a committee. This is because the purpose of parliamentary privilege, that is, to ensure that the Parliament can exercise its powers freely on behalf of its electors, with access to all relevant information, goes to the very heart of representative democracy. Representative democracy can flourish only when citizens can communicate freely with a member of Parliament and in the knowledge that the actions of members in the conduct of proceedings in Parliament will go unchallenged by outside interference or intimidation.

2.9 While parliamentary privilege gives members rights and immunities which exceed those possessed by other bodies or individuals, it was never intended to set members above the ordinary law. Members of Parliament are subject to the law, including the criminal law, except in relation to the freedom of speech and debates in the context of parliamentary proceedings (see below).

2.10 There is no legislation comprehensively defining the powers and immunities of the Legislative Council in particular, or of the NSW Parliament in general, although there are various statutes which confer specific powers and immunities on the Houses and their committees.[5] In the absence of a statutory source for parliamentary privilege, the Legislative Council relies on its inherent powers, as recognised by the common law.

Article 9

2.11 Article 9 of the Bill of Rights 1689 expresses what is generally recognised as the central parliamentary privilege: the freedom of speech and debate in parliamentary forums. It has also been interpreted as placing restrictions on the uses which courts of law and other extra-parliamentary bodies may make of evidence of parliamentary proceedings.[6]

2.12 Article 9 applies in NSW,[7] and in all other Australian jurisdictions. It declares:

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4 [1995] 1 AC 321 at 335.

5 Eg *Parliamentary Evidence Act 1901* (NSW), *Defamation Act 1974* (NSW), *Imperial Acts Application Act 1969* (NSW).

6 E. Campbell, *Parliamentary Privilege*, Sydney 2003, p. 6.

7 In NSW, Article 9 applies by virtue of section 6 and Schedule 2 of the *Imperial Acts Application Act 1969* (NSW). In addition, many of the freedoms guaranteed by Article 9 would be implied at common law, as being necessary for the existence and functioning of the Houses: see Solicitor General (Mary Gaudron), 'Re: the privileges of the Parliament of New South Wales', 25 March 1983, in Joint Select Committee upon Parliamentary Privilege, *Minutes of Proceedings together with certain Minutes of Evidence taken before the Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege*, 1984-85, Parliamentary Paper No. 271B.

> That the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament.

2.13 The rationale for Article 9 has been described as:

> the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will be later held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say.[8]

2.14 The purpose of the immunity has been said to be:

> to enhance deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of Members, particularly against threats or reprisals from the Executive.[9]

2.15 Given this fundamental purpose, the immunity conferred by Article 9 is not capable of being waived by any individual member.[10] It can only be waived by the House, by legislative authorisation. Accordingly, where it is desired that an executive body of inquiry examine an aspect of 'proceedings in Parliament', any abrogation of Article 9 can only be by express words in a statute.[11] This occurred, for example, with the *Special Commissions of Inquiry Amendment Act 1997*, which authorised the Legislative Council to waive privilege in connection with a Special Commission of Inquiry into allegations made by the Hon Franca Arena MLC under parliamentary privilege.

2.16 It has been recognised that the immunity conferred by Article 9 may conflict with other aspects of the public interest, such as the interests of justice in ensuring all relevant evidence is before the courts. However, it is established that the immunity prevails over such competing interests. For example, in *Prebble v Television New Zealand Ltd* [1995] 1 AC 231, the Privy Council stated:

> There are three such issues (public policy or human rights issues) in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has long been settled that, of these three public interests, the first must prevail.[12]

2.17 A final aspect of Article 9 to be noted in this context is that the immunity is absolute: it applies regardless of the accuracy of statements made during proceedings in Parliament, or the

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8 *Prebble,* op.cit at 334.

9 'Search warrant on offices of the Hon Peter Breen MLC', Bret Walker SC, 9 October 2003, paragraph 8.

10 Ibid.

11 *Duke of Newcastle v Morris* (1870) LR 4 HL 661.

12 *Prebble*, ibid, at 336.

motive with which they were made. However, if a member of the House were to abuse the privilege, such as by making highly defamatory or unreasonably invasive allegations against a named individual without supporting evidence, the House itself would have the power to take action against the member concerned.

2.18 While the privilege of freedom of speech and debate within the House and its committees has been universally accepted within the Westminster system, questions concerning the meaning of 'proceedings in Parliament', 'impeached or questioned' and 'place outside of Parliament' have remained problematic.

Proceedings in Parliament

Definition

2.19 The definition of 'proceedings in Parliament' is critical when determining whether particular matters are protected by Article 9. In *May's Parliamentary Practice*, the expression is broadly described as:

> some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee…Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing presentation of a petition.[13]

2.20 *Halsbury's Laws of England* (4th ed 1980) includes the following statement, which was quoted with approval by Hungerford J in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 123:

> An exact and complete definition of 'proceedings in Parliament' has never been given by the courts of law or by either House. In its narrow sense the expression is used in both Houses to denote the formal transaction of business in the House or in committees.
>
> It covers both the asking of a question and the giving of written notice of such question, and includes everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.
>
> In its wider sense "proceedings in Parliament" has been used to include matters connected with, or ancillary to, the formal transaction of business. A select committee of the Commons, citing and approving a Canadian dictum, stated in its report that it would be unreasonable to conclude that no act is within the scope of a member's duties in the course of parliamentary business unless it is done in the House or a committee of it and while the House or committee is sitting.

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13 *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, D Limon and WR McKay, eds, 1997, London, p. 95.

2.21 The principle to be derived from these authorities is that 'proceedings in Parliament' encompasses both the formal transaction of business in the House and its committees, and matters sufficiently connected with, or ancillary to, such transaction.

Parliamentary Privileges Act 1987 (Cth)

2.22 The Commonwealth *Parliamentary Privileges Act 1987* provides a clearer and more comprehensive definition of 'proceedings in Parliament', and clarifies the extent of the use of evidence which derives from such proceedings. Therefore, consideration of the relevant provisions of the Act, and the manner in which they have been interpreted, assists in an understanding of the meaning of 'proceedings in Parliament' within Article 9.

Section 16(2)

2.23 The relevant provision of the Act is section 16(2), which defines the extent of 'proceedings in Parliament' for the purposes of the Commonwealth Act:

> For the purposes of the provisions of Article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

2.24 Under this definition, 'proceedings in Parliament' covers not only matters in the House and committees, such as debates, motions, questions and answers, evidence, the tabling of documents, and the presentation of petitions,[14] but also words and acts 'for the purpose of or incidental to' such proceedings.

2.25 The reference in section 16(2) to statements and actions 'for the purpose of or incidental to' the transaction of business effectively expresses the content of the wider limb of Article 9 referred to above. As such, its inclusion in the Commonwealth Act is significant, as the wider limb is a matter on which there is scant, consistent authority at common law, so far as Article 9 is concerned. The Clerk of the Senate commented on the role of this provision during evidence before the Committee as follows:

> The inclusion in the Act of the expression which makes it clear that proceedings in Parliament not only includes the actual proceedings but matters for the purposes of, and incidental to, makes it clear that there is an area outside the actual proceedings

[14] Campbell, op. cit., p. 12.

> which is also protected. In effect, the Act declares that it always was protected but it had just never been statutorily declared before. It is very useful to have that expression in the Act.[15]

Interpretation by courts

2.26 The meaning and scope of section 16(2) has been considered by the courts on a number of occasions.

2.27 One of the most illustrative cases is *O'Chee v Rowley* (1997) 150 ALR 199. That case involved an appeal against an order of the Supreme Court of Queensland, requiring the defendant in defamation proceedings, Senator Bill O'Chee, to produce certain documents for inspection. In appealing against the order, Senator O'Chee claimed that the documents in question 'were created, prepared, brought into existence or came into my possession for the purposes of or incidental to the transacting of the business of the Senate of the Parliament of Australia',[16] and were therefore immune from production under the 1987 Act and Article 9.

2.28 In his judgment on the appeal, McPherson JA noted that generally proceedings in Parliament include all acts done for the purpose of transacting business of a House, together with any acts that are incidental to them. He further stated that:

> Bringing documents into existence for such purposes; or for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to 'proceedings in Parliament'.[17]

2.29 Given the status of such documents, McPherson JA considered that to order Senator O'Chee in this case to produce the documents concerned would be to hinder or impede the transacting of business of the Senate. Further, he warned that if Senator O'Chee were required to produce the documents for inspection, there would be the potential that he and other parliamentarians would be deterred from preparing or collecting information for future debates and questions in the House. He concluded that:

> Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.[18]

2.30 A further significant aspect of the decision of the Court in that case was the view that section 16(2)(c), which refers to the 'preparation of a document for purposes of or incidental to the transacting of parliamentary business', covers not only documents generated by members, but also documents supplied to members by non-members, providing the members have chosen

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15 Harry Evans, *Evidence*, 10 November 2003, p. 4.

16 *O'Chee v Rowley* (1997) 150 ALR 199 at 206.

17 Ibid, at 215.

18 Ibid.

to keep the documents for the purpose of transacting parliamentary business.[19] In relation to documents provided to members, McPherson JA commented that, while it is not possible for 'an outsider to manufacture parliamentary privilege for a document by the artifice of planting it upon' a member, it is nonetheless possible for the document to attract privilege if 'the member or his or her agent does some act with respect to it for the purposes of transacting business within the House'.[20]

2.31 This aspect of 'proceedings in Parliament', in the context of the Commonwealth Act, was also discussed by Crispin J in *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28, at paragraph 22:

> Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind. Hence, if a Member obtains a document that has been prepared for some reason unrelated to the business of the Assembly but elects to retain it for such purpose, subs 16(3) [of the *Parliamentary Privileges Act 1987* (Cth)] would prevent the admission of any evidence of that retention or any subsequent use for such a purpose.[21]

2.32 A final illustration of the scope of section 16(2), with regard to a particular class of documents, is provided by the judgment in *Crane v Gething* (2000) 169 ALR 727, in which French J observed that documents relating to a Senator's travel arrangements would be unlikely to be proceedings in Parliament:

> I would not have regarded the itineraries as falling within the protected class. The fact that they may include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator would want to make public does not of itself raise an issue of parliamentary privilege. The documents do not otherwise answer the description in s. 16.[22]

Determining the status of members' documents

2.33 In view of the principles discussed above, to determine whether documents held by a member of the Legislative Council are protected by the immunity attaching to 'proceedings in Parliament', an assessment will need to be made as to whether each individual document is part of the formal transaction of business in the House or its committees, or is sufficiently closely connected with the transaction of such business.

2.34 There is usually no difficulty in identifying matters which fall within the first category, the formal transaction of business. However, difficulties can arise in relation to the second

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19 This aspect of the case is noted by Enid Campbell, op. cit., p. 15.

20 *O'Chee v Rowley* (1997) 150 ALR 199 at 209.

21 *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28 (10 April 2002) at para 22.

22 *Crane v Gething* (2000) 169 ALR 727, at paragraph 43.

category, when seeking to determine whether the nexus between a particular matter and the formal transaction of business is sufficiently close, such as to bring the matter within 'proceedings in Parliament'.

2.35 The nature of the necessary connection with the transaction of parliamentary business, where the wider limb of 'proceedings in Parliament' is at issue, is discussed below. Following that discussion, consideration is given to the application of the relevant principles to a range of specific types of documents commonly held by members.

Nature of connection with the transaction of business

2.36 Various commentators have attempted to accurately express the precise nature of the connection with the transaction of business in the House which is required before a matter can be said to qualify as 'proceedings in Parliament'. The Clerk of the New Zealand House of Representatives has stated that:

> The application of the Bill of Rights to actions taken off the floor of the House is confined to activities which have a close formal link with the business to be transacted in the House or in a select committee, or which are transacted in execution of an order of the House.[23]

2.37 The constitutional author, S. A. De Smith, suggested in 1958:

> in determining whether such a transaction is part of proceedings in Parliament one should have regard not to mere reasonable possibilities but to the immediate intentions of the actor or actors and to the degree of proximity between that transaction and proceedings that are taking place or are about to take place or have just taken place in the House.[24]

2.38 During evidence before this Committee, the Clerk of the Senate, Mr Harry Evans, observed that:

> you would have to show that there is some link between the documents and some proceedings in Parliament, or at least some strong potential link. It has to be a letter from a constituent, for example, asking a member to raise a matter, providing information to a member, and asking the member to raise that matter in the House or in a committee. That is the clearest possible case. If it is just a letter from a constituent passing on rumours and gossip without any suggestion of a request for parliamentary action, it is not protected. There is a lot of grey area in between. You really cannot decide without looking at the individual document and saying, "What is the purpose of this document? What is its connection with parliamentary proceedings, if any?[25]

2.39 Mr Evans went on to suggest that, where a document has been created for more than one purpose, the question of whether the document is a proceeding in Parliament is to be determined by identifying the 'dominant purpose' for which the document was created:

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23 D McGee, *Parliamentary Practice in New Zealand*, 2nd ed., 1994, p. 475.

24 S. A. De Smith, "Parliamentary Privilege and the Bill of Rights" (1958) 21 *Modern Law Review* 465 at 480.

25 Harry Evans, *Evidence*, 10 November 2003, p. 3.

> In looking at individual documents you are bound to get documents that have different purposes. The letter from a constituent might, in its first two paragraphs, ask the member to raise a matter in a committee or in the House and be providing information for that purpose. In the last two paragraphs of the letter it may be simply exchanging information that has no connection with any actual or potential parliamentary proceedings. In that case the person sorting the documents would have to look at that and say, "What is the primary purpose of this? What is the dominant purpose of this document?" If it is predominantly for the purpose of proceedings in Parliament, it is protected. The reason I mention that is that courts have gone through that sort of exercise in relation to legal professional privilege.[26]

2.40 Mr Bret Walker SC emphasised during his evidence to the Committee the links between the narrow and the wider senses of 'proceedings in Parliament', and the overriding rationale for Article 9. Firstly, he discussed the nature of the link between the narrow limb, the formal transaction of business in the Chamber, and the rationale for Article 9:

> My understanding, historically and in current functional terms, of the core provision for New South Wales in relation to parliamentary privilege, namely Article 9 of the Bill of Rights, is that it is designed to permit and to enhance the capacity of individual members to contribute to the work of each Chamber, taken as a chamber. It follows that it principally focuses upon contributions to the business of a chamber which involves the transactions conducted by words—some spoken, some written, some collective and some individual—and we have different terms for the different utterances that are in question: We have questions, we have resolutions, we have motions, we have debate, we have explanations, et cetera, et cetera. Because each of the Chambers is deliberative, it is clear that the words ought to be words which are the result of preparation and thought rather than spontaneous ejaculation, as it were. Because of that, there is an integral connection—to the extent no doubt of some members writing out in advance what they intend to say in the Chamber—between what is done in a member's office and what is done in the Chamber by way of utterances to which that member is a party, or at least there is an integral connection with some of the work done in the office or in the home, or indeed anywhere at all outside the Chamber.[27]

2.41 Secondly, Mr Walker pointed out that the existence of the more extended meaning of Article 9 is necessary in order to maintain adequate protection for the core business referred to in the narrower limb. As such, the wider meaning could extend as far as dealings with people which influence the way in which a member might vote in the House:

> The critical aspect, as it seems to me, is that Article 9's reference to the freedom of speech and Article 9's reference to proceedings in Parliament naturally focus attention on utterances actually made in or presented to the Chamber, physically inside the Chamber. No doubt that will remain the mainstream concern of parliamentary privilege, as it should. But it seems to me that if there is to be any functional efficiency to the privilege, then it needs to be ensured that the Executive in particular—not only the Executive, but in particular the Executive—is warded off by an immunity in the name of the Chamber for each individual member in relation to work, statements, dealings, and interactions with people outside the Chamber which are directly or

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26 Ibid.

27 *Evidence*, 10 November 2003, p. 41.

> intimately connected with what that member proposes to do in the Chamber. The classic example of course is the receiving of information about which notes are made by the member for the purposes of the speech. But that is only a very easy classic example. It may well also be, I suggest, that dealings with people which influence the way in which one might vote on the question before the House could as well be subject to questions about whether the parliamentary privilege under Article 9 grants an immunity in relation to certain aspects of it.[28]

2.42 Finally, Mr Walker explained that, where borderline questions concerning the application of Article 9 arise, they should be determined within the framework of the ultimate purpose of Article 9:

> They are very difficult case-by-case determinations, but my elaboration of the rationale, I hope, has made it clear that it is the work which it is expected that individual members do in the Chamber, namely participate in deliberation—which means speaking, listening and thinking, making your mind up, changing your mind—which ought to set the framework in which the very difficult borderline questions that arise…… need to be addressed.[29]

Types of documents

2.43 As the question of 'proceedings in Parliament' can only be determined in relation to individual documents, it is not possible to define all the categories of documents which may or may not be covered. However, some guidance can be given in general terms in relation to this issue.

2.44 Firstly, there are some kinds of documents which will clearly fall within the scope of 'proceedings in Parliament', whether on the narrow or wider senses of that term. These include, but are not limited to, notices of motion to be given in the House, questions without notice, speeches prepared for use during debate in the House, and draft committee reports.

2.45 Secondly, there are other kinds of documents which will usually fall outside the scope of the definition, unless there is some particular aspect of the circumstances in which they were created, or the purpose for which they were retained by the member, which establishes a clear connection with the transaction of parliamentary business. Such documents may relate to recognised aspects of a member's role, such as constituency work, party activities, or the administration of public resources, but that fact alone will not qualify the documents as 'proceedings in Parliament' for the purposes of Article 9. In this regard, the Clerk of the New Zealand House of Representatives has observed:

> The Bill of Rights does not confer a protection on a member of Parliament in respect of all, or even most, of the work members carry out on behalf of constituents; neither does it offer protection in respect of the party political activities of members in the country at large.[30]

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28 Ibid.

29 Ibid, pp 41-42.

30 McGee, op. cit. p. 475.

2.46 Similarly, Mr Bret Walker SC has advised:

> It is emphatically not the case that every document or item in a member's office is covered by parliamentary privilege. Probably, most of them are not, in the nature of things.[31]

2.47 Types of documents which will usually not be proceedings in Parliament include:

(a) Correspondence between members, or between members and Ministers or executive agencies

2.48 The extent to which communications of this type are protected by Article 9 has been considered in a number of cases. The relevant precedents and authorities have been summarised in a recent publication by Professor Gerard Carney, as follows: [32]

> Only those communications between members, or between a member and a minister, which have a close relationship to parliamentary business are protected. Such communications include discussion of drafts of oral questions, questions on notice, or motions, and any discussion of draft speeches to be made in the House.[33] Discussions between members in parliamentary party meetings (or caucus) on legislative matters are unlikely to be protected.[34]
>
> On the other hand, communications between a member and a minister in relation to constituency matters have an uncertain status. In the *Strauss Case*,[35] the House of Commons refused by a narrow vote of 218 to 213 to accept the report of its Privileges Committee that a letter written by Mr Strauss MP to a minister which was critical of the London Electricity Board was protected by parliamentary privilege.[36] It is suggested, however, that privilege attaching to a communication between a member and a minister on a constituency matter is justified given the efficiency, discreteness

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31 Bret Walker SC, 'Search Warrant on offices of the Hon Peter Breen MLC', advice provided to the Clerk of the Parliaments, 9 October 2003, paragraph 7.

32 Gerard Carney, *Members of Parliament law and ethics*, 2000, pp. 211-212.

33 'See the 1967 Report of the House of Commons Select Committee on Parliamentary Privilege, HC 34, 1966-1967 at para 91. Contrast Commonwealth Joint Select Committee on Parliamentary Privilege, *Final Report*, PP 219/1984 at para 5.8': Carney, p. 211, footnote 28.

34 'See D McGee, 'Parliament and Caucus' [1997] NZLJ 137. Contrast *Allighan's Case* which was the subject of a 1947 report of the House of Commons Committee of Privileges discussed in McGee's article at 137-139': Carney, p. 211, footnote 29.

35 'Report from the House of Commons Committee of Privileges HC (1956-57); HC Debates 591 (8 July 1958)': Carney p. 212, footnote 30.

36 'Lord Denning considered the letter privileged in his dissent in *In re parliamentary Privilege Act 1770* [1958] AC 331; published later as an Annexure in G F Lock, "Parliamentary privilege and the courts: The avoidance of conflict" [1985] *Public Law* 64 at 83': Carney, p. 212, footnote 31.

> and utility of such a communication when parliament is not sitting.[37] Also of uncertain status are informal meetings held between members of parliamentary committees and even formal meetings of parliamentary committees convened outside the precincts of parliament.[38]

2.49 In NSW, the Joint Select Committee upon Parliamentary Privilege in 1985 noted that, on the basis of House of Commons precedents, Article 9 did not attach to members' correspondence with ministers in relation to matters concerning constituents. In particular, the Committee referred to a specific case, in which a member of the Legislative Assembly had been sued for defamation in respect of statements made by the member in correspondence to a minister, endorsing a constituent's comments which were critical of the conduct of an officer employed in a particular government agency. The Committee noted that, in that case, while the member would not have been protected from liability in defamation by the absolute immunity of Article 9, he could have relied on the defence of qualified privilege, in the absence of any malice on his part in making the statements.[39]

(b) Correspondence between members and informants/constituents

2.50 There is judicial authority to the effect that correspondence between a member and a constituent is not protected as a matter of 'proceedings in Parliament'.[40] For example, in *R v Grassby* (1992) 55 A Crim R 419, which involved a prosecution for criminal libel in respect of the provision of a document to a member of the NSW Legislative Assembly, Allen J quoted the following the passage from *Erksine May's Parliamentary Practice* (21st ed, at pp 132-133) with approval:

> Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of members of the House of Commons who voluntarily and in their personal capacity provide information to members, the question of whether such information is subsequently used in proceedings in Parliament being immaterial.[41]

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37 'See the Commonwealth Joint Select Committee on Parliamentary Privilege, *Final Report* PP 219/1984 at paras 5.14-5.15. Contrast the 1999 Report of the UK Joint Committee on Parliamentary Privilege': Carney p. 212, footnote 32.

38 '1999 Report of the UK Joint Committee on Parliamentary Privilege at paras 5.24 and 5.25. Contrast *Re Quellet (No 1)* (1967) 67 DLR (3d) 73 at 85': Carney, p. 212, footnote 33.

39 Joint Select Committee upon Parliamentary Privilege, *Parliamentary privilege in New South Wales*, NSW Parliament, pp. 107-108. At common law, a defence of qualified privilege is available in defamation proceedings if a statement is made in the performance of any legal, moral or social duty or interest, to a person having a corresponding duty or interest to receive it (NSW Law Reform Commission, Report 75 (1995) *Defamation*, para 10.5). In NSW the common law defence is accompanied by a statutory defence of qualified privilege under section 22 of the *Defamation Act 1974*. Unlike the absolute immunity from liability conferred by Article 9, the defence of qualified privilege is defeated if it is shown that the person making the statements was actuated by malice.

40 *R v Rule* [1937] 2 KB 375; *Rivlin v Bilainkin* [1935] 1 QB 485; *R v Grassby* (1992) 55 A Crim R 419 at 428: cited in Carney, op. cit, p. 214, footnote 39.

41 At 430-431.

2.51 However, that approach, and the decision itself, has been criticised. In a paper published in 1996, the Clerk of the Senate, Mr Harry Evans, argued that the question of whether communications from informants are protected as 'proceedings in Parliament' 'is likely to be determined by the closeness of the connection between the communication of the information to the member and potential or actual proceedings in a house or committee.'[42]

2.52 The view taken by Mr Evans in 1996 is consistent with the principles discussed in earlier sections of this chapter, and with the view taken by the Court in *O'Chee v Rowley* (1997) 150 ALR 199 (see paragraph 2.30 above). It is also consistent with evidence provided by witnesses to the Committee in this inquiry, including the evidence of Mr Bret Walker referred to at paragraph 2.41 above, that Article 9 extends to 'dealings, and interactions with people outside the Chamber which are directly or intimately connected with what that member proposes to do in the Chamber', 'the receiving of information about which notes are made by the member for the purposes of the speech', and potentially, 'dealings with people which influence the way in which one might vote on [a] question before the House'.

2.53 As with communications between members and ministers, the defence of qualified privilege may be available in defamation proceedings in respect of statements made by an informant to a member, or vice versa, in the absence of proof of malice.

(c) Memoranda, diary notes, file notes, research, briefing notes, speech notes etc

2.54 Consistently with the principles already discussed, memoranda, diary notes, and file notes held by members will usually not relate to, or be sufficiently closely connected with, the transaction of business in the House or committees, so as to attract the protection of Article 9. However, it is likely that research, briefing notes, and speech notes, will have a sufficiently close link with business in the House or a committee to attract Article 9.

2.55 This view is supported by evidence received by the Committee during the inquiry. The Clerk of the Senate stated that 'briefing notes prepared by a member's staff for the purpose of a debate in the House or a hearing of a committee' are 'clearly … protected'.[43] The Deputy Commissioner of the ICAC, Mr Keiran Pehm, suggested that speech notes and material prepared for the purpose of speeches in Parliament are also protected:

> **CHAIR:** […] What criteria do you believe should be taken into account in determining whether or not a document is relevant for proceedings in Parliament?
>
> **Mr PEHM:** It is difficult to answer in the abstract in relation to general principles. Obviously, there are some things, like speech notes, the preparation of speeches and

42 Harry Evans, 'Protection of persons who provide information to members', *27th Conference of Presiding Officers and Clerks*, Hobart, 1996. Mr Evans noted in that paper that in the Grassby case, 'there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential'.

43 Harry Evans, *Evidence*, 10 November 2003, p. 3.

> material collected for the purpose of making speeches in Parliament. There are other issues which are a bit further removed from those principal parliamentary proceedings …[44]

2.56 Mr Bret Walker SC referred to 'notes for a speech, the production of which one would ordinarily assume could clearly not be compelled because of parliamentary privilege'.[45]

(d) Documents relating to meetings of party caucuses

2.57 Party caucus meetings are considered not to be matters which are 'proceedings in Parliament'.[46] The position with regard to such activities has been stated by the Clerk of the New Zealand House of Representatives as follows:

> Meetings of party caucuses are not proceedings in Parliament. They are meetings which are attended by members of Parliament because they are members, and parliamentary business may be under discussion at such meetings, but they are not transactions of parliamentary business as such.[47]

Place out of Parliament

2.58 The scope of Article 9 extends to protection against impeachment or questioning in any court 'or place out of Parliament'. The meaning of 'place out of Parliament' has not been defined, although in Blackstone's words, 'whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.'[48]

2.59 This protection is said to be:

> in essence a safeguard of the separation of the powers: it prevents the other branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature. (cf *US v Johnson* 1966 383 US 169; *Hamilton v Al Fayed* 1999 3 All ER 317.[49]

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44 Kieran Pehm, *Evidence*, 10 November 2003, p. 36. Further, in advice provided to the Deputy Premier on 16 December 2002, the ICAC Commissioner stated: 'It is the Commission's view that considering the content of what a member of Parliament has said in Parliament or indeed considering anything that a member has done in preparation for what is said in Parliament falls within the ambit of parliamentary privilege: letter dated 16 December 2002, ref E02/1706.

45 Bret Walker SC, *Evidence*, 10 November 2003, p. 49.

46 See D. McGee, 'Parliament and Caucus', New Zealand Law Journal [1997] p. 137, which is critical of the decision in *Rata v Attorney-General* 10 PRNZ 304.

47 See D McGee, *Parliamentary Practice in New Zealand*, 2nd ed., 1994 at 475, and HC 138 (1946-47).

48 Blackstone, *Commentaries on the Laws of England* (4 vols) 1765-69, vol. 1 at 163.

49 *Odgers' Australian Senate Practice*, 10th edn, Canberra, 2001, p. 33.

2.60 It would not be reasonable to suggest that Article 9 prevents any comment in the media or elsewhere on what is said in Parliament. To take the view that 'place out of Parliament' includes places other than courts, tribunals and their like, would seem too literal a view of the purpose of Article 9, and would ultimately stifle the freedom to comment on what is said or done in Parliament.

2.61 However, there is authority that 'place out of Parliament' includes an executive commission of inquiry, such as a royal commission.[50] Fitzgerald P in *O'Chee v Rowley* suggests that 'place out of Parliament' in Article 9 might be wider than 'tribunal' suggested by the terms of section 16 of the *Parliamentary Privileges Act* 1987 (Cth).[51]

2.62 Furthermore, the Crown Solicitor has commented, in advice provided to the Legislative Council in February 2000, that the existence of section 122 in the ICAC Act 1987 (NSW), which preserves the application of parliamentary privilege, implies that the ICAC is a place outside Parliament for the purposes of Article 9,[52] a view supported by the Commissioner in correspondence tabled in the House in September last year.[53]

2.63 Provisions similar to section 122 are to be found in a number of other statutes, including the *Police Integrity Commission Act 1996* (section 145), the *Protected Disclosures Act 1994* (section 23), the *Evidence Act 1995* (section 10), the *Commission for Children and Young People Act 1998* (section s. 22(3)), and the *Administrative Decisions Tribunal Act 1997* (section 125).

Impeached or questioned

2.64 The effect of Article 9 is not to prevent or restrict the disclosure of things said in the course of parliamentary proceedings,[54] but to preclude the impeachment or questioning of such matters. 'Impeached or questioned' in this context does not necessarily involve some allegation of improper motive, as noted by Popplewell J in *Rost v Edwards*:

> It might have been thought that the juxtaposition of the word 'questioned' with the word 'impeached' in the Bill of Rights would have led the courts to construe it as meaning 'adversely question or criticise' or 'attribute improper motive'. This was not, however, how the law developed. In *Blackstone's Commentaries*, 17th ed. (1830), vol. 1, p. 163 it says:

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50 *Privilege of Parliament* (1944) 18 ALJ 70 per Lowe J at 75; *Royal Commission into Certain Crown Leaseholds* (1956) St. R. Qd. 225 per Townley J at 229; *Re Royal Commission on Licensing* [1945] NZLR 665, 666, 669.

51 (1997) 150 ALR 199 at 201.

52 Advice LGC088.34, dated 8 February 2000 at 6.12. The same considerations would apply to PIC and the Ombudsman.

53 Correspondence from Commissioner Irene Moss to the Clerk of the Parliaments, dated 17 September 2002, and tabled 26 September 2002 (Legislative Council, *Minutes of Proceedings*, No. 20, 26 September 2002, p. 472).

54 See *Mundey v Askin* (1982) 2 NSWLR 369 at 367D-G; *Henning v Australian Consolidated Press Limited* (1982) 2 NSWLR 374 at 375B-C.

> 'whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'
>
> In *Stockdale v Hansard*, 9 Ad. & El. 1 Lord Denman said, at p. 114:
>
> 'whatever is done within the walls of either assembly must pass without question in any other place.' ….
>
> Patterson J. said, at p. 209:
>
> 'Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that whatever is done or said in either House should not be liable to examination elsewhere'[55]

2.65 This view of the immunity is consistent with section 16(3) of the *Parliamentary Privileges Act 1987* (Cth), which, according to Lord Browne-Wilkinson, 'contains … the true principle to be applied' as to the effect of Article 9.[56] Under that provision, evidence may not be tendered or received, or questions asked, or comments made, for the purpose of 'relying on the truth, motive, intention or good faith of anything forming part of … proceedings in Parliament', 'establishing the credibility, motive, intention or good faith of any person', or 'drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament'.[57]

2.66 In *Prebble* Lord Brown-Wilkinson stated:

> … their Lordships are of the view that parties to litigation … cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House, subject to any statutory exception … However, their Lordships wish to make it clear that this principle does not exclude all references in court proceedings to what has taken place in the House. … A number of the authorities on the scope of article 9 betray some confusion between the right to prove the occurrence of Parliamentary events and the embargo on questioning their propriety.[58]

2.67 Commenting on the phrase 'impeached or questioned' as it applies in the Commonwealth sphere, Davies JA stated:

> It is not just where a member or witness is sued or prosecuted for what that person has said in Parliament or before a committee. It is in any proceedings in a court or tribunal in which evidence is sought to be tendered or received, questions asked or statements, submissions or comments made concerning proceedings in Parliament by any of the ways or for any of the purposes stated in paragraphs (a) (b) or (c) [of s16(3)

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55 *Rost v Edwards* [1990] WLR 1280 at 1286.

56 *Prebble,* op. cit. at 333.

57 *O'Chee v Rowley,* op. cit. at 201, per Fitzgerald P.

58 *Prebble,* op. cit. at 337.

> of the *Parliamentary Privileges Act 1987*]. In other words sub-s.(3) makes it unlawful in any such proceedings to tender or receive evidence, ask questions or make statements, submissions or comments concerning proceedings in Parliament by way of or for any of these purposes if that would impeach or question the freedom of proceedings in Parliament. And it leaves for decision in each case whether that consequence will ensue.[59]

2.68 While this derives from the Commonwealth *Parliamentary Privileges Act 1987*, which does not have application in New South Wales, it could be argued that this merely clarifies the effect of Article 9.

Breach of immunity and contempt

2.69 Breach of immunity, often referred to as 'breach of privilege', and contempt are not necessarily one and the same thing. A breach of privilege occurs whenever any of the rights or immunities of the House and its members is disregarded or attacked by any individual or authority. A contempt of Parliament occurs whenever an offence is committed against the authority of the House, and may not always involve a breach of a specific immunity. According to *May's Parliamentary Practice*:

> Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.[60]

2.70 Following this definition, the critical feature of contempt is that the relevant conduct must impede or obstruct the House or its members in the performance of their functions, or have a tendency to produce this result. When dealing with contempt, successive committees both here and elsewhere have determined that for a contempt to be found, the breach must be of such seriousness that it could have a substantial and detrimental impact upon the ability of the House, its committee or the member concerned, as the case may be, to function.

2.71 The Clerk of the Senate, Mr Harry Evans, in evidence before this Committee, described the difference between breach of immunity and contempt as follows:

> A breach of privilege or, as I prefer to call it, a breach of the legally recognised immunities of the Houses, as I have said, is not necessarily a contempt and a contempt is not necessarily a breach of immunity. Such contempts as threatening a witness, for example, or threatening a potential witness could clearly be a contempt of Parliament, but it is difficult to say what immunity is breached. You could say that it was a breach of the immunity of the freedom of speech, but it is more appropriately seen as a contempt that is not linked to a particular immunity.[61]

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59 *Laurance v Katter* [1996] QCA 471 (22 November 1996) para. 35.

60 *May*, op. cit. p. 108.

61 Harry Evans, *Transcript*, 10 November 2003, p. 2.

2.72 He also indicated that, in order for a contempt to be found, it would need to be established that the alleged offender acted with improper intent, or with reckless disregard:

> **CHAIR:** Does there need to be intention for a contempt to be found?
>
> **Mr EVANS:** Normally, yes. You would have to establish that the executing authority, the law enforcement authority, had some improper intention; that it was intending to obstruct a member by the execution of the search warrant or it was intending to seize documents that had nothing to do with its proper criminal investigation. It is possible that you could find that such an authority was so reckless or negligent in obtaining and executing a search warrant that that amounts to a contempt. In other words, there is no guilty intention but there is such a degree of recklessness or negligence that that would amount to a contempt. But I think there has to be some culpable intention of that sort to establish a contempt.
>
> **CHAIR:** So the intention may be by way of omission rather than commission?
>
> **Mr EVANS:** Yes, certainly. If they are simply careless to a degree that they should not be you could say that that was an improper obstruction of a member and that that amounted to a contempt.[62]

[62] Harry Evans, *Transcript*, 10 November 2003, p. 2.

Chapter 3 Execution of the search warrant

This chapter outlines the events surrounding the execution of the search warrant, and considers whether any breach of the immunities of the House, or contempt, was involved, as required by paragraph (a) of the terms of reference for this inquiry.

Outline of events

3.1 On Friday 3 October 2003 officers of the ICAC were granted a search warrant by a judicial officer, under section 40(1) of the ICAC Act, authorising entry and search of the Parliament House office of Mr Breen. The warrant was executed in the afternoon of the same day.

3.2 The warrant was obtained as part of an investigation under the Act concerning the use of parliamentary allowances and resources by Mr Breen, for the purpose of determining the matters set out in section 13(2) of the Act.[63] The particular matters under investigation at that stage were:

- Mr Breen's entitlement to claim the Sydney Allowance,
- Mr Breen's use of the Logistic Support Allocation, and
- Mr Breen's use of Parliamentary staff resources to assist with electioneering work, writing of a book (and associated computer program) and other apparently non-Parliamentary duties.[64]

3.3 Shortly before the officers' arrival at Parliament House, the Solicitor to the Commission contacted the Deputy Clerk of the Legislative Council to advise of the proposed search. On arrival at the office of Mr Breen, the officers requested a member of Mr Breen's staff to contact Mr Breen and advise him of the warrant. According to the ICAC's submission to this inquiry, the officers were advised that Mr Breen declined to attend.[65] The officers provided the staff member with an 'Occupier's notice' relating to the search, in accordance with the requirements of the *Search Warrants Act 1985* (NSW), which was subsequently handed to the Deputy Clerk (Appendix 4).

3.4 During the search, the Deputy Clerk, 'in obedience to the ICAC Act, and pursuant to a duty to the House under an equally binding law', reminded the officers of the issue of parliamentary privilege and the need to ensure that material connected with proceedings in

63 Section 13(2) provides that the Commission is to conduct its investigations with a view to determining certain specified matters relating to 'corrupt conduct'.

64 ICAC, *Submission*, 6 November 2003, p. 1.

65 Ibid, p. 2. The issue of Mr Breen's absence at the time of the search was referred to by Mr Breen in the House on 15 October 2003: *Hansard* (weekly pamphlet), pp. 3790 and 3792.

Parliament not be seized.[66] The officers advised that they had no intention to violate parliamentary privilege.[67] Section 122 of the *Independent Commission Against Corruption Act 1988* preserves parliamentary privilege in relation to the freedom of speech, debates, and proceedings in Parliament.

3.5 During the execution of the warrant, the officers seized a quantity of documents, Mr Breen's laptop computer, and the hard disk drives of two desk-top computers. They also downloaded onto a compact disk certain information from Mr Breen's personal drive on the Parliament's IT network system. The laptop, hard drives, and downloaded information were taken on the understanding that they would not be accessed and examined except in the presence of Mr Breen, at a later date.[68]

3.6 On 9 October 2003 the President of the Legislative Council wrote to the ICAC Commissioner, raising questions as to the lawfulness of the seizure of the material, and drawing attention to certain issues relating to the application of parliamentary privilege. The Commissioner's reply, dated 10 October 2003, included advice as to how the seized computer material had been handled following the seizure, and outlined certain procedures which the ICAC proposed to follow to protect the material until the issue of access by the ICAC could be clarified.

3.7 In relation to how the material had been handled, the Commissioner advised that the information stored on one of the hard drives, and the information stored on the laptop, had been 'imaged' and downloaded onto the Commission's system network, but that the imaged copies had not been opened or accessed in any way. The Commissioner also advised that the hard drive which had been imaged had subsequently been returned to the Parliament.

3.8 In relation to the procedures to be followed, the Commissioner advised that the computer equipment, ie the laptop, the hard drive still in the ICAC's possession, and the disk onto which the network information had been copied, would be 'bagged and sealed by the Commission' and placed in the possession of the Clerk of the Parliaments until the question of access had been clarified. The imaged information from the laptop and from the returned hard drive would remain with the Commission, but would not be opened until the issue of access had been settled.

3.9 In subsequent advice to this Committee, the Clerk of the Parliaments indicated that a procedure similar to that agreed on in relation to the imaged material had also been agreed on in relation to the seized paper documents, ie quarantining of the documents with the ICAC pending resolution of the issues.[69]

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66 Letter from President of the Legislative Council to the ICAC Commissioner, dated 9 October 2003, tabled by the President on 14 October 2003, p. 2.

67 Ibid.

68 Statement by the President, *Hansard* (weekly pamphlet), p. 3671; letter from the ICAC Commissioner to the President dated 10 October 2003, tabled by the President on 14 October 2003, pp 2 and 3.

69 Clerk of the Parliaments, *Submission*, 7 November 2003, p. 11.

3.10 After the procedures described above had been implemented, a meeting took place between representatives of the Legislative Council and representatives of the ICAC on Friday 31 October 2003, to discuss options for resolving issues of privilege relating to the documents and computer disks seized by the ICAC.[70] Subsequent to that meeting the Clerk has attended the ICAC on a number of occasions and is in the process of listing the documents.[71]

Was any breach of immunity committed?

3.11 Paragraph (a) of the terms of reference for this inquiry requires the Committee to consider, among other things, 'whether any breaches of the immunities of the Legislative Council were involved in the execution of a search warrant by the ICAC on the Parliament House office of the Honourable Peter Breen'. The answer to this question depends on two key issues: (i) whether any of the documents or things seized under the warrant were 'proceedings in Parliament' within the meaning of Article 9 of the Bill of Rights 1689; and (ii), if so, whether such documents were immune from seizure. Each of these issues is considered below.

Were any of the documents 'proceedings in Parliament'?

3.12 In a letter dated 14 October 2003 to the President, and in a speech delivered in the Legislative Council on 15 October 2003, Mr Breen stated that, while he was not able to identify all of the documents which had been seized without inspecting them, some of the material was immune from seizure by virtue of parliamentary privilege. In particular, he explained that ICAC officers had seized one manilla folder containing miscellaneous documents including the transcript of two interviews between a prisoner, Stephen Jamieson, a private investigator and himself. According to Mr Breen, the transcript was used for the purpose of a speech to the House on 20 November 2002 on the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill*. Mr Breen told the House:

> One of the documents removed from my office by the ICAC was a transcript of two tape recordings taken at Goulburn gaol on 12 November 2002 and 28 November 2002 in which Stephen Jamieson explains how he was allegedly verballed by corrupt police officers and forced to sign a false record of interview. Material from the first of these two tape recordings was used by me in preparing a speech to the House on 20 November 2002, and that is the basis on which I claim parliamentary privilege over the transcript.[72]

3.13 In relation to this material, the Clerk of the Parliaments has advised that:

> based on the information presented by Mr Breen it is my opinion that this transcript is material related to proceedings in the House, and therefore protected under parliamentary privilege.[73]

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70 Clerk of the Parliaments, *Submission*, 28 November 2003, p. 1.

71 Ibid.

72 *Hansard* (weekly pamphlet), 15 October 2003, p. 3792.

73 *Submission*, 7 November 2003, p. 12.

3.14 The question of whether material used by members to prepare speeches in the House is within the scope of 'proceedings in Parliament' is discussed in chapter 2. In particular, it was noted there that 'proceedings' encompasses not only the formal transaction of business in the House, but also statements made and actions performed for the purpose of, or incidental to, such transaction. It was also noted that Article 9 extends to 'statements, dealings, and interactions with people outside the Chamber which are directly or intimately connected with what that member proposes to do in the Chamber',[74] which could clearly include a document such as the transcript in this case.

3.15 In view of these considerations, and the Clerk's advice in relation to the particular document in question, the Committee has concluded that the transcript is a matter which falls within the scope of 'proceedings in Parliament'.

3.16 In reaching this view, the Committee notes that Mr Breen also stated in the House that he used the transcript for another, additional purpose, a complaint to the Police Integrity Commission about allegations of corrupt police conduct,[75] an activity that does not fall within the scope of 'proceedings in Parliament'. However, in the Committee's view, the fact that the material was also used for this additional purpose does not detract from the consequence which follows from its use in the preparation of the parliamentary speech.

3.17 Having been satisfied that in this instance, at least, the document does attract parliamentary privilege, the Committee is of the view that it is not necessary for it to further consider whether other documents attract parliamentary privilege. The case has been established that at least one privileged document has been seized. Given this the Committee turned its attention to the issue of immunity from seizure, and the consequences of such a finding.

Are documents within the scope of proceedings in Parliament immune from seizure?

3.18 As the Committee has found that the transcript was a matter within 'proceedings in Parliament', the question arises as to whether the document was immune from seizure by virtue of Article 9.

3.19 This question emerged, during the inquiry, as the key issue for determining whether a breach of the immunities of the House has occurred in this case. It was also the question on which there was the widest divergence of views in the evidence received by the Committee. In particular, while some of the evidence received asserted that the effect of Article 9 is merely to restrict the uses to which seized material can be put, other evidence affirmed that the effect of Article 9 is to prevent seizure itself, where the seizure of particular documents amounts to an impeaching or questioning of proceedings.

3.20 The divergence of views on this issue in part reflects the fact that there is no legal authority directly on the point. In the one case to have been brought before the courts in which this issue has been raised, the question of the application of parliamentary privilege was not ultimately decided. In that case, *Crane v Gething* (2000) 169 ALR 727, which concerned the seizure of documents under search warrant in the offices of a senator, French J, in the Federal

74 Mr Bret Walker SC, *Evidence*, 10 November 2003, p. 41, quoted in paragraph 2.40 of this Report.

75 *Hansard* (weekly pamphlet), 15 October 2003, p. 3793.

Court of Australia, decided that the court did not have jurisdiction to determine whether parliamentary privilege prevented such a seizure, as the issue of search warrants is an executive act and not a judicial proceeding, and the question of the application of privilege in that context was one which only the House and the executive could resolve.[76]

3.21 The question of whether Article 9 can prevent the actual seizure of material essentially depends on the meaning or effect to be accorded to the words 'impeached or questioned'. As discussed in chapter 2, Article 9 is not expressed to prevent the disclosure of things said in the course of parliamentary proceedings, but only as precluding the impeachment or questioning of such matters. On this basis, for example, it is settled law that evidence of what is said in Parliament is admissible in court proceedings for the purpose of proving a relevant fact, but that such evidence is not admissible for the purpose of drawing inferences as to the motives for which a particular statement was made. However, while that position is clear in relation to the kinds of cases in which the distinction has been drawn, there is no definitive authority as to how such a distinction might apply in the case of the seizure of members' documents under search warrant.

3.22 The differing positions adopted in the evidence received by the Committee in relation to these issues are outlined below.

The ICAC's position

Generally

3.23 The ICAC's position was stated in its submission to the Committee dated 6 November 2003 as follows:

> The present position of the ICAC in respect of the issuing, searching and seizing is that based on available judicial authority these actions do not contravene Article 9 because they do not constitute the impeaching or questioning of freedom of speech, debates or proceedings in Parliament in any court or place out of Parliament.[77]

3.24 This position was consistent with the view taken by the NSW Crown Solicitor and the Solicitor General in a number of advices, copies of which were given to the Committee.[78] For example, in an advice dated 29 October 2003, the Crown Solicitor stated:

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[76] This statement of what was decided in the case is based on the description contained in *Odgers' Senate Practice*, 10th ed., at p. 43. However, in evidence before the Committee, Mr Bret Walker SC advised that the decision in that case appears to have been influenced by the unusual nature of the proceedings, and the way in which the case was pleaded, and that the outcome may well have been different if a different kind of claim had been brought before the Court: *Evidence*, 10 November 2003, p. 43.

[77] ICAC, *Submission*, 6 November 2003, p. 1.

[78] Letters from the Crown Solicitor to the Solicitor to the ICAC, dated 23 October 2003, and 29 October 2003; advice by the Solicitor General dated 10 November 2003, SG 2003/40, entitled 'Question of parliamentary privilege in relation to material seized under search warrant from office of member of Parliament by Independent Commission Against Corruption'. All of this material was attached to a letter from the Deputy ICAC Commissioner to the Clerk to the Committee dated 14 November 2003.

> It is only in the event that some use is subsequently purported to be made by the Commission of documents seized and retained that an issue of contravention of parliamentary privilege may arise and that use would, so far as Article 9 is concerned, have to amount to an impeachment or questioning of free speech, etc by the Commission.[79]

3.25 As to the particular uses of seized material which in the ICAC's view would contravene Article 9, the Deputy Commissioner, Mr Pehm, stated during evidence to the Committee that use at an ICAC hearing could give rise to an issue of privilege:

> **Reverend the Hon. FRED NILE:** Would you discuss the parliamentary privilege issue if it were claimed at the point of using that material in a prosecution?
>
> **Mr PEHM:** Not in a prosecution but in any proceedings of a commission—
>
> **Reverend the Hon. FRED NILE:** In a tribunal.
>
> **Mr PEHM:** Yes, in a hearing in the commission. The situation has never risen, but if we felt at that stage that some claim of privilege might attach to a document that it was proposed to use we would notify the Presiding Officer of the relevant House and extend the opportunity to claim privilege. It could of course be the basis for an objection by a person appearing before the commission.[80]

3.26 The Solicitor General also advised that use of privileged material at a hearing would offend Article 9, but suggested that use in an ICAC investigation would not so offend, although he conceded that the latter issue is a difficult question:

> There is a further question… as to what degree of protection Article 9 gives to a document which is sufficiently related to parliamentary proceedings. It may be assumed, in my view, that such a document could not be tendered in evidence or otherwise used in a hearing before the Commission. But it is at least arguable that information in the document might be used as the basis for an investigation by the Commission. This is a difficult question and can really only be properly investigated in the context of a particular document and a proposed investigation.[81]

In Mr Breen's case

3.27 Despite the ICAC's stated view that Article 9 does not prevent the seizure of documents but only their subsequent use, the evidence received by the Committee indicated that, in the case involving Mr Breen at least, the issue of parliamentary privilege was considered by the ICAC to have some relevance both prior to and at the time of the search.

3.28 For example, as was noted earlier in this chapter, prior to the search, in response to advice from the Deputy Clerk concerning the need to ensure that material connected with

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79 Letter from the Crown Solicitor to the Solicitor for the ICAC, 29 October 2003, p. 1.

80 *Evidence*, 10 November 2003, p. 32.

81 Michael Sexton SC, Solicitor General, advice SG 2003/40, 'Question of parliamentary privilege in relation to material seized under search warrant from office of member of parliament by Independent Commission Against Corruption', dated 10 November 2003, p. 4.

proceedings in Parliament was not seized, ICAC officers indicated that they had no intention to violate parliamentary privilege.[82] Further, according to the evidence of the Deputy ICAC Commissioner in this inquiry, the investigating officers refrained from deliberately taking any documents to which privilege attached during the search, where the privileged status of the documents could be readily ascertained at the time. Where, however, it was not practicable for the officers to ascertain whether privilege attached to particular documents then and there, such as in the case of electronic documents stored on a computer, the view was taken that the documents could be seized:

> **The Hon. AMANDA FAZIO:** So it did not occur to you that this issue of privilege might come up and that it might be worthwhile to tell [the] investigators, "This is an issue that you need to look into"?
>
> **Mr PEHM:** We did in broad terms. … As I understand it, the officers executed the warrant, at least with respect to the paper documents or the hard copies, with that in mind. My understanding is that they did not deliberately take anything that they felt privilege attached to. The problem we have is with the electronic documents. They are not in a position to make that examination on the spot. It is a real practical problem. On counsel's advice, we would be entitled to sit in that office for as long as it took and open up every document and look at it. That is not something that we would want to do and everyone knows how disruptive that might be to the House, but that is the legal entitlement.[83]

3.29 In other evidence, Mr Pehm reiterated that the ICAC has no intention to seize documents that would attract parliamentary privilege:

> What we are saying is that there is no intent to take any documents that would attract parliamentary privilege. …[84]

3.30 Other evidence received by the Committee appeared to suggest that the kinds of documents which the ICAC will not take are those which, in addition to being 'proceedings in Parliament', are likely to be used by the ICAC, were they to be seized, in a manner which would offend Article 9, according to an assessment to be made by the investigating officer at the time of the search. This suggestion appears to have been made by the solicitor to the ICAC, Mr John Pritchard, during the Committee's hearing, at the end of the following exchange:

> **CHAIR:** Mr Pehm, if it is your position—which you said has not changed—that at the point of seizure parliamentary privilege did not apply at all, and yet advice was being given to the officers of the Parliament that material that attracted parliamentary privilege would not be seized, how do those two statements accord? Were any documents privileged?
>
> **Mr PEHM:** The documents that were taken from that office?

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82 Letter from the President of the Legislative Council to the ICAC Commissioner, dated 9 October 2003, tabled by the President on 14 October 2003, p. 2.

83 *Evidence*, 10 November 2003, p. 37.

84 Ibid, p. 35.

CHAIR: Yes.

Mr PEHM: We do not know. We have not looked at them. Let me go back—

CHAIR: You have just told the Committee that your position—which has not changed since that point—is that, in terms of seizing this material, it does not attract privilege under Article 9, is that the case?

Mr PRITCHARD: We believe that to be the position, yes.

CHAIR: Therefore, how could you then make the claim that privileged items would not be seized?

Mr PRITCHARD: Because we can agree to that position.

CHAIR: But, surely, none of them were privileged, under your definition?

Mr PRITCHARD: No. It is more—

CHAIR: Please describe how it works.

Mr PRITCHARD: Our view is that it is a question of the use to which the document that is seized is going to be put by us as the tribunal later on. I have not seen the documents. I was not involved in the execution of the search warrant. An officer involved in it may well have taken the view, looking at the document, that a use was going to be made of it that could infringe the privilege—I do not know.

CHAIR: That is an interesting procedure.[85]

Evidence of Mr Harry Evans

3.31 In contrast to the position advanced by the ICAC, the view taken by the Clerk of the Senate, Mr Harry Evans, in evidence to the Committee was that Article 9 confers an immunity from the compulsory production of documents, including by means of the execution of a search warrant, where the documents are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings.

3.32 The basis for this view was comprehensively set out in a document provided to the Committee by Mr H Evans, the Senate's submission to the Federal Court in the case of *Crane v Gething*. As noted earlier, *Crane v Gething* concerned issues similar to those involved in the present case, although at the federal level. However, Mr H Evans advised the Committee that there would appear to be no basis for concluding that the law at state and federal levels would be different in that regard.[86]

3.33 The reasoning adopted in the Senate's submission to the Court is outlined below. The other evidence presented by Mr H Evans to this Committee is then considered.

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85 *Evidence*, 10 November 2003, p. 34.

86 Harry Evans, *Submission*, 28 October 2003, p. 2.

Senate submission in Crane v Gething

3.34 The submission begins by acknowledging that the law of parliamentary privilege, as codified by section 16 of the *Parliamentary Privileges Act 1987* (Cth), restricts the use to which evidence of parliamentary proceedings may be put in proceedings before a court or tribunal. As a result, 'parliamentary privilege is … basically a use immunity, rather than a rule relating to the admissibility of evidence'.[87]

3.35 However, the submission also points out that, apart from the use immunity, parliamentary privilege encompasses what has been referred to in the United States as the 'testimonial privilege', which provides a basis for refusing to provide evidence at all, without going to the use to which the evidence may be put. Accordingly, for example:

> if a senator were to be asked to give evidence in court about the sources of information contained in the senator's speech in the Senate, the senator could refuse to answer any such questions about the speech on the basis that answering in itself would facilitate a questioning of proceedings in Parliament, regardless of any other use to which the answers might be put.[88]

3.36 The submission then asserts that this testimonial privilege is not confined in its application to the provision of evidence by witnesses in court, but also applies to 'documentary evidence, such that a party may lawfully resist compulsory processes for the production of documents on the basis that production of those documents would infringe parliamentary privilege'.[89] In support of the existence of this documentary dimension, the submission refers, among other things,[90] to a number of recent court judgments, in which it has been accepted that the production of documents may be resisted on the basis of privilege:

> It has been made clear by the United States courts that production of documents may be resisted where interference with legislative activities is involved regardless of the use to which the documentary evidence is to be put (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408). The Queensland Court of Appeal accepted that parliamentary privilege could provide a basis for resisting an order for discovery of documents, depending on the nature of the documents (*O'Chee v Rowley,* 1997 150 ALR 199).[91]

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87 'Parliamentary privilege: seizure of documents under search warrant, *Crane v Gething*, Submission on behalf of the Senate to the Federal Court of Australia', paragraph 1.

88 Ibid, paragraph 3.

89 Ibid, paragraph 4.

90 The submission notes, at paragraph 5, that the *Parliamentary Privileges Act 1987* (Cth) enacts a part of the documentary testimonial privilege, by providing in section 16(4) that a record of in camera evidence by a House or committee is not to be admitted in a court or tribunal for any purpose.

91 Senate submission to the Federal Court, paragraph 6.

3.37 The submission acknowledges that the judgments in those cases related specifically to the production of documents by subpoena and orders for discovery of documents, respectively. However, it argues that:

> the same principle would apply to seizure of documents under search warrant by law enforcement bodies.[92]

Other evidence

3.38 In line with the reasoning adopted in the Senate's submission, in a written submission relating specifically to this inquiry, Mr H Evans argued that it can be assumed that the testimonial element also applies in this case:

> We may proceed on the assumption, although the question has not been distinctly decided, that the immunity of parliamentary proceedings from impeachment and question in courts, tribunals and other places includes, as part of the "testimonial" element of the immunity, an immunity against the compulsory production of documents which are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings, and that this immunity extends to the seizure of documents under search warrant.[93]

3.39 He further argued that the existence of the documentary component has been accepted by the Australian Federal Police, and the Queensland Police,[94] referring to two recent cases which involved the execution of search warrants in the offices of Senators.[95] In those cases, the law enforcement bodies concerned agreed to seized material being quarantined until the question of privilege could be resolved, and in one case, acquiesced to certain documents in respect of which claims of privilege had been upheld by an 'independent arbiter' being returned to the relevant Senator, without further examination by the law enforcement body itself.[96]

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92 Ibid, paragraph 7. The submission also notes that, in order to invoke the immunity against production of documents, the documents in question would have to be closely related to proceedings in Parliament such that they would fall within the expression used in the *Parliamentary Privileges Act*, 'for purposes of or incidental to' proceedings in Parliament: paragraph 9.

93 Harry Evans, *Submission*, 28 October 2003, pp.1-2.

94 Ibid, p. 2.

95 See Senate Committee of Privileges, 75th Report, *Execution of Search Warrants in Senators' Offices*, March 1999; 105th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris*, June 2002; 114th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris Matters arising from the 105th Report of the Committee of Privileges,* August 2003.

96 This occurred in the first case, involving Senator Crane: see correspondence and statement by Mr Stephen Skehill, 23 August 2001, tabled by the President of the Senate on 27 August 2001 (*Hansard*, 27 August 2001, p. 26625). In the second case, involving Senator Harris, the independent arbiter reported that all of the seized documents which had been referred to him for assessment were outside the authorisation of the search warrant, and on that basis should be returned to the Senator, and it was therefore unnecessary for him to consider whether the documents were covered by parliamentary privilege.

3.40 In oral evidence to the Committee, Mr H Evans confirmed his stated view as to the existence of the documentary testimonial immunity,[97] and his view as to the application of that immunity, in appropriate cases, where the production of documents is sought by means of the execution of a warrant. For example, Mr H Evans stated that:

> What we say is that the act of executing a search warrant and seizing documents of itself does not breach Article 9; it is the seizure of documents, the compulsory production of which is prevented by parliamentary privilege, that is prevented by parliamentary privilege. In other words, there is a category of documents which, just as they cannot be forced to be produced in response to a court subpoena, cannot be lawfully seized under a search warrant. In relation to that category of documents, a search warrant does not legally run.[98]

Evidence of Mr Bret Walker SC

3.41 Consistent with the view expressed by Mr H Evans, the position taken by Mr Walker, in evidence to the Committee, was in essence that, while Article 9 does not prevent the seizure of documents as such, it does prevent the seizure of documents the use of which would amount to an impeaching or questioning of parliamentary proceedings.

3.42 Various different facets of this view were discussed by Mr Walker at the Committee's hearing. Firstly, in an answer to a question from the Chair in relation to the ICAC's position on this matter, Mr Walker explained that the question of the seizure of documents by the ICAC must be considered not just in the light of Article 9, but also in the statutory context in which the question arises, and in particular, in light of the inclusion within the ICAC Act of section 122:

> I think it is a very interesting point that …raises a number of issues transcending simply what I have referred to as the Article 9 question. First of all, of course, it requires attention to the statutory provisions governing the issue and execution of search warrants by the Independent Commission Against Corruption [ICAC]. That in turn most particularly involves consideration of what section 122 of the Independent Commission Against Corruption Act means because section 122, in very round terms, preserves parliamentary privilege. … In this case the Parliament of this State, by section 122, has made even clearer what is probably in any event the case; that is, I think, it makes it very difficult to construe the search warrant provisions in the ICAC Act and the relevant provisions in other statutes, the other legislation governing the execution of search warrants, so as to permit the seizure of material which is conceded cannot then be used by ICAC by reason of parliamentary privilege.[99]

3.43 Secondly, Mr Walker pointed out that the contrary position which has been advanced by the ICAC, ie that privileged documents may be seized but not used, is anomalous, in that it requires the act of seizure to be understood in isolation from the purpose for which seizure is effected.[100] In that regard, Mr Walker advised that, if a court were called on to decide the

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97 *Evidence*, 10 November 2003, p. 8.

98 Ibid, p. 7.

99 Ibid, p. 42.

100 Ibid.

question, it would be highly likely to conclude that 'the statutory provisions upon which ICAC relies to issue and execute warrants will be construed so as not to authorise what I will call a warrant for seizure but not for use'.[101]

3.44 Thirdly, Mr Walker specified that, while Article 9 does not prevent the seizure of documents per se, in some circumstances the seizure of documents itself must be seen as involving an impeaching or question of proceedings:

> It is a privilege or immunity against, ultimately—to use the seventeenth century language—proceedings or freedom of speech in the House being impeached or questioned in another place. ... That is not at all the same as an immunity from having your papers looked through and is not at all the same as immunity from having some of your papers taken away. However they may, practically speaking, converge on the same point so that papers may not be looked at and may not be taken away because that is held in particular circumstances to be part of a process of impeaching or questioning.[102]

3.45 Fourthly, at a later stage in his evidence, Mr Walker identified a further, practical, problem inherent in the ICAC's position - the difficulty of erasing from the minds of investigators the knowledge of information contained in seized material, so as to ensure that there is no subsequent unlawful use:

> If they can seize a whole lot of material, and someone has to look at it in order to work out whether it can be used bearing in mind Article 9, the invidious question then is: How does that information get hoovered out of the minds of the people who looked at it? We have come across that kind of problem in litigation a fair bit. Quite often it means that particular lawyers can take no more part in litigation. That strikes me as being an extremely unfortunate matter. The ICAC is scarcely overresourced, and investigative experts are scarcely thick on the ground. It would be terrible if your A team, as it were, suddenly finds itself stopped in its tracks because they have seen something they should not have seen. Yet, I think it is a bit of a joke to say, "They promised not to think about those matters." I do not mean that unkindly at all; I just do not think that any of us are capable of doing that.[103]

3.46 Finally, in relation to this issue, Mr Walker suggested that, although the usual context in which Article 9 is invoked involves the possible impeaching or questioning of parliamentary proceedings by bodies with an adjudicative role, such as courts or tribunals, that is not to say that there cannot be a relevant impeaching or questioning by bodies such as modern statutory agencies with a purely reporting role. In particular, Mr Walker expressed the view that an ICAC report which includes a finding of corrupt conduct against a member in respect of statements made by the member during parliamentary proceedings, clearly involves an impeaching or questioning of those proceedings, in a place out of Parliament, within the meaning of Article 9:

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101 Ibid.

102 Ibid.

103 Ibid, p. 51.

> An ICAC report may say: So-and-so has been guilty of corrupt conduct. I find the facts to be as follows, contrary to what he or she said in the House, for example. Or statements might be used in the House to show prejudice in favour of a particular cause, which has led to, say, an allegation of ministerial favouritism which might be corrupt. In my view, that seems to be a shocking sort of possibility, and very clearly impeaching or questioning those proceedings, that member's statements in the House.
>
> … It would be quite wrong to restrict the seventeenth century language to courts and tribunals which have an adjudicative role. There is also the modern phenomenon of agencies which have a reporting role, instead of reporting into the ether like the ICAC, so that there is a published finding that X has engaged in corrupt conduct. In fact, that does not change X's legal status at all. I do not see how anyone could sensibly say that that is not impeaching or questioning their conduct, because it certainly is. For example, there may be a statement in a report about somebody who may not be the main target of the report, yet their words to Parliament are to be believed. I think that is impeaching or questioning.[104]

Evidence of the Clerk of the Parliaments

3.47 In an initial written submission, dated 7 November 2003, the Clerk of the Parliaments, Mr John Evans, addressed various issues, including immunity from seizure. With regard to that issue, the Clerk advised:

> it is my contention that documents which fall within the category of parliamentary privilege are **immune from seizure**. In my opinion such documents should not be made available to any investigating body, regardless of the terms of their warrant or the use to which the documents may be put.[105]

3.48 In a later written submission, dated 28 November 2003, the Clerk addressed the issue in more detail. Firstly, he advised that:

> there is a **preponderance of authorities** supporting the notion that the immunity in Article 9 should be interpreted widely, as was found in *Prebble*, rather than the narrow use interpretation found in *Murphy*.[106]

3.49 Further, he indicated that there is a long line of authorities in the United States affirming that the 'speech or debate clause' of the US Constitution, which was modelled on Article 9 and is similar in wording, is an absolute immunity.

3.50 Having noted these authorities, the Clerk reasoned that 'if, as the great majority of court decisions suggests, statements made in the House cannot be questioned at all, ie. the immunity is absolute, then the ICAC has no power to demand by warrant [n] or seize documents falling within the description of "proceedings in Parliament".[107] In this regard, he referred to the following passage from the judgment of McPherson J in *O'Chee v Rowley* (1997) 150 ALR 199:

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104 Ibid, p. 50.

105 Clerk of the Parliaments, *Submission*, 7 November 2003, p. 16.

106 Clerk of the Parliaments, *Submission*, 28 November 2003, p. 2.

107 Ibid.

> Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that the acts of the kind done here for purposes of Parliamentary debates or question time are vulnerable to compulsory court process of that kind (produce documents to the Court for inspection). That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 (Commonwealth Parliamentary Privileges Act) are intended to prevent.[108]

3.51 In relation to the argument that Article 9 merely provides an immunity from use, the Clerk observed:

> To suggest that the privilege is only an immunity from use implies that the privilege is a qualified privilege. To me it is difficult to conceive the circumstances in which an act itself is privileged but the circumstances surrounding the occasion are not. The use of documents covered by privilege would in all likelihood involve questioning the documents' contents, and possibly even questioning the motives and intentions of the member concerned. Delicate questions could arise as to whether or not things said or done by a member form part of a proceeding in Parliament.[109]

3.52 He also pointed out that the 'use immunity' argument appears incongruous with a number of other factors: firstly, with section 10 of the *Evidence Act 1995*, which preserves the law relating to parliamentary privilege, and has the consequence that members are not competent to give evidence in court on matters within the scope of 'proceedings in Parliament'; secondly, with the principle that the courts will deny the seizure of documents claimed to be privileged on certain other kinds of grounds, such as on the basis of client legal privilege; and thirdly, with statements which have been made by the ICAC Commissioner in this case, in correspondence to the President of the Legislative Council, affirming that the ICAC carries out its functions so as not to offend parliamentary privilege in any way.[110]

3.53 Finally, the Clerk advised that, even if the immunity in Article 9 is only an immunity from use, section 122 of the ICAC Act could still be construed as a testimonial immunity against compelling evidence from members and others about 'proceedings in Parliament'.[111] This is because the privilege belongs to the House, and not to the individual member, who has no capacity to waive the privilege.[112] In this regard, the Clerk noted the following statement by Debelle J in *Rowan v Cornwall & Ors* [2002] SASC 160:

> The rationale for the privilege is that a member of Parliament should be able to speak in Parliament with impunity and without any fear of the consequences: … The privilege is intended to ensure that the Parliament can exercise its power freely on behalf of its electors.[113]

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108 (1997) 150 ALR 199 at 215.

109 Clerk of the Parliaments, *Submission*, 28 November 2003, p. 3.

110 Ibid.

111 Ibid, p. 3

112 Ibid.

113 [2002] SASC 160 at para 103.

Conclusion

3.54 In view of the evidence provided by the Clerk of the Senate, the Clerk of the Parliaments, and Mr Walker, the Committee has proceeded in this matter on the basis that Article 9 applies so as to prevent the seizure of a document under search warrant, where, as a natural consequence of the seizure, a questioning or impeaching of proceedings in Parliament within the meaning of Article 9 necessarily results.

3.55 In adopting this approach, the Committee acknowledges the lack of judicial authority on the question, and the contrary view of the ICAC, as stated in the ICAC Commissioner's submission to the Committee,[114] that is, that Article 9 does not prevent the seizure of privileged documents, but only restricts their subsequent use. However, the Committee is also mindful of the overriding purpose of Article 9, as expressed in advice provided to the Clerk of the Parliaments by Mr Walker, viz 'to enhance deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of members, particularly against threats or reprisals from the Executive.' Further, the Committee is mindful of the potentially 'chilling effect' on the flow of information to members in future which may result from the seizure of privileged documents in the course of Executive investigations – a flow of information on which members substantially depend to participate in the deliberative democracy and responsible government to which Mr Walker refers.

3.56 The Committee acknowledges that this approach can be seen as giving rise to a degree of conflict with the ability of bodies such as the ICAC to conduct certain aspects of their investigations in an untrammelled fashion. However, the Committee believes that the potential for such conflict is likely to be minimised, in any future cases, once appropriate protocols and procedures concerning the execution of search warrants are developed, as discussed in chapter 4.

3.57 The Committee further points out that the potential for such conflict will only arise where material sought by an investigative body has a sufficiently close link with the formal transaction of business in the House or a committee such as to bring the material within the scope of 'proceedings in Parliament'. In this regard, the Committee has noted in chapter 2 of this report that many of the activities performed by members on a daily basis, such as constituency work, party activities, and accounting for the use of public resources, are not 'proceedings in Parliament', and are not protected by Article 9, in the absence of evidence demonstrating a clear and specific close link with the transaction of parliamentary business.

3.58 To the extent that the Committee's approach may still leave an area of conflict with the conduct of investigations, even after suitable protocols have been developed, the Committee draws attention to statements which have been made by the courts, recognising that the immunity conferred by Article 9 may at times conflict with other aspects of the public interest, such as the interests of justice in ensuring all relevant evidence is before the courts, but affirming nonetheless that Article 9 prevails over such competing interests (see chapter 2, paragraph 2.16).

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[114] See paragraph 3.23 above.

3.59 Finally, the Committee notes that the approach which it has adopted in relation to this issue is consistent with the approach which has been adopted in cases in the Australian Senate,[115] and the Australian Capital Territory,[116] where the question of the execution of search warrants in members' offices has been considered.

3.60 In light of these considerations the Committee has concluded that the seizure of the document in question, in the circumstances of this case, and in the context of the ICAC's established statutory function of conducting investigations to determine matters relating to corrupt conduct,[117] involved an impeaching or questioning of proceedings in Parliament within the meaning of Article 9.

3.61 The Committee has also concluded that an ICAC investigation is a 'place out of Parliament' within the meaning of Article 9, in line with advice previously provided by the Crown Solicitor and discussed in chapter 2,[118] and evidence provided by Mr Walker, referred to earlier in this chapter.[119]

3.62 Accordingly, the Committee finds:

Finding 1

That a breach of the immunities of the Legislative Council was involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Honourable Peter Breen on 3 October 2003.

Was any contempt committed?

3.63 Apart from the question of breach of immunity, the Committee is also required to determine, under paragraph (a) of the terms of reference for this inquiry, whether any contempt of Parliament was involved in the execution of the search warrant in this case.

3.64 As noted in chapter 2, the essential feature of contempt is that the relevant conduct must impede or obstruct the House or its members in the performance of their functions, or have a tendency to produce such result. Further, successive committees both here and elsewhere have determined that to amount to contempt, the obstruction must be of such seriousness that it could have a substantial impact on the ability of the House, its committees, or

115 Senate Committee of Privileges, 75th Report, *Execution of Search Warrants in Senators' Offices*, March 1999; 105th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris*, June 2002; 114th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris Matters arising from the 105th Report of the Committee of Privileges,* August 2003.

116 Legislative Assembly Secretariat, Australian Capital Territory, Annual Report 2001-2002, pp. 12-13.

117 See section 13(2) of the ICAC Act.

118 See chapter 2, paragraph 2.62.

119 See chapter 3, paragraph 3.46, and *Evidence*, 10 November 2003, p. 42.

members, to perform their functions. In addition, as was noted at the end of chapter 2, the Clerk of the Senate has advised that a finding of contempt requires that the alleged offender acted with improper intent, or with reckless disregard as to the consequences of his or her actions.

3.65 In relation to the seizure of documents from Mr Breen's office, it does not appear that the ICAC acted with improper intent, or with reckless disregard as to the effect of its actions on the rights and immunities of the House and its members. Both immediately prior to and during the execution of the warrant, the ICAC was concerned to comply with its obligations to preserve parliamentary privilege, and expressed its intention not to take any documents which might fall within the scope of proceedings in Parliament.

3.66 Accordingly, the Committee finds:

Finding 2

That no contempt of Parliament was involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Honourable Peter Breen on 3 October 2003.

3.67 Although the Committee has found, in the initial execution of the warrant, that no contempt was committed, and that the ICAC did not act with a relevant intent, the Committee is concerned that in subsequent correspondence with and evidence to the Committee the ICAC now appears to have modified its position in relation to the import of section 122 of the *Independent Commission Against Corruption Act 1988*, and is asserting that it has the power to both seize documents which fall within the scope of proceedings in Parliament and to use them in their investigations providing such use does not amount to a calling into question or impeachment.

3.68 Such an interpretation of parliamentary privilege and the operation of Article 9 is at odds with other evidence before the Committee. In particular it is at odds with the concept embodied in Article 9 of the Bill of Rights 1689 that members, witnesses before committees, and electors in general through their representatives must be free to act without threats or fear of reprisal from the Executive, or agents of the Executive.

3.69 The ICAC's interpretation would effectively remove the protections afforded by Article 9, allowing any document no matter how closely linked to proceedings in Parliament to be seized, examined and used by any investigative agency, whether federal or State, and would place the onus of proof of a breach of privilege on the individual member concerned in the first instance, and ultimately the House, after the fact. Such a position must be seen as intolerable to the very nature of the privilege, since the protection afforded by the privilege would no longer apply.

3.70 The Committee is of the view that documents which fall within the scope of proceedings in Parliament may not be seized, and any subsequent attempt by the ICAC to use such documents in an investigation would amount to a contempt of Parliament. The Committee therefore finds:

Finding 3

That any subsequent attempt by the ICAC to use documents which fall within the scope of proceedings in Parliament in their investigations would amount to a contempt of Parliament.

Other matters

Submission of the Hon. Peter Breen MLC

3.71 In a submission to the Committee, Mr Breen made the following observations concerning the powers of the ICAC, and the impact which an ICAC investigation can have on the standing of a public official:

> The ICAC is a body with extensive coercive powers and the ability to produce reports and make recommendations, which can have a substantial impact on the standing and lives of public officials, including members of Parliament. In conducting public hearings, the ICAC is not subject to the usual constraints of the *Evidence Act 1995* or the procedural requirements of the *Criminal Procedure Act 1986*. Taken together, the two Acts are examples of legislation designed to ensure that only credible and admissible evidence is received and admitted against a person, that a person the subject of an allegation of wrongdoing is given proper and detailed notice of the allegation and that the person is given time to prepare a proper answer to the allegation. Those protections are not available to a person who is the subject of an ICAC investigation.[120]

3.72 He also specifically referred to the impact which an investigation can have on a member of Parliament, and the need for the Parliament to maintain a proper review of the ICAC's functions:

> Members of Parliament are particularly vulnerable to mischievous and unsustainable attacks on their credibility and integrity, and the injudicious exercise of the ICAC powers can unfairly damage and destroy political careers. The ICAC frequently holds public hearings, which are attendant with great publicity, and the absence of the usual protections and safeguards has the potential to work significant injustice. For that reason alone, it is essential that the Parliament maintain a proper review of the ICAC's actions. Outside the limited role of the parliamentary oversight body, however, few opportunities arise to question ICAC policy on which matters it will investigate, the terms of reference it adopts for a particular inquiry and the witnesses it will call to inform an inquiry.[121]

3.73 In relation to the particular investigation in this case, Mr Breen stated that, apart from an anonymous letter concerning certain alleged complaints, which has been circulated to the press, he is not aware of any other complaints or allegations against him.[122] He also indicated

120 Peter Breen, *Submission*, 26 November 2003, p. 2.

121 Ibid.

122 Ibid, p. 1.

that the commencement of the investigation has had a devastating impact on his reputation and standing:

> Since the investigation into my affairs began, I have had numerous devastating experiences of people treating me as a pariah on the basis that I must have something to hide otherwise the ICAC would not be investigating me.[123]

[123] Ibid, p. 8. In this regard, the submission suggests that there should be a requirement for the ICAC to identify the nature of allegations against a person once an investigation of the person finds its way onto the public stage.

Chapter 4 Procedures and Protocols

Paragraph (b) of the terms of reference requires the Committee to inquire into and report on "what procedures should be established, such as the appointment of an independent arbiter, to examine and determine whether any of the documents and things seized by the Independent Commission Against Corruption are immune from seizure under the warrant by virtue of parliamentary privilege."

This chapter suggests procedures for the resolution of the question of whether any of the documents seized from Mr Breen's office are immune from seizure by virtue of parliamentary privilege.[124] Also discussed are a number of issues which the Committee believes to be worthy of further examination, in the context of the development of protocols and procedures covering the execution of search warrants on members' offices in future, should that task be referred to the Committee.

Resolution of Breen matter

4.1 In developing procedures for the resolution of the Breen matter the Committee has been mindful of the unique circumstances of this matter. The ICAC has previously utilised its powers under section 21 (power to obtain information) and 22 (power to obtain documents etc) on a number of occasions in relation to members of the Legislative Council, through notices directed to the Clerk. In December 2002 the ICAC exercised its powers under section 23 (power to enter public premises) in relation to the Parliament House office (and home) of the Hon Malcolm Jones MLC.[125] However, 3 October 2003 is the first occasion on which the ICAC has exercised its powers under section 40 (issue of search warrant) to obtain and execute a search warrant in respect of the Parliament House office of a Member of the Legislative Council.

4.2 At this point in time there are no protocols or procedures in place in relation to the execution of search warrants on a member's office and the issue of parliamentary privilege, notwithstanding specific statutory recognition of the privilege in s. 122 of the Act. However the ICAC's *Operations Manual* dealing with search warrants includes detailed protocols in

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124 The Hon Peter Breen MLC contended that, in executing the search warrant, the ICAC investigators seized documents and other material beyond the authorisation of the warrant. *Submission*, 26/11/2003, p 5. The Committee has not addressed this issue, as the terms of reference require the Committee to consider the question of the immunity of documents from seizure "by virtue of parliamentary privilege" only. In any case, the question of whether or not documents have been seized beyond the authorisation of the warrant is one for resolution directly between Mr Breen and the ICAC. In this regard, the ICAC has indicated that if Mr Breen considers the ICAC's seizure of material was not validly authorised by the terms of the warrant "he has avenues open to him to challenge the validity of the warrant." *Correspondence*, 28/11/2003.

125 As far as the Committee is aware, the issue of privilege in relation to Mr Jones' documents was not raised by the member at the time the section 23 notice was served on him, nor during the subsequent ICAC investigation.

relation to the execution of search warrants on a solicitor's office, including detailed provisions for dealing with claims of legal professional privilege.[126]

4.3 In the absence of any such protocols, the legal advice received by officers of the Legislative Council on the afternoon of 3 October 2003 was that the ICAC had the power to execute the search warrant which had been granted and that there were no apparent grounds for resisting the execution of the warrant. Evidence provided to the Committee on 10 November 2003, including from the President of the NSW Bar Association, Bret Walker SC, confirms that position. As outlined later in this chapter, protocols to be developed for any future cases may include provisions dealing with events preceding the execution of the warrant, together with the execution of the warrant itself, including provisions which might reduce (if not eliminate) the possibility of some difficulties arising. The Committee's recommendations for resolution of the Breen matter, therefore, should not necessarily be seen as a precedent for what must happen in all future instances where search warrants are executed on a member's office. Rather, the Committee's recommendations are aimed at providing a workable resolution to the issues being faced by the ICAC, the Legislative Council and Mr Breen in the case at hand, as expeditiously as possible.

4.4 As required by the terms of reference, the Committee's proposed procedures focus on:

- the early identification of any documents which may be immune from seizure by virtue of parliamentary privilege;
- the subsequent identification of any of those in relation to which where there is a dispute as to their status; and
- a process for the resolution of any such disputes.

4.5 As outlined later in this chapter, procedures have been adopted in recent cases in which search warrants have been executed on the offices of Senators whereby a legal arbiter has been appointed to review all documents, without any preliminary steps being taken to narrow down the focus to only those documents in dispute between the Senators and the police. Rather than simply adopting those procedures, the Committee has sought to include in its proposed procedures steps to enable the precise identification of (what may prove to be a small number of) documents in dispute. The Committee therefore proposes that, after Mr Breen, together with the Clerk and officers of ICAC, has examined the seized documents, including any documents contained on the laptop computer and hard drives currently held by the Clerk, and compiled a list of those documents considered to be privileged,[127] the ICAC would be able to dispute any claim of privilege, providing reasons for their dispute of the claim. Mr Breen is to be immediately informed of any such dispute and given an opportunity to provide reasons in

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126 A copy of this document was forwarded to the Committee with correspondence from the Deputy Commissioner of the ICAC, dated 14 November 2003. The Deputy Commissioner requested that the document remain confidential to the Committee and it has not been made public.

127 Mr Breen has submitted that, although the House may direct a member to identify documents and nominate which of them are covered by parliamentary privilege, the Clerk is "ideally placed" to perform this task. Submission, 26/11/2003, p. 6. However, it is the view of the Committee, based upon advice from the Clerk, that it is not possible for the Clerk to categorically determine the status of a member's documents, as it is only the member who can identify the purpose for which a document has been created.

support of his claim. The House will be informed of any disputed claim, and any documents provided by the ICAC or Mr Breen will be tabled by the President.

4.6 The Committee has been mindful of the fact that, as the privileges at issue are the privileges of the House, it is most appropriate for the determination as to whether documents are privileged be made by the House itself, upon consideration of any disputed claim of privilege and any written reasons tabled by the President. Any document on which the House does not uphold the claim of privilege will be immediately made available to the ICAC by the President.

4.7 It should be noted that during the course of this inquiry there has been consultation with the ICAC in relation to the development of procedures for the resolution of this matter. A number of possible procedures have been considered. Ultimately it has not been possible to reach an agreement with the ICAC on procedures which would ensure that the privileges of the House are upheld concerning the documents seized. In this regard, correspondence between the ICAC Commissioner and the Committee is attached at Appendix 7.

4.8 While recognising the right of the ICAC to seize documents under the authority of the search warrant, the Committee considers that they had and have no authority to seize documents which fall within the scope of proceedings in Parliament. To facilitate the resolution of this matter without compromising the ability of the ICAC to legitimately investigate members of Parliament and without undermining the very important principles embodied in the rights and immunities of the Parliament the Committee has proposed that the documents be returned to the House, where the member, together with the Clerk and officers from the ICAC can inspect them, and the issue of privilege can be ultimately determined by the House. In this way, the Parliament can uphold its privileges, as recognised by section 122 of the *Independent Commission Against Corruption Act 1988*, and the ICAC can continue its investigation of the matters in hand.

4.9 The Committee therefore recommends:

Recommendation 1

That the following procedures be adopted for the resolution of this matter:

1. That the ICAC return to the President, by a date and time to be determined by the House, all documents and things seized from Mr Breen's parliamentary office on Friday 3 October 2003.
2. That the documents be kept in the possession of the Clerk until the issue of parliamentary privilege is determined.
3. That, by a date and time to be determined by the House, Mr Breen, together with officers of the ICAC and the Clerk, examine the seized documents and things, including any documents held on the laptop computer and hard drives in the possession of the Clerk, and compile a list of documents which fall within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, including:
   (a) the giving of evidence before a House or a committee and evidence so given;
   (b) the presentation or submission of a document to a House or a committee;
   (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
   (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
4. That any documents not listed as falling within the scope of proceedings in Parliament be immediately returned to the ICAC.
5. That the ICAC be provided with a copy of the list indicating documents which fall within the scope of proceedings in Parliament.
6. That the ICAC dispute any claim of privilege in writing to the President of the Legislative Council, together with reasons for its dispute of the claim.
7. That the President immediately inform Mr Breen of any dispute, at which time he may provide written reasons in support of his claim.
8. That the President inform the House of any disputed claim, and table any documents provided by either the ICAC or Mr Breen relating to the dispute.
9. That the House consider the disputed claim of privilege, together with any written reasons tabled by the President, and determine whether the document or documents fall within the scope of proceedings in Parliament.
10. That any documents which the House determines are privileged be returned to Mr Breen and any documents which the House determines are not privileged be returned to the ICAC.

Development of protocols for the future

Existing draft protocols and guidelines

4.10 The Senate and House of Representatives Privileges Committee have been recommending the development of guidelines or protocols for the execution of search warrants on Members' offices since 1995. Initially, the Senate Privileges Committee had recommended that the protocols to be developed should be based on the guidelines in place for the execution of search warrants on lawyers' offices.[128] More recently, reference has been made to draft guidelines prepared by the Commonwealth Attorney General's Department for the Australian Federal Police.[129] The most recent draft of these guidelines is dated 26 June 1998.

4.11 The Clerk of the Senate, Harry Evans, in evidence to the Committee, indicated that the Senate Privileges Committee had expressed some frustration at the length of time being taken to finalise these guidelines. Mr Evans said that the issues requiring examination in the guidelines were reasonably clear and he called for the development of a uniform set of guidelines covering all law enforcement agencies at both federal and state level. Mr Evans emphasised the need for the guidelines to include provision for narrowing down of the documents where privilege is claimed and there is any dispute before the introduction of a legal arbiter.

> Basically all that is required of these guidelines is that a mechanism is provided for a senator or member to identify the documents for which privilege might be claimed. In other words, there has to be some arrangement for a senator, member or their staff to be present when the search is undertaken. Once the claim of privilege is raised, there have to be guidelines for the documents to be sealed and held by a neutral third party until the question of their privileged status is determined. Then there needs to be a procedure for the member or senator and the law enforcement agency to negotiate about particular documents, to exchange lists and so on, in an attempt to narrow down the documents for which privilege is claimed… There needs to be an opportunity for the law enforcement agency to look at a list of documents and say, "These documents"—and there should be a lot of them in normal circumstances—

128 In 1999 the Senate Privileges Committee recommended the existing guidelines for the execution of search warrants on lawyer's' offices provide the basis for the development of guidelines for the execution of search warrants in senators' and members' offices: Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices*, 75th report, March 1999, para 1.11. The House of Representatives Standing Committee of Privileges had also recommended the adoption guidelines in 1995 in its *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, para 31.

129 These guidelines have been referred to in various reports of the Senate and House of Representatives Privileges Committees since November 2000: see House of Representatives Standing Committee of Privileges, *Report on the status of records held by members of the House of Representatives*, November 2000, p. 48; Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices – Senator Harris*, 105th report, June 2002, para's 6-7; House of Representatives Standing Committee of Privileges, Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for members, November 2002, Appendix C, para 1.22; Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices – Senator Harris*, *Matters arising from the 105th Report of the Committee of Privileges*, 114th report, August 2003, para 37.

> "have nothing to do with our investigation, so we are not interested in them." That would be a fundamental step toward solving this problem…[130]

4.12 In addition to the draft AFP guidelines and the established guidelines for execution of search warrants on lawyers' offices referred to above, during the course of this inquiry the Committee has received information from a number of Canadian jurisdictions in relation to protocols and procedures for the execution of search warrants on members' offices. These include:

- Practice in the Canadian House of Commons,
- The procedures of the Quebec National Assembly, and
- The Alberta Assembly's Policy on service of documents and execution of search warrants at the Legislature's building and its precincts.

4.13 The ICAC has also included a proposed protocol in its submission to the inquiry.[131] Reproduced as Appendix 5 is a table which compares the content of each of these protocols.

Recent experience in other jurisdictions

Australian Senate

4.14 The Committee received evidence from the Clerk of the Senate about the recent experience of the Senate in respect of the execution of search warrants on the electorate offices of Senators Crane and Harris.

Senator Crane

4.15 In December 1998 search warrants were executed by the Australian Federal Police on the Parliament House and electorate offices, and the home, of Senator Crane. Mr Evans outlined the sequence of events which followed. This included Senator Crane seeking a declaration from the Federal Court that some of the documents seized were immune from seizure on the grounds of parliamentary privilege. French J declined to make such a declaration indicating that "the issuing of and execution of a search warrant is an entirely executive act and not subject to judicial examination, and the Senate and the police would have to sort out the question of parliamentary privilege."[132]

4.16 The court ordered the documents be returned to the Senate, which subsequently appointed an independent legal arbiter, Mr Stephen Skehill, to examine the documents and determine which were protected by parliamentary privilege. Mr Skehill was required to give the ones that were not protected to the police, and to return the ones that were protected to the Senator. However, Mr Evans said that in the course of his examination of the documents, Mr Skehill

130 *Transcript*, 10/11/03, p. 10.

131 *Submission*, 29 October 2003.

132 *Evidence*, 10/11/03, p. 10. For an explanation the judgment of French J in *Crane v Gething* [2000] FCA 45, including the unusual nature of the proceedings and the circumstances in which the issue of parliamentary privilege was raised, see the evidence of Mr Bret Walker SC: *Transcript*, 10/11/03, p. 43.

came back and said that it appeared that many of the documents seized were actually beyond the authorisation of the warrant and that it would be anomalous for those documents to be returned to the police. He therefore proposed that he should also determine the documents that were not covered by the warrant. Mr Evans said that "the Senate with some reluctance agreed" to have Mr Skehill also make that determination.

4.17 At the end of Mr Skehill's examination of the documents one bundle was returned to Senator Crane. Of the 25,000 pages of documents examined, about 1,400 pages of documents were found to be within the scope of the warrant and not privileged. These were returned to the police. After examining those documents the police announced that no prosecution would be instituted against Senator Crane. Mr Evans noted that the fact that the Senate had custody of the documents, following the decision of French J, meant that the Senate was able to "impose its own solution on the whole matter" and that the police basically had no choice but to accept the arrangement.[133]

Senator Harris

4.18 In November 2001 a search warrant was executed by the Queensland Police Service on the electorate office of Senator Harris. In this case Mr Evans immediately wrote to the Queensland Police saying that some of the material could be protected by parliamentary privilege, and that "I think you should seal it up and wait for the question to be determined". The Queensland Police agreed and the material was sealed and held by the Queensland Police solicitor.

4.19 The Senate referred to the privileges committee the question of whether there was any contempt involved in the issuing and execution of the search warrant. The Committee found that at that stage the Queensland Police had behaved appropriately, sealing the documents and allowing the question of privilege to be determined before seeking to examine the documents. However, as Senator Harris and the Queensland Police could not agree on the scope of the documents in dispute (Senator Harris insisting on claiming privilege in relation to all the documents seized), the matter came back to the Senate for resolution. As the Privileges Committee had a reference about Senator Harris's case, the Privileges Committee was able to commission Mr Skehill and get him to undertake examination of the documents.[134] Of the 74,000 pages of documents examined, Mr Skehill found that all were outside the authorisation of the warrant.

4.20 The Committee was interested to ascertain why Mr Skehill's brief was expanded beyond examining whether documents were immune from seizure on the grounds of parliamentary privilege, to include examination of whether documents were immune from seizure because they were beyond the authorisation of the warrants, even though the Privileges Committee had initially stated that this was a matter for the courts not for the Senate. Mr Evans agreed that, in principle, this matter was more appropriately a matter for the Senator to resolve with the police.

> The view of the Senate is that it was a matter more appropriately for him to determine but, as I said, Mr Skehill in the Crane matter came back to the Senate and in effect

133 *Evidence*, 10/11/2003, pp 4-5.

134 *Evidence*, 10/11/2003, p. 8.

> said, "Look, it would be very anomalous for me to be giving these documents back to the police when I believe that they are not authorised for seizure by the terms of the warrant." Now he could have said, "Well, I'm just giving these back to the police and I'll give a list of the ones concerned to Senator Crane, and Senator Crane will then have to challenge the seizure of those documents separately, as a separate exercise, through the court."
>
> He said, in effect, it would be anomalous to do that and he might as well give back to Senator Crane the documents not covered by the warrant. The Senate agreed to that. Having done that in the Crane case, I think they felt they had to treat the Harris case in the same way so as not to discriminate between senators, apart from anything else. That decision was vindicated by the fact that none of the documents were authorised for seizure and they were all returned to Senator Harris. The position of the Senate is it does not concede that it is a matter for the Senate to determine, even though in those two cases it did determine it. It was forced to determine it virtually.[135]

4.21 The Committee received evidence from Mr Stephen Skehill, Special Counsel with Mallesons Stephen Jacques, about his experience as an independent arbiter in the Crane and Harris matters. Mr Skehill outlined a number of concerns about the process that he was required to undertake in the Crane and Harris matters, particularly in relation to the lack of opportunity for either party to challenge his findings and the lack of protocols concerning consultation and contact with the parties during the process.[136]

4.22 In answer to a question from the Committee, Mr Evans indicated that the cost to the Senate, of Mr Skehill's work on these matters was $62,000 in the Crane matter and $80,000 in the Harris matter.[137]

Australian House of Representatives

4.23 As outlined in chapter five in the context of the "provision of information to members", the House of Representatives Privileges Committee has conducted inquiries in relation to the execution of a search warrant on the office of a member and the related issue of the status of the records and documents of members.[138] Drawing upon the findings of these inquiries, the Clerk of the House of Representatives, Mr Ian Harris, provided information to the Committee about the procedures put in place recently during the execution of a search warrant on a member's Parliament House office.[139]

4.24 The matter involved a criminal investigation. The Speaker was given prior notice of the intention to exercise the search warrant but decided that it was not necessary to know the

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135 *Evidence,* 10/11/2003, p. 9.

136 Ibid, p. 21.

137 Ibid, p. 5.

138 House of Representatives Standing Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, 1995, *Report of the inquiry into the status of the records and correspondence of members*, November 2000.

139 *Correspondence*, 4 November 2004.

identity of the member or specific alleged offence. The Speaker's consideration of the warrant was limited to ascertaining whether the warrant had been duly approved and ensuring that the officers seeking to execute it could demonstrate their identity. The warrant was served on the Serjeant-at-Arms who, following an indication from the Speaker, accorded access to the member's office.

4.25 The execution of the warrant was video-taped. The investigators were made aware of issues of parliamentary privilege and the need for confidentiality in relation to members' documents (and provided with a copy of the draft AFP guidelines referred to above). The Serjeant-at-Arms or a representative remained present with the investigators at all times while they were in the building. The Serjeant-at-Arms attempted to ensure that no unauthorised person became aware that the search had taken place and that there was minimal evidence of activity in the area near the member's suite at the time. The Serjeant-at-Arms attempted to ensure that there was minimum disruption to the office and that everything was replaced where found. The Serjeant-at-Arms asserted the right, in the absence of the member or an employee on that member's personal staff, for the member to be provided with a copy of any documentation proposed to be removed. The investigators furnished a duly completed Property Seized Record.

Australian Capital Territory

4.26 The Committee also received advice from the Clerk of the ACT Legislative Assembly in relation to the procedures adopted following the execution of a search warrant on a member's parliamentary office in March 2002. In this instance only a small number of documents was seized. They were all stored in the Clerk's office pending resolution of any issues concerning parliamentary privilege. In accordance with a resolution passed by the Assembly, and following agreement by the party leaders, the Deputy Clerk was appointed to examine the documents and provide a report to the Speaker for tabling on that examination. Of the 27 documents examined, one was considered immune from seizure and returned to the member. The remainder of the documents were given to the police.

Issues for further examination

4.27 The Committee is of the view that protocols should be developed for the execution of search warrants on members' offices in future cases. These protocols should cover all investigative agencies which have the power to be granted and to execute search warrants on members' offices, including the police. The development of these protocols will require consultation with a wide range of agencies which may be affected, as well as members of Parliament. Some of the issues requiring examination include:

- The need for additional/external checking before a decision is taken to apply for and execute a search warrant in respect of a member's office.
- Prior notice to the Clerk and Presiding Officer before execution of a warrant.
- Scrutiny of the warrant by the Presiding Officer (for procedural sufficiency and the precise description of the documents covered) before consent is given to execution of the warrant.
- Prior notice to the member.

- Requirements for the member to be present during a search.
- Administrative procedures to be adopted during execution of the warrant.[140]
- Initial claim of privilege.
- Handling of documents subject to a claim of privilege.
- Custody of documents subject to a claim of privilege.
- Initial review of a privilege claim, and procedures for narrowing down the range of documents potentially in dispute.
- Procedures for the resolution of disputed claims of privilege.
- Procedures to minimise the risk of documents being seized that are beyond the authorisation of the warrant.
- Procedures for the resolution of disputes about documents which have already been seized and which may be beyond the authorisation of the warrant.

4.28 The Committee therefore recommends:

Recommendation 2

That the House refer to the Committee for inquiry and report the development of protocols for the execution of search warrants on members' offices.

[140] For example, Mr Breen has suggested that future ICAC search warrants concerning members' offices be executed in the Office of the Clerk. *Submission*, 26/11/2003, pp 7-8.

Chapter 5 Other matters

Paragraph (c) of the terms of reference allows the Committee to inquire into and report on "any other matters the Committee considers relevant" in relation to this inquiry. This chapter briefly discusses a number of issues that have arisen during the course of this inquiry. Some of these could be the subject of a further reference by the House to enable further examination by the Committee (eg the desirability of clarification of aspects of parliamentary privilege through legislation, the need for the provision of education/training to investigative agencies in relation to parliamentary privilege, and the opportunity for the provision of further information to members about parliamentary privilege and the extent to which it applies to their documents). Others issues are simply identified as possibly requiring further investigation by some other body.

Issues that could be the subject of further examination by this Committee

Legislation to clarify privilege issues

5.1 As outlined in chapters 2 and 3, this inquiry has raised important and difficult questions about the nature of parliamentary privilege. Those difficulties are further complicated by the absence of a Parliamentary Privileges Act in NSW. In most instances questions of parliamentary privilege in NSW must be determined by recourse to the common law.

5.2 The Clerk of the Parliaments, in his submission to this Committee, suggested that many of the issues under consideration in this inquiry could be simplified if legislation was passed defining parliamentary privilege in NSW. The Clerk referred to the Commonwealth *Parliamentary Privileges Act* 1987 as a useful model from both a jurisprudential and jurisdictional point of view.[141]

5.3 It should be noted that the enactment of legislation to define the privileges and powers of the NSW Parliament has been recommended by committees of the Legislative Council on a number of occasions.[142]

Education/training for investigative agencies

5.4 Another issue raised by the Clerk of the Parliaments is the desirability of the provision of education or training about parliamentary privilege to investigative agencies. This suggestion arose in the context of a description of a number of recent occurrences in which investigative agencies have sought to gain access to information from members of the Legislative Council in ways that had the potential to impact upon parliamentary privilege. The agencies involved

141 *Submission*, 7/11/03, p. 17.

142 Standing Committee Upon Parliamentary Privilege, *Report Concerning the publication of an Article Appearing in the Sun Herald newspaper containing details of in camera evidence*, October 1993, p. 20; Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into sanctions where a minister fails to table documents*, May 1996, p. 22; *Inquiry into Statements made by Mr Gallacher and Mr Hannaford*, November 1999, p. 20; *Report on sections 13 and 13B of the Constitution Act 1902*, March 2002, p. 32.

include: the Royal Commission into the NSW Police Service; the NSW Police; the Police Integrity Commission; and the Auditor-General. Having briefly outlined each of these cases, the Clerk commented that there is a need for clarity when investigative agencies are dealing with Parliament and its members, so that parliamentary privilege is not breached and investigations are not unduly impeded. He went on to suggest that proactive education or training for the staff of investigative agencies could be beneficial, and suggested that brief, simply written material including relevant examples could be useful.[143] The Clerk of the Senate, in agreeing that such education or training would be beneficial, noted that the promulgation of protocols for the execution of search warrants in member's offices would, in itself, have a very significant educative effect.[144]

Provision of information to members

5.5 As outlined in chapter 2, the question of how to determine which of a Member's documents are privileged, whilst straight forward in most cases, is not always clear and it will not be possible to provide authoritative answers to all questions that may arise with regard to members' documents. However, the Committee is of the view that it would be of assistance to members for some concise guidelines and advice to be provided on parliamentary privilege generally, and the status of their documents specifically. The Clerk has suggested that this information could include examples, from decided cases or recent dealing with investigative agencies, of instances of "successful" claims of privilege.[145]

5.6 In November 2002 the House of Representatives Committee of Privileges published *Draft Guidelines for members on the status and handling of their records and correspondence*.[146] These guidelines were developed to implement an earlier recommendation of the Privileges Committee[147] and aim to assist members in their consideration of the status of their documents and handling of those documents, including the implications of parliamentary privilege. The Committee has subsequently published a set of frequently asked questions and brief answers concerning members' records and documents.[148] These questions address issues such as how parliamentary privilege affects a member's records, what a member should do if they receive a court order for the production of documents, and issues concerning the execution of search

143 Ibid, p. 14.

144 *Evidence*, 10/11/03, p. 13.

145 *Submission*, 7/11/03, p. 14.

146 These were published as Appendix Two to the Report entitled *Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members*, November 2002. They are also published at www.aph.gov.au/house/committee/priv/index.htm

147 House of Representatives Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of members*, November 2000, p 49. This inquiry followed an earlier inquiry into the execution of a search warrant on a member's office: House of Representatives Standing Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, 1995.

148 *Handling of Members' records and documents: Common Questions*, published at www.aph.gov.au/house/committee/priv/QA.pdf

warrants on a member's office. While the answers to some of these questions may be somewhat different in NSW, due to the absence of comprehensive privileges legislation addressing these issues, and while there is room for debate over the level of detail that is required in relation to these sorts of questions, the material published by the House of Representatives Privileges Committee is illustrative of the sort of material that could be developed for the guidance of members of the Legislative Council.

5.7 The Committee therefore recommends:

Recommendation 3

That the House refer to the Committee for inquiry and report:

- the desirability of clarification of aspects of parliamentary privilege through legislation,
- the need for the provision of education/training to investigative agencies in relation to parliamentary privilege, and
- the opportunity for the provision of further information to members about parliamentary privilege and the extent to which it applies to their documents.

(The Committee should have access to the submissions, correspondence and evidence received during the course of this inquiry.)

Issues for examination by other bodies

Lawfulness of imaging of computer hard drives under warrant

5.8 During the course of this inquiry the Committee's attention was drawn to questions as to the lawfulness of the practice of investigative agencies "imaging" the hard disk drives of computers during the execution of a search warrant. This issue was raised by Mr Stephen Skehill, Special Counsel with Mallesons Stephen Jacques, who acted as legal arbiter for the Senate in the Crane and Harris matters. Mr Skehill expressed concern that Commonwealth and Queensland laws (which he had dealt with in the Crane and Harris matters) and, as far as he was aware, NSW law, did not provide for the copying of the contents of a hard disk drive of a computer during the execution of a search warrant. In his submission, Mr Skehill stated that this practice, and the uncertainty of the law, had the potential to affect both the rights and interests of every citizen and the prospects of success of the Crown in otherwise sound prosecutions:

> If the entire contents of computer hard drives are "imaged" by police or other authorities acting under warrant, grave intrusions on privacy and breaches of personal rights may well be unlawfully and unjustifiably committed; and

> If the law does not permit the taking of electronic copies of documents otherwise within the scope of warrants, then the public interest in ensuring successful prosecution of otherwise provable offences will be defeated.[149]

5.9 Officers of the ICAC acknowledged, in evidence before the Committee, that the question of the lawfulness of the imaging of computer hard disk drives under a search warrant was a "vexed issue". However, it should be noted that they referred to general principles in relation to the execution of search warrants at common law as stated in a recent decision of Bell J in the Supreme Court of NSW[150], including the appropriateness of keeping original documents or things seized for no longer than reasonably necessary. It was suggested that it could therefore be implied that "in copying a computer hard drive you are complying with that principle of taking a copy and returning the original, or not even taking the original in the first place."[151]

5.10 A related issue was raised by the President in correspondence with the Commissioner of the ICAC, namely, the sequential requirement under the terms of a search warrant for material to be searched, and a judgment made that the thing searched includes relevant documents etc as specified in the warrant, prior to seizure. As Mr Bret Walker SC stated in an opinion provided to the Clerk on this matter: "The authority to seize, in my opinion, depends on an actual consideration of the substance of the material sufficiently to decide whether it falls within the category or topic specified in the warrant itself."[152] In evidence to the Committee, Mr Skehill referred to the possibility of investigative agencies addressing this requirement by searching computer hard disk drives "by running a program with buzz words" and thereby identifying particular documents falling within the categories specified in the warrant, prior to seizure of a printed hard copy of those documents.[153]

5.11 The question of the lawfulness of the imaging of computer hard disk drives during the execution of search warrants goes beyond the scope of the Committee's terms of reference and is of broader significance than this inquiry. However, as the issue has been raised in evidence, the Committee is of the view that this matter should be brought to the attention of the House, for referral for further investigation by the appropriate authority or body.

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149 *Submission*, 29/10/03, p. 3.

150 *Greer v Commissioner of the NSW Police and Anor* NSWSC 356 (26 April 2002)

151 *Evidence*, 10/11/03, p. 30.

152 Tabled in the House on 14 October 2003, *Minutes of Proceedings*, No 24, item 3, p. 319.

153 *Evidence*, 10/11/03, p. 15.

5.12 The Committee therefore recommends:

Recommendation 4

That the issue of the lawfulness of the practice of the "imaging" of computer hard disk drives in the execution of search warrants be drawn to the attention of the Attorney General (with the Attorney General having access to the submission of Mr Stephen Skehill and the transcript of evidence taken by this Committee on 10 November 2003.)

ICAC's powers under sections 23, 25 and 40 of the *Independent Commission Against Corruption Act 1988*

5.13 The Deputy Commissioner of the ICAC, Mr Keiran Pehm, and the Solicitor to the Commission, Mr John Pritchard, provided the Committee with an explanation of the some of the ICAC's powers under section 21 (power to obtain information), 22 (power to obtain documents etc), 23 (power to enter public premises), and division 4 (search warrants) of the *Independent Commission Against Corruption Act 1988*. This included an explanation of the operation of sections 24 (privilege as regards information, documents etc) and 25 (privilege as regards entry on public premises) as they circumscribe the operation of the powers under sections 21, 22 and 23. It was suggested that the effect of section 25 was that if, during the execution of an order to enter public premises under section 23, investigators were to find incriminating material "the person who is incriminated must be advised of that and given an opportunity to say whether they consent or agree to the notice continuing to be executed" and that if the person does not consent "there is an argument that you have to stop."[154] These constraints were not apparent, however, in relation to the execution of search warrants under division 4 of the Act. For this reason, it appears that the ICAC may be tending to shift from using section 23 orders to the use of search warrants in its investigations.

5.14 The interaction of the various sections of the *Independent Commission Against Corruption Act 1988*, including the operation of sections 24 and 25 in circumscribing some of the powers of the ICAC, is a matter which is beyond the Committee's terms of reference and of potentially broader significance or interest than the resolution of the case at hand. The Committee is of the view that the evidence taken by the Committee on 10 November 2003 should be made available for inspection by the Joint Committee on the Independent Commission Against Corruption.

5.15 The Committee therefore recommends:

Recommendation 5

That the evidence taken by the Committee on 10 November 2003, submissions and relevant material/correspondence be made available to the Joint Committee on the Independent Commission Against Corruption.

154 *Evidence*, 10/11/03, p. 26.

Appendix 1 Statements by the President

Statement by the President of the Legislative Council, 14 October 2003 (I)

THE HONOURABLE PETER BREEN INDEPENDENT COMMISSION AGAINST CORRUPTION INVESTIGATION

Page: 1

The PRESIDENT: On Friday 3 October 2003 officers of the Independent Commission Against Corruption [ICAC] were granted a search warrant by a judicial officer, under section 40 (1) of the Independent Commission Against Corruption Act 1988, authorising entry and search of the Parliament House office of the Hon. Peter Breen, MLC. The warrant was executed in the afternoon of the same day. As members are aware, parliamentary privilege is preserved by section 122 of the Independent Commission Against Corruption Act, which, together with article 9 of the Bill of Rights, recognises that the debate and proceedings of Parliament cannot be impeached or questioned outside of Parliament.

Both prior to and during the execution of the search warrant, the officers of the ICAC were reminded of the issue of parliamentary privilege and the need to ensure that material connected with proceedings in Parliament was not to be seized. The officers of the commission advised that they had no intention of violating parliamentary privilege, and agreed not to take any material subject to parliamentary privilege. However, several hard drives and Mr Breen's laptop were seized and retained, on the understanding that they would not be opened and examined except in the presence of Mr Breen, at a later date.

There are two matters arising from the execution of this search warrant which I wish to draw to the attention of the House this afternoon. On 7 October 2003, and again on 9 October 2003, the Clerk received advice from Mr Bret Walker, SC, which questioned the lawfulness of the seizure of the hard drives and laptop computers during the course of the execution of the search warrant. On 9 October 2003 I wrote to the Commissioner of the ICAC expressing my view that, on the basis of the advice received by the Clerk, the ICAC did not have the authority to seize these computers for retention and later examination, and asking that they be returned immediately without being examined.

The commissioner's reply was received on 13 October 2003. The commission's reply states that officers of the ICAC are aware of, and sensitive to, issues of parliamentary privilege and that no officer involved in the execution of the search warrant would in any way deliberately seek to breach parliamentary privilege. The commissioner also advised that, while some of the information stored on the computer hard drives in question had been imaged, it had not been accessed or examined. Furthermore, the commissioner advised that, in accordance with arrangements discussed between the solicitor to the commission and the Deputy Clerk following receipt of my letter of 9 October, the material in question would be "bagged and sealed by the Commission" and placed in the possession of the Clerk, and the imaged copies of any material would not be accessed until such time as the question of the lawfulness of the seizure of this material under the search warrants can be resolved.

I table copies of this correspondence and the advice of Mr Walker, SC. Copies are available for members from the Clerks at the table.

Statement by the President of the Legislative Council, 14 October 2003 (II)

THE HONOURABLE PETER BREEN INDEPENDENT COMMISSION AGAINST CORRUPTION INVESTIGATION

Page: 54

Privilege

The PRESIDENT: By letter dated 14 October 2003, the Hon. Peter Breen has raised with me under Standing Order 77 a matter of privilege relating to seizure of material from his Parliament House office on 3 October 2003 by the Independent Commission Against Corruption [ICAC]. In his letter, the Hon. Peter Breen claims that breaches of the immunities of the Legislative Council may have been involved in the search and seizure of documents in his office. He indicates that although he cannot identify all documents seized without inspecting them some of the material in his office was outside the authorisation of the warrant and immune from seizure by virtue of parliamentary privilege. In particular, one folder seized contained a document that was used for the purpose of a speech to this House on 20 November 2002 on the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill.

Members will be aware from my statement to the House earlier today that following my representations to the Commissioner of the ICAC, the laptop computer and hard disk drives seized by the ICAC are now in the custody of the Clerk pending resolution of appropriate procedures for their examination. However, Mr Breen has indicated in his letter that the ICAC remains in possession of material seized from his office, some of which may attract parliamentary privilege. I am required under Standing Order 7 to determine whether this matter should have precedence of other business as a mater of privilege. I acknowledge that officers of the ICAC are aware of and sensitive to issues of parliamentary privilege. Nonetheless, I am concerned that the seizure of material which is not authorised by the warrant and which is subject to parliamentary privilege, and the continued possession of that material by the ICAC, is capable of being held to be a breach of the immunities of the House and a contempt.

Furthermore, only the House can resolve a question of parliamentary privilege arising from the execution of a search warrant to seize documents and things in the possession of a member. I regard the seizure of material protected by parliamentary privilege seriously and am concerned to ensure that proper procedures are put in place to determine questions of parliamentary privilege arising from the execution of search warrants to seize documents and things in the possession of members. In this regard I note the work of the Senate Committee of Privileges in its reports Nos 75, 105 and 114 concerning the execution of search warrants in senators' offices. I have therefore determined that a motion to refer the matter of privilege raised by the Hon. Peter Breen to the Standing Committee on Parliamentary Privilege and Ethics should have precedence under Standing Order 77. I table the correspondence from Mr Breen and my reply.

The Hon. PETER BREEN [9.15 p.m.], by leave: Madam President, in your statement you referred to one file seized that contained a document used for the purposes of a speech to this House on 20 November 2002 on the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill. Without seeing the document, I cannot be certain that it was produced prior to the debate on the bill or afterwards. I ask to be given the opportunity to determine which came first—the speech or the document. However that may have a bearing on this issue, I seek to give notice under Standing

Order 77 that at the next sitting day I will move:

That the Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the following matters:

(a) whether any breaches of the immunities of the Legislative Council or contempts were involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Hon. Peter Breen on 3 October 2003.

(b) what procedures should be established, such as the appointment of an independent arbiter, to examine and determine whether any of the documents and things seized by the Independent Commission Against Corruption are immune from seizure under the warrant by virtue of parliamentary privilege.

(c) any other matters that the committee considers relevant.

Appendix 2 Communications between the President and the Independent Commission Against Corruption

LEGISLATIVE COUNCIL

THE HON. DR MEREDITH BURGMANN PRESIDENT OF THE LEGISLATIVE COUNCIL

9 October 2003

Ms I Moss AO
Commissioner
Independent Commission Against Corruption
Level 21
133 Castlereagh Street
SYDNEY NSW 2000

Dear Commissioner

Search warrant on offices of the Honourable Peter Breen, MLC

I refer to the "Occupier's Notice Otherwise than for a Part 2 Warrant", concerning the search warrant granted at 2.15 pm on 3 October 2003 by P Morgan, under section 40(1) of the *Independent Commission Against Corruption Act 1988*, authorising entry and search of "the parliamentary offices of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW."

The occupier's notice indicates that the search warrant gives the persons executing it the power to:

- "enter the named premises";
- "search for" a range of things listed "connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC";
- "seize any documents or other things found in or on the premises and deliver them to the Independent Commission Against Corruption"; and
- perform a number of other things, including "retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2..."

Issues of parliamentary privilege

As you are no doubt aware parliamentary privilege is preserved by section 122 of the ICAC Act, which together with article 9 of the Bill of Rights recognizes that the debates and proceedings of Parliament, cannot be impeached or questioned outside of Parliament.

Section 122 and article 9 combined, raise the possibility that some of the documents or things seized under the supposed authority of the warrant are beyond the power of the warrant.

Whilst not wishing in any way to impede the processes of the law, there can be no authority granted by the statutory warrant to seize for the purposes of investigative use any documents or things in the possession of Mr Breen that fall within the category of proceedings in Parliament. This immunity from seizure cannot be waived, except by statute.

Parliament House
Macquarie Street
Sydney

Telephone (02) 9230 2300
Facsimile (02) 9230 3316
meredithburgmann@parliament.nsw.gov.au

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Under what may be termed the Harris protocol of the Australian Senate I would wish to raise objection to any seizure of documents or things touching proceedings in Parliament and that the appropriate treatment of any such material should be a matter for determination between the ICAC and the Legislative Council. Attached for information is a copy of reports Nos 75, 105 and 114 of the Senate Committee of Privileges concerning the execution of search warrants in Senators' offices, the latter two reports concerning Senator Harris.

It is my understanding that during the execution of the search warrant, the Deputy Clerk of the Legislative Council in obedience to the ICAC Act and pursuant to a duty to the House under a equally binding law, reminded the officers of the Independent Commission Against Corruption who executed the warrant of the issue of parliamentary privilege and the need to ensure that material connected with proceedings in Parliament not be seized, and the officers of the Commission advised that they had no intention to violate parliamentary privilege.

Mr Breen's laptop computer and the hard disc drive of the computer of Mr Breen's Research Assistant

I appreciate that the occasion and the time did not allow for full consideration of issues of parliamentary privilege and that as a matter of convenience Mr Breen's laptop computer and the hard disc drive of Mr Breen's Research Assistant were seized in good faith under the authority of the warrant and sealed for retention and later examination.

Notwithstanding steps that were taken with the intent of respecting parliamentary privilege, including the "sealing" of Mr Breen's laptop computer and the hard disc drive of the computer of Mr Breen's Research Assistant, I have been advised that the seizure of these things by the officers of the Commission was not authorised under the search warrant.

The warrant lays out a sequential process of enter, search, decide, seize, retain and return of documents or things specified in paragraph (b) of the warrant. Under the terms of the warrant, these things could only be seized if they had been searched and relevant documents or other things had been found on them. (I understand that this process was followed in respect of documents in Mr Breen's office as well as files identified and copied from the Parliament's computer network servers, including an attempt to identify material which could be subject to parliamentary privilege and could not be copied.)

I am advised that paragraph (d) (ii) of the warrant does not entitle seizure without first conducting a search to determine if a document or thing fits within the category of documents or things required under the warrant. As Mr Breen's laptop computer and the hard disc drive of the computer of Mr Breen's Research Assistant had not been searched, and relevant documents or things had not been found on them, the officers of the Commission had no authority to seize them, in the absence of any belief and decision that relevant documents and things were on the laptop computer and hard disc drive.

Regrettably and without impinging on the good faith and role of the ICAC in investigating corrupt conduct and issues of parliamentary privilege, it is my view that the ICAC does not have authority to take the laptop computer and hard disc drive for retention and later examination. Furthermore, this morning it has been brought to my attention that notwithstanding the express assurance from ICAC officers that the seized computers would not be opened and examined except in the presence of either Mr Breen or his Research Assistant, the desktop computer has already been copied and the disc returned. This is in complete contradiction to the process agreed with the Deputy Clerk last Friday.

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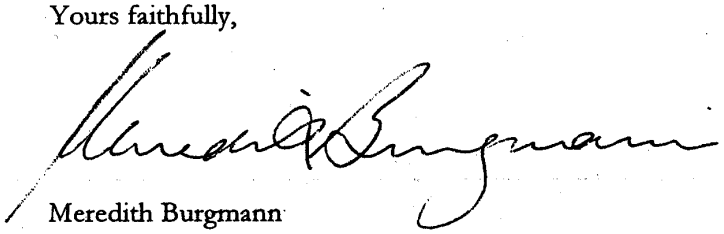
As the search warrant has now been executed and consequently expired, the laptop computer and hard disc drive, together with any copies already made, should be returned immediately without being examined. Accordingly, I would appreciate the immediate return of the seized laptop computer and hard disc drive.

Yours faithfully,



Meredith Burgmann
President

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

10 October 2003

Our ref: E03/1390

The Hon Dr Meredith Burgmann
President
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Dr Burgmann

Re; Search warrants on offices of the Honourable Peter Breen, MLC

I refer to your letter of 9 October 2003 in relation to this matter and the execution of a search warrant on the Parliament House office of Mr Breen by Commission officers on 3 October 2003.

Your letter raises two main issues in relation to the circumstances surrounding the execution of that warrant and things purported to be seized under the authority of that warrant.

The first issue you raise is one of parliamentary privilege as provided for in section 122 of the *Independent Commission Against Corruption Act 1988.*

Let me assure you that Commission officers are very aware of parliamentary privilege and the impact it has upon the scope of Commission investigations. The Commission has had cause to carefully consider the privilege in the context of some of its recent inquiries. Indeed all officers of the Commission involved in any investigation that touches on the conduct of Members of Parliament are aware of and sensitive to the issue.

Further, prior to the execution of the search warrant a briefing was conducted with the officers involved and which specifically addressed the restrictions that parliamentary privilege placed on the nature of material that could be seized under the warrant. The officer in charge of the execution of the warrant was also the lead officer involved with a similar search of Mr Malcolm Jones's parliament house office earlier this year as part of its Operation Athens investigation.

With this in mind I can also assure you, as you refer to in your letter, that no officer involved in the execution of the search warrant would in any way deliberately seek to breach the privilege in carrying out their tasks under the warrant.

The second issue you raise goes to the authority granted under the warrant for the officers to seize and take away computer hard disc drives and Mr Breen's lap top computer. While I do not wish to argue the legality of the Commission's actions in this letter, by way of clarification and further information I advise as follows;

ALL CORRESPONDENCE TO GPO BOX 500 SYDNEY NSW 2001
TELEPHONE (02) 8281 5999 FACSIMILE (02) 9264 5364
www.icac.nsw.gov.au

1. Mr Breen's lap top computer.

The hard drive from Breen's lap top has been imaged and copied by Commission officers. The lap top is currently located under secure storage in the Commission's property room.

I have been reassured that consistent with the undertaking given by Commission officers during the search the imaged copy of the hard drive has not been opened or the information stored on it examined in any way by any Commission officers. Since receiving your letter I have also arranged for further measures to be put in place to ensure that it is not opened or examined until the question of the Commission's authority to examine the material is clarified.

2. Hard disc drive – desk-top computers

There were two desk top computers located in Mr Breen's office and operated by Mr Breen's staff.

An attempt was made to image the hard disc drive from one of these desk-top computers on site during the search but due to technical problems that could not be completed. I am advised that in the process of doing so some damage appears to have been done to the hard drive itself but the data stored on it remains intact. I understand that with some assistance from the Parliament House IT staff the damage to the hard drive can be repaired.

This hard drive was taken by Commission officers and is currently in secure storage in the Commission's property vault. I am advised that the information stored on it has not been imaged, accessed or copied by the Commission in any way.

A second desk top hard drive was also taken from the office and returned to the Commission's offices. The information stored on it has been imaged and down loaded on to the Commission's own system network.

I have again been reassured that consistent with the undertaking given by the Commission's officers during the search that the information imaged and copied has not been opened or accessed in any way. Since receipt of your letter I have also directed that further steps be taken to secure access to that information by way of pass word protection which is limited to relevant Commission officers.

I am also advised that this second hard drive has since been returned to the Parliament.

3. Information from Mr Breen's personal drive stored on the Parliament House's IT network

During the execution of the search warrant and with the assistance of Parliament House IT staff Commission officers downloaded on to a

compact disc information from Mr Breen's personal drive maintained on the Parliament's IT network system. I am also advised that consistent with the undertaking given during the search that information has not been accessed or examined in any way by Commission officers. Since your letter I have also arranged for that disc to be placed in secure storage.

As I have indicated above information provided to me is that contrary to your understanding none of the information copied or imaged from the various hard drives taken during the search have been examined, accessed or opened in any way by Commission officers. All that has occurred is that information on those hard drives has been copied or transferred to the Commission's own network or stored on separate discs.

Your letter asserts that based on legal advice provided to the Parliament that the scope of the authority granted under the warrant did not authorise Commission officers to seize these items of computer hardware. Your letter requests the immediate return of that equipment and any copies of that material.

The Commission is of course anxious to ensure that it acts at all times with lawful authority. To this end I wish to obtain some further advice about the legality of the Commission's actions under the authority of the search warrant.

To this end, I understand since the receipt of your letter there have been some discussions between Mr John Pritchard, the Solicitor to the Commission and Ms Lynne Lovelock, the Deputy Clerk of the Council with a view to resolving the question of the Commission's authority to seize this material and examine it under the warrant and steps that can be taken to preserve the integrity of the material seized in the interim.

With this in mind I understand the following course of action has been agreed upon;

1. The Commission will bag and seal Mr Breen's personal lap top computer hard drive and agrees to place it in the possession of the Deputy Clerk who will keep it in secure storage until the question of access to it by the Commission is clarified. I repeat the undertaking previously provided by the Commission that its contents downloaded onto the Commission's network will not be accessed by any Commission officers until the search warrant issue is clarified.

2. The damaged desk-top hard disc drive taken from Mr Breen's office will also be bagged and sealed by the Commission and placed with Deputy Clerk for secure storage under the same conditions. As previously indicated no copy of the information on this hard drive has been made or downloaded by the Commission and nor will it until the issue of access is clarified;

3. The information from the desk-top hard disc drive which has been copied and downloaded by the Commission on to its network will also not be accessed or opened until the search warrant issue is clarified. As I have already noted this hard drive has since been returned to the Parliament.

4. The disc on to which information copied from Mr Breen's personal hard drive stored on the Parliament's network will also be bagged and sealed and placed in the possession of the Deputy Clerk until the search warrant

issue is resolved. This information has not otherwise been stored or saved separately on the Commission's network.

I am advised that this material is available for collection by your staff subject to signing for its receipt from the Commission. I would ask that if these arrangements are suitable to you that you make contact with Mr Pritchard of the Commission who will arrange for its delivery or pick up.

I understand that Mr Bret Walker, SC who has provided you with oral advice is overseas for two weeks but upon his return will provide you with a written advice on the legality of the warrants.

The Commission in the meantime has made arrangements to obtain its own advice regarding the authority to seize the subject material. I am advised that this advice should be available within two weeks at which time the Commission will be in contact with your officers to discuss further action on the matter with a view to resolving the issues.

Yours faithfully

Irene Moss

Irene Moss AO
Commissioner

Appendix 3 Opinion by Mr Bret Walker, SC, 9 October 2003

SEARCH WARRANT ON OFFICES OF THE HON PETER BREEN MLC

OPINION

I am asked to advise the Clerk of the Parliaments, on behalf of the President of the Legislative Council, concerning the purported execution of a search warrant issued at the request of the Independent Commission Against Corruption. The warrant authorized ICAC officers to enter and search the parliamentary office of the Hon Peter Breen MLC.

2. During the course of the search, a computer hard-drive was located but not accessed there and then. Rather, it was taken away supposedly under the authority granted by the warrant. It is being held by ICAC but has not been accessed pending arrangements designed to secure observance of parliamentary privilege.

3. I confirm my advice to the Clerk that the letter dated 9th October 2003 from the President to the Commissioner is soundly based in law and is an appropriate position to take in the balance or tension between co-operation with the full extent of the authority granted under the search warrant on the one hand, and on the other hand protection and vindication of parliamentary privilege.

4. Without repeating the President's letter, I would merely stress the following fundamental propositions. First, given the absence in New South Wales of any statutory extension of parliamentary privilege beyond that recognized and granted in Article 9 of the *Bill of Rights*, privilege attaches only in relation to proceedings, a notoriously imprecise nexus.

5. Probably, although not certainly, privilege prevents the seizure of material directly connected to the votes or utterances of a Member in any session of the House (including any Committee). I have discussed some examples in conference - I do not pretend the line is an easy one to locate.

6. Second, sec 122 of the *Independent Commission Against Corruption Act 1988* prevents the issue of a search warrant which purported to authorize seizure of material covered by parliamentary privilege.

7. Third, it is emphatically not the case that every document or item in a Member's office is covered by parliamentary privilege. Probably, most of them are not, in the nature of things.

8. Fourth, the privilege is not to protect individual Members from investigation under statutory authority. Given its historical and current purpose, viz to enhance deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of Members, particularly against threats or reprisals from the Executive, it is not to be waived by individual Members.

9. On these bases, and for the reasons spelled out in the President's letter, it is quite possible that the seized hard-drive contains material which could not lawfully have been demanded because of parliamentary privilege. The authority to seize, in my opinion, depends on an actual consideration of the substance of the material sufficiently to decide whether it falls within the category or topic specified in the search warrant itself. In theory, it may be that an unaccessed hard-drive could wholly answer that description, but that would be very difficult to justify in the abstract.

10. I confirm, in conclusion, my support for an agreed arrangement akin to the approach taken in the Australian Senate in order to negotiate these somewhat difficult circumstances.

FIFTH FLOOR

ST JAMES' HALL

9th October 2003 Bret Walker

Appendix 4 Letter from Mr Breen to the President 14 October 2003

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The Hon. Peter Breen, M.L.C.
Reform the Legal System
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14 October 2003

The Hon. Dr. M. Burgmann MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

Dear Madam President,

I raise a matter of privilege under standing order 77 in relation to the seizure of material by the Independent Commission Against Corruption (ICAC) from my parliamentary offices on 3 October 2003.

You will be aware that officers of the ICAC entered my parliamentary offices under authority of a search warrant and seized a laptop computer, books, files, cheque records, papers, computer disks, letters, dockets, receipts and invoices. Also seized were boxes, lever-arch folders and manilla folders containing various documents. The Deputy Clerk of the Legislative Council was present during part of the search.

I cannot identify all the documents without inspecting them and some of them may attract parliamentary privilege. One document I can identify is described in the ICAC's property seizure record as a manilla folder containing miscellaneous documents including a transcript of an interview at Goulburn Gaol. Closer examination of the document will reveal that it relates to two interviews between a prisoner Stephen 'Shorty' Jamieson, private investigator John Bracey and myself.

The transcripts of the interviews attract parliamentary privilege because Mr. Jamieson has two cases, one before the Innocence Panel and the other before the High Court, and both were referred to in my contribution to debate on the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*. A copy of my speech is attached and I have highlighted the relevant remarks.

I was not informed of the ICAC's intention to carry out a search and seizure operation in my parliamentary offices and I was not present during the operation. I have been given no opportunity to identify material attracting parliamentary privilege.

Furthermore, with the exception of my laptop computer and computer hard drives referred to in your statement to the House today, the material seized from my offices remains in the possession of the ICAC.

I therefore ask that precedence be given to a motion to refer this matter to the Privilege and Ethics Committee, so that the committee can inquire into the following matters:

- The seizure of material outside the authorisation of the warrant;
- The disregard of the ICAC for the likelihood that some material was immune from seizure by virtue of parliamentary privilege;
- The continued access by the ICAC to the material notwithstanding that situation;
- The failure of the ICAC to observe appropriate procedures when executing search warrants in members' premises;

and other relevant matters arising from the search.

I emphasise that I have no difficulty with the ICAC investigating suspected corruption, including by way of lawfully executing properly obtained search warrants. Members have no immunity from properly conducted corruption investigations. The point is that this search was not properly conducted and, as a result, the immunities of the Legislative Council have been infringed. A copy of the search warrant is attached.

I ask that you make your determination on this matter under standing order 77 of the standing orders as early as possible.

Yours sincerely,

PETER BREEN

CRIMES (SENTENCING PROCEDURE) AMENDMENT (STANDARD MINIMUM SENTENCING) BILL

The Hon. PETER BREEN [3.15 p.m.]: I have some experience in the prison system. The comments of the Hon. John Ryan raise a number of serious matters that I have had some experience with—although not to the same extent as him. I have witnessed some rather disturbing things in the prison system. For example, a few weeks ago I visited some prisoners in X wing at Goulburn gaol, the wing that houses prisoners who have a mental illness. Of the 18 prisoners in X wing, 17 of them were recidivists—they had been there before, done their time, gone outside, been involved in further crimes, come back into the system and were back in X wing. Of the 18 prisoners, 17 were there for at least the second time and in some cases they were there for the third and fourth time. I made some observations about this to one of the officers in the gaol. I suggested to him that it was inappropriate and unfair that people with mental disorders be required to go to prison rather than have proper facilities for them elsewhere in the community. That prison officer suggested to me that his solution would be to take them out the back and shoot them.

If that kind of attitude to prisoners is widespread in the gaol system, I agree with the Hon. John Ryan: we have a serious problem and we need to take steps to find some solutions. I refer to sentencing laws that have been passed in this House since I have been a member. I am reminded of the debate we had last year on the Crimes Legislation Amendment (Existing Life Sentences) Bill 2001, or the cement law as it is commonly known. Once again the Government and the Opposition were trying to outbid each other on who could be toughest on the 10 prisoners in New South Wales gaols whose files are marked "Never to be released." The then Leader of the Opposition, Kerry Chikarovski, almost won the day with her private member's bill to nail down Allan Baker and Kevin Crump, who were the alleged murderers of Virginia Morse.

The Hon. Charlie Lynn: It was proved they did it.

The Hon. Rick Colless: They did it. They should have been garrotted.

The Hon. PETER BREEN: They were never convicted for the murder of Virginia Morse.

The Hon. John Jobling: You are technically correct.

The Hon. PETER BREEN: Technically, I am correct. The Hon. Kerry Chikarovski's bill was defeated—in fact, it went down by one vote in this House. Mr Carr then introduced his bill, which he said would cement in these so-called 10 worst killers. As usual, the Premier trumped the Opposition because he has the numbers in both Houses of Parliament. However, I have heard Government members in this House and in the other place say that they were ashamed to vote for the Crimes Legislation Amendment (Existing Life Sentences) Bill. The law was mandatory, it was retrospective and it involved the redefinition of "life sentences" without any regard for the individual circumstances of the 10 prisoners affected by the legislation. Crump and Baker were two of those 10 prisoners.

It is a fundamental principle of due process that prisoners are entitled to have their individual circumstances taken into account on sentencing. In short, the legislation was a scandal, in my opinion—the same as this bill, which seeks to shadow similar draft legislation from an Opposition that is hell-bent on setting the sentencing agenda in what I believe is a most destructive and divisive way. Honourable members may recall that it was the former Coalition Premier John Fahey who began the sentencing auction almost 10 years ago when he tried unsuccessfully to keep Gregory Kable in gaol with the Community Protection Act 1994. Before the legislation was passed former Premier Fahey lamented judicial recommendations that certain prisoners should never be released. He wanted the recommendations to be taken literally by the Parole Board, even though some of the prisoners demonstrated that they were no longer a threat to the community. Former Premier Fahey wanted these prisoners to stay in gaol regardless of their rehabilitation. On 16 May 1993 he told the *Sun-Herald*:

We cannot go back to … put in a new sentence and we've no intention of doing it. But we are prepared to look at those who were recommended never to be released, even though there was no legal power or legal basis for that statement.

This was a defining moment in the history of sentencing in New South Wales because the Carr Labor Government subsequently picked up Mr Fahey's misconceived idea that a judge's remarks on sentencing could be turned into legislation. The expression "never to be released", which was nothing more than an expression of opinion by the sentencing judge, has now been set in concrete, so to speak, by Mr Carr's Crimes Legislation Amendment (Existing Life Sentences) Act 2001. I expect that this legislation will be challenged in the High Court. I understand that leave to lodge a challenge will be heard in April next year. I am also pleased to inform the House that I am assisting in that challenge because I believe that it is a disgraceful sentencing law.

I predict that Mr Carr's cement law will suffer the same fate as Mr Fahey's Community Protection Act 1994, which was struck down by the High Court in *Kable v The Director of Public Prosecutions*. The court ruled in the Kable case that the judicial power of the Commonwealth extends to State courts and, consequently, State or Federal Parliament cannot legislate in a way that might undermine those courts. Justice McHugh said in the Kable case that Parliament does have the power to make a preventive detention order but, as I pointed out in debate on the Crimes Legislation Amendment (Existing Life Sentences) Bill, including 10 prisoners in the sweep of one bill without the opportunity for individual assessment of their individual circumstances is inviting the High Court to strike down the legislation.

To illustrate my point, three of the 10 prisoners to whom the bill was directed have been the subject of later judicial remarks to the effect that the recommendation "never to be released" was inappropriate in their cases. Two of those prisoners were juveniles and one of them, a prisoner named Bronson Blessington, who was just 14 when he murdered Janine Balding, is the youngest person sentenced to life imprisonment in New South Wales since transportation from England ended in 1840. Today Blessington is a model prisoner. After he went to prison he studied theology at the Moore Theological College and for the past 10 years has conducted bible classes in the State's gaols. Since 1997 more than 4,000 prisoner attendances have been recorded at Blessington's classes.

The problem with Mr Carr's cement law and the current sentencing bill is that young offenders are often deeply remorseful as they mature and become cognisant of the gravity of their crimes. To include such offenders in the sweep of sentencing legislation is to suggest that children bear the same degree of criminal responsibility for their actions as hardened criminals and psychopaths. Another prisoner caught up in last year's sentencing legislation is a prisoner named Stephen "Shorty" Jamieson, who has a good chance of proving his innocence now that the Minister for Police, the Hon. Michael Costa, has convened the innocence panel. I have spoken with more than a dozen people with detailed knowledge of Jamieson's case, including some of the State's top criminal lawyers, and none of them believes that Jamieson committed the crimes for which he has now served 14 years.

I raise Mr Carr's cement law to illustrate the appalling injustices that can occur when the bipolar political system throws up two parties that represent the same electoral interests. The law and order mantra is the worst kind of populism and nowhere is it more destructive to the rule of the law than in the area of sentencing. Fortunately, in Australia we have the Commonwealth Constitution to protect us from legislators who think they know more about sentencing than judges. The High Court demonstrated in the Kable case that it will strike down laws that intrude on the judicial power in chapter 3 of the Constitution.

Similarly, with guideline judgments the High Court has foreshadowed that such laws are fundamentally unjust and High Court observers believe a challenge would be successful. For example, Stephen Gageler, SC, writing in the latest issue of the University of New South Wales law journal, has alerted me to the fact that those guideline judgments are suspect and, in his opinion, will be defeated when and if they are challenged in the High Court. Honourable members on both sides would benefit from the speech on this bill by the honourable member for Bligh, Clover Moore, in the other place. Ms Moore said:

The prospect of imprisonment is particularly irrelevant for those whose decision-making ability is impaired by drugs, mental illness, intellectual disability or desperation. Mandatory sentencing in the Northern Territory failed to deter people from committing property offences. Under that harsh regime, home burglaries

increased, as was acknowledged by the Premier in this House three months before he announced his minimum sentencing scheme.

I was particularly interested in her observation that young offenders who receive harsh penalties are likely to become hardened criminals while the recidivism rate for offenders who receive a nominal penalty is only 12.4 per cent, according to one study. It should be emphasised that this bill is about harsher penalties and increasing the prisoner population. It is almost impossible to keep up with the construction rate of prisons. A stranger to the State would be forgiven for thinking that prison construction is part of the New South Wales property boom and that the Treasurer collects additional stamp duty each time a prison is built. In other States of Australia, and some States in the United States of America, the trend is towards reducing prison populations and investing in the social capital required to address the causes of crime rather than its symptoms.

I will repeat only one of the other statistics referred to by the honourable member for Bligh. Britain spends 10 times more pro rata on early intervention programs than New South Wales. The Attorney General in his second reading speech did not quote any statistics, even though the speech ran to half a dozen pages. He did quote selectively from the High Court case of *Veen v The Queen (No. 2)* to explain the principle of proportionality in sentencing and to identify the purposes of criminal punishment. The Attorney might have mentioned that *Veen v The Queen (No. 2)* is also authority for the proposition that the Parliament cannot usurp the role of judges on sentencing without establishing some form of independent tribunal to access the individual circumstances of prisoners adversely affected by sentencing legislation.

One example of such a tribunal is the Mental Health Tribunal. Perhaps the Attorney General is belatedly seeking to comply with the directions of the High Court by setting up the Sentencing Council to advise him on sentencing under this bill. It is too little too late, in my opinion, and nothing will save the Premier's cement law from a good trouncing in the High Court based on the principles laid down in *Kable v The Director of Public Prosecutions* and *Veen v The Queen (No. 2)*. Personally I find the Attorney General to be industrious, conscientious and always approachable. Whenever I have felt the need to canvass an issue with Bob Debus or his predecessor, Jeff Shaw, I have always been given a good hearing and frequently action has been taken to address my concerns. In this context I would like to raise a red flag and express my amazement that the Attorney General made the following statement in his second reading speech:

Under the mandatory sentencing proposals of the Leader of the Opposition an offender with a long criminal record who cold-bloodedly plots and plans his crime will receive the same sentence as a young impetuous offender.

For more than a year I have been trying to make that point in this House about the Government's approach to sentencing. As legislators we cannot treat children in the same way as cold-blooded killers who plot and plan the crimes. The Attorney General has given, in his own words, the reason that the High Court is likely to strike down unjust sentencing laws. Of course, the Attorney may be using his second reading speech on this bill to send the Premier a message that the High Court is about to take a jackhammer to his precious cement law. In any event, psychopaths can be kept in gaol without denying all hope to other prisoners who were children when they committed their crimes. It seems to me that dialogue would be a useful way to achieve this important and just objective.
Last Friday I had the privilege of attending a Kairos closing ceremony at Grafton gaol. Honourable members may not be aware that Kairos is an interdenominational initiative of the Christian churches, in which groups of 20 to 30 prisoners attend three-day seminars conducted in the gaols. Teams of about 40 volunteers, including church ministers, run the seminars, during which they teach prisoners such things as trust, self-esteem and other life skills. The Grafton Kairos was attended by representatives of 11 different Christian church denominations. I was pleased to attend the closing ceremony, along with more than 100 other community volunteers. I witnessed grown men laugh and cry and express emotions that are normally inconceivable in a place like prison, where any form of human weakness is normally exploited.

Throughout this debate I have been concerned about the comments made about prisoners, as if they are not human beings, as if they belong to some form of subculture. They are people who are in a very dangerous and threatening situation. Many of them are victims of almost unbelievable abuse and misfortune in their lives, and they live in constant fear of attack, rape, denigration and various other forms of intimidation. Before the Kairos seminar most of the men in the group I saw had never spoken to each other, they had never

smiled, and they had never shared any kind of communication. The experience of Kairos transformed their lives. I was particularly struck by the number of prisoners who said that no-one had ever shown any interest in them as human beings, not just since they were prisoners but during their whole lives.

I take this opportunity to thank Bruce Steenson from Tweed Heads and Father Vince Doyle from Lismore for extending the invitation to me to attend the Grafton Kairos. Also, I thank the Governor of the gaol, Doug Stanford, for supporting the program and for his words of wisdom and experience at the closing ceremony. It is worth noting that Kairos has been running for several years in New South Wales prisons, and it is an extraordinarily successful initiative. I understand that the initiative came from America. I do not know much about its history, but I know that it now operates in Junee, Long Bay, Silverwater, Cessnock, Goulburn, Mannus, Lithgow, Frank Baxter—a junior institution—Bathurst, Fulham in Victoria and Mulawa women's prison, as well as Berrima and Emu Plains. Various Kairos groups are now operating in Queensland and Canberra as well.

It is important to note that Kairos cannot run without the support of the governors of the gaols. The governors report, without exception, that the positive effect of Kairos on the prisoners is profound. The reason I mention Kairos is to illustrate that the law and order debate about sentencing and prisoners could have an entirely different focus but for the stupidity of politicians and the extraordinary shortsightedness of legislation such as this bill. In an article published in the *Sydney Morning Herald* on 26 September 2002, Stephen Odgers, SC, made the point that politicians have an obligation to act in the public interest and not to sacrifice what is just for the sake of political expediency. Mr Odgers gave some compelling examples of how injustice can occur when sentencing discretion is removed from judges.

I turn now to the role of judges in sentencing and the unreasonable expectation on the part of the Government and the community that judges should be accurate in their assessments of prisoners and their crimes, and consistent in the penalties they impose. During his contribution Reverend the Hon. Fred Nile asked the rhetorical question, "Why do some judges give lenient sentences?". He then went on to suggest that perhaps they were civil libertarians—or "snivel" libertarians, as they are now more popularly known—as if perhaps that is a crime or a sin. At the time I did interject that they might have been compassionate Christians but, as the President so often says, interjections are always disorderly.

I believe it is a perverse idea that a human being, even a judge, should be expected to do the same thing over and over again in exactly the same way without going mad. That is why we have appeal judges to correct the errors of the single judges who so often consider these questions. The idea that judges should get it right all the time is based on the false premise that a common judicial template can be placed over a diverse range of prisoner characteristics and the varied circumstances of crime. What we are doing is suggesting that judges behave like robots while recognising that every conceivable human behaviour is possible for prisoners. Judges are simply not that smart. It is sometimes said that bad cases make bad law. What we mean by that expression is that a judge faced with appalling facts is likely to make an appalling decision about the application of the law to those facts.

In my experience judges are no less human than the rest of us, and they frequently make mistakes. As a lawyer for nearly 30 years I have been appalled at times by the mistakes that judges make. They frequently misunderstand the facts, they become obsessive about the conduct of counsel, they focus too narrowly on the law and they selectively use precedents based on their own personal experiences and their preconceived ideas about how the world goes round. Nevertheless, judges are mere mortals and their decisions are fallible. That is why we have appeal judges—to correct the mistakes of judges sitting alone. If I had my way, which I rarely get, we would abandon altogether the practice of judges sitting alone and try the European civil law system, in which judges work together as investigators rather than act as independent and impartial observers. The fact is that judges are neither independent nor impartial.

Honourable members may think that I am anti judges, but that is not the case. Some of my best friends are magistrates and judges, and I hold them in the highest esteem both in terms of their personal integrity and the knowledge and experience they bring to their decision-making. For example, the Chief Justice of New South Wales, James Spigelman, with whom I have just a nodding acquaintance, is an absolute luminary as a human being but, frankly, he is a wasted talent as the top judicial officer in New South Wales. In my opinion, he should be Prime Minister, and if the Labor Party had a different history he might have been. Recently, I wrote to Chief Justice Spigelman and asserted that judges make decisions based on their personal

interpretation of what the Government is doing, whether on sentencing, tort law reform or whatever the issue at hand might be. After all, judges are part of the Government. When they collect their pay each week it is a government cheque. They are the judicial arm of government as opposed to the legislative and executive arms.

In my letter I told the Chief Justice that judges in New South Wales are not independent; they are merely an extension of the Executive Government. Needless to say, this letter provoked an immediate response from His Honour, who informed me in no uncertain terms, "I reject this proposition completely". I had complained to the Chief Justice that a District Court judge made a decision completely at odds with the facts of a case. I have related the details of that case to the House on a previous occasion, and I will not repeat them today. In another celebrated case involving the gang rape of four young women in the month before the Sydney Olympics, the now infamous Bilal Skaf was sentenced to a maximum of 55 years and a minimum of nearly 40 years. One of the co-offenders, Mohamed Ghanem, received a 40-year sentence for his part in the crimes with a minimum term of 26 years to be served.

Both offenders were teenagers at the time of the offences, but Judge Michael Finnane had little sympathy for them in passing what Professor Mark Findlay of the University of Sydney's Institute of Criminology described as the toughest sentences handed down for offences of this kind by an Australian court in 50 years. Premier Bob Carr said that the severity of the sentences demonstrated that the Government's plan to make criminals responsible for their actions was working. I took this to mean that politicians were congratulating themselves once again on manipulating judges to toe the party line at the sentencing end of the law and order debate. Commenting further on the sentences, Professor Findlay said:

I think we have a very violent and very extreme set of facts, we have a community that has been fed a line that justice means severity and we have the context of political and judicial rhetoric which makes us believe you can't have justice without long prison terms.

When sentencing Ghanem, Judge Finnane expressed the opinion that multiple rape can be worse than murder, although I doubt that that opinion is shared by the families of murder victims. Personally I am inclined to believe that Judge Finnane lost the plot when he sentenced Bilal Skaf and Mohamed Ghanem, but I suspect that most honourable members would disagree with me about that.

The Hon. Charlie Lynn: And the community disagrees with you.

The Hon. PETER BREEN: I acknowledge that. I acknowledge that the predominant feeling in the community is that we should be tough on crime, and the tougher we are, the longer the sentences, and the more powers police have, the better and safer we will all be. But the reality is it does not work like that.

The Hon. Charlie Lynn: It is exactly the opposite, according to you.

The Hon. PETER BREEN: It is exactly the opposite. The point is that judges cannot please everybody with their decisions and they need to be far less precious about the criticisms they receive. History is littered with the damaged egos of judges, and this is a good thing in my opinion. When the Mabo decision was handed down in the High Court the level of criticism of our judges was at a fever pitch. I think it was Tim Fischer who said that the High Court judges were a pack of historical dills. Someone said they were basket weavers—that may have been Tim Fischer as well. Personally I thought the judges were heroes, but that is only my opinion. Criticising our judges is a much healthier activity than passing draconian sentencing laws, particularly when those laws are likely to be struck down in the High Court in any event.

I make the point that in an address to a law term dinner which was reported in the *Daily Telegraph* on 13 January Chief Justice Spigelman said that when one tells people the facts and the circumstances of the crime people have a different perspective. It is only ignorance and lack of understanding of the system that creates in people's minds the idea that we are unsafe and that we are not treating prisoners harshly enough. In his speech Justice Spigelman quoted the Chief Justice of the High Court, the Hon. A. M. Gleeson, who recently summarised the result of public opinion polls about sentencing, not just in Australia but also in the United Kingdom and North America, and said:

… when people are asked whether they think the sentences imposed by judges are too lenient, or too

severe, or just about right, most say that the sentences are too lenient. However, when they are then given the facts of individual cases, and asked what sentences they themselves would have imposed, a majority come up with sentences that are more lenient than sentences that were actually imposed by judges.

When I wrote to the Chief Justice stating that judges in New South Wales were merely an extension of the Executive Government, I was referring to the fact that only the seven judges of the High Court had independent authority under the hybrid system of government that operates in Australia. Some commentators call it the "Washminster" system because it combines different features of the American and British systems of government. Judges in America are creatures of the Executive Government as they are in Australia, but American judges have the benefit of the United States Bill Of Rights on which they can hang their independence hats. We have no bill of rights in Australia. More importantly, judges in Australia apply the Diceyan doctrine of parliamentary supremacy in a relentless and almost mindless way to the point where they inevitably rule that Parliament can do no wrong. Judges in New South Wales will follow this bill to the letter, treating it as the last word on sentencing law, but many questions remain unanswered.

For example, the question whether the so-called 13 excuses in the bill that still allow some judicial discretion is an exhaustive list. The excuses are to be found in clause 21A under the heading "Mitigating factors". Beyond this list of excuses, judges have other principles in the common law to which they might refer when determining the appropriate sentence. These include the hardship of custody in particular circumstances. Just a few weeks ago a judge refused a custodial sentence because of danger of a particular prisoner being raped. Another common law sentencing principle is the effect of a custodial sentence on dependents. The High Court case of Teoh comes to mind. The question remains: Are the judges entitled to refer to these principles when they make a sentence determination? Clause 54B, which is headed "Sentencing procedure" provides:

The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in section 21A.

This provision may seem straightforward but one should refer back to clause 21A which, at the end of the excuses, provides:

The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

It is impossible to say with any degree of certainty whether this provision preserves the common law principles on sentencing that have not been included as mitigating factors in the bill. I have attempted to clarify the position with an amendment, which I hope to move in Committee. The amendment was prepared with the assistance of Philip Selth and Chrissa Loukas of the Bar Association, who provided material to crossbench members. Unfortunately, the Government has indicated it will not support the amendment, suggesting to me that it prefers to pass ambiguous laws. This is consistent with the Government's two bob each way approach to sentencing—a shilling for the Opposition's proposal and the voters it represents, and a shilling for the bleeding hearts, "snivel" libertarians and other do-gooders who threaten to desert Labor ranks and vote Green or Independent.

I contend that the Government is making the same mistake on sentencing that the Labor Party made on refugees just over a year ago. Instead of taking a principled stand and presenting moral choices to the electorate, the Government is abandoning its traditional support base for the shifting sands of middle-class voters. In doing so it has alienated ethnic groups and churches, as well as stirring up the so-called chattering classes. I am reminded of an article in the latest edition of the *Law Society Journal* article entitled "The Politics of Law and Order," which was written by David Brown, Professor of Law at the University of New South Wales. Professor Brown wrote:

The Government's proposed standard minimum sentencing policy has the merit of retaining judicial discretion but is unnecessary. It has been conceived in secrecy and haste, amounts to a significant escalation in sentencing tariffs across a range of offences without consultation and on unarticulated criteria, and constitutes a considerable shift toward sentencing by that Parliament, prey thereafter to never-ending populist escalation.

We enjoy a proud history as a culturally diverse community in New South Wales but we also have much to be ashamed of from the way we treat prisoners. It is not so long ago that we flogged convicts at the triangles and hung their bodies from the gibbet. The bill seeks to limit and restrict judges in the way they deal with prisoners. Like the sentencing laws that preceded it under the Carr Labor Government, the bill is vulnerable to a challenge in the High Court. More importantly, the bill takes us back to a period in our history from which we need to be liberated, and I urge honourable members to vote it down.

The Hon. Dr PETER WONG [3.46 p.m.]: The intention of the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill is clear. The Government, to show what are termed its law and order credentials in the lead-up to another law and order auction, brings into the House a disturbing bill. Once again, smoke and mirrors are being offered up to the public to suggest it is a tough on crime manoeuvre, when in fact it is a soft-in-the-brain attempt to mislead the public—an approach that should have disappeared long ago—that poor people are evil and deserve to suffer more. I do not disagree that in some cases the community would ask for stronger penalties for criminals who commit heinous crimes, but one of the effects of this bill will be that more non-violent minor offenders, who are unable to afford competent legal representation, will end up in prison. A few more shock jocks on the radio will sell a few more advertisements to citizens from the same demographics, and a few more Labor members will be interviewed on those programs to sell themselves and, in so doing, sell-out many disadvantaged citizens whose only crime was to be true believers of the Labor Party.

If this bill results in anything, it will be just a continuation of this Labor Government's attacks on the poor, the unemployed and the mentally ill, and we will see among the few dangerous convicts collected, many who will be sentenced for drug use and trafficking in small quantities to support their nasty habits and other minor offenders. Those who have to defend themselves in court or rely on the ever-decreasing legal aid will be fodder for this week's law and order gimmick. Of course, richer folk will be able to afford the competent legal representation that will easily knock back what is supposed to be the object of this bill—standard minimum sentences. Standard people are the object of this bill's intent; non-standard people will slip out of the net. This is made obvious on page 3 of the explanatory notes to the bill under the heading "Aggravating, mitigating and other factors in sentencing."

Schedule 1 [2] replaces existing section 21A of the Crimes (Sentencing Procedure) Act with a new section that sets out specific aggravating and mitigating circumstances that are to be taken into account by sentencing courts in determining the appropriate sentence for an offence if those circumstances are relevant and known to the court. I repeat those words: "if those circumstances are relevant and known to the court". If one has an expensive Macquarie Street barrister or solicitor or similar quality representation, one will have a person who will ensure that the court becomes aware of any and every mitigating factor possible. If on the other hand one is an intellectually challenged person, suffering from a drug disorder or addiction, or just depending on substandard legal representation, defending oneself, or unaware that one has mitigating aspects that would provide one with consideration under this provision, the result will be, "Well goodbye, we are building a new room for you as we speak."

We can expect that many people will be disadvantaged by this new law if it is passed. I have already mentioned a few people that the Labor Party traditionally sells itself to as interested in their plights. Another group the Labor Government continually pays lip service to is Aborigines. As we all know, Aborigines are often targeted by police with the old trifecta. Under this bill someone loaded up with the trifecta who does not bring to the attention of the court mitigating circumstances may well go to prison for a minimum of three years. Like many results that this bill will produce, this is unacceptable. I thank the members of the House and members of our society who have expressed concerns about this bill. I will support the amendment foreshadowed by the Hon. Peter Breen, and ask that other members do likewise. I will also support the amendments to be moved by the Hon. Richard Jones; they are self-explanatory. That he has to move them is alarming. The legal system and judicial discretion are important. A system such as this bill aims to bring in, one based on one's ability to employ decent legal advice, has no place in our society. It is unprincipled and dangerous. I do not support the bill.

Search Warrant Application No: 1368 of 2003

Search Warrants Regulation 1999
Form 6

(Clause 6(b))

OCCUPIER'S NOTICE
OTHERWISE THAN FOR A PART 2 WARRANT

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE SEARCH WARRANT

A search warrant has been issued by an authorised justice. It gives the authority and power to the persons named in the search warrant to enter and search the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW ("the premises").

Expiry

The search warrant will expire at 2.15 ~~a.m.~~/p.m. on 17-10-03 *(date)*.

Force

The persons granted the power to enter under the warrant may use such force as is reasonably necessary to gain entry to the premises and to carry out the purpose of the warrant.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE PERSONS EXECUTING IT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 84 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT REASONABLE EXCUSE IS A FINE OF 20 PENALTY UNITS OR IMPRISONMENT FOR TWO YEARS, OR BOTH.

The powers given by the search warrant

The search warrant gives the power to the persons executing it to:

(a) Enter the named premises.

(b) Search for the following things (whether in original or copy form): computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment

books, note books, address books, correspondence, tax returns, whether in paper form or computer or electronic form, connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC.

(c) Seize any such documents or other things found in or on the premises and deliver them to the Independent Commission Against Corruption ("Commission").

(d) Perform the following functions:

(i) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.

(ii) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.

(iii) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

(e) Exercise such other powers as are specified in the *Independent Commission Against Corruption Act 1988*, including:

(i) to use such force as is reasonably necessary for the purpose of entering the premises;

(ii) to break open any receptacle in or on the premises for the purposes of the search if it reasonably necessary to do so;

(iii) to execute the search warrant with the aid of such assistants as the person executing the warrant considers necessary;

3

Issue details

The search warrant was granted by ..... P. MORGAN .....

an authorised justice under Section 40(1) of the *Independent Commission Against Corruption Act 1988* on ..... 3-10-03 ..... at ..... 2.15 PM .....
(date) *(time)*

The search warrant was issued on the application of Robert Anthony Graham, who is an officer of the Independent Commission Against Corruption, which is located at level 21/133 Castlereagh Street, Sydney, New South Wales 2000.

Basis for the issue of the warrant

The warrant was granted on the basis that the authorised justice found that there were reasonable grounds for the issue of the warrant and, in particular, that the applicant had reasonable grounds to believe:

(i) that the Commission is conducting an investigation for the purposes of section 13 of the ICAC Act of the conduct of Mr Peter Breen MLC, a Member of the Legislative Council; and

(ii) that there is in or on the premises documents or other things connected with the matter being investigated referred to in paragraph (b) above.

Challenging the issue of the warrant or conduct of the search

If you are dissatisfied with the issue of the warrant or the conduct of the people executing the warrant you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

You should produce this notice at the court when seeking to inspect the application.

Limitations on the powers conferred

1. The warrant must be executed before the date and time of expiry given above.
2. Any force used must be reasonably necessary.
3. The warrant authorises entry only between the time of 6.00 am and 9.00 pm unless other times are specified on the warrant.
4. The warrant must be shown to you if you ask to see it.

5. Only functions and powers authorised under the warrant or by the Act authorising the issue of the warrant may be performed.

Inspection

The application for the issue of the warrant, written reasons for the issue of the warrant and other associated documents are to be held at DOWNING CENTRE, LEVEL 4 143-147 LIVERPOOL ST., SYDNEY Local Court. You may inspect those documents by arrangement with that Court.

Signed:..... Date: 3-10-03
(Authorised Justice)

LEGISLATIVE COUNCIL

THE HON. DR MEREDITH BURGMANN PRESIDENT OF THE LEGISLATIVE COUNCIL

14 October 2003

The Hon. Peter Breen MLC
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Mr Breen

RE: MATTER OF PRIVILEGE UNDER S.O. 77 - SEIZURE OF DOCUMENT OR OTHER THING BY ICAC UNDER WARRANT

I refer to your letter of 14 October 2003 raising a matter of privilege under Standing Order 77, and requesting that precedence be given to a motion to refer the matter to the Standing Committee on Parliamentary Privilege and Ethics.

As I informed the House earlier today in my statement concerning the ICAC search warrant executed on your Parliament House office on 3 October 2003, parliamentary privilege is preserved by section 122 of the ICAC Act, which together with article 9 of the Bill of Rights recognizes that the debates and proceedings of Parliament cannot be impeached or questioned outside of Parliament. From correspondence between myself and the Commissioner of the ICAC, it appears that officers of the ICAC are aware of, and sensitive to, issues of parliamentary privilege and that no officer involved in the execution of the search warrant in any way deliberately sought to breach parliamentary privilege. Nonetheless, I am concerned that some of the documents seized may indeed, as you have suggested, attract parliamentary privilege.

Furthermore, as I also informed the House today, legal advice obtained by the Clerk in relation to the execution of the search warrant on 3 October 2003 has questioned the lawfulness of the seizure of the hard drives and laptop computers during the course of the execution of the search warrant.

In view of the seriousness of the situation I am willing to accede to your request that a motion referring the matter to the Privileges Committee be given precedence under standing order 77.

Yours sincerely

Meredith Burgmann, MLC
President

Parliament House
Macquarie Street
Sydney

Telephone (02) 9230 2300
Facsimile (02) 9230 3316
meredithburgmann@parliament.nsw.gov.au

Appendix 5 Comparisons of protocols from other jurisdictions

Comparison of protocols from other jurisdictions

The existing protocols address 3 separate but inter-related issues:

- actual execution of the warrant (including scrutiny of the warrant before access is provided);
- resolving questions about immunity of documents from seizure on the grounds of parliamentary privilege; and
- resolving questions about immunity of documents from seizure on the grounds that they are beyond the authorisation of the warrant.

Set out below is a table which compares the approach to each of these issues in the following procedures or protocols:

- *Guidelines for execution of search warrants by the AFP on the electorate offices of Members of Parliament*, DRAFT 29/6/98 (referred to as Draft AFP guidelines)[155];
- *General guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyer's premises, Law Societies and like institutions in circumstances where a claim of legal professional privilege is made*, dated 3 March 1997 (referred to as AFP/lawyers guidelines)[156];
- Canadian House of Commons practice[157];
- The procedures of the Quebec National Assembly[158];
- The Alberta Assembly's *Policy on service of documents and execution of search warrants at the Legislature's building and its precincts*[159]; and
- ICAC's proposed general protocol.[160]

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155 These guidelines have been referred to in various reports of the Senate and House of Representatives Privileges Committees since November 2000: see House of Representatives Standing Committee of Privileges, *Report on the status of records held by members of the House of Representatives* , November 2000, p. 48; Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices – Senator Harris*, 105th report, June 2002, para's 6-7; House of Representatives Standing Committee of Privileges, Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for members, November 2002, Appendix C, para 1.22; Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices – Senator Harris*, *Matters arising from the 105th Report of the Committee of Privileges* , 114th report, August 2003, para 37.

156 In 1999 the Senate Privileges Committee recommended the existing guidelines for the execution of search warrants on lawyer's' offices provide the basis for the development of guidelines for the execution of search warrants in senators' and members' offices: Senate Committee of Privileges, *Execution of Search Warrants in Senators' offices*, 75th report, March 1999, para 1.11. The House of Representatives Standing Committee of Privileges had also recommended the adoption guidelines in 1995 in its *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, para 31.

157 As described in an e-mail message from Steve Chaplin, Legal Counsel, Legal Service, House of Commons, dated 29 October 2003, and Marleau & Monpetit, *House of Commons Procedure and Practice*, 2000, pp 115-121.

158 As described in an e-mail message attaching a briefing note from Hubert Cauchon & Rene Chretien, legal advisers, Quebec National Assembly, 22 October 2003, and P Duchesne, "Execution of Search Warrants in the National Assembly", *The Table*, volume 63 [1995], pp 23-27.

159 Forwarded by e-mail message from Robert Reynolds, Senior Parliamentary Counsel, 5 November 2003.

160 *Submission*, 29 October 2003.

Comparison of draft protocols and procedures

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Execution of Warrant						
Checking before warrant is obtained	Office of the DPP should be consulted	-	-	-	-	-
Notice to Presiding Officer	Prior consultation if parliamentary precincts involved[161]	N/A	May only enter with permission of the Speaker. Police required to present themselves to Speaker before entering a member's office within the parliamentary precincts.	Police do not have lawful access to execute a search warrant within the parliamentary precincts without President's consent.	Every attempt is made to contact the Sergeant-at-Arms, who advises the Speaker, Clerk and Parliamentary Counsel	ICAC to notify Clerk that warrant has been obtained and is to be executed, and request attendance of member and representative of the House.
Scrutiny of warrant by Presiding Officer	-	Up to the lawyer to take legal advice on the question of whether the warrant is good on its face.	Presiding Officer personally examines every warrant to ensure it is lawful on its face.[162]	President obtains written advice from a specialist in criminal law as to whether the warrant is lawful then personally reviews warrant according to criteria.[163]	Speaker makes determination as regards the validity and contents of the warrant.	-

[161] This reflects the conventions which exist at the Commonwealth level whereby the AFP do not conduct inquiries in relation to senators or members, or execute search warrants on their premises, without notifying the relevant Presiding Officer.

[162] The Speaker considers the "procedural sufficiency" of the warrant and the "precise description of the documents sought."

[163] See Appendix One for list of criteria considered.

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Execution of Warrant contd.						
Notice to Member.	"Unless inappropriate" contact should be made with Member or staff (to arrange timing of execution of warrant). Reasonable time provided to consult with Presiding Officer or a lawyer.	Reasonable time should be allowed for the lawyer to consult clients, obtain legal advice etc.	-	-	-	Member to be advised (through Clerk).
Requirement for Member to be present	-[164]	If lawyer not present the office is sealed and execution of the warrant deferred.[165] NB Role of lawyer in identifying documents etc (outlined below).	-	-	-	Member's attendance is to be requested (through the Clerk)

[164] The guidelines are framed on the assumption that the member or staff are present in order for any privilege claims to be made. Practice in the Senate is for the senator or a representative to be present during the search.

[165] The guidelines distinguish between situation in which the lawyer is co-operative / unco-operative. In order for a privilege claim to be made the lawyer must be co-operative and this seems to require them to be present.

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Resolving questions of immunity from seizure on grounds of **parliam'tary privilege**						
Who makes an initial claim of privilege?	Member or person acting on their behalf	Lawyer whose office the subject of the search warrant.	Review by Speaker (presumably after claim by Member).	-	-	Member and/or representative of the House (Representative only may claim privilege when Member does not attend)
Requirements in making a claim of privilege	Member or person acting on their behalf making claim asked to indicate basis for claim	Lawyer asserting claim should be prepared to indicate grounds for claim				
Handling of documents subject to a claim of privilege	Documents secured. Opportunity for member to make copies. Schedule prepared.	Documents placed in container. Lawyer may take copies. List prepared. List & container endorsed & signed.	-	-	-	Documents inspected by ICAC officers.

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Resolving questions of immunity from seizure on grounds of **parliam'tary privilege contd.**						
Custody of documents pending resolution of claims	Documents subject to a claim of privilege delivered into safekeeping of 3rd person (eg judge issuing warrant or Clerk)	Documents subject to a claim of privilege delivered into custody of judge issuing warrant or an agreed third party.	Speaker might assert privilege and instruct Police not to remove the documents in question.	-	Sergeant-at-Arms arranges for the documents named in the warrant to be brought to an agreed place within the precincts.	Where ICAC agrees with privilege claim documents would not be removed; where ICAC disagrees with claim, pending resolution, documents would be retained by ICAC but isolated.
Initial review of privilege claim	Presiding Officer indicates one of the following: • no basis for claim • claim should be respected • matter should be considered by the House[166]	Matter dealt with either by way of court proceedings or agreement between lawyer and AFP about which documents can be accessed	Speaker would make determination whether to assert privilege and deny access to documents	-	-	ICAC officers inspect documents and advise whether or not they accept the claim

[166] Practice in the matters of Senators Crane and Harris has been for an independent legal arbiter (Mr Skehill) to be appointed to examine the documents and report to the Senate (or its Privileges Committee) on which documents are immune from seizure both on grounds of privilege and the authorisation of the warrant.

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Resolving questions of immunity from seizure on grounds of **parliam'tary privilege contd.**						
Resolution of disputed claim of privilege	Difficult questions would be considered by the House.[167]	The courts.	Police could commence proceedings to have a court order the production the documents. Speaker might participate in such proceedings.	-	-	Documents in dispute would be referred to an independent legal arbiter. Arbiter reports to House, which may then assert privilege.
If matter still not resolved?	Guidelines not exhaustive – do not rule out further / alternative steps for asserting and resolving claims of privilege (presumably refers to the Courts	-	Speaker might continue to assert privilege in the face of a court order for the production of the documents?	-	-	-[168]

[167] Practice in the matters of Senators Crane and Harris has been that the report of the independent legal arbiter (Mr Skehill) has been regarded as the final word on the matter.

[168] Although not addressed in the guidelines, if the ICAC took the view that lack of access to the documents in question would inhibit the investigation this could be the subject of a report to the House (possibly seeking legislation to waive privilege in relation to the documents). Alternatively, ICAC could commence proceedings to seek to have the matter determined by the Courts?

	Draft AFP guidelines	**AFP/lawyers guidelines**	**Canadian House. of Commons**	**Quebec** National Assembly procedure	**Alberta** search warrants policy	**ICAC** proposed protocol
Resolving questions of immunity from seizure on grounds of **authorisation under the warrant**	-[169]	Issues should not arise if lawyer co-operates with search – procedures provide for lawyer to assist police to locate all documents which may be within the warrant, including by explaining records system.	Not specifically addressed but the "precise description of the documents sought" will be addressed when the warrant is scrutinised by the Speaker before consent is given for execution of the warrant.	Not specifically addressed but risk of this should be minimised by scrutiny of warrant by President before consent is given for execution of the warrant.	Not specifically addressed but risk of this should be minimised by scrutiny of warrant by Speaker before consent is given for execution of the warrant.	-

[169] Practice in the matters of Senators Crane and Harris has been for an independent legal arbiter (Mr Skehill) to be appointed to examine the documents and report to the Senate (or its Privileges Committee) on which documents are immune from seizure both on grounds of privilege and the authorisation of the warrant. The arbiter's report has been regarded as the final word on the subject.

Appendix One

Criteria to be considered by Presiding Officer before consenting to the execution of a search warrant in relation to a Member's office in the parliamentary precincts:[170]

- Is the description of the document referred to in the warrant precise and accurate?
- Does the warrant allow the police officer discretion?
- Is the document referred to in the warrant directly connected with the alleged offence?
- Is it possible to obtain from another source the document referred to in the warrant?
- If the warrant refers to an original document, should we rather provide a certified copy of the document?
- Is the nature of the document referred to in the warrant related to any privileges, immunities and collective and individual rights of the House and its members?
- Are there any aspects of the document referred to in the warrant that raise the slightest doubt? If need be, can the police officer offer any explanation?
- Does the document referred to in the warrant reveal information protected by the professional secrecy which must be respected by the deputy?

170 As described in an e-mail message attaching a briefing note from Hubert Cauchon & Rene Chretien, legal advisers, 22 October 2003, and P Duchesne, "Execution of Search Warrants in the National Assembly", *The Table*, volume 63 [1995], pp 23-27.

Appendix Two

Procedures adopted in the House of Representatives, in relation to the execution of a search warrant in a Member's Parliament House office:[171]

The Speaker's role in deciding whether to allow access to the building for the purposes of execution of the search warrant was to ensure that the administration of justice was not hindered, yet balanced with appropriate recognition of the rights of Members. The Speaker decided that **it** was not necessary to know the identity of the Member or the specific alleged offence, but did determine that the matter being investigated was a criminal matter.

- The Speaker was not involved in determining whether justification had been advanced for the issuing of a search warrant. This was appropriately the province of the magistrate involved.
- Primary matters for consideration were: whether a search warrant was duly approved, and that those seeking to discharge its terms could demonstrate that they were who they purported to be.
- The warrant was served on the Serjeant-at Arms who, following an indication from the Speaker, accorded access.
- The officers executing the warrant indicated that, in the interests of all concerned, it was standard practice to videotape events in the course of discharging a search warrant.
- The team executing the warrant was made aware of the parliamentary privilege considerations and the need for confidentiality in respect of Members' documents, whether or not they related to proceedings in Parliament.
- The team was provided with a copy of the Daft Guidelines for the execution of search warrants in members' electorate offices, though recognising that these have no formal status.
- The Serjeant-at-Arms or a representative remained present with the team discharging the search warrant at all times while they were in the building.
- The Serjeant-at-Arms attempted to ensure that no unauthorised person became aware that the search had taken place and that there was minimal evidence of activity in the area near the member's suite at the time
- The Serjeant-at-Arms attempted to ensure that there was minimum disruption to the office and that everything was replaced where found.
- The Serjeant-at-Arms, aware of the provisions of the *Crimes Act,* asserted the right in the absence of the Member or an employee of that Member's personal staff, declaring themself to be the Member's representative and, on that basis, for the Member to be provided with a copy of any documentation proposed to be removed. The seizing authority furnished a duly completed Property Seized Record.

[171] As outlined in correspondence received from Ian Harris, Clerk of the House of Representatives, dated ? November 2003.

Appendix 6 Letter from ICAC Commissioner 28 November 2003

[redacted]

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

FAXED 28/11/03

28 November 2003

Our ref: Z03/0242

Ms Lynn Lovelock
Clerk to the Standing Committee on Parliamentary
Privileges and Ethics
Legislative Council
NSW Parliament
Macquarie Street
SYDNEY NSW 2000

Dear Ms Lovelock

Inquiry into Parliamentary Privilege and Seizure of Documents by ICAC

I refer to your letter of 24 November 2003 enclosing a copy of the Committee's revised flow chart outlining a proposal for the handling of documents and things seized by the Commission from Mr Breen's Parliament House office.

Your letter seeks the Commission's views concerning the adoption of such a proposal.

The starting point for the proposal involves the return of the documents and other things seized under the warrant to the custody of the Clerk. It is envisaged that upon return of the material the Clerk and Mr Breen would then list the "privileged documents" for review by the Commission.

As the Committee may be aware, pursuant to the arrangement agreed upon at the meeting between the respective officers and representatives of the House and Commission on 31 October 2003, the Clerk of the Council has been attending the Commission to compile a detailed list of material seized under the warrant for consideration by Mr Breen and the House. I understand that Mr Evans has almost completed this list.

The Committee may also recall that in his letter to the Commission on 28 October 2003 Mr Breen himself requested that the Commission might "complete a list of the documents, files, letters etc seized from my office so that an accurate assessment can be made as to whether they relate to proceedings in the parliament".

On this basis it would be the Commission's view that there is no real necessity for that material to be now returned to the custody of the Clerk for the purposes of preparing a list that in any event appears to be near completion.

The Commission has also previously made it clear that the documents and other things remain available for inspection or examination by Mr Breen or his representatives at the Commission at a mutually convenient time. Should Mr Breen

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www.icac.nsw.gov.au

wish to avail himself of that opportunity he need only contact the Commission to do so.

If Mr Breen considers that the Commission's seizure of the material was not validly authorised by the terms of the warrant, then aside from the question of parliamentary privilege, he has avenues open to him to challenge the validity of the warrant.

The Commission has previously indicated its doubts about the suitability of the Committee as the appropriate forum to address issues arising from the execution of the search warrant in this particular matter. In this respect I note that it is now some eight weeks since the warrant was executed and the matter still remains unresolved.

I also note that it is some seven weeks since the electronic or computer material purportedly seized under the warrant was returned to the custody of the Clerk following the concerns the President of the Council raised about the validity of its seizure.

The Committee's proposal does not appear to address the question of any privilege that might be claimed over this material although it has been in possession of the Clerk for this time. Is it suggested that the status of this material should also be addressed.

To the extent that the Commission wishes to make any further comment on the proposal, it is noted that the proposal appears to be concerned with documents and things relating to Mr Breen. So far as a future protocol is concerned, the Commission rests on its proposed protocol for resolution of parliamentary privilege in the context of search warrants as set out on page 3 of its submissions to the Committee of 6 November 2003.

Yours faithfully

Irene Moss

Irene Moss AO
Commissioner

Appendix 7 Correspondence with ICAC concerning proposed protocols

[redacted]

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

03 December 2003

Ms Lynn Lovelock
Clerk to the Standing Committee on Parliamentary Privileges and Ethics
Legislative Council
Macquarie Street
SYDNEY NSW 2000

BY HAND

Dear Ms Lovelock

RE: Inquiry into Parliamentary Privilege and Seizure of Documents by the ICAC

At our meeting yesterday we discussed some possible options for a procedure to deal with documents seized from the Parliamentary Office of Mr Breen. As has been previously noted there are some points on which the Legislative Council Standing Committee on Parliamentary Privileges and Ethics, and the ICAC disagree, particularly in regard to the operation of section 122 of the *Independent Commission Against Corruption Act 1988* and Article 9 of the *Bill of Rights 1688* (UK).

In the interests of bringing this current matter to an expeditious conclusion, I am asking the Committee and the Legislative Council to consider the attached procedure to deal with this particular issue.

As you can appreciate this is a difficult issue made even more complex by the differing views of the parties involved. In agreeing to any procedure on dealing with this issue, I can only commit the ICAC to a procedure which reflects our position in principle in respect of the interpretation of the law that is available. It is my position that the issue of questioning and impeaching does not become relevant until the use to which the ICAC intends to put such material is determined. It is strongly arguable, based on advice I have received to date from the Crown Solicitor and the opinion of French J in Crane v Gething, that the acts of issuing and executing a search warrant do not breach Article 9 of the Bill of Rights. On this basis, any procedure that I agree to must also reflect the position of the ICAC in respect of these issues.

As you are no doubt aware I have no intention or desire to use documents seized under the warrant where that use would question or impeach the freedom of speech, or debates or proceedings in the Parliament. I do, however, believe that in agreeing to a procedure under

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which material seized under the warrant is appropriately dealt with, I must be careful to ensure the independence of the Commission's investigation. You will note that the proposed procedure attached agrees to provide the documentary material seized under the warrant to the President and a subsequent procedure that provides for the House to assert that privilege may apply.

Yours sincerely

Irene Moss

Irene Moss AO
Commissioner

Proposed procedure with respect to the ICAC investigation into the Hon. Peter Breen MLC

1. All material seized under the search warrant will be returned to the possession of the President of the Legislative Council on 5 December 2003. Electronic material seized under the warrant has already been returned to the President.

2. Mr Breen and a representative from both the Legislative Council and the Independent Commission Against Commission (ICAC) will jointly view this material by no later than 12 December 2003. Mr Breen and the representative will identify that material claimed to be associated with proceedings of the House as defined in Section 16 of the *Parliamentary Privileges Act 1987* (Cwth):

> *For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section,* proceedings in Parliament *means 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, and, without limiting the generality of the foregoing, includes:*
>
> *(a) the giving of evidence before a House or a committee, and evidence so given;*
>
> *(b) the presentation or submission of a document to a House or a committee;*
>
> *(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and*
>
> *(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.*

3. Material, which is not considered as being associated with the proceedings of the Legislative Council, will be returned to the offices of the ICAC.

4. A list of material considered to be associated with the proceedings of the House will be prepared and provided to both the ICAC and Mr Breen by no later than 12 December 2003. A complete copy of all material on that list will be provided to both the ICAC and Mr Breen by no later than 12 December 2003. The original of any such material will remain in the possession of the President of the Legislative Council until such time as the ICAC investigation is concluded and the ICAC advises that the material is no longer required and can be returned to Mr Breen.

5. If during the course of the ICAC investigation, the ICAC determines it intends to use any of the material on the list in any way, it will notify the President of the Legislative Council of its intention (i.e. which document will be used and how it will be used) and will provide reasonable time for submissions to be made to the ICAC and for the House to take any other action it considers necessary in this circumstance. During this time, the ICAC undertakes not to use the material in question in any way.

6. The ICAC will respond to any submission received before the material in question is used in any way. If the ICAC disagrees with the submission (i.e. considers the intended use of the material will not infringe Article 9), the ICAC will notify the President of its position allowing reasonable time for the House to take whatever action it considers necessary in this circumstance, include time to seek judicial review. During this time, the ICAC undertakes not to use the material in question in any way.

7. If there is no dispute between the ICAC and the House over the use of such material during the course of the investigation, the ICAC will notify the President at the conclusion of the investigation and the original material can be returned to Mr Breen.

LEGISLATIVE COUNCIL

FAXED
5/12/2003

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

3 December 2003

Ms Irene Moss AO
Commissioner
Independent Commission
Against Corruption
GPO Box 500
Sydney NSW 2000

Dear Commissioner

Inquiry into parliamentary privilege and seizure of documents by ICAC

I refer to your letter of 3 December 2003 addressed to the Clerk to the Committee, in relation to procedures for the resolution of issues concerning the documents seized from the parliamentary office of the Hon Peter Breen MLC. Your letter refers to the meeting which was attended by the Clerk to the Committee and the Clerk of the Parliaments, on behalf of the Standing Committee on Parliamentary Privilege and Ethics, yesterday. It is my understanding that a procedure for the resolution of these issues was discussed and agreed to at yesterday's meeting. However, following legal advice, the ICAC has now proposed a different procedure.

The Committee notes that there is some commonality between points 1 – 3 of the ICAC's proposed procedure, as appended to your letter, and the Committee's proposed procedures for the resolution of this matter. However, I regret to inform you that the Standing Committee on Parliamentary Privilege and Ethics cannot agree to your proposed procedure.

Whilst it is appreciated that your proposed procedure is based upon the ICAC's understanding of the current law concerning the extent of the immunity provided by Article 9 of the Bill of Rights 1689, based upon its own legal advice and the majority of evidence received during the course of this inquiry, the Committee takes a different position.

Of most concern, under your proposed procedure, the determination of whether material is associated with proceedings in Parliament and the use to which such material can be put would be, in effect, decided by the ICAC. This is not acceptable to the Committee. There is clear judicial authority that once the courts have recognised the existence of a parliamentary privilege, it is for the House to determine how that privilege is to be exercised in any particular matter. For example, in the NSW Court of Appeal, in *Egan v Willis*, the then Chief Justice, Gleeson CJ, stated:

> As the High Court observed in *R v Richards; Rx parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a

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privilege exists it is for the House to determine the occasion and the manner of its exercise.[1]

For important constitutional reasons it is not appropriate for the privileges of the House to be determined by the ICAC in the manner contemplated in your proposed procedures.

The Committee will therefore be proceeding on the basis of the procedure agreed to at yesterday's meeting with the ICAC, namely that:

1. That the ICAC return to the President, by a date and time to be determined by the House, all documents and things seized from Mr Breen's parliamentary office on Friday 3 October 2003.
2. That the documents be kept in the possession of the Clerk until the issue of parliamentary privilege is determined.
3. That, by a date and time to be determined by the House, Mr Breen, together with officers of the ICAC and the Clerk, examine the seized documents and things, including any documents held on the laptop computer and hard drives in the possession of the Clerk, and compile a list of documents which fall within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, including:
   (a) the giving of evidence before a House or a committee and evidence so given;
   (b) the presentation or submission of a document to a House or a committee;
   (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
   (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
4. That any documents not listed as falling within the scope of proceedings in Parliament be immediately returned to the ICAC.
5. That the ICAC be provided with a copy of the list indicating documents which fall within the scope of proceedings in Parliament.
6. That the ICAC dispute any claim of privilege in writing to the President of the Legislative Council, together with reasons for its dispute of the claim.
7. That the President immediately inform Mr Breen of any dispute, at which time he may provide written reasons in support of his claim.
8. That the President inform the House of any disputed claim, and table any documents provided by either the ICAC or Mr Breen relating to the dispute.
9. That the House consider the disputed claim of privilege, together with any written reasons tabled by the President, and determine whether the document or documents fall within the scope of proceedings in Parliament.
10. That any documents which the House determines are privileged be returned to Mr Breen and any documents which the House determines are not privileged be returned to the ICAC.

Yours sincerely

Peter Primrose

Hon Peter Primrose MLC
Chair

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[1] *Egan v Willis and Cahill* [1996] 40 NSWLR 650 at 653 (Gleeson CJ). See also - *Egan v Willis* (1998) 195 CLR 424 at 446 (Gaudron, Gummow and Hayne JJ); *Halden v Marks* (1996) 17 WAR 447 at 462.

Appendix 8 Minutes of proceedings

Minutes of the Committee's proceedings

Note: Asterisks indicate text which has been deleted as it is not relevant to this inquiry.

Meeting No 2

Thursday 16 October 2003, Parliament House, 1.00 pm.

1. Members present

Mr Primrose (in the Chair)
Mr Catanzariti
Miss Gardiner
Ms Griffin
Ms Forsythe
Ms Fazio
Revd Mr Nile

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams

2. Confirmation of minutes

Minutes no. 1 were confirmed on motion of Mrs Forsythe.

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4. Parliamentary privilege and seizure of documents

The Chair addressed the Committee on the inquiry process.

Resolved, on the motion of Revd Nile:

(i) That the Committee invite submissions and oral evidence from individuals and organisations identified as being able to contribute to the inquiry, and

(ii) That prior to the first hearing the Committee examine and discuss the procedure to be followed.

The Committee deliberated.

The Clerk described and discussed the contents of the folder distributed to the Committee.

The Chair thanked the Committee secretariat for assembling the material provided so quickly

Resolved, on motion of Revd Nile: That a calendar be circulated to the Committee this day for Members to indicate their availability to attend meetings and hearings in relation to this inquiry with a view to the Committee reporting on paragraphs (a) and (b) of the terms of reference by the last sitting day in 2003.

5. Adjournment

The Committee adjourned at 1.45 pm sine die.

Meeting No. 3

Friday 7 November 2003, Parliament House, 2.00 pm.

1. Members present

Mr Primrose (in the Chair)
Mr Catanzariti
Miss Gardiner
Ms Forsythe
Ms Fazio
Revd Mr Nile

An apology was received from Ms Griffin

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams

2. Confirmation of minutes

Minutes no. 2 were confirmed on motion of Revd Mr Nile.

3. Correspondence

Correspondence received:

- Responses to requests for information and submissions received from the following:
  - Email from Michael Patrick, Yukon, on 17 October 2003, together with a facsimile dated 16 October 2003
  - Email from Kate Ryan, British Columbia on 22 October 2003
  - Email from Quebec on 25 October 2003,
  - Email from Neil Laurie, Clerk of the Parliament, Queensland, on 27 October 2003
  - Letter from Mr Harry Evans, Clerk of the Senate, dated 28 October 2003, together with his submission to the Committee.
  - Facsimile from Mr Rick Crump, Parliamentary Officer, House of Assembly, South Australia, dated 29 October,
  - Facsimile from Mr Stephen Skehill, dated 29 October, 2003, together with his submission to the Committee
  - Email from Steve Chaplin, Canadian House of Commons on 29 October 2003,
  - Email from Suzanne Verville, Deputy Clerk's Office, House of Commons, and Canada on 31 October 2003, with an extract from House of Commons Procedure and Practice
  - Email from Bob Reynolds, Senior Parliamentary Counsel, Legislative Assembly, Alberta, on 5 November 2003, together with attachments as indicated in the email,
  - Email from Patricia Chaychuk, Clerk of the Manitoba Legislative Assembly, on 6 November, 2003,
  - Letter from Mr Ian Harris, Clerk of the House of Representatives, dated 4 November 2003,
  - Letter from Ms Irene Moss, Commissioner ICAC, dated 6 November 2003, together with her submission to the Committee,
  - Letter from Mr John Evans, Clerk of the Parliaments, dated 7 November 2003, together with his submission to the Committee.

- Letter from Mr Keiran Pehm, Deputy Commissioner, ICAC, dated 29 October 2003, to the Chair, referring to the terms of reference of the Committee in the context of the search warrant executed by Commission Officers on Mr Breen's office on 3 October 2003

Correspondence sent:

- Letter dated 16 October 2003 from the Chair to Mr Paul Spry, forwarding an amended submission for a citizen's right of reply for agreement.
- Letter dated 16 October 2003 from the Chair to Dr James Goodman, forwarding an amended submission for a citizen's right of reply for agreement.
- Letters, dated 20 October 2003, requesting submissions for the inquiry into parliamentary privilege and seizure of documents by ICAC, sent to:
  Mr John Evans, Clerk of the Parliaments
  Mr Harry Evans, Clerk of the Senate
  Mr Bret Walker, SC
  Ms Irene Moss, Commissioner, ICAC
  Mr Stephen Skehill, SC
- Letter dated 21 October 2003 to the President from the Chair requesting the use of the Legislative Council Chamber for a hearing on Friday 21 November 2003.
- Email sent to the Clerks of the Parliaments in Australia, members of ANZACATT and to the participants of CATS, seeking advice in relation to the inquiry into parliamentary privilege and seizure of documents by ICAC.
- Letter dated 31 October 2003 from the Chair to Mr Kieran Pehm, Deputy Commissioner ICAC, responding to his letter dated 29 October 2003 related the privilege of documents seized from the office of Mr Peter Breen MLC.
- Letters, dated 3 November 2003, requesting attendance at the hearing of the Committee on 10 November 2003, sent to:
  Mr Harry Evans, Clerk of the Senate
  Mr Stephen Skehill, SC
  Ms Irene Moss, Commissioner, ICAC
  Mr Bret Walker, SC

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5. Parliamentary privilege and seizure of documents

The Chair addressed the Committee on the inquiry.

The Committee deliberated.

Resolved, on the motion of Miss Gardiner: That each member of the Legislative Council be invited to provide a written submission to the Committee addressing the issues contained in the terms of reference of the resolution agreed to be the House on 15 October 2003 relating to parliamentary privilege and the seizure of documents by the ICAC.

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That notice of proposed questions be provided to Mr Harry Evans, Mr Stephen Skehill, and the ICAC.

The Committee deliberated.

The Clerk reported that the ICAC had no objection to their submission dated 6 November 2003 being made public.

Resolved, on the motion of Revd Mr Nile: That under section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and under authority of standing order 223, the Committee authorises the Clerk of the Committee to publish the submissions from Mr John Evans, Clerk of the Parliaments, Mr Harry Evans, Clerk to the Senate, Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jacques, and the ICAC.

6. Adjournment

The Committee adjourned at 3.12. pm until 9.45 Monday 10 November 2003.

Meeting No. 4

Monday 10 November 2003, Parliament House, 9.45 am.

1. Members present

Mr Primrose (in the Chair)
Miss Gardiner
Ms Griffin
Ms Forsythe
Ms Fazio
Revd Mr Nile

An apology was received from Mr Catanzariti

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams

2. Confirmation of minutes

Minutes no. 3 were confirmed on motion of Ms Forsythe.

3. Correspondence

The Chair tabled the following correspondence:

Correspondence sent:

- Letters dated 10 November 2003 to Members of the Legislative Council inviting them to provide a submission in relation to the inquiry into parliamentary privilege and seizure of documents by ICAC.
- Faxes and emails dated 7 November 2003 to the following, attaching submissions and draft questions:

  Mr Harry Evans, Clerk of the Senate
  Mr Bret Walker, SC
  Ms Irene Moss, Commissioner, ICAC
  Mr Stephen Skehill, SC

4. Parliamentary privilege and seizure of documents

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That, in accordance with the resolution of the Legislative Council of 11 October 1994 the Committee authorises the sound broadcasting and television broadcasting of its public proceedings.

The public and media were admitted.

The Chair advised the media of the guidelines re broadcasting.

Mr Harry Evans, Clerk of the Senate, was sworn and examined.

Evidence concluded, the witness withdrew.

Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jaques, was sworn and examined.

Evidence concluded, the witness withdrew.

The Committee adjourned at 12.40 pm.

The Committee resumed at 2.00 pm.

Mr Kieran Pehm, Deputy Commissioner, and Mr John Pritchard, Solicitor to the Commission, Independent Commission Against Corruption, were sworn and examined.
Attended by adviser, Mr Ian Knight.

Evidence concluded, the witnesses withdrew.

Mr Bret Walker, SC, was sworn and examined.

Evidence concluded, the witness withdrew.

The Committee deliberated.

Resolved on the motion of Ms Forsythe: That pursuant to the provisions of section 4 of the Parliamentary papers (Supplementary Provisions) Act 1975 and under the authority of Standing Order 224, the Committee authorises the Clerk of the Committee to publish the transcript of the hearing.

The Committee continued to deliberate.

Resolved on the motion of Revd Mr Nile: That the Clerk prepare an options paper for consideration by the Committee by Friday 21 November 2003.

5. Adjournment

The Committee adjourned at 4.52 pm until Friday 21 November 2003 at 10.00 am.

Meeting No. 5

Friday 21 November 2003, Parliament House, 10.00 am.

1. Members present

Mr Primrose (in the Chair)
Mr Catanzariti
Ms Griffin
Ms Forsythe
Revd Mr Nile

Apologies was received from Ms Fazio and Miss Gardiner

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams

2. Confirmation of minutes

Minutes no. 4 were confirmed on motion of Revd Mr Nile.

3. Correspondence

The Chair tabled the following correspondence:

Correspondence received:

- Letter dated14 November 2003 from Mr Kieran Pehm, Deputy Commissioner, ICAC, enclosing copies of legal advice and a procedure from the Commissions Operations Manual.

- Letter dated 14 November 2003 from Mr Harry Evans, Clerk of the Senate, enclosing a copy of the transcript of the hearing held on 7 November 2003 with suggested corrections.

- Letter dated 17 November 2003 from Mr John Pritchard, Solicitor to the Commission, ICAC, enclosing the transcript of the hearing held on 7 November 2003 with his suggested corrections and those of Mr Kieran Pehm, Deputy Commissioner, ICAC.

- Letter, dated 19 November 2003, to the Chair from Mr Peter Breen, requesting an extension of time to prepare his submission to the Committee.

Correspondence sent:

- Letters dated 11 November 2003 forwarding transcripts for correction to:

  Mr Harry Evans, Clerk of the Senate
  Mr Bret Walker, SC
  Mr Kieran Pehm, Deputy Commissioner, ICAC
  Mr John Pritchard, Solicitor to the Commission, ICAC
  Mr Stephen Skehill, Special Counsel,

- Letter, dated 19 November 2003, from the Chair to Mr Peter Breen agreeing to the request for an extension of time.

4. Parliamentary privilege and seizure of documents by ICAC
The Committee deliberated.

The Chair addressed the Committee.

The Committee continued to deliberate.

The Clerk of the Parliaments addressed the Committee concerning the documents held by the ICAC.

The Committee continued to deliberate.

Resolved on the motion of Revd Mr Nile: That the Clerks meet and discuss with the ICAC the various options available for resolving the Breen matter and report back to the Committee.

The Committee continued to deliberate.

Resolved on the motion of Mr Catanzariti: That the Chair write to the Clerk of the Parliaments requesting him to advise the Committee in writing in relation to the documents held by the ICAC, and what has occurred to date.

5. Adjournment
The Committee adjourned at 12.18 pm until Monday 1 December 2003 at a time to be confirmed.

Meeting No. 6

Monday 1 December 2003, Parliament House, 8.00 am.

1. Members present
Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

In attendance: John Evans, Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes
Minutes no. 5 were confirmed on motion of Ms Forsythe.

3. Correspondence
The Chair tabled the following correspondence:

Correspondence received:

- Letter dated 18 November 2003 from Mr Stephen Skehill, Special Counsel, Mallesons Stephen Jaques, enclosing a copy of the transcript of the hearing held on 7 November 2003 with suggested corrections.

- Letter dated 26 November 2003 from the Hon Peter Breen MLC together with his submission to the Committee.

- Letter dated 28 November 2003 from Mr John Evans, Clerk of the Parliaments together with his submission to the Committee.

- Facsimile dated 28 November 2003 from Ms Irene Moss, Commissioner, ICAC, related to the Commissions consideration of the proposal for the protocols for the handling of documents and things seized from Mr Breen.

Correspondence sent:

- Letter dated 24 November 2003 to Mr John Evans, Clerk of the Parliaments, requesting him to prepare a submission to the Committee related to his communications with ICAC.

- Letter dated 24 November 2003 to Mr John Pritchard, Solicitor to the Commission, ICAC, related to proposed protocols for the handling of documents and things seized from Mr Breen.

- Letter dated 27 November 2003 to Mr Breen responding to the submission received by the Committee from him.

4. Parliamentary privilege and seizure of documents by ICAC

The Committee deliberated.

The Clerk of the Committee briefed the Committee about the ICAC's response dated Friday 28 November 2003 to the proposed protocols for the handling of documents and things seized from Mr Breen.

The Clerk of the Parliaments addressed the Committee concerning his discussions with Bret Walker, SC, in relation to the ICAC's response to the proposed protocols.

The Committee continued to deliberate.

Resolved on the motion of Revd Mr Nile: That a draft report be prepared for the Committee to consider.

The Committee considered the draft report.

Resolved on the motion of Ms Forsythe: That Finding 1 in the draft report be adopted.

The Committee continued to deliberate.

Resolved on the motion of Ms Forsythe: That Finding 2 in the draft report be adopted.

The Committee continued to deliberate.

The Committee considered the ICAC's letter dated Friday 28 November 2003.

Resolved on the motion of Ms Fazio: That a new Finding in relation to subsequent actions by the ICAC be included in the report.

The Committee requested the Clerks discuss the wording of draft recommendation No. 1 with Mr Bret Walker, SC, and redraft the recommendation for the Committee to consider.

The Committee continued to deliberate.

Resolved on the motion of Miss Gardiner: That the Committee authorise the publication of the submissions to the Committee from Mr Peter Breen, dated 26 November 2003 and from the Clerk of the Parliaments, dated 28 November 2003.

5. Adjournment
The Committee adjourned at 9.40 am until Wednesday 3 December 2003 at 8.00 am.

Meeting No. 7

Wednesday 3 December 2003, Parliament House, 8.00 am.

1. Members present
Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

In attendance: John Evans, Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes
Minutes no. 6 were confirmed on motion of Ms Forsythe.

3. Parliamentary privilege and seizure of documents by ICAC
The Committee deliberated.

The Clerk of the Committee briefed the Committee about her meeting (together with the Clerk of the Parliaments) with the Commissioner and senior officers of the Independent Commission Against Corruption on Tuesday 2 December 2003, including the procedures agreed upon for the resolution of this matter.

The Clerk of the Committee further briefed the Committee about the advice provided by Bret Walker, SC, in relation to the procedures agreed upon with the ICAC for resolution of this matter.

The Committee continued to deliberate.

The Committee considered the Chair's draft report.

The Committee considered Chapter 1.

Resolved, on the motion of Ms Fazio: That Chapter 1 be adopted.

The Committee considered Chapter 2.

Resolved, on the motion of Ms Fazio: That Chapter 2 be adopted.

The Committee considered Chapter 3.

Revd Mr Nile moved: That a new paragraph 3.74 be inserted:

> The Committee notes, however, that Mr Breen made the original complaint to the Independent Commission Against Corruption which led to the ICAC's investigation into the conduct of the Hon Malcolm Jones MlC.

Debate ensued.

Question put and negatived.

Resolved, on the motion of Mrs Forsythe: That Chapter 3 be adopted.

The Committee considered Chapter 4.

Resolved, on the motion of Miss Gardiner: That a footnote be added to paragraph 4.1

> As far as the Committee is aware, the issue of privilege in relation to his documents was not raised by the member when the section 23 Notice was served on him, nor during the subsequent ICAC investigation.

Resolved, on the motion of Revd Mr Nile: That paragraph 4.6 and the opening words of Recommendation 1 be amended to note the ICAC's agreement to the recommended procedures for resolution of this matter, provided that written advice is received from the ICAC to this effect before the report is to be tabled.

Resolved, on the motion of Ms Fazio: That Chapter 4, as amended, be adopted.

The Committee considered Chapter 5.

Resolved, on the motion of Mrs Forsythe: That Chapter 5 be adopted.

Resolved, on the motion of Mrs Forsythe: That the executive summary be adopted.

Resolved, on the motion of Ms Fazio: That the report, as amended, be adopted.

Resolved, on the motion of Ms Fazio: That the report be signed by the Chair and presented to the House.

Resolved, on the motion of Ms Fazio: That the transcript of the hearing held on 10 November 2003 be tabled with the report and printed.

Resolved, on the motion of Ms Fazio: That the submissions, correspondence and other documentation received by the Committee (excepting the ICAC's *Operations manual* concerning search warrants) be tabled with the report and made public.

The Committee discussed the timing for the tabling of the report and for the giving of effect to the Committee's recommendations.

4. Adjournment
The Committee adjourned at 9.10 am sine die.

Meeting No. 8

Wednesday 3 December 2003, Parliament House, 6.40 pm.

1. Members present
Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Mr Nile

In attendance: John Evans, Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes
Minutes no. 7 were confirmed on motion of Ms Forsythe.

3. Correspondence
The Chair tabled the following correspondence:

Correspondence received:
Letter dated 3 December 2003 from Ms Irene Moss, Commissioner, Independent Commission Against Corruption, including new proposed procedures for resolution of this matter.

4. Parliamentary privilege and seizure of documents by ICAC
The Committee deliberated.

The Clerk of the Parliaments briefed the Committee about the advice received from Mr Bret Walker SC concerning the correspondence received from the ICAC.

The Chair tabled a draft response to be sent to the ICAC.

The Committee deliberated.

Resolved, on the motion of Ms Fazio: That the draft response be amended by inserting at the start of the second paragraph the words:

> The Committee notes that there is some commonality between points 1 – 3 of the ICAC's proposed procedure, as appended to your letter, and the Committee's proposed procedures for the resolution of this matter.

Resolved, on the motion of Ms Fazio: That the draft response, as amended be sent by the Chair on behalf of the Committee.

Resolved, on the motion of Miss Gardiner, that the Committee's report be amended by the inserting in paragraph 4.7 the words:

> Ultimately it has not been possible to reach an agreement with the ICAC on procedures which would ensure that the privileges of the house are upheld concerning the documents seized. In this regard, correspondence between the ICAC Commissioner and the Committee is attached at Appendix 7.

5. Adjournment

The Committee adjourned at 7.10 pm sine die.
