

Privileges Committee

Execution of search warrants by the Australian Federal Police (No. 3)

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Execution of search warrants by the Australian Federal Police (No. 3)

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Chair: Hon Peter Primrose MLC



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Terms of reference

- (1) That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:
 - (a) the rights available to a staffer to make a claim of privilege over documents,
 - (b) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,
 - (c) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege,
 - (d) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
 - (e) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
 - (f) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
 - (g) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
 - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
 - (i) any other related matter.
- (2) That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.

The terms of reference were referred to the committee by the Legislative Council on 19 November 2020.¹

¹ *Minutes*, NSW Legislative Council, 19 November 2020, p 1739.

Committee details

Committee members

The Hon Peter Primrose MLC	Australian Labor Party	<i>Chair</i>
The Hon Revd Fred Nile MLC	Independent	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
The Hon Wes Fang MLC*	The Nationals	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Shayne Mallard MLC**	Liberal Party	
The Hon Taylor Martin MLC***	Liberal Party	

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* The Hon Wes Fang MLC became a substantive member of the committee on 23 March 2022 following the resignation of the Hon Don Harwin MLC on 23 March 2022.

** The Hon Shayne Mallard MLC replaced the Hon Scott Barrett MLC as a member of the committee on 29 March 2022.

*** The Hon Taylor Martin MLC became a substantive member of the committee on 24 January 2022 following the resignation of the Hon Trevor Khan MLC on 6 January 2022.

Chair's foreword

This is the third report of the Privileges Committee arising from the execution of search warrants by the Australian Federal Police on 24 June 2020 on a member of the Legislative Council and his then staffer at various locations. The first two reports dealt specifically with privilege claims made by firstly the member then by the staffer, with the committee making recommendations on the determination of these issues that were subsequently agreed to by the House. This final report deals with a number of policy issues that were raised during the first two inquiries for which there was insufficient time to consider in detail. In completing this inquiry the committee was assisted by thoughtful and in depth submissions from the Clerk of the Parliaments, the Chief Commissioner of the ICAC and several Clerks from other parliamentary jurisdictions.

This report addresses two protocols for execution of search warrants – the AFP guideline used in 2020, and the Memorandum of Understanding between the Presiding Officers and the ICAC. While the inquiry was originally to consider whether the NSW Parliament should enter into a formal Memorandum of Understanding with the AFP, during this inquiry a new Guideline was produced in 2021 which clearly states that the AFP will consider itself bound to follow the same procedures when executing search warrants on state parliaments as it does for the Commonwealth Parliament. This formalises an understanding that previously relied upon an exchange of correspondence between this committee and the AFP. In regard to the execution of search warrants by the ICAC, this report highlights the currently inadequate coverage by the existing MoU and the need to revive negotiations which stalled in 2014. Currently there is no protocol with the ICAC to protect privilege when a search warrant is executed on a member's home or any other location other than the parliamentary precincts, despite there only being one point of disagreement between the committee and the ICAC remaining from the 2014 discussion.

Importantly the report considers the right of a staffer to claim that certain documents are privileged when subject to a search warrant, but also the right that a member has to make a claim of privilege upon documents held by their staffer.

Chapter Three deals with a particularly difficult question which arose in the second inquiry – if a member translates a speech they made in parliament into another language and distributes the speech, does that translation have the full protection of parliamentary privilege? While there are differing views on this, and the matter has yet to come before the courts, the conclusion in this report is that the translation is a republication, and not proceedings in parliament. For that reason the distribution of the speech would only receive qualified privilege, not the full protection of absolute privilege given to parliamentary proceedings. It is important that members are aware of this potential risk, and the committee recommends induction of new members include education on this finding.

I would like to thank my fellow committee members for their work on this and the two inquiries which preceded it, which they approached responsibly and impartially at all times. I am also very grateful to the committee secretariat for their work and expertise on these complex issues of privilege.

Hon Peter Primrose MLC
Committee Chair

Findings

Finding 1

9

A member's staffer has the right to claim parliamentary privilege over documents sought to be seized by an investigatory agency, in their own right as well as on behalf of their member. The member and the Presiding Officer should be notified by the staffer when this occurs.

Finding 2

9

The assumption is that a member's staffer is working under the direction of their member, and that the member should be able to inspect the documents the agency wishes to seize from the staffer. In the rare circumstances where the interests of the member and their staffer are divergent, the Presiding Officer or Clerk will need to determine the level of access to documents afforded to the member.

Recommendations

- Recommendation 1** **15**
 That the Clerk, in induction of new members, draws members' attention to the need to exercise caution when distributing translations of parliamentary proceedings.
- Recommendation 2** **25**
 That the Chair of the Privileges Committee write to the Australian Federal Police Commissioner to clarify whether the reporting obligations under Section 6 of the 2021 Australian Federal Police Guideline will apply to the privileges committees of the NSW Parliament.
- Recommendation 3** **25**
 That the President write to the Australian Federal Police Commissioner to confirm the NSW Parliament's recognition that the 2021 Guideline provides a commitment to use the framework if any member or members' staff in the NSW Parliament becomes the subject of a future investigation.
- Recommendation 4** **32**
 That:
- (a) the 2014 draft protocol proposed by the Independent Commission Against Corruption be amended to allow members who did not have the opportunity to make a claim of privilege before items were seized to have three working days from the date of seizure in which to make a claim of parliamentary privilege,
 - (b) subject to this change, the Presiding Officers be requested to enter into the revised memorandum of understanding with the Independent Commission Against Corruption before the end of the current Parliament to ensure there is a protocol to cover searches of members premises outside the parliamentary precincts, and
 - (c) the Privileges Committees of both Houses review the operation of the protocol in the next Parliament, with particular focus on the operation of section 8.
- Recommendation 5** **35**
 That the Clerk and the Independent Commission Against Corruption discuss a procedure for inclusion in the revised memorandum for dealing with s22 notices, such procedure requiring a cull of material by the investigators for the Independent Commission Against Corruption prior to requiring the review of privilege by the Clerk.
- Recommendation 6** **44**
 That the Chair of the Privileges Committee seek the agreement of the Chair of the Assembly Committee on Parliamentary Privilege and Ethics to write jointly to the Commissioner of the Australian Federal Police to request that the reporting provisions contained in section 6 of its 2021 Guideline be also applicable to the privileges committees of the NSW Parliament when the Australian Federal Police undertakes investigations of NSW parliamentarians or their staff.

Conduct of inquiry

The terms of reference for the inquiry were referred to the committee by the Legislative Council on 19 November 2020.

The committee received nine submissions.

Inquiry related documents are available on the committee's website, including submissions.

Chapter 1 Background

This chapter explains the context of the current inquiry, arising from two previous Privileges Committee inquiries related to the same set of circumstances. The chapter then considers the issue of who has the right to make a claim of privilege when a search warrant is executed on a member's staffer or another individual who holds documents that relate to a member's activities.

Previous inquiries

- 1.1** This is the third inquiry to arise from the execution of search warrants on offices and other premises of the Honourable Shaoquett Moselmane and his staffer Mr John Zhang by the Australian Federal Police (AFP) which began on 24 June 2020. The search warrants executed were authorised under various sections of the *Crimes Act 1914* (Cth), to obtain evidence for the possible prosecution of Mr Zhang under the so-called “foreign interference” laws, that is, s 92 of the *Criminal Code* 1995 (Cth). The warrants did not identify Mr Moselmane as having committed any offences, and both on the day and subsequently the AFP confirmed to Mr Moselmane that he was not a suspect² despite contrary media coverage.
- 1.2** The first inquiry into this matter, referred by the House on 5 August 2020, considered claims of privilege made by Mr Moselmane from documents identified by the AFP as being of interest to their investigation. The report of the committee recommended that privilege claims be upheld on 12 of the 119 documents for which Mr Moselmane or his legal representative had lodged claims³. The House resolved to uphold the claims on the 12 documents on 15 October 2020⁴, with those documents returned to Mr Moselmane and the remaining documents, until then held in the custody of the Clerk, provided to the AFP.
- 1.3** Following the tabling of the first report, the AFP wrote to the legal representative of Mr Zhang on 14 October 2020 seeking to progress the resolution of the unresolved parliamentary privilege issues in relation to Mr Zhang, which had not been considered in the first report. Following the exchange of correspondence between the AFP and Mr Zhang's legal representative, the President of the Legislative Council the Hon John Ajaka on 27 October 2021 referred to the Privileges Committee an inquiry to expeditiously resolve Mr Zhang's privilege claims to report by 18 November 2020. The terms of reference for the second inquiry included the following:

That the report to the House on the claims of privilege by Mr Zhang, contain a recommendation for terms of reference for the Committee to inquire into and report into outstanding issues raised in Chapter 5 of Report no 80 “Execution of Search Warrants by the Australian Federal Police”, and into related issues raised in correspondence to the Clerk of the Parliaments dated 15 October 2020 regarding the alleged seizure of material from Mr Zhang by the Australian Border Force in January 2020.⁵

² *LC Hansard* 11 November 2020.

³ Privileges Committee, *Execution of search warrants by the Australian Federal Police* Report 80, October 2020.

⁴ *LC Minutes* 15 October 2020, p1422.

⁵ *LC Minutes* 10 November 2020, p1527.

The current inquiry

- 1.4 These outstanding issues in Chapter Five of the report of the first inquiry are the subject matter of this, the third inquiry into the execution of the search warrants. The terms of reference were adopted by the House on 19 November 2020, following the tabling of the report of the second inquiry.⁶
- 1.5 Submissions were invited from various stakeholders including the Australian Federal Police (AFP), the Independent Commission Against Corruption (ICAC), the Clerk of the Parliaments and other parliamentary jurisdictions, with a total of nine submissions received. In addition, during the period this inquiry was held open, the AFP executed with the Presiding Officers of the Commonwealth Parliament a new Memorandum of Understanding with a protocol for executing search warrants where parliamentary privilege may be an issue. This is discussed in Chapter Five.

⁶ *LC Minutes* 18 November 2020, p1739.

Chapter 2 The rights of a member and member's staff to make privilege claims on documents

This chapter considers the rights of a member when a search warrant is executed on a member or their staff or on another individual who holds documents which may relate to parliamentary proceedings with which the member is involved. It also considers whether the staffer themselves has the right to claim privilege.

The 2020 AFP search warrant

- 2.1** As discussed in the previous chapter, the focus of the search warrants executed by the AFP in June 2020 was the staffer of Mr Moselmane, Mr John Zhang. The second inquiry undertaken by this committee was aimed at resolving claims of privilege made by Mr Zhang's legal representatives.⁷ The AFP's protocol *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (The 2005 AFP guideline) provided the right to a member's staff to make such claims, with frequent references throughout the document that refer to the member "or the member's staff" being able to make claims of privilege.⁸
- 2.2** For the documents seized from Mr Zhang the 2005 AFP Guideline also provided the member the right to make a claim, and this was facilitated by the AFP investigation team during the second inquiry.⁹ However the committee noted the instance earlier that year where it was reported that Mr Zhang was stopped at Sydney airport and documents were seized by the Australian Border Force (ABF), without either Mr Zhang or the ABF notifying the member or the President of the Legislative Council.¹⁰ The ABF is not bound by any protocol requiring notification, unlike the AFP or the NSW Police.
- 2.3** The Committee notes the matter involving Mr Zhang is still a live legal matter and does not intend to comment further on the specific circumstances. However the first two reports noted the situation raises questions:
- What rights should a staff member have to make claims of privilege over documents an investigatory agency seeks via search warrant?
 - What rights should a member have to make claims of privilege over documents held by their staff member in this circumstance?
- 2.4** The purpose of parliamentary privilege is to enable the House and its members to carry out their legislative, representative and scrutiny functions in the interests of the public they represent.¹¹ Certain privileges attach to members as individuals (such as freedom of speech)

⁷ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2* Report 81, November 2020.

⁸ For instance see paras 5.7, 5.10, 5.11, 5.12 and 5.13 of the 2005 AFP guideline.

⁹ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2* Report 81, November 2020 Chapter 2.

¹⁰ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2* Report 81, November 2020 p 4-5.

¹¹ Blunt and Frappell, *NSW Legislative Council Practice* 2nd edition 2021, p59.

while others belong to the House as a whole. Protocols such as the AFP guideline recognise that a staffer can make a claim despite not being an elected representative, in the same way that witnesses in a parliamentary inquiry have certain protections afforded by parliamentary privilege.

- 2.5** When the staff of a member hold documents, however, those documents where parliamentary privilege is relevant will almost always be those which are related to their work for the member. It is possible that the significance of some of these documents to parliamentary proceedings may be much clearer to the member than the staffer. For instance, a member may ask their staff for research to be undertaken without specifying the purpose. The member may intend that the results of the research will be used by him or her for a speech on a bill or for questions in a committee hearing. If these research documents held by the staffer are seized through the execution of a search warrant the staffer may not make a claim of privilege whereas the member, knowing the purpose of the research, may make a claim.¹² If the search is conducted at a staffer's home at the same time a member's office is subject to the execution of a search warrant it is also likely that the member will not be present at the time the staffer's documents are being seized.
- 2.6** The Committee in its earlier reports identified this as an important issue arising from the circumstances of the June 2020 search warrants. The approach taken to this in other jurisdictions is considered below.

New Zealand

- 2.7** The New Zealand Parliament has two separate agreements with the New Zealand Police – one for general policing in the precincts and a specific agreement on search warrants on premises occupied or used by members of parliament.¹³ Under the Search Warrant Agreement a member must be given a reasonable opportunity to claim parliamentary privilege in respect of anything searched, and any material where privilege is claimed is placed in the custody of the Clerk with the Speaker ultimately determining the claim.
- 2.8** The Clerk of the House of Representatives in New Zealand advises that the Search Warrant Agreement with the Police relies upon privilege being claimed by a member, and that while a person working for a member may claim privilege on the member's behalf, this must be with the member's consent. The Agreement does not specifically provide for anyone other than a member to claim privilege, so differs from the AFP protocol in that respect.

United Kingdom

- 2.9** As part of this inquiry the committee received submissions from the House of Commons and the House of Lords. Both referred to an incident in 2008 when the Police searched the parliamentary office of a member of the House of Commons in pursuit of the leaking of

¹² The validity of the claim itself would need to be assessed by the three step Breen test as modified by the Senate – see Privileges Committee *Execution of Search Warrants by the Australian Federal Police* Report 80, October 2020, Chapter 3. The member has to produce contemporaneous proof that the research was contemplated to be used for a parliamentary proceeding.

¹³ Submission 2, Clerk of the House of Representatives, New Zealand, p1.

documents from the private office of the Home Secretary, and arrested the member.¹⁴ No search warrant was obtained although the police did gain consent from the Serjeant at Arms prior to taking the action. This police action led to the Speaker making a statement to the House and subsequently issuing a protocol which required the issue of a warrant in all cases involving a police search within Parliament and specifying conditions for the issue of a warrant. The House of Lords in 2009 adopted a similar protocol.

- 2.10** The submissions from both Houses state that the adoption of the protocol was “unilateral” – that is the consent of the Police was not sought, on the understanding that exclusive cognisance, the control of each House over its own proceedings, enabled this action to be taken.¹⁵ The protocols appear far less detailed than those which the NSW Parliament have entered into with the NSW Police, the ICAC and, indirectly, the AFP. What is notable is that unlike the NSW situation members cannot make a claim of privilege directly, they can only make a complaint to raise a potential contempt if privileged documents are seized. Staff cannot make any complaint of potential contempt, so effectively do not have any way of raising privilege independently of the member. Indeed, the only initial protections to a member rely upon the attendance of a parliamentary officer – the Black Rod or Yeoman Usher for the House of Lords or the Serjeant at Arms or other officers for the House of Commons – during the search:

Any search of a member’s office or belongings will only proceed in the presence of the Serjeant at Arms, Speaker’s counsel or their deputies. The Speaker may attach conditions to such a search which require the police to describe to a senior parliamentary officer the nature of any material being seized which may relate to a member’s parliamentary work and may therefore be covered by parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material removed until such time as any issue of privilege has been resolved.¹⁶

Queensland

- 2.11** Like most jurisdictions in Australia other than NSW, parliamentary privilege has statutory protection in Queensland through the *Parliament of Queensland Act 2001*. This Act at s 9(2) includes a definition of parliamentary proceedings which can be used in any dispute over privilege. Currently the Queensland Parliament has search warrant protocols with the Queensland Police and the Crime and Corruption Commission, with an understanding that when the AFP conducts searches it has followed similar steps to those contained in the other protocols.¹⁷ The processes involve notification of the Speaker and the Clerk and anticipate that a member’s staff may have a role in being present during the search and assisting with the retention of copies of material for which privilege may be claimed, but does not provide a staff member a right to make a claim of privilege separate from the member.

¹⁴ Submission 4, The House of Lords p2, Submission 5, The House of Commons p1-2.

¹⁵ Submission 5, The House of Commons, p1.

¹⁶ Submission 5, The House of Commons, p3.

¹⁷ Submission 8, The Clerk of the Parliament, Queensland p2.

House of Representatives and Senate

- 2.12** The AFP guideline which was used to execute search warrants on various premises of Mr Zhang on 24 June 2020 represents the agreed position between the Presiding Officers of the Senate and House of Representatives and the Australian Federal Police, as formalised in a Memorandum of Understanding signed in 2005 with and the Attorney General and Minister for Justice and Customs. (As is discussed in Chapter 4, a new Memorandum with a revised protocol was signed in 2021).
- 2.13** As indicated above, the 2005 AFP guideline provides the right of a member's staff to make a claim of privilege but did not clearly state the rights of the member to make a claim on documents held by the staffer independently of the staffer's right to claim privilege, although as part of the dispute process in 2020 the member was given those rights.
- 2.14** In its submission to this inquiry the Clerk of the House of Representatives provides an example which arose on 24 August 2016 where a search warrant executed by the AFP sought computers, related devices and computer records of a named staffer of the Federal Member for Blaxland, with the member not himself being named in the search warrant.¹⁸
- 2.15** On the day prior to the execution of the search warrant both the Speaker and the Member for Blaxland were notified and advised that the 2005 AFP guideline would be followed. Later that day the member advised the AFP that he would be claiming parliamentary privilege for all material seized. The Clerk advises that the staffer themselves did not subsequently make a claim of privilege. However it appears that the basis for the member making the claim over the staffer's materials was based upon statute rather than the AFP provisions:

It is relevant to note that members are regarded as the employers of their staff under the *Members of Parliament (Staff) Act 1984*. Equipment, such as computers and email accounts, issued to staff of a member is regarded as being held by the member and any information contained therein belongs to the member. It is in this context that the Member for Blaxland rather than the named staffer made a claim of parliamentary privilege in relation to a search warrant in which the staffer was named and the member was not.¹⁹

- 2.16** The Clerk of the Senate in his submission to the inquiry cautioned against elevating the provisions of the AFP Guideline to providing rights which derive instead from either the *Parliamentary Privileges Act 1987* or the inherent rights and immunities of a House:

While procedural guidance is useful in establishing ground rules for making and determining claims of privilege, applying too narrow an interpretation of that guidance shifts the focus away from the task of the House involved, which is to determine whether material seized in the execution of warrants ought to be protected against compulsory production on the basis of its connection to the proceedings of that House.²⁰

- 2.17** This has been stated clearly by the Senate Committee of Privileges:

¹⁸ Submission 7 Clerk of the House of Representatives p2.

¹⁹ Following an inquiry by the Committee of Privileges the claim by the member was upheld by the House and all material seized returned, see Submission 7, Clerk of the House of Representatives, p3.

²⁰ Submission 9, Clerk of the Senate, p3.

The right to claim parliamentary privilege in relation to the execution of search warrants does not derive from the MoU and National Guideline. It adheres to material closely connected to parliamentary proceedings by reason of the Commonwealth Parliament's inheritance of the House of Commons powers, privileges and immunities. Therefore the National Guideline should not be viewed as providing any particular authority to make such claims, rather it guides officers of the Executive arm of government in their interactions with members of parliament.²¹

- 2.18** The Clerk makes the point that these inherent protections would cover a staff member compiling a speech for a member regardless of the actions of the member, and there may be circumstances where a staffer can make a claim on their own behalf without reference to the member solely on the connection of the documents held by them to the business of the House or its committees. However he also acknowledges that most references in the AFP 2005 guideline can be interpreted as indicating that the staff member in claiming privilege will be taken to be acting on behalf of the member.
- 2.19** Since the submissions from the Clerks of the Commonwealth Parliament were received, a new Memorandum of Understanding has been entered into between the Presiding Officers and the Attorney General and Minister for Home Affairs incorporating a new Guideline by the AFP (the 2021 AFP guideline). This guideline is discussed in detail in a later chapter. It continues to indicate a staffer can make a claim of privilege, but also includes a new provision which gives members (or their staff) the right to make a claim when documents are held by a third party such as a cloud service provider. The issues raised by the Clerk of the Senate are equally relevant to the 2021 AFP Guideline.

Clerk of the Parliaments

- 2.20** In his submission to this inquiry the Clerk of the Parliaments, Mr David Blunt, noted that the execution of the search warrants on a staffer was unusual in his experience:

At no time during the course of the AFP investigation, ... was there any doubt expressed by the AFP as to Mr Zhang's rights to make a claim of privilege.

However, as this was the first occasion such a claim had been made by a member's staffer it did receive careful consideration in the Office of the Clerk. Ultimately the Deputy Clerk and I accepted Mr Zhang's right to make such claims and therefore received into our safekeeping various bundles of documents and electronic records sought to have been seized by the AFP from Mr Zhang's premises.²²

- 2.21** The basis on which the Clerk accepted the possession of the documents was firstly that the AFP 2005 Guideline made multiple references to member's staff making claims of privilege, and secondly because of advice the former Clerk of the Senate, Dr Rosemary Laing, to the Senate Privileges Committee in 2016 that material provided to an adviser to a member could be

²¹ Senate Committee of Privileges, 168th report *Parliamentary privilege and the use of intrusive powers* para 2.7, quoted in Submission 9 Clerk of the Senate p2.

²² Submission 6, Clerk of the Parliaments p2

immune from seizure on the same basis as material held by a committee witness or a parliamentary officer for a parliamentary proceeding.²³

2.22 The Clerk noted an unpublished submission provided to him by the AFP during the inquiry to resolve Mr Zhang's privilege claims which discussed the right of a staffer to make privilege claims, where some documents prepared or used by a staffer have a sufficient nexus with parliamentary proceedings. Conversely though, the Clerk advised that the AFP stated that ordinarily the involvement of a staffer in "parliamentary proceedings" will be less direct than the involvement of a member, and that there was potential for the legal interests of a member and a staffer to diverge.²⁴

2.23 This was explored further in the Clerk's submission, noting there were two scenarios that could arise:

- Where a staff member makes claims of privilege that might or might not be supported by the member, or
- Where a staff member fails to make claims of privilege that the member would be likely to have made.

2.24 As described in Report 81 of this committee, the staffer made claims of privilege and as part of the process of determining those claims the Committee gave both the staffer and the member the opportunity to make a submission to clarify the claims. The member confirmed support for a small number of privilege claims by the staffer, and did not comment on other claims. The Clerk advised that the process followed satisfactorily addressed the first issue, of ensuring any divergence of views between the member and the staffer, and that the second scenario did not arise²⁵. The Clerk did however pose questions as to whether giving a member a right to inspect documents seized from a staffer raises any privacy issues for the staffer, and also the legal complications posed if a staffer has made a complaint against a member or is acting as a whistleblower and the member, with a very distinct interest, seeks the right to inspect.²⁶

Committee comment

2.25 It is clear that a member's staff make a claim of privilege on the execution of search warrants by the AFP, and that this right exists independently of the provisions of the AFP's 2005 and 2021 guidelines – the right is that given to a participant in parliamentary proceedings who holds documents that have a nexus to those proceedings. This principle is important, because it extends to the execution of search warrants by other agencies, whether those such as the NSW Police or the ICAC where a Memorandum of understanding with the parliament exists, or those other agencies where no such protocol is in place.

²³ Senate Committee of Privileges *Status of material seized under warrant: Preliminary report*, 163rd report, December 2016, Appendix B, p47, quoted in Submission 6, Clerk of the Parliaments p2. The matter concerned the 2016 AFP raids on various offices of Senator Conroy and one of his staff members.

²⁴ Submission 6, Clerk of the Parliaments p3.

²⁵ Although it is noted elsewhere in this report that the January 2020 action by the Australian Border Force in seizing material from Mr Zhang may potentially have been such a situation.

²⁶ Submission 6, Clerk of the Parliaments, p4.

- 2.26** The position is less clear as to the rights of a member to make a claim of privilege over documents held by a staffer. This is particularly highlighted by the submission of the Clerk of the Parliaments, where examples are given where the legal interests of a staffer and their member may diverge.
- 2.27** Generally however the assumption should be made that a staffer is acting under the direction of the member for which they work. To not provide the member an opportunity to inspect documents held by their staffer may lead to documents being seized initially which the member knows to be connected directly or indirectly to work concerned with parliamentary proceedings. A staffer subject to a search warrant should notify their member and also seek the advice of either the Presiding Officer or the Clerk, and in most cases the committee would expect part of the advice given is that the member should be afforded the right to inspect the documents proposed to be seized. Should there be special circumstances such as a member and staffer in conflict with each other, the Clerk may need to advise the Presiding Officer as to whether the usual course of action is appropriate.

Finding 1

A member's staffer has the right to claim parliamentary privilege over documents sought to be seized by an investigatory agency, in their own right as well as on behalf of their member. The member and the Presiding Officer should be notified by the staffer when this occurs.

Finding 2

The assumption is that a member's staffer is working under the direction of their member, and that the member should be able to inspect the documents the agency wishes to seize from the staffer. In the rare circumstances where the interests of the member and their staffer are divergent, the Presiding Officer or Clerk will need to determine the level of access to documents afforded to the member.

Chapter 3 Translations of parliamentary proceedings

This chapter considers whether parliamentary privilege extends to translations of proceedings of Parliament, including speeches, motions and contributions to debates in parliament or in parliamentary committees.

The chapter briefly outlines the background to the question arising and then considers viewpoints from other parliamentary jurisdictions. It then considers potential implications for members of Parliament if translations of parliamentary proceedings are considered to not be protected by parliamentary privilege.

Parliamentary privilege claimed over translated documents

Mr Zhang's claim of privilege over translated documents

- 3.1** The question of whether parliamentary privilege could be claimed over translated documents arose when Mr John Zhang, a former staffer of the Honourable Shaoquett Moselmane MLC, claimed privilege over six documents that contained Chinese translations of the member's speeches, motions and contributions to debates in Parliament.
- 3.2** As noted in the committee's report no. 81, *Execution of search warrants by the Australian Federal Police No. 2*, the Australian Federal Police (AFP)'s submission argued that the documents did not fall within the scope of 'proceedings in parliament' because the translations had been created after Mr Moselmane had given the relevant speech, motion or contribution to debate and therefore did not appear to have been prepared for use in the course of, or for the purposes of or incidental to, the transacting of the business of a House or a committee.²⁷
- 3.3** Presenting a different view, Mr Zhang's legal representatives contended that in lieu of guiding precedent in New South Wales, analogy should be drawn to the qualified privilege provided for under the *Defamation Act 2005* which protects members in republishing proceedings of parliament where it can be shown that the republication was justified, fair and made without malicious intent. The legal representatives submitted that the translations were prepared for the benefit of Mr Moselmane's Mandarin-speaking constituents and thus made without malicious intent.²⁸
- 3.4** The Clerk of the Parliaments (the Clerk) in making his first submission did not have the benefit of the arguments presented in the AFP submission nor in the supplementary submission received by Mr Zhang's legal representatives. The Clerk found that, while the claims put forward by Mr Zhang's legal representatives initially appeared to be reasonable, having subsequently had the benefit of considering the arguments put forward by all parties when the additional submissions were received, the arguments made by the AFP raised 'interesting and substantiative issues for consideration by the committee'.²⁹

²⁷ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, p 10, citing Submission 4, Australian Federal Police, p 5.

²⁸ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, p 10, citing Submission 2a, Mr John Zhang, pp 2-3.

²⁹ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, p 11.

- 3.5** In regard to Chinese translations of speeches given by Mr Moselmane in the House, the Clerk observed that the reference to the demographics of the Rockdale Electorate made in the second submission provided by Mr Zhang's legal representatives suggested the purpose of the translations was related to republication. Therefore, the submission of the AFP in regard to those documents was worthy of careful consideration.³⁰
- 3.6** Having applied the three-step test to the explanations and arguments submitted by all parties, the committee concluded that the Chinese translations were not translated for the purpose of using those documents in the course of, or for the purposes of or incidental to the transacting of business of a House or committee.³¹
- 3.7** The committee subsequently made a recommendation that the House should not uphold Mr Zhang's claim of privilege in respect of the translations and this recommendation was implemented by the House.³²
- 3.8** To this end, the committee noted that many members with diverse community constituencies translate speeches given in parliament and distribute them. In doing so the assumption is that these are protected by the same privilege as the original speech. As the current instance shows, this republication may not attract parliamentary privilege, although the committee noted the argument in the supplementary submission of Mr Zhang's legal representative that verbatim translations may be protected by qualified privilege under the *Defamation Act 2005* provided the republication was justified and fair and made without malicious intent. This protection applies for the purposes of defamation proceedings only, so was not applicable in the current instance.³³

Submissions made by other parliaments

- 3.9** A number of parliaments made submissions to the inquiry and while several jurisdictions indicated that this issue had not yet risen for them,³⁴ the submissions provided useful insights as to the factors that determine whether translated documents of parliamentary proceedings attract privilege.
- 3.10** The Clerk of the New Zealand House of Representatives expressed the view that 'an exact translation of proceedings in parliament must be treated in the same way as a copy of the proceedings would be' noting it would be 'difficult' to see why a copy of the proceedings in English or Māori be protected, but a translation of that information not be similarly protected.³⁵

³⁰ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, pp 11-12.

³¹ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, p 13.

³² Submission 6, The Clerk of the Parliaments, p 4.

³³ Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, 18 November 2020, p 13.

³⁴ Submission 2, The Clerk of the House of Representatives, New Zealand, p 3; Submission 7, The Clerk of the House of Representatives, p 3.

³⁵ Submission 2, The Clerk of the House of Representatives, New Zealand, p 3.

- 3.11** However, other jurisdictions flagged the importance of considering the nature and purpose of the document to therefore determine its categorisation – namely whether the translation is treated as a 'republication', whereby the protection of parliamentary privilege is not as clear.
- 3.12** The Clerks of the Australian House of Representatives and the Senate contended that a translation of proceedings may be treated as a separate publication or republication from the original official record. The Clerk of the House of Representatives noted that republications are not categorised as proceedings in parliament and quoted from *House of Representatives Practice*, which states:
- If a Member publishes his or her speech, this printed statement becomes a separate publication, a step removed from actual proceedings in Parliament and this is also the case in respect of the publication of Hansard extracts, or pamphlet reprints, of a Member's parliamentary speeches.³⁶
- 3.13** Similarly, *New South Wales Legislative Council Practice* observes that parliamentary privilege does not extend to republications of proceedings of the House.³⁷
- 3.14** The Clerk of the Senate further reflected that while a translation could be argued as 'incidental to' the transaction of parliamentary business, the Senate has generally accepted that events that occur after a senator has made his or her contribution are not classified as proceedings in parliament.³⁸
- 3.15** However, the Clerk of the Senate's submission acknowledged that apart from parliamentary privilege, there may be other protections available for the courts to apply, including qualified privilege or the 'implied freedom of political communication found by the High Court in the Constitution as a corollary of the system of representative government'.³⁹
- 3.16** The House of Representatives and the Senate indicated that there may be potential implications for members (and others) regarding protections for translated documents if they are categorised as republications. The Clerk of the Senate noted that other protections, including qualified privilege, are available for the courts to apply and stated, 'Members seeking to issue translations of their speeches and other extracts of proceedings would be well advised to ensure they amount to a fair and accurate report of proceedings, to attract qualified privilege'.⁴⁰
- 3.17** The Clerk of the House of Representatives echoed this sentiment and recommended that members exercise caution with translated documents as the protections of parliamentary privilege is not straightforward in these circumstances.⁴¹
- 3.18** In the United Kingdom, when a member, outside of proceedings, repeats or provides a translation of proceedings, it could be constituted as 'effective repetition' in cases such as defamation proceedings, thereby losing the protection of privilege. The House of Commons

³⁶ Submission 7, The Clerk of the House of Representatives, p 3, citing *House of Representatives Practice* (2018, 7th ed) 741.

³⁷ *New South Wales Legislative Council Practice* (2021, 2nd ed) 128.

³⁸ Submission 9, The Clerk of the Senate, pp 3 and 4.

³⁹ Submission 9, The Clerk of the Senate, p 4.

⁴⁰ Submission 9, The Clerk of the Senate, p 4.

⁴¹ Submission 7, The Clerk of the House of Representatives, p 3.

acknowledged that in these instances, it is less certain whether protection is afforded and noted that the position would depend on the facts of the case and how closely linked the repetition was to the original proceedings.⁴²

3.19 The House of Commons and the House of Lords submitted that if a translated document of proceedings was published other than by order of the House, it would also be a matter for the courts to determine whether the translated documents amounted to an 'extract from or abstract of' proceedings.⁴³

3.20 However, in instances where the House specifically orders a publication or translation of proceedings, the Clerks of the Senate and the House of Commons agreed that absolute privilege would attach to that publication.⁴⁴

3.21 In a separate vein, the United Kingdom House of Lords highlighted that committees are authorised to take evidence in another language and to accept evidence originating in another language if accompanied by a translation. It noted that once the committee accepted the submissions as evidence, these would be protected by privilege.⁴⁵

The submission from the Clerk of the Parliaments

3.22 As noted earlier, the Clerk of the Parliaments ultimately concluded that the translated documents were a republication and therefore worthy of careful consideration in relation to whether it attracted parliamentary privilege.⁴⁶

3.23 The Clerk conceded that, although translation of the member's speeches and motions were not held to be privileged in this matter, it is possible to envisage circumstances where translations would be regarded as privileged, including:

- a translation of a document from another language into English so that a member can use it in proceedings in the House or a committee
- a translation of words (such as a phrase or greeting, or acknowledgement of country) from English into a language other than English for use by a member in a proceeding in the House or a committee
- a translation into a language other than English used by a member to directly facilitate a member's participation in a proceeding in the House or a committee (for example, by enabling the conduct of research or gathering of data or community views for a speech).⁴⁷

3.24 The Clerk acknowledged that the above list of examples was 'somewhat restrictive' because of the requirement for contributions to debate in the Legislative Council to be conducted in

⁴² Submission 5, The House of Commons, United Kingdom, pp 2-3.

⁴³ Submission 4, The House of Lords, United Kingdom, p 2; Submission 5, The House of Commons, United Kingdom, p 2.

⁴⁴ Submission 9, The Clerk of the Senate, p 3.

⁴⁵ Submission 4, The House of Lords, United Kingdom, p 2.

⁴⁶ Submission 6, The Clerk of the Parliaments, p 5.

⁴⁷ Submission 6, The Clerk of the Parliaments, p 5.

English.⁴⁸ Notwithstanding this, he also recognised the importance of language, including Aboriginal languages, within the context of a representative democracy reflecting an increasingly multicultural and diverse society.⁴⁹

3.25 The Clerk further observed that the High Court of Australia has recognised that what is 'reasonably necessary' for parliament to perform its functions evolves over time. Noting that 'reasonable necessity' is the common law basis of parliamentary privilege in New South Wales, the Clerk suggested that what is considered 'reasonably necessary' may evolve further in consequence of some of these factors.⁵⁰

Committee comment

3.26 The Committee notes that the question of whether parliamentary privilege extends to translations of proceedings in parliament has not yet arisen for many jurisdictions. However, we remain of the opinion that this is a matter that has the potential to affect many members of parliament, particularly within the context of a representative democracy reflecting an increasingly multicultural and diverse society.

3.27 The Committee concurs that until it is tested by the courts, it is unclear whether parliamentary privilege extends to translations of proceedings in parliament. We also agree that translations are likely to fall within the definition of a republication. The Committee notes that *New South Wales Legislative Council Practice* has observed that parliamentary privilege does not extend to republications and cautions, 'Members therefore distribute copies of their speeches or other parliamentary contributions, not being the official records of the House, at their own risk.'⁵¹

3.28 Therefore, caution should be exercised by members and others who produce translations of speeches, motions and contributions to debate in Parliament.

3.29 Noting the uncertainty around this issue and to raise members' awareness of it, the Committee therefore recommends that the Clerk in induction of new members draws members' attention to the need to exercise caution when distributing translations of parliamentary proceedings.

Recommendation 1

That the Clerk, in induction of new members, draws members' attention to the need to exercise caution when distributing translations of parliamentary proceedings.

⁴⁸ Submission 6, The Clerk of the Parliaments, p 5, citing Ruling of former President Harwin, *LC Parliamentary Debates*, 22 October 2014, p 1609.

⁴⁹ Submission 6, The Clerk of the Parliaments, p 5.

⁵⁰ Submission 6, The Clerk of the Parliaments, p 5.

⁵¹ *New South Wales Legislative Council Practice* (2021, 2nd ed) 128.

Chapter 4 A Memorandum of Understanding with the AFP

This chapter considers the current arrangements in place for the rare instances when the Australian Federal Police (AFP) conduct an investigation into a member or employee of the NSW Parliament. It includes a discussion of the new Memorandum of Understanding entered into between the AFP and the Presiding Officers of the Commonwealth Parliament and its impact on this legislature.

Background

4.1 As noted earlier, this inquiry is the third to arise from the investigation by the Australian Federal Police into the Honourable Shaoquett Moselmane's staffer, Mr John Zhang, with the NSW Parliament's involvement in the investigation beginning with the early morning execution of a search warrant on various premises, including the parliamentary office of Mr Moselmane on Friday 26 June 2020.

4.2 As discussed in the two previous reports,⁵² in conducting the investigation the AFP advised that in undertaking any searches and seizures of evidence they would follow the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (The 2005 AFP guideline) which forms part of the Memorandum of Understanding with the Presiding Officers of the Commonwealth Parliament. This guideline was established in relation to experience with the Commonwealth Parliament and did not specifically reference the NSW Parliament. However in its 2010 inquiry to establish a protocol with the NSW Police, an exchange of correspondence between the Chair of the Privileges Committee and the AFP established that in a situation such as this both parties would rely upon the AFP guideline. When put to the test this informal arrangement was effective – the committee's first report stated:

when this committee examined the issue of search protocols in 2010 the AFP indicated that it was considered very unlikely that the AFP would execute a search warrant on a state MP, but if it did so it would use the National Guideline. It has done so in this instance, and unlike the Senate experience in 2016 the guideline has been closely followed and resulted in a co-operative and professional relationship between the AFP investigative unit and parliamentary officers.⁵³

4.3 In its first report the Committee did however indicate that there were issues raised in the execution of the search warrants, such as the rights of a member to claim privilege over material held by a staffer, that would be important to clarify in a future guideline, and that the experience of the extensive search process by the AFP suggested there was value in the NSW Parliament following the lead of its Federal counterparts by entering into a formal Memorandum of Understanding with the AFP Commissioner. When the committee was referred a second inquiry in late 2020 to deal with time sensitive privilege claims relating to Mr Zhang the consideration

⁵² Privileges Committee, *Execution of search warrants by the Australian Federal Police* Report no 80, October 2020 p24, Privileges Committee, *Execution of search warrants by the Australian Federal Police (no 2)* Report 81 November 2020.

⁵³ Privileges Committee, *Execution of search warrants by the Australian Federal Police* Report no 80, October 2020 p 24.

of the need for a Memorandum of Understanding was held over to be part of the terms of reference of this current (third) inquiry:

For both the first two inquiries the committee and the AFP have acted under the understanding that the AFP *National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved* (The AFP Guideline) will be followed, on the basis of the informal agreement made in 2010 during an earlier inquiry. It has worked effectively to date because of the respect and cooperation of individuals within the AFP investigation team and the Parliament. However in a situation of conflict an informal arrangement has potential to break down. The committee notes the discussion in its previous report of recent Senate inquiries which recommended improvements to the guideline. It would be valuable for the committee to explore the experience in other jurisdictions of the use of the guideline, with a view to entering a formal memorandum of understanding. Such an inquiry could include considering as a subsidiary issue the legal expenses incurred by members when involved in an investigation such as the current instance.⁵⁴

- 4.4** In his submission to this inquiry, the Clerk of the Parliaments, Mr David Blunt, argued in support of a formal agreement, noting that while this was the second occasion a search involving a member of the NSW Parliament has occurred:

The foreign interference offence provisions in section 92.3 of the Criminal Code (Cth) may conceivably be triggered in relation to a range of conduct by members of state and territories parliaments or their staff who are the targets of attempted foreign interference by operatives working on behalf of a number of foreign governments or entities. It can therefore be anticipated that these sorts of matters may arise again in the future.⁵⁵

Experience of other jurisdictions

- 4.5** As part of this inquiry the committee invited submissions from a number of larger Australian parliaments regarding their experiences with the AFP or comparable instances. While Parliaments such as the Queensland Legislative Assembly have entered into protocols for the execution of search warrants by their Police service, it appears the only formal Memorandum of Understanding is with the Federal Parliament. The Clerk of the Queensland Parliament stated

While there has been no MoU entered into with the AFP, in practice when they have executed warrants on members electorate offices the same principles and steps in the MoUs [with the Queensland Police Service] have been followed.⁵⁶

- 4.6** The Clerk of the New Zealand House of Representatives advised that it has a protocol with the New Zealand Police for execution of search warrants which was first raised in 2006 but not finally negotiated and adopted until 2017.⁵⁷ The key features of the Search Warrant Agreement are

⁵⁴ Privileges Committee, *Execution of search warrants by the Australian Federal Police (no 2)* Report no 81, November 2020 p 15-16.

⁵⁵ Submission, Clerk of the Parliaments Mr David Blunt, p 5.

⁵⁶ Submission 8, Clerk of the Queensland Parliament, p 3.

⁵⁷ Submission 2, The Clerk of the House of Representatives of New Zealand, p 2-3.

- Police must get the approval of an Assistant Commissioner of Police or above before applying for a warrant in respect of matters covered by the agreement.
- Prior to executing a warrant the Police must notify the Speaker of the proposed search, outline the scope of the warrant and the nature of the material that Police consider is located at the intended search location.
- Any warranted search must not take place at a time when the House is actually sitting or when a committee is actually meeting, the member must be given the opportunity to be present for the search, and where the search takes place within the parliamentary precinct, the search should be conducted when the Clerk is present.
- The member must be given a reasonable opportunity to claim parliamentary privilege in respect of anything being searched and the Police must take all reasonable steps to minimise the extent to which documents that may attract parliamentary privilege are examined or seized.
- Where privilege is claimed by a member, the material is placed in the safe custody of the Clerk until a decision about parliamentary privilege has been made. The Speaker determines any claim of privilege.
- Where there is a dispute about the interpretation or application of the agreement, the agreement provides a process to determine the matter.⁵⁸

4.7 The Clerk reported that since 2017:

In the limited instances where a search warrant has been issued, the relevant members did not claim privilege in any of the material seized under the warrants (these were mainly telephone records of two members and consisted of text exchanges between them). While that matter did not result in the agreement being operated, the existence of the agreement provided useful guidance for Police and ensured early engagement with my office to ensure that the exercise of their enforcement powers was consistent with the constitutional protections of Parliament.⁵⁹

4.8 The House of Commons and the House of Lords do not have the equivalent of the AFP guideline, although there have been instances of a search warrant being executed on a member within the parliamentary precincts, and officers within the precincts such as the Standards Commissioner have their own protocols entered into with the Metropolitan Police.⁶⁰ There is a protocol for each House on Police requests for access to the precincts with a view to arresting a member or searching a member's office but these do not appear to contain a detailed framework for resolving claims of privilege.

4.9 The Memorandum of Understanding with the Federal Parliament has been in place since 2005, but has been the subject of some controversy from 2016 onwards, beginning with the execution of search warrants on opposition members and member's staffers in both the House of Representatives and the Senate as part of an investigation into leaks within the NBN

⁵⁸ Submission 2, The Clerk of the House of Representatives of New Zealand, p 2-3.

⁵⁹ Submission 2, the Clerk of the House of Representatives of New Zealand, p 3.

⁶⁰ Submission 4, House of Lords, p3, submission 3, House of Commons p 4.

organisation.⁶¹ The experience of the House of Representatives appears to have been limited to the NBN matter, which resulted in all documents seized by the AFP being returned to the member on the basis of the claim of privilege.⁶² However the Senate has had other involvements with the AFP and use of the guideline which gave it further concern that the current guideline was not sufficient to protect the privileges of the Senate.⁶³ This resulted in the passing of a resolution on 6 December 2018 which asserted the rights of the Senate in regard to claims of parliamentary privilege and stated:

- (c) [the Senate] declares, for the avoidance of doubt:
 - (i) that the right of the Houses to determine claims of privilege over material sought to be seized or accessed by executive agencies adheres regardless of the form of the material, the means by which those agencies seek seizure or access, and the procedures followed, and
 - (ii) in particular, that these rights adhere against the covert use of intrusive powers, by which agencies may seek to seize or access information connected to parliamentary proceedings without the use or presentation of warrants;
- (d) requires the executive and executive agencies to observe the rights of the Senate, its committees and members in determining whether and how to exercise their powers in matters which might engage questions of privilege; and
- (e) calls on the Attorney-General, as a matter of urgency, to work with the Presiding Officers of the Parliament to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers, which complies with the principles and addresses the shortcomings identified in reports tabled in the 45th Parliament by the Senate Committee of Privileges and the House of Representatives Committee of Privileges and Members Interests⁶⁴

4.10 In his submission to this inquiry the Clerk of the Senate indicated that while the AFP 2005 Guideline provided a framework for resolving claims of privilege its focus on the physical storage of documents has long been overtaken by the electronic storage and sharing of information, and that the establishment of general principles, supplemented by more detailed procedures for different law enforcement agencies would be more useful to the Senate.⁶⁵

4.11 The Clerk of the Senate suggested that the Council may consider that the likelihood of a specific MoU being called upon with the AFP may be too remote to justify the administrative burden of negotiating the agreement and then keeping it up to date. If that were the case the options the Council could consider are:

⁶¹ S Reynolds “Parliamentary Privilege and Searches by investigatory agencies” June 2017. – www.parliament.nsw.gov.au.

⁶² Submission 7, Clerk of the house of Representatives, p 2.

⁶³ For instance Senate Committee of Privileges *Disposition of material seized under warrant* Report 172, November 2018.

⁶⁴ *Journals of the senate* No 137, 6 December 2018, item 14, p 4485.

⁶⁵ Submission 9, The Clerk of the Senate, p 4-5.

- having the House resolve that the current or updated MoU with the ICAC form the basis for managing any issue of parliamentary privilege that arise in relation to other agencies, or
- having the House resolve to adopt the procedures set out in the AFP 2005 Guideline, perhaps then formalising this understanding with a side agreement with the AFP. (The Clerk noted this was essentially the approach taken in the Moselmane matter).⁶⁶

4.12 In his submission to this inquiry the Clerk of the Parliaments, Mr David Blunt, noted this was the second occasion that the AFP had investigated at least one other member of the NSW Parliament and there were “good reasons to now formalise the steps that were taken in this matter via a memorandum of understanding”.⁶⁷ In particular he noted two important practical steps agreed between the AFP, Mr Moselmane and Mr Zhang or their legal representatives and the Parliament:

- The AFP prepared indexes of items of relevance and interest to the investigation seized under each search warrant (which were the subject of initial claims parliamentary privilege and therefore kept in the Clerk’s safekeeping),
- Mr Moselmane and Mr Zhang (via their legal representatives) were then afforded opportunities to review the indexes and refine the scope of their claims of parliamentary privilege.⁶⁸

4.13 The Clerk argued that as these two steps were critical to the co-operative and timely resolution of the privilege claims it would be helpful for any memorandum to mandate these practical steps when applying the AFP Guideline.

The AFP and the 2021 Guideline

4.14 In its submission, which the committee received on 4 March 2021, the AFP noted the “co-operative and professional manner of both parties” when the AFP executed the search warrants in June 2020, and concluded that:

The conduct of those warrants highlighted how the process [in the AFP Guideline] is still sufficient to protect parliamentary privilege while facilitating the legitimate objectives of the AFP to enforce the Commonwealth law.⁶⁹

4.15 However the Commissioner noted that following the Senate resolution of December 2018 the AFP was reviewing its guideline, with a drafting process involving the Commonwealth Attorney General’s Department, the Department of Home Affairs, the AFP and representatives of both Presiding Officers, and that any concluded view about the necessity of a formal Memorandum of Understanding with the NSW Parliament should await the drafting process for the new Commonwealth MoU.⁷⁰

⁶⁶ Submission 9, The Clerk of the Senate, p 5.

⁶⁷ Submission 6 , Clerk of the Parliaments p 5.

⁶⁸ Submission 6 , Clerk of the Parliaments p 6.

⁶⁹ Submission 3, Mr Reece Kershaw APM, Commissioner, Australian Federal Police p 1.

⁷⁰ Submission 3, Mr Reece Kershaw APM, Commissioner, Australian Federal Police p 2.

4.16 On 8 December 2021, the Chair of the Senate Privileges Committee wrote to the Chair of the Privileges Committee and on 10 December the Presiding Officers of the Commonwealth Parliament wrote to the Presiding Officers of the NSW Parliament to advise that a new Memorandum of Understanding between the Commonwealth Parliament and the AFP had been signed on 23 November 2021 and tabled in Parliament. This MoU and accompanying guideline appear as Appendix 1 and 2, and will be referred to as the 2021 Guideline.

4.17 The MoU makes it clear that it and the accompanying revised AFP Guideline is a response to the resolution of the Senate of 6 December 2018, and repeats throughout the principle that while it should not be used as a shield for illegal activity, the guideline is designed to:

Ensure that law enforcement investigations are conducted without improperly interfering with the functioning of Parliament and that Members and their staff are given a proper opportunity to raise claims of parliamentary privilege in relation to material that is obtained through the execution of search warrants.⁷¹

4.18 Significantly, the MoU identifies the AFP's use of covert investigative powers as an issue for further review:

The parties to this MoU will seek to review and update this MoU and the Guideline to cover the AFP's covert investigative powers under the *Telecommunications (Interception and Access) Act 1979 (Cth)* and the *Surveillance Devices Act 2004 (Cth)* in relation to Members. This work will be conducted during the 47th Parliament.⁷²

4.19 While the MoU emphasizes the primacy of parliamentary privilege and the need for the AFP to ensure their investigations do not commit a contempt by attempting to seize material which forms part of 'proceedings in parliament', the AFP Guideline provides the detailed framework to facilitate claims of parliamentary privilege. The new Guideline is a major advance on the 2005 Guideline which it replaces, while retaining much of the framework for handling of evidence. Some of the important new features are:

- There is an AFP Sensitive Investigation Oversight Board (SIOB) chaired by the Deputy Commissioner of Investigations which will generally oversee investigations where parliamentary privilege may be involved. Approval of the SIOB is required before applying for a search warrant. This is to ensure AFP senior executive have direct awareness and oversight of the matter.
- Online training on parliamentary privilege and the application of the guideline to all AFP members, and the lead investigator in any investigation that potentially involves parliamentary privilege must ensure all officers involved are trained in the requirements of the guideline, including not to disclose any details of the investigation outside of the investigation team.
- A detailed definition of the premises covered in the guideline, including the residence of the member or their staff, premises used for private purposes by the member or their

⁷¹ *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p 1.

⁷² *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p 1.

staff and any premises not used or occupied by a member or their staff where the AFP suspects documents on the premises may be subject to parliamentary privilege.

- A procedure for contacting the member or senior member of staff to agree on a time for execution of the search warrant, including notification of the relevant presiding officer, or, if the presiding officer is not available, the Clerk or Deputy Clerk.
- A detailed quarantine procedure for evidence subject to a claim of privilege, with the Clerk (or other person identified by the presiding officer) to hold the exhibits for ten business days, unless otherwise agreed, from the delivery of the exhibits by which time they are required to notify the AFP executing officer whether the claim of privilege is abandoned or whether the House will be required to consider the claim. Under the previous guideline the member or staffer claiming privilege had the option of having privilege determined by the House or the courts, now it is solely the prerogative of the relevant House.
- The executing officer is to inform the member that to the greatest extent possible the AFP will facilitate access to the exhibits where such access is necessary for the performance of the member's duties. This would, for instance, be an important issue where a member's phone has been seized.
- A requirement that when information is held by a third party on behalf of a person – for example a cloud service provider – the executing officer should request the information directly from the person for whom the third party is holding the information when there is likely to be issues of parliamentary privilege. If for various reasons the information needs to be sought from the third party, the presiding officer needs to be notified and the member or member's staff are able to make claims of parliamentary privilege over the material executed on the third party.
- If a third party claims that the information upon which the warrant is executed contains disclosures to a parliamentarian that may be protected by parliamentary privilege the relevant Member should be given the opportunity to make the claim.

4.20 Many of these enhancements to the 2021 Guideline address issues which arose during the first two inquiries of this committee into the execution of search warrants, and the impact of some aspects of these is also discussed in Chapter 6 of this report. The new guideline recognises the reasons for these protections:

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim of privilege, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search. The executing officer should consider inviting the member or staff to identify where documents or other material that fall within the scope of the search warrant are located. When viewing electronic evidence, the executing officer should also consider strategies, for example word searches, to find documents that meet conditions of the warrant rather than seizing entire drives or computers in the first instance. If relevant documents are identified, they should be transferred to another external storage device and secured along with other material.⁷³

⁷³ *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p4.

- 4.21** This process of limiting the material seized corresponds generally with the approach taken by the AFP investigation team in the execution of the 2020 search warrants. As discussed in Chapter 5, it contrasts with the experience with s21 and s22 notices served on the NSW Parliament by the Independent Commission Against Corruption, which generally seek to obtain a large amount of material (see Chapter Five).
- 4.22** The 2021 Guideline concludes with a commitment to provide a confidential report to the relevant privileges committee and the relevant presiding officer annually on the number of instances in the last financial year where telecommunication data requests, surveillance device warrants or telecommunications interception or warrants are authorized in respect of a member or their staff. The reporting will include a description of the general type of offences that are being investigated but only the number of instances in categories. It will not include in its reports information on data requests where these were generated in response to investigations where the member or their staff is the victim or person making the request, for example when threats or abuse are directed towards a member or their staff. This is discussed further in Chapter Six.
- 4.23** The 2021 Guideline repeats the statement in the MoU that the area of covert surveillance will be subject to further discussions during the 47th Parliament, but otherwise the Guideline will be reviewed every three years.

The NSW Parliament and the 2021 AFP Guideline

- 4.24** The new Guideline is clearly the result of negotiations at a federal level. However unlike the 2005 version, this document contains an understanding that the Guideline may be used in investigations involving state legislatures. At the end of the document there is a definitions section which makes this explicit. “Clerk” is defined in terms of the two positions in the Commonwealth parliament, but also includes “or in state or territory jurisdictions, the equivalent position/role”.⁷⁴ Similar clarity is given to the definition of “Presiding Officer”.⁷⁵ The Guideline defines “Houses” as

The Houses of Parliament: the Senate and the House of Representatives, or relevant state or territory house of assembly or legislative council.⁷⁶

- 4.25** In his submission to the inquiry the Clerk of the Parliaments indicated that any formal agreement should require the AFP to prepare indexes of items of relevance and interest to the investigation seized under each search warrant, then allow the member or staffer to review their initial claims of privilege based upon the items in the index, the process which succeeded in the 2020 investigation in reducing the task of determining privilege.⁷⁷ This process is explicitly

⁷⁴ *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p 8.

⁷⁵ *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p 8.

⁷⁶ *Memorandum of Understanding on the Execution of Search Warrants in relation to a Member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, November 2021, p 8.

⁷⁷ Submission 6, Clerk of the Parliaments, Mr David Blunt, p 6.

provided for in 5.3 and 5.4 of the new Guideline. It includes statements that “the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search” and “When viewing electronic evidence the executing officer should also consider strategies, for example key word searches, to find documents that meet conditions of the warrant rather than seizing entire drives or computers in the first instance”.

Committee comment

- 4.26** The terms of reference for this inquiry asked the Committee to consider whether there was value in the NSW Parliament entering into a formal Memorandum of Understanding with the AFP for the execution of search warrants. Under the 2005 Guideline, the execution of search warrants effectively relied upon an informal agreement, resulting from an exchange of correspondence between this committee’s predecessor and the AFP in the 2010 inquiry. In those circumstances the need for a more formal arrangement had considerable merit.
- 4.27** Under the 2021 Guideline, the AFP is effectively binding itself to apply the same framework in dealing with state parliaments as it is with the Commonwealth Parliament. The only area of doubt is whether the reporting regime is equally to apply to privileges committees of state legislatures or whether the intent is only to report to the Senate and House of Representatives committees. It would be useful for this committee to clarify this with the AFP, and to advise its counterpart in the Legislative Assembly of the outcome.
- 4.28** Aside from this issue, the Committee would encourage the Presiding Officers to write to the AFP to confirm they have received the new Guideline and to note the commitment it provides to use this if any member or members’ staff in the NSW Parliament becomes the subject of an investigation. In the Committee’s view a Memorandum of Understanding is not necessary given the current definitions section of the Guideline.

Recommendation 2

That the Chair of the Privileges Committee write to the Australian Federal Police Commissioner to clarify whether the reporting obligations under Section 6 of the 2021 Australian Federal Police Guideline will apply to the privileges committees of the NSW Parliament.

Recommendation 3

That the President write to the Australian Federal Police Commissioner to confirm the NSW Parliament’s recognition that the 2021 Guideline provides a commitment to use the framework if any member or members’ staff in the NSW Parliament becomes the subject of a future investigation.

Chapter 5 A revised Memorandum of Understanding with the ICAC

This chapter considers several matters relevant to the search process used by the Independent Commission Against Corruption (ICAC) when investigating members of parliament. It includes a discussion of the need for the Memorandum of Understanding between the Presiding Officers and the ICAC to be revised to ensure parliamentary privilege is protected when searches are undertaken outside of the parliamentary precincts.

Background

- 5.1** The development of a Memorandum of Understanding between the NSW Parliament and the ICAC arose following the difficulties experienced during the execution of a search warrant on the office of the Honourable Peter Breen MLC in 2003.⁷⁸ An inquiry by the Privileges Committee in 2009 finally agreed with the ICAC that Section 10 of Procedure 9 of the Commission's Operations manual incorporated the key measures necessary for any future similar situations.⁷⁹ In December of that year the President and the Speaker entered into a formal Memorandum of Understanding (the MoU).
- 5.2** When the Parliament later entered into a Memorandum with the NSW Police after a subsequent inquiry⁸⁰ it became apparent that there was a gap in the MoU with the ICAC. Unlike the Memorandum with the Police, it did not cover execution of search warrants on members home premises or other offices outside of Parliament House.
- 5.3** In July 2013 the then Presiding Officers wrote to the ICAC with a proposed revised draft MoU. The submission received from the ICAC for this current inquiry provides extensive detail on the various exchanges between the Presiding Officers and the Commission which resulted in a draft protocol being referred to the Privileges Committees of both Houses in 2014.⁸¹ Considerable progress was made towards a new revised MoU, initially as a result of discussions between the agency and parliamentary officers.⁸² However following the 2014 inquiry there remained one sticking point regarding the time allowed to members to make a claim of privilege in relation to documents removed from premises under s75 A of the *Law Enforcement (Powers and Responsibilities) Act 2002* (discussed further below). The ICAC maintained its position on this point of difference with the Privileges Committee, and the Presiding Officers did not pursue the matter further as the state election followed not many months after the Privileges Committee tabled its report.

⁷⁸ Privileges Committee, *Parliamentary Privilege and seizure of documents by ICAC* Report No. 25, December 2003, *Parliamentary Privilege and seizure of documents by ICAC* No. 2, Report No. 28, March 2004.

⁷⁹ Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices* Report No. 47, November 2009.

⁸⁰ Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report No. 53, September 2010.

⁸¹ Submission 1, Independent Commission Against Corruption, p 7-8.

⁸² Privileges Committee, *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises*, Report No. 71, November 2014.

- 5.4 While the matter has not been re-examined since November 2014, it was raised in the two reports of the Privileges Committee in 2020 which considered claims of privilege arising from the AFP search warrants executed on Mr Moselmane and his staffer Mr Zhang. Each report concluded by raising the need to revisit the Memorandum of Understanding in the ICAC protocol.⁸³ The search on the member's home was covered by the AFP Guideline, and the President was appropriately notified and a framework for resolving claims of privilege was followed. If the ICAC was the agency conducting the search, there would have been no requirement to notify a Presiding Officer or Clerk of the search except for the part of the warrant related to the parliamentary precincts.

Revising the 2014 draft protocol

- 5.5 The final draft of the 2014 revised protocol arose out of several months of discussions between the ICAC and officers of the Legislative Council, was tabled by the President in the House on 16 September 2014⁸⁴ and subsequently referred to the Privileges Committee. A copy of this draft appears at Appendix 3.

- 5.6 Section 7 of the 2014 draft protocol deals with the procedure for a member who was not present when items were seized to subsequently make a claim of privilege. It states:

This section of the Memorandum of Understanding applies where the ICAC has complied with its relevant obligations in sections 5 or 6 of this Memorandum of Understanding, as the case may be. No ICAC officer will seize any document or thing which it is clear to the officer is subject to parliamentary privilege. The following procedures are to be observed where the member was not present at the execution of a search warrant and, as a consequence, has not had an opportunity to consider making a claim of parliamentary privilege over any of the items seized.

- a) If the member wishes to make a claim for parliamentary privilege with respect to any item seized the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the seizure and provide a list of the items over which the claim is made.
- b) For those items where the ICAC does not object to the claim, the ICAC will return the items in accordance with the return instructions of the occupier
- c) For those items where the ICAC objects to the claim, the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

- 5.7 Section 8 of the draft 2014 protocol deals with the procedure for making claims where items have been removed under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) for examination but not seized. If the member decides they wish to make a claim of parliamentary privilege over items before they are seized, it is governed by 8 (a):

- (a) If the member needs to consider whether to make a claim for parliamentary privilege with respect to the thing or any of the contents of the thing, the member

⁸³ Privileges Committee *Execution of search warrants by the Australian Federal Police* Report 80, October 2020, p *Execution of search warrants by the Australian Federal Police No. 2* Report 81 November 2020 p 16.

⁸⁴ *LC Minutes* 16 September 2014, p 72.

should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the removal of the thing. The ICAC will not use the document or thing or any of the contents of the document or thing until the expiry of that working day.

5.8 Section 8 (e) then states:

Where the member does not require time to consider whether to make a claim for parliamentary privilege, the member will, within one working day from the removal of the thing, notify the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal that the member claims parliamentary privilege with respect to the thing or part of the contents of the thing. In the event the claim relates to part of the contents of the thing, the member will provide the ICAC with a list of the items or subject matter over which the claim is made.

5.9 It was this one day limit for both section 7 and 8 which the Privileges Committee expressed concern over, and recommended instead members be granted five days to make a claim when they were not present at the time of the execution of the search warrant.⁸⁵

While mindful of the need not to unnecessarily delay ICAC investigations of members' conduct the Committee is concerned that the period of one working day under paragraphs 7(a) and 8(e) or two working days under paragraph 8(a)-(c) may not be sufficient for a member to make a meaningful claim for parliamentary privilege and to provide the required list of things or subjects in every case. There may be practical difficulties, for example, if the member is travelling overseas during the relevant working day or otherwise out of email or mobile phone access, or if the member needs to obtain advice before deciding whether to include particular items in the list.⁸⁶

5.10 In response to the Committee's concerns, in November 2014 the ICAC indicated it was prepared to agree to the suggestion of a three working day period for a member who did not have an opportunity to make a claim at the time of seizure (section 7(a)), and in its submission to this current inquiry the then-Chief Commissioner indicated the ICAC was still agreeable to this change to the draft 2014 protocol.⁸⁷

5.11 The other recommendation of the Committee was that where things were removed for examination (but not seized) members should have two working days in which to consider making a claim, during which time the ICAC would not use what was seized. In 2014 and in its submission to this inquiry, the Commission expressed concern over this proposal, given that once the member had notified the investigators they would make a claim they had a further day to then actually make the claim.⁸⁸ If the Commission then objected to the claim, which would take further time to resolve, the seven working day limit under s75A (1) (c) of the LEPR would mean the forensic examination of any electronic database would not be completed.

⁸⁵ Privileges Committee *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises* Report 71, November 2014, p 12-13.

⁸⁶ Privileges Committee *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises* Report 71, November 2014, p 12.

⁸⁷ Submission 1, Independent Commission Against Corruption, p 9.

⁸⁸ Submission 1, Independent Commission Against Corruption p 9.

5.12 Section 75A in full is as follows:

- (1) A person executing or assisting in the execution of a warrant to which this Division applies may—
 - (a) bring to the premises the subject of the warrant any electronic and other equipment reasonably necessary for the examination of a thing found at the premises, and
 - (b) operate any such equipment (or equipment already at those premises) to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant, and
 - (c) move a thing found at the premises to another place (for up to 7 working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if—
 - (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
 - (ii) there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.
- (2) If a thing is moved to another place for examination under this section, an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding 7 working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant.
- (3) The person executing the warrant must advise the occupier that the occupier may make submissions to the eligible issuing officer on the matter and is to give the occupier a reasonable opportunity to do so (except in the case of a covert search warrant).
- (4) The eligible issuing officer may authorise the removal of a thing for a period exceeding a total of 28 days only if satisfied that it is justified on the basis that there are exceptional circumstances in the case.
- (5) The limitation imposed by this section on the period that a thing may be removed to another place ceases when it is determined that it is or contains a thing that may be seized under the warrant.
- (6) This section does not authorise the operation of equipment already at the premises the subject of the warrant to examine a thing unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

5.13 It is noted that s75A (4) provides for an extension of up to 28 days “in exceptional circumstances”. The question would be whether a member taking two days to advise they would lodge a claim, then a further day to make the claim of parliamentary privilege, would satisfy this test and permit the investigation to examine the database further. This is perhaps something which could be explored further at a later date.

- 5.14** In the meantime, the problem remains that because of the stalemate in 2014, the revised memorandum was not finalised, and with the 2015 election any momentum to reach agreement dissipated. The Clerk of the Parliaments highlights the need to address the anomaly that there is currently no coverage of searches of members off site offices or homes:

There are also a number of examples over the last decade of the ICAC itself executing search warrants on members' homes or other premises (e.g. Electorate Offices) apart from their Parliament House offices. Hence the urgent need to have a modern MOU which covers those premises. It may be that the sticking point from the 2014 inquiry, described above, can be resolved with the benefit of the experience described above in resolving the Moselmane and Zhang claims of privilege (i.e. initially broad claims of privilege, followed by the more precise identification by the AFP in indexes of the items of relevance to its investigations, enabling the making of more focused claims of privilege - all enabling items over which privilege is no longer claimed to be released to the AFP and making the job of the Privileges Committee in reviewing the claims more manageable and able to be completed in a timely manner).⁸⁹

Committee comment

- 5.15** In its submission, as indicated above, the ICAC agrees to the recommendation of the Privileges Committee to allow members three working days to make a claim when they are not present at the time of the execution of the search warrant, but has not agreed to the extension from one to two working days under section 8 (e) of the 2014 draft protocol.⁹⁰
- 5.16** While the Committee believes further work is required to reach an acceptable outcome for this latter issue, it recognizes that even without this the 2014 protocol with a revised section 7 would be a considerable improvement on the complete lack of coverage that currently exists. Currently there is no protocol for searches of members offices or other premises outside the parliamentary precincts, and there is not even the one day provision for members not present to claim privilege. The Committee believes the progress made in 2014 between the Parliament and the ICAC should be consolidated while the remaining issue in dispute can continue to be pursued. It therefore recommends the Presiding Officers enter into a revised protocol with some urgency, then further review the protocol in the next Parliament if it is perceived that section 8 (e) is leading to any gaps in the protection of parliamentary privilege.

⁸⁹ Submission 6, Mr David Blunt, Clerk of the Parliaments, p 7.

⁹⁰ Submission 1, Independent Commission Against Corruption p 10.

Recommendation 4

That:

- (a) the 2014 draft protocol proposed by the Independent Commission Against Corruption be amended to allow members who did not have the opportunity to make a claim of privilege before items were seized to have three working days from the date of seizure in which to make a claim of parliamentary privilege,
 - (b) subject to this change, the Presiding Officers be requested to enter into the revised memorandum of understanding with the Independent Commission Against Corruption before the end of the current Parliament to ensure there is a protocol to cover searches of members premises outside the parliamentary precincts, and
 - (c) the Privileges Committees of both Houses review the operation of the protocol in the next Parliament, with particular focus on the operation of section 8.
-

Section 21 and 22 notices

5.17 Section 21 of the ICAC Act provides:

Power to obtain information

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of information.
- (2) A notice under this section must specify or describe the information concerned, must fix a time and date for compliance and must specify the person (being a Commissioner, an Assistant Commissioner or any other officer of the Commission) to whom the production is to be made.
- (3) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the public authority or public official and may, but need not, specify the person or class of persons who may so act.

5.18 Section 22 of the ICAC Act provides:

- (1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person—
 - (a) to attend, at a time and place specified in the notice, before a person (being a Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
 - (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.
- (2) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the person on whom it was imposed and may, but need not, specify the person or class of persons who may so act.

5.19 The Clerk of the Parliaments notes in his submission that in contrast to the rare instances in which the ICAC has executed search warrants on member's offices or other premises, orders for documents under s22 have increased significantly in frequency and scope since 2009, particularly electronic records. Many of these are used for preliminary investigations which do not reach the stage of a public hearing or report.⁹¹

5.20 When such an order is made the Clerk is obligated to ensure that parliamentary privilege is protected, that is to ensure that no material is provided which directly or indirectly relates to proceedings in parliament. Given the wide scope of many of the orders and tight timeframes, the time required to review material has become very problematic:

During this period I have sought to ensure that parliamentary privilege is taken into account in responding to section 22 notices, through the application of an informal protocol that was negotiated between my predecessor and the ICAC in 2011. However, as the scope of information sought under section 22 notices has become wider and the volume of material (particularly electronic records) gathered has increased, the application of the informal protocol has become at times unreasonably resource intensive for us. Furthermore, we have been increasingly conscious of not being able to be assured that all matters potentially subject to parliamentary privilege have always been identified. This is because most section 22 notices are framed in such a way that we are prohibited from notifying the member concerned and the member therefore has no opportunity to review the material and identify material which is in their view privileged.⁹²

5.21 In its submission the ICAC advises that s 21 notices issued will specify a time for compliance which takes into account the time likely to be required to provide the information, and this may be extended by the Commission where the person receiving the notice requests additional time. A member of Parliament or other public official receiving such a notice will be in a position to identify if any information sought by the notice might be subject to parliamentary privilege and, if so, to ensure that information is not included in the statement of information. Because of this the Commission "does not consider that it is necessary to include in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 21 of the ICAC Act."⁹³

5.22 In regard to s22 notices the Commission confirms the Clerk's explanation that the member may not have the opportunity to claim privilege when this mechanism is used:

When seeking production of parliamentary electronic databases, such as email accounts, a s22 notice will usually be served on both the Clerk of the relevant House and the Department of Parliamentary Services. This is because the Commission understands that electronic databases are held by the Department of Parliamentary Services rather than by individual members. The Commission's purpose of also serving the notice on the Clerk of the relevant House is to alert the Clerk to the notice so that consideration can be given to whether a claim for parliamentary privilege should be made over any of the contents of the relevant database.

In some cases, the Commission will have no objection to the relevant member being made aware of the notice. If this is the case, the Commission will inform the relevant

⁹¹ Submission 6, Mr David Blunt, Clerk of the Parliaments, p 7

⁹² Submission 6, Mr David Blunt, Clerk of the Parliaments, p 7

⁹³ Submission 1, Independent Commission Against Corruption p 15.

Clerk and the member can be involved in determining whether any contents of the database are subject to parliamentary privilege. In other cases, however, it may prejudice the Commission's investigation if the member under investigation becomes aware of the Commission's investigation. In such circumstances it would not be appropriate for the member to be informed of the existence of the notice.⁹⁴

- 5.23** In a case study illustrating the use of s22⁹⁵, the Commission does indicate a process where there was a further check by a Commission officer for matters which may involve parliamentary privilege, with a further opportunity provided to the parliamentary officer to have the material omitted from the documents retained. While this provides an additional safeguard it does not address many of the concerns of the Clerk of the Parliaments. He argues that what is needed is for a similar process to that used by the AFP where the preparation of indexes of items of interest are used to narrow down the range of documents where privilege should be considered. He argues that the current arrangements for s22 notices "are not sustainable"⁹⁶, because of the resource intensive demands the volume of material the Clerk must review, in contrast to the AFP process where the agency reviewed the large volume of documentation and distilled the documents of interest for review on potential privilege issues.

Committee comment

- 5.24** The Committee recognises there are significant differences in the way an agency like the ICAC gathers information required for an inquiry and the much narrower evidence gathering process undertaken by law enforcement agencies. But there needs to be a sustainable process which also does not risk potentially privileged information being produced because it is missed in the volume of material being searched. During the AFP search process many days were spent by officers on site while they searched through the databases provided, with (in this case) the member and the Clerk only required to assess the privilege status of the items that were of relevance to the investigation. This allowed searches to be undertaken without any privileged information or potentially privileged information leaving the parliamentary premises.
- 5.25** In contrast, under the current arrangements with the ICAC the Clerk must search through thousands of items, the vast majority of which will not be used by the Commission, to determine their privilege status, before the material sought under s22 leaves the parliamentary premises and comes into the possession of the ICAC. Given current workload of all senior parliamentary officers in the Legislative Council since 2019, there would be expected to be extensive delays in being able to respond to future s22 notices, which in turn will impact on ICAC investigations.
- 5.26** Pleasingly, it appears the ICAC recognises the need to discuss this issue further with the parliament:

The Commission is open to including in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 22 of the ICAC Act.⁹⁷

⁹⁴ Submission 1, Independent Commission Against Corruption p 11.

⁹⁵ The Committee has chosen not to publish this case study which forms part of the Commission's submission for reasons of comity, as the case study involves internal procedures within the Legislative Assembly in dealing with such a notice.

⁹⁶ Submission 6, Mr David Blunt, Clerk of the Parliaments p 8.

⁹⁷ Submission 1, Independent Commission Against Corruption p 13.

Recommendation 5

That the Clerk and the Independent Commission Against Corruption discuss a procedure for inclusion in the revised memorandum for dealing with s22 notices, such procedure requiring a cull of material by the investigators for the Independent Commission Against Corruption prior to requiring the review of privilege by the Clerk.

Privileged documents held by government agencies

5.27 Recently the Deputy Secretary of the Department of Premier and Cabinet has written to the Clerks of both Houses to express a related concern, when government agencies are faced with statutory requirements to produce documents from investigatory agencies, when some of the documents in their possession may be subject to parliamentary privilege:

significant practical difficulties may arise where there is a need to assess extremely large numbers of documents to identify documents which may be subject to parliamentary privilege (for example, where the production of entire email accounts, or large parts of email accounts, is required).

It will not ordinarily be possible to provide documents which may be subject to parliamentary privilege to Parliament for its review prior to them being produced. This is due to the volume of documents routinely captured by statutory notices and requirements, the number of notices and requirements which are issued or imposed, and the fact that the notices will invariably capture information subject to confidentiality or other restrictions on disclosure.⁹⁸

5.28 As a response, the Deputy Secretary asked the Clerks to consider the approach taken in Western Australia following the case of *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223, where a protocol has been established between the Executive and the Parliament which authorises State agencies, to make initial assessments of whether parliamentary privilege applies on behalf of the House and withhold from production any documents which are assessed to be subject to privilege; and where it is not reasonably practicable for the agency to undertake an individual review of each document prior to production – to produce the documents to the investigative agency on the basis that the investigative agency be requested to provide an opportunity to the relevant House to make a claim over a document which appears to the investigative agency to be subject to parliamentary privilege prior to its use or disclosure for the purposes of an investigation.

5.29 Both Clerks responded to the Deputy Secretary to indicate that consideration of such a protocol was a matter for the Privileges Committees to consider on behalf of their respective Houses.⁹⁹

⁹⁸ Correspondence, Ms Kate Boyd, Deputy Secretary, Department of Premier and Cabinet, 27 May 2022.

⁹⁹ Correspondence, Clerk of the Parliaments Mr David Blunt and Clerk of the Legislative Assembly Ms Helen Minnican, 16 June 2022.

5.30 The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics subsequently considered the issue and the WA Protocol, and tabled a report entitled *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers*.¹⁰⁰ In it the Committee considers the WA Protocol developed following the Supreme Court decision which provides checks and balances to ensure that parliamentary privilege is determined by the Parliament. In particular a distinction is made when large amounts of data is required to be produced, as frequently happens with s22 notices. The Assembly Committee considered that the following features of the WA Protocol were desirable for incorporation in the NSW context:

- Limiting initial access to the material produced to a particular digital forensic specialist within the investigative body, which would not include solicitors or investigators.
- Creating a second forensic image of the device on which the material is held without reviewing its contents and storing that image securely on a segregated forensics system, for which the Clerk can obtain audit logs.
- The Clerk being able to be present when the Digital Forensic Officer creates the forensic image of the device, and when the same officer undertakes a cull using search terms to identify material of relevance to the investigation.
- Having the Digital Forensic Officer produce a report of the relevant material, which is provided to the Clerk. The Presiding Officer has an opportunity to indicate whether they, or their delegate, committee, or other authorised individual, will make a claim for parliamentary privilege.
- As agreed, the Presiding Officer's authorised delegate may assist the investigative body with any further narrowing of the identified material to be reviewed for parliamentary privilege. After this review, any remaining material that is not privileged is released to the person required to comply with the notice to produce the material.
- Except for any access contemplated in the agreed protocol, the investigating body undertakes not to intentionally access or review any data within the identified material that does not contain a relevant keyword or search term.
- With respect to third parties the subject of notices to produce, the protocol provides that the investigatory body is to inform the relevant Presiding Officer, as soon as is reasonably practicable on a confidential basis, where it becomes aware that material, which may be immune from production by reason of parliamentary privilege, has been produced to the them.¹⁰¹

5.31 Other aspects of the WA Protocol, such as conferring “officer of Parliament” status on staff of investigatory bodies handling privileged material, were not supported, and ultimately the Assembly Committee indicated it would seek independent legal advice on the production of material by third parties, among other matters raised by the Deputy Secretary's correspondence of 27 May.¹⁰²

¹⁰⁰ Report 3/57 June 2022.

¹⁰¹ Standing Committee on Parliamentary Privilege and Ethics *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers* Report 3/57 June 2022, pp 4-5.

¹⁰² Standing Committee on Parliamentary Privilege and Ethics *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers* Report 3/57 June 2022, pp 6-7.

5.32 The Assembly Committee's deliberations and the outcome of its legal advice will be watched with interest.

Section 23 notices and section 35

5.33 Section 23(1) of the ICAC Act provides:

- (1) For the purposes of an investigation, a Commissioner or an officer of the Commission authorised in writing by a Commissioner may, at any time:
 - (a) enter and inspect any premises occupied or used by a public authority or public official in that capacity, and
 - (b) inspect any document or other thing in or on the premises, and
 - (c) take copies of any document in or on the premises.

5.34 No authorities have been issued under s 23 of the ICAC Act authorising a Commission officer to enter premises occupied by a member of Parliament. Section 25(2) of the ICAC Act provides that the powers under s 23 of the ICAC Act shall not be exercised if it appears to a Commissioner or authorised officer that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist inspection of the premises or production of the document or other thing and it does not appear to the Commissioner or authorised officer that the person consents to the inspection or production.

5.35 Given this provision has not been used and the check on this power in s25 (2) should deter its use for members of parliament, the Commission does not consider that it is necessary to include in any MOU a procedure for dealing with claims of parliamentary privilege arising from any authorisations issued under s 23 of the ICAC Act.¹⁰³ The Committee cautiously agrees.

5.36 The submission from the ICAC also discusses the power under s35(1) of the Act to summon a person to appear at a public inquiry and give evidence. It is acknowledged that s122 (1) of the Act which provides the protection to parliamentary privilege could be relied upon by any witness asked to produce evidence related to parliamentary proceedings.¹⁰⁴ This has not been a significant issue to date.

¹⁰³ Submission 1, Independent Commission Against Corruption p 15-16.

¹⁰⁴ Submission 1, Independent Commission Against Corruption p 16.

Chapter 6 Remote searches and surveillance of members and staff by investigatory agencies

This chapter considers the term of reference for this inquiry which asks the committee to consider remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken. It includes a discussion of the way this issue has been addressed by the AFP in its revised Memorandum of Understanding with the Australian Parliament.

Background

- 6.1** The two earlier reports of the Privileges Committee in 2020 arising from the AFP search warrants executed on Mr Moselmane and his staffer Mr Zhang noted with some concern the media report that Mr Zhang was the subject of a search and seizure by the Australian Border Force (ABF) at Sydney airport in January 2020, without any notification being made to either the member, Mr Moselmane, or the Parliament.¹⁰⁵ While this is relevant to the issue considered in Chapter 2 of the current report in relation to the rights of a member to claim privilege over documents held by their staffer, it also raised the issue of covert surveillance by agencies which do not have an MOU with the NSW Parliament. Both covert surveillance and the specific instance of the ABF search were made terms of reference (f) and (g) respectively of the inquiry referred to this committee by the President.
- 6.2** In regard to the ABF, the Committee wrote to the Commissioner of the ABF on 14 December 2020. The correspondence has resulted in an informal response to the Clerk of the Parliaments on behalf of the agency but no written advice. At present the committee has not prioritised pursuing this issue, as the likelihood of privileged material being seized is not high. The more important aspect of the incident is what it reveals about the risks when searches are conducted that privileged material may be seized without a member even being aware they are the subject of a search.
- 6.3** The Clerk of the Parliaments in his submission noted a recent reported instance of covert surveillance allegedly undertaken by the Independent Commission Against Corruption (ICAC) – reported as photographs taken by “undercover surveillance officers” in the public areas of Parliament House in August 2017.¹⁰⁶ While noting that no permission is required to be present in the public spaces of the Parliament, the Clerk advised:

¹⁰⁵ Privileges Committee *Execution of search warrants by the Australian Federal Police* Report 80, October 2020, p23-25, *Execution of search warrants by the Australian Federal Police No. 2* Report 81 November 2020 p 15-16.

¹⁰⁶ “Secret ICAC Spy Op in Parliament” *The Daily Telegraph* 16/10/2020 p6-7, quoted in Submission 6, Clerk of the Parliaments Mr David Blunt, p 8.

I can confirm that neither I nor the Chief Executive of the Department of Parliamentary Services had any knowledge of such surveillance taking place or any permissions or courtesies extended by way of notification.¹⁰⁷

- 6.4 The Committee is not aware of the accuracy of the media report. Again it is referred to here as an illustration of the potential for covert searches to arise even in the parliamentary precincts.

Senate inquiries into covert surveillance

The Conroy inquiries

- 6.5 Of all the Australian parliaments the Australian Senate has in recent years been the most focused on the implications of current investigatory techniques and tools for protecting parliamentary privilege. Following two Senate Privileges Committee reports arising from the AFP's execution of search warrants relating to the NBN ("the Conroy matter")¹⁰⁸, a third report was tabled in March 2018 which addressed the issue of use of "intrusive" or covert powers and the potential threat to parliamentary privilege.¹⁰⁹
- 6.6 The inquiry which led to the report received submissions from a number of parliaments and from investigatory bodies, and noted that the concerns expressed by some parliaments did not appear to be shared by bodies such as the AFP, who argued that if members were not aware their details were being searched there could not be a "chilling effect" on parliamentary privilege or a disruption to the member, unlike the execution of a search warrant.¹¹⁰
- 6.7 The Senate Committee expressed particular concern about the use of meta data enabled by legislation such as the *Cybercrime Legislation Amendment Act 2012* and the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*:

While these amendments significantly enhanced the ability of law enforcement and intelligence agencies to access new sources of information, they made no particular provision for the protection of members of Parliament. This, in itself, is not unusual. The law of parliamentary privilege is of general operation and applies without being specifically acknowledged in individual laws. Nonetheless, this recent expansion of intrusive powers does raise questions regarding the adequacy of existing safeguards to protect the ability of members of Parliament to carry out their functions without possible improper interference.¹¹¹

¹⁰⁷ Submission 6, Clerk of the Parliaments, Mr David Blunt p8. Note: permission is required from the Presiding Officers currently for photographs to be taken in this area.

¹⁰⁸ Senate Committee of Privileges *Preliminary Report: Status of material seized under warrant* Report 163, December 2016, Senate Committee of Privileges *Search Warrants and the Senate* Report 164 March 2017.

¹⁰⁹ Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018.

¹¹⁰ Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018 p14.

¹¹¹ Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018, p17.

- 6.8** Although investigatory bodies argued that meta data searches are not content based, the report quotes a particularly alarming example from the UK where it was used to identify a whistleblower interacting with an MP:

One such case referred ... concerned the use of metadata in the investigation of a leak of information by a civil servant to Mr Damian Green MP, Member for Ashford. The investigation ultimately led to the arrest of Mr Green, and the importance of certain metadata in this case was a cause for concern for some members. Mr David Davis MP captured these concerns, telling the House of Commons:

The collection of metadata cripples whistleblowers, because it tells us precisely who has talked to whom, when and where. Metadata tracking led to the arrest of my right hon. friend the Member for Ashford. That area is material to the operation of holding the Government to account.¹¹²

- 6.9** Concluding that none of the existing oversight measures for use of metadata contain specific protections for parliamentary privilege, the Senate Committee expressed a strong need to address parliamentary privilege in protocols and other measures:

The lack of transparency in relation to metadata access presents a problem. To the extent that access by law enforcement and intelligence agencies to certain metadata might be said to have amounted to an improper interference with the free exercise by a House or committee of its authorities or functions, or with the free performance by a member of the member's duties as a member, then the access to this metadata could be dealt with as a potential contempt, even if such access was otherwise lawful. Yet as it stands, it is highly unlikely that information on the extent to which members of Parliament and their staff have been subjected to metadata access orders will be made public or otherwise made available to members of Parliament, let alone brought to the attention of members whose metadata may have been accessed.¹¹³

- 6.10** In the final chapter of the report the Committee acknowledged the importance of preserving the integrity of confidential investigations but that this had to be balanced in a way which provided some opportunity for a member, Presiding Officer or clerk to make a claim of parliamentary privilege when this was relevant. It concluded that the most effective way to achieve this was a re-negotiation of existing protocols with investigatory bodies such as the AFP to establish processes where parliamentary privilege can be considered.¹¹⁴

- 6.11** These issues were also canvassed in the Senate in another inquiry during 2018. In his submission to the inquiry the Clerk to the Senate, Mr Richard Pye, details a useful summary of many of the issues involved in covert surveillance that were contained in a submission made by Senate President The Hon Scott Ryan to an inquiry by the Joint Committee on Intelligence and Security into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill

¹¹² Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018, p 18.

¹¹³ Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018, p 19.

¹¹⁴ Senate Committee of Privileges *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018, p 29.

2018.¹¹⁵ The bill provided for the expansion of agencies' search, seizure and access powers. The President noted the difficulties some of the proposals raised:

the main issue with covert access in relation to privilege (whether through remotely accessing the device or concealing physical access to it) is that there would be no opportunity for a parliamentarian who considers that material is protected by privilege to raise such a claim. Similarly, while in some respects the amendments relate to existing powers, they are proposed to be exercisable by additional organisations that do not have MOU arrangements for the execution of warrants where parliamentary privilege may be engaged.

Unlike search warrants applying to premises, computer access warrants and warrants used to secure remote access to devices are not served on any party with an interest, if they are served at all. There is therefore no trigger for anyone within the parliamentary sphere to seek to raise privilege. Neither is there a clear path for the resolution of such claims if they are made. In that case, the Parliament has to rely on the agency seeking the warrant, and the authority approving it, to have proper regard to privilege. No-one within the parliamentary sphere is empowered to intervene. Clearly the purposes sought to be secured in the MOU and National Guideline are not met in the exercise of these powers. Although the bill does not create these difficulties, it extends them, at the same time as the Privileges Committees are seeking to rein them in.¹¹⁶

Senate resolution and a new 2021 AFP Guideline

- 6.12** Following the adoption of Report 168 of the Senate Privileges Committee the Senate subsequently on 6 December 2018 agreed to a resolution moved by the Leader of the Opposition Senator Wong declaring the rights of the Houses to uphold and determine claims of parliamentary privilege and called on the Attorney General to work with the Presiding Officers “to develop a new protocol for the execution of search warrants and the use by executive agencies of other intrusive powers”.¹¹⁷
- 6.13** In his submission to this inquiry, received on 13 April 2021, the Clerk of the Senate indicated the MOU with the AFP was being re-negotiated to establish ground rules for determining claims of parliamentary privilege against the exercise of broader executive investigative powers.¹¹⁸ Likewise, in their submission to this inquiry the AFP stated:

The MOU (and National Guideline) is currently under review following a resolution passed by the Senate on 19 December 2018.

Any revised MOU and accompanying guideline will likely result in changes to the scope of material covered by the current guidance documents, and may well alter the process of how claims of privilege may be made and resolved.¹¹⁹

- 6.14** As discussed in Chapter Four, this has resulted in a new Memorandum of Understanding being entered into between the Presiding Officers of the Commonwealth Parliament and the AFP in

¹¹⁵ Submission 9, The Clerk of the Senate, Mr Richard Pye, p 6.

¹¹⁶ Submission 9, Clerk of the Senate Mr Richard Pye, p 6.

¹¹⁷ Journals of the Senate, 6/12/2018 pp 4485-4486.

¹¹⁸ Submission 9, Clerk of the Senate Mr Richard Pye p 7.

¹¹⁹ Submission 3, Mr Reece Kershaw, Commissioner, Australian Federal Police p 1.

November 2021 , a revised Guideline (the 2021 Guideline) which updates and replaces the 2005 MOU.

- 6.15** The 2021 Guideline appears to address the issue of covert surveillance in three ways:
- Establishing a process around information held by a third party such as a cloud service provider (section 5.6)
 - Annual reporting to the privileges committees (section 6), and
 - Intention to further review and update the guideline in this area over the term of the next Federal Parliament (section 7).
- 6.16** In relation to section 5.6, information held by a third party, the AFP acknowledges that third parties such as a cloud service provider may hold material for which an issue of parliamentary privilege may arise, and so that generally the executing officer should obtain the information directly from the person for whom the third party is holding the information. However where the AFP Sensitive Investigation Oversight Board (SIOB) or Deputy Commissioner determines that this is likely to adversely impact on the investigation, the executing officer should notify the Presiding Officer, or if not available, the Clerk/Deputy Clerk, or Committee Chair, outlining the reasons why requesting information directly from the person rather than the third party is likely to have an adverse impact on the investigation.
- 6.17** Once the information is obtained from the third party the executing officer must inform members and their staff “as soon as practicable with regard to operational requirements” to ensure they have a reasonable opportunity to claim parliamentary privilege. Once a claim is made the quarantine procedure outlined in 5.4 of the 2021 Guideline must be followed, which involves secured evidence being delivered to the safekeeping of the Clerks.
- 6.18** In section 6 the AFP commits to making an annual confidential report to the privileges committee of each House to report on:
- Prospective or historical telecommunication data requests authorized in respect of a member or their staff
 - Surveillance device warrants granted or renewed in respect of a member or their staff
 - Telecommunications interception warrants granted or renewed in respect of a member or their staff.
- 6.19** This reporting will exclude data requests where the member is the victim or person requesting investigatory activity, for example when threats or abuse are made to a members’ office. The reporting will only describe the general offences and the number of instances in each category, because of what the AFP advises are the risks associated with providing detailed information about law enforcement investigations and use of covert powers as “there is a potential for adverse inferences to be drawn from this data”.
- 6.20** The reference to further review of procedures that govern telecommunications data, intercepts and surveillance device warrants in section 7 indicates that dealing with this issue is very much a work in progress.

Committee comment

- 6.21** The committee acknowledges this is a difficult issue, and welcomes the progress made by the AFP, the Senate and the House of Representatives in creating a framework for facilitating claims of parliamentary privilege. The issue of obtaining information from a third party, such as a cloud service provider, is very important. It is also relevant to other agencies that may execute search warrants on matters relating to the NSW Parliament.
- 6.22** As discussed in Chapter 4, the expectation of the AFP is that this 2021 Guideline would be used in any future investigation involving a member or member's staff in the NSW Parliament. One ambiguity however, is in relation to reporting. It is not clear whether the annual reporting in section 6 would extend to annual reporting to the respective privileges committees of the NSW Parliament, noting investigations of state members will be less frequent than of federal MPs. Unless the NSW Parliament enters into a specific MOU with the AFP, this could be addressed in the short term by the chairs of the privileges committees writing to the Commissioner to request that a reporting mechanism be established.

Recommendation 6

That the Chair of the Privileges Committee seek the agreement of the Chair of the Assembly Committee on Parliamentary Privilege and Ethics to write jointly to the Commissioner of the Australian Federal Police to request that the reporting provisions contained in section 6 of its 2021 Guideline be also applicable to the privileges committees of the NSW Parliament when the Australian Federal Police undertakes investigations of NSW parliamentarians or their staff.

- 6.23** The other notable gap in this framework is that it only covers one agency. There are several intelligence agencies authorised under federal legislation to make searches of metadata, albeit that the AFP is usually the agency used to execute search warrants on behalf of some of these other agencies. In the case of Mr Moselma the committee has no knowledge as to whether the execution of search warrants by the AFP was preceded by covert surveillance by federal agencies. The January 2020 detention of Mr Zhang by the Australian Border Force suggests other agencies may have had an interest in the matter.
- 6.24** The AFP 2021 Guideline, while very much a work in progress, should be a model for other agencies to follow when their investigations involve members of parliament, particularly when seeking information from third parties holding information relating to the member. This is an issue which needs to be watched closely by all Australian parliaments.

Appendix 1 Memorandum of understanding on the execution of search warrants in relation to a member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney-General and the Minister for Home Affairs

1 Preamble

This Memorandum of Understanding (**MOU**) records the understanding of the Attorney-General, the Minister for Home Affairs, the Speaker of the House of Representatives, and the President of the Senate on the process to be followed where the Australian Federal Police (the **AFP**) execute search warrants, in relation to a member of Federal Parliament (a **Member**).

This process is designed to ensure that law enforcement investigations are conducted without improperly interfering with the functioning of Parliament and that Members and their staff are given a proper opportunity to raise claims of parliamentary privilege in relation to material that is obtained through the execution of search warrants.

This MOU is to be read with the AFP National Guideline on Investigations where Parliamentary Privilege may be involved (the **Guideline**) at Annexure A to this MOU. The Guideline sets out procedures that the AFP will follow for the collection and quarantining of material that could be subject to privilege, and the processes for a Member or their staff to claim privilege. The parties to this MOU acknowledge that the MOU and Guideline are not intended to provide a shield to illegal activity. The Guideline is designed to ensure that the AFP can conduct investigations in a way that does not amount to a contempt of Parliament. It also allows Members to be confident that parliamentary privilege is being respected, and that they will have an opportunity to make a claim that material is protected by the privilege.

The parties to this MOU will seek to review and update this MOU and the Guideline to cover the AFP's covert investigative powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth) in relation to Members. This work will be conducted during the 47th Parliament.

2 Replacement of previous AFP Memorandum of Understanding

This MOU replaces the *Memorandum of Understanding on the execution of search warrants in the premises of Members of parliament between the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives, and the President of the Senate* signed by the Speaker of the House of Representatives on 2 March 2005 (the **2005 MOU**).

This MOU and the Guideline provide more detailed procedures and also provides additional requirements on training, oversight and reporting.

3 Background

In 2005, the Presiding Officers, together with the Attorney-General and the then Minister for Justice and Customs signed the 2005 MOU relating to the process for the AFP to follow when executing search warrants on the premises of Members. The agreed process was spelt out in the AFP's *National Guideline for the Execution of Search warrants where Parliamentary Privilege may be involved* (the **2005 AFP Guideline**), which was Annexure A to the 2005 MOU. The 2005 MOU remained in force until the commencement of this MOU.

On 6 December 2018, the Senate passed a resolution on parliamentary privilege (the **Resolution**). The Resolution noted and affirmed, amongst other matters, that the powers, privileges and immunities of the Senate and House of Representatives are secured through section 49 of the Constitution and include the traditional freedoms formulated in Article 9 of the Bill of Rights 1688 and declared in the *Parliamentary Privileges Act 1987* (**Parliamentary Privileges Act**).

The Minister for Home Affairs has portfolio responsibility for the AFP.

4 Parliamentary privilege

Nothing in this MOU or the Guideline can diminish, constrain or expand the scope of parliamentary privilege. In particular the parties note:

- (1) A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member, or over other material held by, or on behalf of a Member – such as digital records. Evidential material cannot be placed beyond the reach of the AFP simply because it is held by a Member or is on premises used or occupied by a Member.
- (2) However, it can be a contempt of Parliament for a person to improperly interfere with the free performance by a Member of the Member's duties as a Member. The Houses of Parliament have the power to imprison or fine people who commit contempt of Parliament.
- (3) Some of the principles of parliamentary privilege are set out in the *Parliamentary Privileges Act 1987*. They are designed to protect proceedings in Parliament from being questioned in the courts but they may also have the effect that documents and other things which attract parliamentary privilege cannot be seized under a search warrant.

Parliamentary privilege is part of the law of Australia and refers to the powers, privileges and immunities of the Houses of Parliament, Members and committees. An important aspect of that privilege is that material which forms part of 'proceedings in Parliament' ought not be impeached or questioned in any Court or place out of Parliament. As defined in section 16 of the Parliamentary Privileges Act, 'proceedings in Parliament' means all words spoken and acts done in the course of, or incidental to, the transacting of the business of a House or of a committee. 'Proceedings in Parliament' includes, but is not limited to, evidence given before a committee, material presented to a House or a committee, material created for the purposes of a House or committee and material created incidentally to the transaction of that business. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.¹ Under section 4 of the Parliamentary Privileges Act, conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

The AFP can execute search warrants on premises occupied by a Member and can exercise other powers involving a Member, in accordance with the law. Material is not beyond the reach of powers available to the AFP simply because it relates to, is held, or is accessed by a Member; or is on premises used or occupied by a Member. Equally however, the AFP must not improperly interfere with the free performance of a Member's duties. There may be some circumstances where the execution of a search warrant is impermissible because the act itself would amount to an improper interference with a House, a committee or a Member performing their duties. The attached Guideline details a set of procedures intended to ensure that law enforcement investigations do not improperly interfere with the business of Parliament or Members.

5 Execution of search warrants and parliamentary privilege

The execution of search warrants by the AFP is a legitimate criminal investigation methodology, however, like other statutory powers they are constrained by parliamentary privilege. Nevertheless, all parties to the MOU recognise that, subject to those constraints, the conduct of criminal investigations by the AFP is necessary in some cases to ensure the integrity of Parliament. However, under the Guideline it is open to any affected Member to make a claim for privilege, which may have the effect of constraining how information collected through the course of an AFP operation may be used, or may otherwise require that material's return or destruction. The agreed process is detailed in the Guideline. It establishes the procedures that AFP officers will follow when executing search warrants in relation to premises owned or used by, or material pertaining to, a Member. The Guideline is **Annexure A** to this MOU and sets out the following:

- The background to and purpose of the Guideline
- Oversight arrangements for investigations where parliamentary privilege may arise
- Training of law enforcement officers
- Execution of search warrants
- Reporting
- Review of the Guideline.

6 Distribution and availability of this MOU

This MOU will be tabled in the House of Representatives and the Senate by the Speaker of the House of Representatives and the President of the Senate respectively.

The MOU will be published as part of the AFP's Governance Framework, and will be made available on the AFP intranet.

The AFP will ensure AFP members who are involved in investigations under the Guideline are trained in its use.

7 Creation and variation of the National Guideline

The Guideline will be issued by Deputy Commissioner Investigations under section 37(1) of the *Australian Federal Police Act 1979* (Cth) as delegate of the Commissioner under section 69C of the Act.

The AFP will consult with the Speaker of the House of Representatives and the President of the Senate when varying the National Guideline.

8 Variation of this MOU

This MOU can be amended at any time by agreement of all the parties.

This MOU will continue to be in effect until any future agreement is signed by representatives of the Parliament and the Executive Government.

9 Revocation of agreement to this MOU

Any party to this MOU may revoke their agreement at any time. The other parties to this MOU must be notified in writing of the revocation.

10 Conflict Resolution

Any issues, difficulties or disagreements that arise in relation to the interpretation or operation of this MOU should be discussed, in the first instance, by the relevant parties. If required, the Minister for Home Affairs will raise issues arising with the Commissioner of the AFP.

11 Review of this MOU

This MOU will be reviewed by the parties, or otherwise by parties authorised by the Parliament and the Executive respectively, within 3 years of the signing of this MOU.

The parties to this MOU will continue to consider the AFP's use of covert powers where parliamentary privilege may be involved, with a view to reviewing and updating this MOU during the sitting of the 47th Parliament.

Appendix 2 AFP 2021 National Guideline on investigations where parliamentary privilege may be involved

1. Disclosure and compliance

This document is classified **OFFICIAL** and is intended for internal AFP use.

Disclosure of any content must comply with Commonwealth law and the [AFP National Guideline on information management](#).

This instrument is part of the AFP's professional standards framework. The [AFP Commissioner's Order on professional standards \(CO2\)](#) outlines the conduct expected of AFP appointees. Inappropriate departures from the provisions of this instrument may constitute a breach of AFP professional standards and be dealt with under Part V of the [Australian Federal Police Act 1979](#) (Cth).

2. Guideline authority

This guideline was issued by Deputy Commissioner Investigations using their power under section 37(1) of the [Australian Federal Police Act 1979](#) (Cth), as delegated by the Commissioner under section 69C of the Act.

3. Introduction

This guideline outlines the obligations of AFP appointees involved in law enforcement investigations where parliamentary privilege may be involved. It is designed to:

- ensure that AFP appointees conduct investigations in a way which does not amount to a contempt of parliament
 - *in other words, to ensure action taken in the course of an investigation does not amount to an improper interference with the functions of the Parliament, a parliamentary committee or a parliamentarian in the course of their duties or performance as a member*
- give an opportunity for claims of parliamentary privilege to be raised and resolved
- ensure that material subject to such claims is managed appropriately.

This guideline cannot prevent a claim of privilege being raised in a different manner, but it reflects an understanding, negotiated with the parliament, of how such claims will usually be raised and resolved.

3.1 Role of the AFP

The AFP recognises the importance of parliamentary privilege and not improperly interfering with the business of parliament. The AFP may need to investigate offences involving parliamentarians and their staff from time to time. The AFP, through this guideline, will ensure that parliamentary privilege is observed.

This guideline is designed to be read alongside [Attachment A: Memorandum of Understanding \(MOU\) between the Attorney-General, the Minister for Home Affairs, the Speaker of the House of Representatives and the President of the Senate](#).

Investigations oversight

The AFP Sensitive Investigation Oversight Board (SIOB), chaired by Deputy Commissioner Investigations, will oversee the investigations where parliamentary privilege may be involved unless the SIOB decides otherwise.

The SIOB provides strategic direction and management of designated sensitive investigations and ensures alignment of AFP capabilities and capacities to conduct sensitive investigations. The purpose of escalating particularly sensitive investigations to the SIOB is to enable the AFP senior executive to have direct awareness and oversight of the matter and, in some cases, to make certain operational and strategic decisions.

4.1 Training

The AFP will deliver online training on parliamentary privilege and the application of the MOU and this guideline to all AFP members. As part of any investigation that potentially involves parliamentary privilege, the lead investigator must ensure all officers involved, including constables assisting, are trained in the requirements of this guideline and their obligations, including not disclosing any details relating to the investigation outside of the investigations team. To inform a decision on an investigation where parliamentary privilege may be involved, investigators must consider this guideline.

5. Executing search warrants

This section outlines procedures that should be followed where the AFP proposes to execute a search warrant in relation to a person elected to a federal, state or territory parliament (a member) or their staff, or premises occupied or used by these individuals, including:

- office in the parliament, legislative assembly, house of assembly or legislative council
- electorate office
- residence of a member or their staff
- any other premises used by a member or their staff for private or official purposes on which there is reason to suspect that privileged material may be located
- any other premises not used or occupied by a member or their staff where the AFP suspects or is informed that documents on the premises may be subject to parliamentary privilege
- any other location where an individual claims that material is covered by parliamentary privilege.

5.1 Procedure prior to obtaining a search warrant

An AFP appointee who proposes to apply for a search warrant in respect of a person or premises listed above must seek approval through the SIOB before applying for the warrant unless there are circumstances of such seriousness or urgency and/or there is reasonable suspicion that evidence could be destroyed (for example, a crime scene). In these circumstances, verbal approval from a deputy commissioner (and subsequent approval of the SIOB) is appropriate.

If approval is given, the appointee may consult the office of the appropriate public prosecutor before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate office is the Commonwealth Director of Public Prosecutions. AFP Legal will provide assistance to draft and/or review the affidavit and warrant, as well as providing legal advice in relation to the execution of the warrant.

AFP appointees should follow the [Better Practice Guide on Crimes Act 1914 search warrants](#).

5.2 Procedure prior to executing a search warrant

The AFP should, unless a deputy commissioner or the SIOB determines that to do so would affect the integrity of the investigation, contact the member or a senior member of staff prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise any interference with the performance of the member's duties.

Additionally, a senior AFP appointee (commander or above) should:

- contact the relevant presiding officer before executing the search warrant and notify that officer of the proposed search or
- if a presiding officer is not available, contact the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee.

5.3 Procedure for executing the search warrant

Where possible, the executing officer should comply with the following procedures unless compliance would affect the integrity of the investigation:

- A search warrant should not be commenced on a sitting day unless otherwise agreed.
- A search warrant should be executed at a time when the member or a senior member of their staff will be available to be present.
- The member or their staff should be given reasonable time to consult the relevant presiding officer and/or a lawyer before the warrant is executed.

If the member or their staff is present when the search is conducted, the executing officer should ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any documents or other material.

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search. The executing officer should consider inviting the member or staff to identify where documents or other material that fall within the scope of the search warrant are located. When viewing electronic evidence, the executing officer should also consider strategies, for example key word searches, to find documents that meet conditions of the warrant rather than seizing entire drives or computers in the first instance. If relevant documents are identified, they should be transferred to another external storage device and secured along with other material.

5.4 Procedure if privilege is claimed or identified

The executing officer should follow this procedure if they identify that any material collected under the warrant might be subject to a claim of parliamentary privilege. It also applies if a claim of parliamentary privilege is made.

If a claim is made, the executing officer should ask the individual to identify the basis for the claim. The executing officer should make a diary note of this request and then follow the quarantine procedure outlined below.

The executing officer should advise the person making the claim of the following procedure to ensure that the relevant documents or other material are protected until the claim has been resolved.

Quarantine procedure:

1. The relevant material should be placed in secure audit bags in accordance with the [AFP National Guideline on property and exhibits](#).
2. A list of the exhibits will be prepared by the executing officer, with the member or their staff to provide particulars where required.
3. The member or their staff must be given an opportunity to take or be provided with copies of any documents or other material before they are secured. The copying should be done in the presence of the executing officer.
4. The secured exhibits should be delivered into the safekeeping of the Clerk or a person suitably identified by the presiding officers.
 - a. In circumstances where electronic devices are seized or moved and require further examination to retrieve information (for example from a computer hard drive), access to the devices can be facilitated by consultation between the AFP with the presiding officers (or clerk) and the relevant member, where appropriate. The timeframes for return to the owner will vary based on the investigation and will occur in consultation with the presiding officers and the relevant member. Information that is able to be retrieved should be transferred to a separate external storage device and secured consistent with quarantine procedures.
5. The member has ten business days (or other period agreed by the AFP and the member) from the delivery of the exhibits to the third party to notify the executing officer either that the claim for parliamentary privilege has been abandoned or confirm they intend to formally request the appropriate House consider whether the material seized is covered by parliamentary privilege. Such notification will be in writing.
6. When a member notifies the executing officer that they will seek a ruling on a claim of parliamentary privilege, the exhibits are to remain in the possession of the Clerk or a person suitably identified by the presiding officers until the disposition of the material is determined in accordance with the ruling.
7. If the member has not contacted the AFP within ten business days (or other period agreed by the AFP and the member), the AFP will be entitled to assume that the claim for parliamentary privilege has been abandoned. The AFP will take reasonable steps to confirm the claim is not being pursued, including attempting to seek that confirmation from the member. Following this, the Clerk or their nominee should deliver the material to the executing officer to proceed as required.

The executing officer may consider and agree to an alternative procedure, in consultation with the member or the presiding officer where circumstances require.

5.5 Obligations at the conclusion of a search

The executing officer must provide a receipt recording exhibits seized under the search warrant. If the member or their staff do not hold copies of the exhibits that have been seized, the receipt should contain sufficient particulars to enable the member to obtain further advice.

The executing officer should inform the member that to the greatest extent possible the AFP will provide or facilitate access

to the exhibits where such access is necessary for the performance of the member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

The AFP will comply with any law, including the requirements set out in the legislation under which the relevant search warrant was issued.

If material is relevant to an investigation and a claim of privilege is upheld, the AFP must, in accordance with disclosure guidelines, notify the prosecutor that material subject to parliamentary privilege has been quarantined. The prosecutor will then assess whether to advise the court and defence counsel.

If the relevant House determines that material is protected by parliamentary privilege, the AFP will not make any use of that material. If the AFP is in possession of material that is subject to an upheld privilege claim, the AFP will consult with the affected member to either return or destroy that material.

5.6 Information held by a third party

Where information is held by a third party and the third party is holding that information on behalf of a person – for example a cloud service provider – and the AFP is aware that an issue of parliamentary privilege may arise, the executing officer should request the information directly from the person for whom the third party is holding the information.

Where a deputy commissioner or the SIOB determines that this is likely to have an adverse impact on the investigation and information is to be sought from the third party, the executing officer should:

- notify the relevant presiding officer before executing the search warrant (If a presiding officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the chair (or if unavailable, the secretary) of that committee) and
- outline the reasons why requesting information directly from the person is likely to have an adverse impact on the investigation.

Members or their staff may make claims of parliamentary privilege in accordance with this guideline over material sought under warrant executed on a third party in this way. Once information is obtained from a third party, the executing officer must then inform members or their staff as soon as practicable with regard to operational requirements and ensure that they have a reasonable opportunity to claim parliamentary privilege in respect of any information obtained.

In addition, the disclosure of information by a third party to a parliamentarian for the purposes of assisting their parliamentary work may be protected by parliamentary privilege (in the same way that submission of evidence to a parliamentary committee is protected). If a third party claims information is protected by parliamentary privilege, the relevant parliamentarian should be given an opportunity to make that claim and, if a claim is made, the quarantine procedure outlined above should be followed.

6. Reporting

For the Commonwealth Parliament, the AFP will provide a confidential report to the relevant privileges committee and the relevant presiding officer annually on the number of instances in the last financial year where:

- prospective or historical telecommunication data requests are authorised in respect of a member or their staff
- surveillance device warrants are granted or renewed in respect of a member or their staff
- telecommunications interception warrants are granted or renewed in respect of a member or their staff.

The AFP will also provide a description of the general type of offences that are being investigated. There are risks associated with providing detailed information about law enforcement investigations and the use of covert powers as there is a potential for adverse inferences to be drawn from this data. Noting this, the AFP will only provide the number of instances in categories such as:

- 0
- 1–5
- 6–10
- 11–15.

In respect of telecommunications data, the AFP will not report data requests generated in response to investigations where the member or their staff is the victim or person requesting investigative activity, for example investigations into threats or abuse directed towards a member or their staff.

The AFP will only report on telecommunications data requests where it is known prior to the check being conducted that the person is a member or a staff member, and the investigative activity likely relates to their role as a member or staff member.

7. Review of this guideline

Note: Procedures to govern telecommunications data, telecommunications intercept and surveillance device warrants will be subject to further discussions to be conducted in the 47th Parliament, which may result in a further review and update of this guideline.

Otherwise, the guideline will be reviewed every three years.

8. Further advice

Queries about the content of this guideline should be referred to Commander Countering Foreign Interference and Special Investigations.

9. References

Relevant legislation

- *Australian Federal Police Act 1979* (Cth)
- *Australian Federal Police Regulations 1979* (Cth)
- *Parliamentary Privileges Act 1987* (Cth)

10. Shortened forms

AFP	Australian Federal Police
MOU	memorandum of understanding
SIOB	Sensitive Investigation Oversight Board

11. Definitions

A member is a person elected as a member of a parliament.

AFP appointee means a deputy commissioner, AFP employee, special member or special protective service officer and includes a person:

- engaged under section 35 of the AFP Act as a consultant or contractor to perform services for the AFP and determined under section 35(2) of the AFP Act to be an AFP appointee
- engaged overseas under section 69A of the AFP Act
- seconded to the AFP under section 69D of the AFP Act.

(See section 4 of the AFP Act.)

AFP member means a 'member of the Australian Federal Police' as defined in section 4 of the AFP Act and the [AFP Glossary](#).

Constables assisting means a person who is a constable and who is assisting in executing the warrant, or a person who is not a constable and who has been authorised by the relevant executing officer to assist in executing the warrant.

Clerk means:

- in the Senate, the incumbent person holding the office of Clerk of the Senate, appointed by the President of the Senate under section 58(1) of the *Parliamentary Service Act 1999*
- in the House of Representatives, the incumbent person holding the office of Clerk of the House of Representatives, appointed by the Speaker of the House under section 58(2) of the *Parliamentary Service Act 1999*
- or in state or territory jurisdictions, the equivalent position/role.

Houses means the Houses of Parliament: the Senate and the House of Representatives, or relevant state or territory house of assembly or legislative council.

Investigator is an AFP appointee responsible for, or involved in, a particular investigation.

Presiding Officer means:

- in the Senate, the incumbent senator holding the office of President of the Senate under section 17 of the Constitution
- in the House of Representatives, the incumbent member of the House of Representatives holding the office of Speaker of the House under section 35 of the Constitution
- or in state or territory jurisdictions, the equivalent position/role.

12. Attachments

Attachment A – Memorandum of Understanding between the Attorney-General, the Minister for Home Affairs, the Speaker of the House of Representatives and the President of the Senate on AFP investigations where parliamentary privilege may be involved.

Appendix 3 2014 Draft MoU with the ICAC



MEMORANDUM OF UNDERSTANDING
ON THE EXECUTION OF SEARCH WARRANTS
IN THE PREMISES OF
MEMBERS OF THE NEW SOUTH WALES PARLIAMENT
BETWEEN
THE COMMISSIONER OF THE INDEPENDENT COMMISSION
AGAINST CORRUPTION
THE PRESIDENT OF THE LEGISLATIVE COUNCIL
AND
THE SPEAKER OF THE LEGISLATIVE ASSEMBLY

1. Preamble

This Memorandum of Understanding records the understanding of the Commissioner of the Independent Commission Against Corruption (ICAC), the President of the Legislative Council and the Speaker of the Legislative Assembly on the process to be followed where the ICAC proposes to execute a search warrant on premises used or occupied by a member of the New South Wales Parliament, including the Parliament House office of a member, the ministerial office of a member, the electorate office of a member and the residence of a member.

The memorandum and associated processes are designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and so its members and their staff are given a proper opportunity to claim parliamentary privilege in relation to documents and things, including electronic documents, in their possession.

This memorandum replaces the previous memorandum entered into by the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly in December 2009.

2. Execution of Search Warrants

The agreed process for the execution of a search warrant by the ICAC over the premises used or occupied by a member is spelt out in the attached 'Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament'.

3. Promulgation of this Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the Parliament of New South Wales and the ICAC.

This Memorandum of Understanding will be tabled in the Legislative Council by the President and in the Legislative Assembly by the Speaker.

4. Variation of this Memorandum of Understanding

This Memorandum of Understanding can be amended at any time by the agreement of all the parties to the Memorandum.

The Commissioner of the ICAC will consult with the President of the Legislative Council and the Speaker of the Legislative Assembly in relation to any revision of this memorandum.

5. Term of this Memorandum of Understanding

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants on the premises of members of the New South Wales Parliament is concluded between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly or until this Memorandum of Understanding is revoked by a party.

6. Revocation of agreement to this Memorandum of Understanding

Any party to this Memorandum of Understanding may revoke their agreement to this Memorandum. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures

**The Honourable Megan Latham
Commissioner of the ICAC**

2014

**The Honourable Don Harwin MLC
President**

2014

**The Honourable Shelley Hancock MP
Speaker**

2014

PROCEDURES FOR THE EXECUTION OF SEARCH WARRANTS IN THE PREMISES OF MEMBERS OF THE NEW SOUTH WALES PARLIAMENT

1. Purpose of these procedures

These procedures are designed to ensure that officers of the ICAC execute search warrants on the premises of members of the New South Wales Parliament in a way which does not amount to a contempt of Parliament and which gives a proper opportunity to members to raise claims of parliamentary privilege in relation to documents and things¹, including electronic documents, that may be on the search premises.

2. Application of these procedures

These procedures apply, subject to any overriding law or legal requirement in a particular case, to the following premises used or occupied by a member:

- the Parliament House office of a member;
- the ministerial office of a member who is also a minister;
- the electorate office of a member; and
- any other premises used by a member for private or official purposes at which the ICAC has reason to suspect that material covered by parliamentary privilege may be located.

3. Parliamentary privilege

A valid search warrant may be executed over premises occupied or used by a member of the New South Wales Parliament, including the Parliament House office of a member, the ministerial office of a member who is also a minister, the electorate office of a member and the residence of a member. Evidential material cannot be placed beyond the reach of officers of the ICAC simply because it is held by a member or is on premises used or occupied by a member.

However, in executing a warrant on the office of a member of Parliament, care must be taken regarding any claim of parliamentary privilege. Under section 122 of the *Independent Commission Against Corruption Act 1988*, nothing in the Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Parliamentary privilege attaches to any documents and things, including electronic documents, which fall within the scope of 'proceedings in Parliament', as specified in Article 9 of the *Bill of Rights 1689*. Article 9 applies in New South Wales under the *Imperial Acts Application Act 1969*.

It is a contempt of Parliament for an officer of the ICAC or any person to improperly interfere with the free performance by a member of his or her parliamentary duties.

¹ The *Independent Commission Against Corruption Act 1988* refers to seizure of "documents or other things". The *Law Enforcement (Powers and Responsibilities) Act 2002* refers to "thing". 'Document' means 'any record of information'. See the definition of 'Document' in section 21 of the *Interpretation Act 1987*.

The scope of 'proceedings in Parliament' is not defined in legislation. In general terms, the phrase is taken to mean all words spoken or acts done by a member in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee of Parliament.

In the context of the execution of a search warrant on the premises of a member, documents or things in the possession of members that may fall within the scope of 'proceedings in Parliament' may include notes, draft speeches and questions prepared by the member for use in Parliament, correspondence received by the member from constituents if the member has raised or is seeking to raise the constituent's issues in the House, correspondence prepared by the member again if the member has or is seeking to raise the issue in the House, and submissions and other material provided to the member as part of his or her participation in committee inquiries.

Things that are unlikely to be captured within the scope of 'proceedings in Parliament' include a member's travel documentation and political party material.

In some cases the question of whether a document or thing constitutes 'proceedings in Parliament' will turn on what has been done with the document or thing, or what the member intends to do with it, rather than what it contains or where it was found.

4. Procedure prior to obtaining a search warrant

No officer of the ICAC is to apply for a search warrant in respect of premises used or occupied by a member without first obtaining the approval of the Commissioner or, in the absence of the Commissioner, the Deputy Commissioner.

Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of documents or things than is necessary to advance the relevant investigation.

5. Execution of a warrant on the Parliament House Office of a member

The following procedures are to be observed in relation to the executing of a warrant on the Parliament House Office of a member:

- a) A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Deputy Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
- b) The Executive Director, Legal will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
- c) The Presiding Officer, Clerk, Deputy Clerk and Executive Manager, Parliamentary Services (or the Deputy Executive Manager) should not advise the member or the

member's staff that officers of the ICAC intend to execute a search warrant unless the Executive Director, Legal has agreed to such advice being given.

- d) To minimise the potential interference with the performance of the member's duties the Search Team Leader should consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
- e) The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to parliamentary privilege at the time of execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.
- f) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
- g) On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the member's office and the relevance of those documents and things to the investigation.
- h) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.
- i) The Search Team Leader, apart from sighting the items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph j) below, should not seek to access, read or seize the items.
- j) Items over which parliamentary privilege is claimed should be placed in a Property container or bag. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.
- k) The Search Team Leader should request the Clerk to secure and take custody of any items over which a claim for parliamentary privilege has been made. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.
- l) At the conclusion of the search the Search Team Leader should provide a receipt recording the items seized to the member or, in the absence of the member, the most senior staff member present. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.
- m) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

- n) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.
- o) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.
- p) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.
- q) Any document or thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.
- r) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

6. Execution of a warrant on premises used or occupied by a member (not being at Parliament House)

The following procedures are to be observed in relation to the executing of a warrant on premises used or occupied by a member, not being an office at Parliament House:

- a) A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Deputy Commissioner or, in their absence, the Executive Director Investigation Division is satisfied that compliance with this restriction would affect the integrity of the investigation.
- b) The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is

not available the Search Team Leader will notify the Clerk or Deputy Clerk. The purpose of this contact is to facilitate timely and informed claims of privilege to be made. Where the Search Team Leader advises the Presiding Officer (or Clerk or Deputy Clerk) that the integrity of the investigation would be affected by notifying the member in advance of the intention to execute a search warrant, the Presiding Officer and other parliamentary officers informed about the search warrant will not advise the member or the member's staff that officers of the ICAC intend to execute a search warrant.

- c) To minimise the potential interference with the performance of the member's duties the Search Team Leader should consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant.
- d) The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to parliamentary privilege at the time of the execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.
- e) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
- f) On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the premises and the relevance of those documents and things to the investigation.
- g) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.
- h) The Search Team Leader, apart from sighting items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph i) below, should not seek to access, read or seize the items.
- i) Items over which parliamentary privilege is claimed should be placed in a Property container or bag sealed by the Search Team Leader. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.
- j) At the conclusion of the search the Search Team Leader should provide a receipt to the member or, in the absence of the member, the occupier of the premises, recording the items seized. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.
- k) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

- l) The Search Team Leader should deliver the sealed Property container or bag containing any items over which parliamentary privilege is claimed to the Clerk of the House. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.
- m) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.
- n) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.
- o) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.
- p) Any document and thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.
- q) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

7. Member not had opportunity to make a claim before items seized

This section of the Memorandum of Understanding applies where the ICAC has complied with its relevant obligations in sections 5 or 6 of this Memorandum of Understanding, as the case may be.

No ICAC officer will seize any document or thing which it is clear to the officer is subject to parliamentary privilege.

The following procedures are to be observed where the member was not present at the execution of a search warrant and, as a consequence, has not had an opportunity to consider making a claim of parliamentary privilege over any of the items seized:

- a) If the member wishes to make a claim for parliamentary privilege with respect to any item seized the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the seizure and provide a list of the items over which the claim is made.
- b) For those items where the ICAC does not object to the claim, the ICAC will return the items in accordance with the return instructions of the occupier.
- c) For those items where the ICAC objects to the claim, the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

8. Removal of things from premises for examination to determine whether they should be seized

Sections 5, 6 and 7 of this Memorandum of Understanding concern situations where the ICAC officers executing the search warrant seize documents or things during the execution of the search warrant. This section concerns the situation where the ICAC officers executing the search warrant decide to remove documents or things not clearly protected by parliamentary privilege for examination to determine whether or not they contain material that may be seized under the search warrant. This section also sets out how claims of parliamentary privilege over such documents or things will be dealt with.

Section 75A(1)(c) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides that a person executing or assisting in the execution of a search warrant may move a thing found at the premises, to another place (for up to seven working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if:

- (i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
- (ii) there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

Section 75A(2) of LEPRA provides that if a thing is removed to another place for examination an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding seven working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant. The eligible issuing officer may only authorise the removal of a thing for a period exceeding a total of 28 days if satisfied that it is justified on the basis that there are exceptional circumstances in the case.

Section 75A(3) of LEPRA provides that, in respect of an application for an additional period, the person executing the warrant must advise the occupier that the occupier may make submissions to the eligible issuing officer on the matter and is to give the occupier a reasonable opportunity to do so.

Except as provided below, no ICAC officer will remove for examination anything which it is clear to the officer is subject to parliamentary privilege.

Where an ICAC officer wishes to remove a thing for examination and that thing is subject to a claim of parliamentary privilege the thing may only be moved to the custody of the Clerk.

Where a thing is subject to a claim of parliamentary privilege it will be dealt with in accordance with section 5 or section 6 of this Memorandum of Understanding, as relevant.

No ICAC officer will remove for examination a thing from the Parliament House office of a member or other premises used or occupied by a member unless the ICAC has complied with its relevant obligations in section 5 or section 6 of this Memorandum of Understanding, as relevant. The following procedures are to be observed where a person executing or assisting in the execution of a search warrant on premises used or occupied by a member exercises the power under LEPR to remove from the premises a thing (which has not been identified by the person as subject to parliamentary privilege or is not at the time the subject of a claim of parliamentary privilege) for the purpose of examination and the member subsequently wishes to consider whether to make a claim of parliamentary privilege or wishes to claim parliamentary privilege with respect to the thing or part of the contents of the thing.

Member requires time to consider making a claim of parliamentary privilege

- a) If the member needs to consider whether to make a claim for parliamentary privilege with respect to the thing or any of the contents of the thing, the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the removal of the thing. The ICAC will not use the document or thing or any of the contents of the document or thing until the expiry of that working day.
- b) If the member needs to identify the contents of the thing in order to determine whether to make a claim, the ICAC will provide the member with a list of the contents of the thing or the nature of the contents of the thing.
- c) If the ICAC is advised by the member that the member is considering making a claim of parliamentary privilege the ICAC will not use the thing or any of the contents of the thing until after whichever of the following first occurs:
 - (i) one working day from the member's advice; or
 - (ii) if a list is provided under paragraph b) above, after one working day from the provision of that list; or
 - (iii) the member has advised the ICAC Executive Director Legal or other person nominated by the ICAC that no claim of parliamentary privilege is to be made.
- d) Where the member decides to claim parliamentary privilege the member will provide the ICAC Executive Director Legal or other person nominated by the ICAC with a list of the things or subject matter over which the claim is made. The matter will then be dealt in accordance with paragraphs f) to i) below.

Member makes a claim of parliamentary privilege

- e) Where the member does not require time to consider whether to make a claim for parliamentary privilege, the member will, within one working day from the removal of the thing, notify the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal that the member claims parliamentary privilege with respect to the thing or part of the contents of the thing. In the event the claim relates to part of the contents of the thing, the member will provide the ICAC with a list of the items or subject matter over which the claim is made.
- f) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC does not object to the claim, the ICAC will return the thing in accordance with the return instructions of the occupier.
- g) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.
- h) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC does not object to the claim, the ICAC will either return those contents in accordance with the return instructions of the occupier or, if it is not possible to separate the contents from the whole thing, will ensure that those contents the subject to the claim are not used by the ICAC in the event that the thing is seized under the warrant.
- i) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

ICAC seeks authorisation for additional period

- j) If the ICAC seeks authorisation under section 75A(2) of LEPRA for an additional period (which must not exceed seven working days at any one time), the ICAC officer who executed the warrant will notify the occupier of the premises of the application so that the occupier has a reasonable opportunity to make submissions to the eligible issuing officer on the matter.

ICAC decides to seize the document or thing

- k) If, after examining the thing, the ICAC decides to seize the thing under the search warrant, the ICAC will provide a receipt for the thing to the occupier of the premises from which the thing was taken.

Appendix 4 Submissions

No.	Author
1	NSW Independent Commission Against Corruption
2	The Clerk of the House of Representatives, New Zealand
3	The Australian Federal Police
4	The House of Lords, United Kingdom
5	The House of Commons, United Kingdom
6	The Clerk of the Parliaments
7	The Clerk of the House of Representatives
8	The Clerk of the Parliament, Queensland
9	The Clerk of the Senate

Appendix 5 Minutes

Minutes no. 14

Wednesday 9 December 2020

Privileges Committee

Room 814/815, Parliament House, Sydney, 12.30 pm

1. Members present

Mr Primrose(Chair)

Mr Donnelly

Mr Khan

Mrs Maclaren-Jones

Mr Mason-Cox

Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore and Noora Hijazi.

2. Apologies

Ms Faehrmann

Revd Mr Nile.

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 13 be confirmed.

4. Inquiry into the proposal for a Compliance Officer for the NSW Parliament

4.1 Terms of reference

The committee noted the following terms of reference adopted by the House on 17 November 2020. The committee additionally noted that a similar terms of reference has been sent to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.

- (1) The Privileges Committee review the following proposed resolution for the establishment of a Parliamentary Compliance Officer, as brought forward by the President, in the same terms as the proposal brought forward by the Speaker in the Legislative Assembly:

Proposed resolution to establish a position of Compliance Officer

(1) Establishment of position

That this House directs the President to join with the Speaker to make arrangements for the establishment of the position of Compliance Officer, to expeditiously and confidentially deal with low level, minor misconduct matters so as to protect the institution of Parliament, all members and staff.

(2) Functions of position

The Compliance Officer shall have the following functions:

- (a) Receive and investigate complaints

The Compliance Officer may receive and investigate complaints confidentially in relation to alleged breaches of the members' code of conduct, not related to conduct in proceedings of the Legislative Council or Legislative Assembly or their committees, including:

- (i) misuse of allowances and entitlements,
(ii) other less serious misconduct matters falling short of corrupt conduct,

- (iii) allegations of bullying, harassment and other types of grievances,
 - (iv) minor breaches of the pecuniary interests disclosure scheme.
- (b) Monitoring Code of Conduct for Members
- The Compliance Officer shall monitor the operation of the Code of Conduct for Members, the Constitution (Disclosures by Members) Regulation 1983 and the members' entitlements system, and provide advice about reform to the Privileges Committee as required.
- (c) Educational presentations
- The Compliance Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.
- (d) Informal advisory services
- A member or the parliamentary administration may seek confidential advice on a matter of interpretation of the Members' Entitlements scheme, for the purposes of resolving any disagreements.

(3) Amendment of the Code of Conduct for Members

The Members' Code of Conduct is amended by the addition of the following paragraph:

"Clause 10

Members must treat their staff and each other and all those working for Parliament in a manner compatible with a safe workplace, free from harassment.

Commentary

Section 22(b) of the Anti-Discrimination Act 1977 makes it an offence for a member to sexually harass a workplace participant or another member in the workplace, or for a workplace participant to sexually harass a member."

(4) Term of appointment

- (a) Appointment by Presiding Officers
- The Presiding Officers shall appoint a Compliance Officer within three months of the mid-term point of each Parliament, or whenever the position becomes vacant, for the remainder of that Parliament and until the mid-term point of the following Parliament. The proposed appointment must have the support of the Privileges Committee in each House. An appointment may be extended for a period of up to six months so as to ensure there is no period in which there is no person holding the position.
- (b) Dismissal
- The Compliance Officer may only be dismissed by the Chief Executive Officer of the Department of Parliamentary Services with the consent of the President and Speaker.

(5) Complaints investigations

- (a) Protocol
- The Compliance Officer shall, within three months of his or her appointment, develop a protocol to be approved by the Privileges Committee and tabled in the House by the President, outlining how complaints may be received, the manner and method by which complaints will be assessed and investigated, the definition of low level, minor misconduct, and arrangements for the referral of matters between the Compliance Officer and the Independent Commission Against Corruption and other relevant

bodies, subject to relevant legislation (including section 122 of the Independent Commission Against Corruption Act).

(b) Investigatory report to the House

Where the Compliance Officer considers that there has been a misuse of an allowance or entitlement, the Compliance Officer may order repayment of funds misused. Where the Compliance Officer considers that a member has otherwise breached the Members' Code of Conduct, the Compliance Officer may recommend corrective action.

Subject to (c) below, the Compliance Officer will make a report to the House if, and only if, the member does not comply with the order or accept the recommendation as the case may be, and the complainant consents to the making of a report.

(c) Minor breach

Where the Compliance Officer investigates a matter and finds that a member has breached the Code or Regulations, but in his or her opinion considers the breach to have been minor or inadvertent and the member concerned has taken such action to rectify the breach, including the making of appropriate financial reimbursement, the Compliance Officer shall advise in writing the member and the complainant of the finding and the action taken by the member. No report to a House is required in this circumstance.

(d) Declines to investigate

If the Compliance Officer receives a complaint but upon assessment declines to investigate the matter, or upon investigation finds no evidence or insufficient evidence to substantiate a breach of the Code of Conduct for Members or the Constitution (Disclosure by Members) Regulation, the Compliance Officer shall advise in writing the member and the complainant of the decision. No report to a House is required in this circumstance.

(e) Expert assistance

The Compliance Officer may engage the services of persons to assist with or perform services for the Compliance Officer, including in the conduct of an investigation, within budget.

(6) Powers of the Compliance Officer

The Compliance Officer shall have power to call for the production of relevant documents and other records from members and officers of the Parliament.

Members, their staff and parliamentary officers are required to reasonably cooperate at all stages with the Compliance Officer's inquiries including giving a full, truthful and prompt account of the matters giving rise to a complaint.

The Compliance Officer may report any failure to comply with these provisions to the President, for determination of the matter by the House.

(7) Keeping of record

The Compliance Officer shall be required to keep records of advice given and the factual information upon which it is based, complaints received and investigations. The records of the Compliance Officer are to be regarded as records of the House and are not to be made public without the prior approval of the Compliance Officer and resolution of the House, except for the referral of information between the Compliance Officer and other relevant authorities in accordance with paragraph 12 of the protocol or where the member requests that the records be made public.

(8) Reports to Parliament

In addition to reports on investigations, the Compliance Officer shall be required to report to the Parliament annually on the performance of his or her functions including the number of members who sought advice, the number and types of complaints received and the number of investigations undertaken and the findings of those investigations. All reports from the Compliance Officer are to be tabled by the President on the next sitting day after receipt.

(9) Annual meeting with relevant committees

The Compliance Officer is to meet annually with the Privileges Committee of the House.

The committee noted Chapter 4 of the Privileges Committee report Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator June 2014, which recommended the appointment of what is now proposed to be a parliamentary compliance officer.

4.2 Submissions

Resolved on the motion of Mrs Maclaren-Jones:

1. That the committee invite joint submissions with the Legislative Assembly Privileges Committee from the following:
 - Independent Commission Against Corruption
 - Members of the Legislative Council
 - Clerk of the Parliaments (LC committee) Clerk of the Legislative Assembly (LA Committee)
 - Ethics Adviser
 - Auditor-General
 - Ombudsman
 - Standards Commissioner UK
 - ACT Legislative Assembly Standards Commissioner
 - Parliament of Victoria
 - PSA, Media Entertainment and Arts Alliance (MEAA) and United Services Union.
2. That members nominate any additional stakeholders within 48 hours of this meeting.

The committee noted that submissions would also be received from other individuals consistent with general committee practice. The committee noted that the resolution establishing the Privileges Committee does not allow for the committee to deal with individual grievances.

4.3 Timeline

Resolved on the motion of Mrs Maclaren-Jones: That the committee adopt the following inquiry timeline:

- Submissions close: 3 February 2021
- Half day hearing: 10 February 2021
- Report deliberative: Sitting week of 16-18 March 2021
- Report tabled: Week of 23-25 March 2021.

5. Inquiry into the execution of search warrants by the Australian Federal Police No. 3

5.1 Terms of reference

The committee noted the following terms of reference adopted by the House on 19 November 2020:

- (1) That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:
 - (a) the rights available to a staffer to make a claim of privilege over documents,
 - (b) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,

- (c) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege
 - (d) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
 - (e) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
 - (f) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
 - (g) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
 - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
 - (i) any other related matter.
- (2) That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.

5.2 Submissions

Terms of reference (a) – (d)

Resolved on the motion of Mr Donnelly:

1. That submissions be invited from:
 - Members of the Legislative Council
 - Clerks of Australian, NZ and UK Parliaments
 - Relevant legal academics (Twomey, Lindell, Williams)
 - Law Society of New South Wales
 - NSW Bar Association
 - The AFP (only in relation to (d))
 - PSA, Media Entertainment and Arts Alliance (MEAA) and United Services Union.
2. That committee members nominate any additional stakeholders within 48 hours.

Terms of reference (e)

1. That submissions be invited from:
 - Members of the Legislative Council
 - The ICAC
 - Ethics Adviser
 - Clerk of the Parliaments.
2. That committee members nominate any additional stakeholders within 48 hours.

Terms of reference (f)

Invite submissions once committee has reported on (a) – (d).

Terms of reference (g)

That to pursue terms of reference (g), the Chair write to the President requesting him to write to the Commissioner of the Australian Border Force seeking details of how parliamentary privilege issues were considered during the alleged seizure of material and detention of Mr John Zhang on 28 January 2020.

5.3 Timeline

Resolved on the motion of Mr Donnelly: That submissions be given a deadline of 12 March 2020.

6. Adjournment

The committee adjourned at 12.49 pm *sine die*.

Steven Reynolds
Committee Clerk

Minutes no. 15

Thursday 18 February 2021

Privileges Committee

Room 1136, Parliament House, Sydney, 1.37 pm

1. Members present

Mr Primrose (*Chair*)
Revd Mr Nile (*Deputy Chair*)
Mr Donnelly
Ms Faehrmann
Mr Khan
Mrs Maclaren-Jones
Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay and Noora Hijazi.

2. Apologies

Mr Mason-Cox.

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 14 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 31 December 2020 – Email from Professor Geoffrey Lindell, Emeritus Professor of Law, University of Adelaide to Privileges Committee, declining the invitation to make a submission to the inquiry into the proposal for a Compliance Officer for the NSW Parliament.
- 23 December 2020 – Letter from Office of the Commissioner of the Australian Border Force to the President of the Legislative Council, confirming receipt of correspondence from the President dated 18 December 2020.
- 18 December 2020 – Letter from Mr Stephen Stanton to the Chair, advising on behalf of the Honourable Shaoquett Moselmane MLC that a search warrant was executed on the McKell Room, Parliament House on Tuesday 15 December 2020.
- 17 December 2020 – Letter from Mr Dennis Miralis to the Clerk of the Parliaments providing documents on behalf of Mr John Zhang.
- 8 February 2021 – Letter from the President to the Chair, forwarding a request for a citizen's right of reply from Ms Kathryn Jurd, General Counsel, RSPCA.

Sent:

- 14 December 2020 – Letter from the Chair to the President of the Legislative Council, requesting that the President write to the Commissioner of the Australian Border Force to seek clarification of a number of issues.
- 18 December 2020 – Letter from the President of the Legislative Council to the Commissioner of the Australian Border Force, seeking clarification of a number of issues.

5. Inquiry into the proposal for a Compliance Officer for the NSW Parliament

5.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1 to 7.

5.2 Inquiry timeline

Resolved, on the motion of Revd Mr Nile:

- (a) That the Chair prepare a draft report with recommendations presented as options, based upon the matters raised in submissions to the inquiry.
- (b) That following consideration of the Chair's draft report the committee consider whether it will be necessary to gather additional evidence via a hearing process to finalise recommendations.

6. Inquiry into the execution of search warrants by the Australian Federal Police No. 3

6.1 Execution of search warrant on 15 December 2020

The committee clerk briefed the committee on the execution of a search warrant on the McKell Room in NSW Parliament on 15 December 2020.

7. Request for a citizen's right of reply

The committee considered a request for a citizen's right of reply forwarded by the President from the RSPCA.

Resolved, on the motion of Ms Faehrmann:

- (a) That the Chair prepare and submit a draft report on the request for a citizen's right of reply by Ms Kathryn Jurd, General Counsel, RSPCA, recommending that a response by the RSPCA in a form of words agreed to by the RSPCA and the Committee be incorporated in Hansard.
- (b) That the report be adopted.
- (c) That the report be signed by the Chair and presented to the House.
- (d) That the Clerk advise the RSPCA and Mr Pearson of the proposed tabling of the report.

8. New app-based ethics resources

The committee considered electronic content developed by EdApp for the purposes of an e-learning resource for members on the new Members' Code of Conduct.

The committee endorsed the content, and undertook to provide any additional comments to the clerk to the committee as a matter of priority.

9. Adjournment

The committee adjourned at 2.00 pm *sine die*.

Steven Reynolds
Committee Clerk

Minutes no. 17

Thursday 6 May 2021 Privileges Committee
Room 1136, Parliament House, Sydney, 1.30 pm

1. Members present

Mr Primrose (*Chair*)
Revd Mr Nile (*Deputy Chair*)
Mr Donnelly
Ms Faehrmann
Mr Khan
Mrs Maclaren-Jones
Mrs Ward.

In attendance: Steven Reynolds, Jenelle Moore and Laura Ismay.

2. Apologies

Ms Faehrmann

3. Draft minutes

Resolved, on the motion of Reverend Nile: That draft minutes no. 16 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 26 April 2021 – Letter from Michael Outram APM, Commissioner, Australian Border Force, to the Clerk of the Parliaments, confirming that the Commonwealth is making arrangements to assist the Privileges Committee in its third inquiry into the execution of search warrants by the Australian Federal Police.

The committee noted that it was open to assistance from the Commonwealth as part of its third inquiry into the execution of search warrants by the Australian Federal Police.

5. Inquiry into the execution of search warrants by the Australian Federal Police No. 3**5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2 to 9.

5.2 Partially confidential submissions – as identified by the secretariat

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 1 with the exception of other identifying information, which is to remain confidential, as per the recommendation of the secretariat.

6. Inquiry into the proposal for a Compliance Officer for the NSW Parliament**6.1 Further consideration of Chair's draft report**

The Chair submitted his draft report entitled Proposal for a Compliance Officer for NSW Parliament and draft foreword, which having been previously circulated, was taken as read.

Resolved, on the motion of Reverend Mr Nile: That paragraph 2.8 be amended by inserting after the final dot point:

- 'Review of policies and procedures for Ministerial offices – bullying, harassment, and sexual misconduct, by the Hon Pru Goward, 19 April 2020'

Resolved, on the motion of Mr Donnelly: That paragraph 4.9 be amended by omitting 'This is unlikely to change'.

Resolved, on the motion of Mrs Ward: That:

The draft report as amended be the report of the committee and that the committee present the report to the House;

The submissions and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished submissions and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee.

7. Report tabling

The Chair advised the committee that the report would be tabled on Tuesday, 11 May 2021.

8. Media release

The Chair advised the committee that a media release would be issued on tabling of the report.

9. Adjournment

The committee adjourned at 2.12 pm, *sine die*.

Steven Reynolds
Committee Clerk

Draft Minutes no. 38

Monday 15 November 2022

Privileges Committee

Room 1136 at 10.30 am

1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Barrett (substituting for Mr Fang) (*via Webex* from 11.00 am, in person from 11.29 am)

Ms Boyd (substituting for Ms Faehrmann)

Mr Donnelly

Mrs MacDonald *via Webex* (substituting for Mr Farlow)

Mr Mallard

Mr Martin.

In attendance: Steven Reynolds, Jenelle Moore, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes nos 36 and 37 be confirmed.

3. Correspondence

Nil.

4. Circulation of Chair's draft reports

The committee noted that it had previously agreed via email that the Chair's draft reports relating to those inquiries listed for consideration at this meeting would be circulated less than 7 days prior to the report deliberative.

5. Annual report of the Parliamentary Ethics Adviser 2021-2022

The Chair welcomed Mr John Evans PSM, Parliamentary Ethics Adviser, to the meeting.

Mr Evans briefed the committee on his 2021-2022 annual report.

Mr Evans left the meeting at 10.48 am.

6. Protocol for an Independent Complaints Officer

The Clerk circulated a draft revised protocol containing minor changes recommended by the Parliamentary Ethics Adviser.

The Independent Complaints Officer briefed the committee on the revised proposed protocol, taking into account feedback received from the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and the Parliamentary Ethics Adviser.

The committee deliberated.

Resolved, on the motion of Revd Mr Nile: That:

- (a) the committee clerk be authorised to meet with the clerk to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to resolve any differences in terms proposed by the two committees, and recirculate the final version,
- (b) the committee agree to the revised protocol, pending any minor alterations arising from the procedure proposed above, and
- (c) the Chair table the protocol in the House on the next sitting day.

7. Members Code of Conduct

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Mr Mallard: That:

- (a) draft report be the report of the committee and that the committee chair present the report to the House,
- (b) the correspondence relating to the inquiry be tabled in the House with the report,
- (c) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling,
- (d) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee, and
- (e) following tabling of the report the chair write to the Chief Commissioner of the ICAC to indicate that Chapter three of the report represents the committee's response to the recommendations of the Commission's report into the Member for Drummoyne.

8. Inquiry into execution of search warrants by the Australian Federal Police (No. 3)

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Revd Mr Nile: That:

- (a) the draft report be the report of the committee and that the committee chair present the report to the House,
- (b) the submissions and correspondence relating to the inquiry be tabled in the House with the report,
- (c) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling,
- (d) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee,

- (e) following tabling of the report the Chair write to the Chief Commissioner of the ICAC and the President to pursue the recommendations relating to a revised Memorandum of Understanding regarding execution of search warrants, and
- (f) following the tabling of the report the Chair write to the Commissioner of the Australian Federal Police to confirm the understanding that any future search warrants executed on NSW members or their staffers will follow the AFP's 2021 guideline, and
- (g) following the tabling of the report the Chair write to the Senate Committee on Privileges to forward a copy of the committee's report for consideration.

9. Special report no. 14 of the Public Accountability Committee

The committee considered the a discussion paper prepared by the Chair, previously circulated.

Resolved, on the motion of Ms Boyd: That the discussion paper be amended to note the chilling effect that disclosure of in camera evidence can have on the willingness of inquiry participants to give evidence to an inquiry and their safety in providing sensitive or incriminating evidence to a committee.

Resolved, on the motion of Mr Donnelly: That:

- (a) the Clerk of the Parliaments be invited to make a submission to the inquiry, and
- (b) following receipt of the submission from the Clerk of the Parliaments, the committee determine its views as to the questions raised in the discussion paper prior to deciding on further action or requesting the Chair to prepare a report.

10. Adjournment

The committee adjourned at 12.03 pm, *sine die*.

Steven Reynolds
Committee Clerk