



LEGISLATIVE ASSEMBLY

STANDING COMMITTEE ON PARLIAMENTARY  
PRIVILEGE AND ETHICS

INQUIRY INTO THE REVISED MEMORANDUM OF  
UNDERSTANDING BETWEEN THE PRESIDING OFFICERS AND  
THE COMMISSIONER OF THE INDEPENDENT COMMISSION  
AGAINST CORRUPTION

REPORT 3/55 – NOVEMBER 2014

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Assembly. Standing Committee on Parliamentary Privilege and Ethics.**

Inquiry into the Revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption / Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics [Sydney, N.S.W.] : the Committee, 2014. (Report no. 3/55 Standing Committee on Parliamentary Privilege and Ethics)

“November 2014”.

Chair: John Sidoti, MP.

ISBN 9781921686993

1. Corruption investigation—New South Wales.
2. New South Wales. Parliament—Officials and employees.
3. New South Wales. Parliament—Ethics.
4. Financial disclosure—New South Wales.
5. Political ethics—New South Wales.
6. Legislators—New South Wales.
7. Parliamentary practice—New South Wales.
  - I. Sidoti, John.
  - II. Title.
- III. Series: New South Wales. Parliament. Legislative Assembly. Standing Committee on Parliamentary Privilege and Ethics. Report ; no. 3/55

(328.944 DDC22)

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

# Membership

CHAIR	John Sidoti MP, Member for Drummoyne
DEPUTY CHAIR	Kevin Anderson MP, Member for Tamworth
MEMBERS	Glenn Brookes MP, Member for East Hills Chris Patterson MP, Member for Camden Andrew Rohan MP, Member for Smithfield Guy Zangari MP, Member for Fairfield
CONTACT DETAILS	Committee on Parliamentary Privilege and Ethics Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	(02) 9230 2225
FACSIMILE	(02) 9230 2828
E-MAIL	<a href="mailto:ethics@parliament.nsw.gov.au">ethics@parliament.nsw.gov.au</a>
URL	<a href="http://www.parliament.nsw.gov.au/laprivilegeandethics">http://www.parliament.nsw.gov.au/laprivilegeandethics</a>

# Terms of Reference

Mr Anthony Roberts moved, That:

- (1) This House notes the revised draft Memorandum of Understanding on the execution of search warrants on 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 tabled by the Speaker on Wednesday 17 September 2014.
- (2) The Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the provisions of the revised draft Memorandum of Understanding.
- (3) A message be sent informing the Legislative Council accordingly.

Question put and passed.

*Excerpt from Votes and Proceedings of the Legislative Assembly No 5, Entry 2, Tuesday 17 September 2014.*

## Chair's Foreword

The relationship between parliaments and investigative agencies has been an issue at both federal and state levels. The important public interest in investigative bodies being able to carry out their statutory functions and obtain information is acknowledged. However, it is equally recognised that parliament must be protected from external interference in the conduct of its business, which includes interference with the members of parliament in the performance of their role.

In recent years court cases have brought into stark relief the difficulty in determining what members' documents constitute 'proceedings in Parliament' where they are subject to seizure under the terms of a search warrant. In New South Wales the Independent Commission Against Corruption exercised a search warrant which resulted in the Legislative Council Privileges Committee reporting that the Independent Commission Against Corruption had unintentionally breached parliamentary privilege in the way they exercised the warrant. Consequently the Committee, and the Commission, both reported on the desirability of a protocol to place such matters on a more formal footing. The Presiding Officers entered into a Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption on 11 December 2009.

The Presiding Officers and the Commissioner have reviewed the Memorandum and proposed amendments to deal with the technicalities involved in copying electronic material, to ensure that the memorandum covers ministerial offices, electorate offices and the residence of a member, and to clarify how claims of privilege will be dealt with.

The Committee thanks officers of the Independent Commission Against Corruption and of the Legislative Council and Legislative Assembly for their assistance in updating the MOU, and assisting the Committee with its review of the draft tabled on 17 September 2014.

This report recommends that the House resolve that the Speaker enter into the Memorandum of Understanding with the Commissioner of the ICAC. I commend the report to the House.



**John Sidoti**  
Chair

# List of Recommendations

RECOMMENDATION 1 \_\_\_\_\_

That the House resolve that the Speaker enter into a Memorandum of Understanding on the execution of search warrants on 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.

RECOMMENDATION 2 \_\_\_\_\_

That the House send a message to the Legislative Council requesting the Council to authorise the President to join with the Speaker in entering into the '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' set out in Appendix 1 to this report.

# Chapter One – Introduction

## TERMS OF REFERENCE

- 1.1 On 17 September 2014 the House resolved that the Committee should inquire into and report on the provisions of a revised draft Memorandum of Understanding on the execution of search warrants on 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.

## PREVIOUS MEMORANDA OF UNDERSTANDING REGARDING SEARCH WARRANTS

- 1.2 Memoranda of Understanding (MOU) between the Presiding Officers and external investigative agencies regarding execution of search warrants exist so that the potential presence of parliamentary privilege over certain items and documents within the premises or office of a member of Parliament is acknowledged and dealt with appropriately. Such Memoranda include recognition of parliamentary privilege and the privileges intertwined with the individual constitutional functions of the Parliament, the executive of the Crown, and the Courts.
- 1.3 The procedures specified in such Memoranda are designed to ensure that officers of external investigative agencies execute search warrants on the premises of members of Parliament in a way which does not amount to a contempt of Parliament and which provides members the opportunity to claim parliamentary privilege over documents.
- 1.4 The NSW Parliament has entered into two similar Memoranda in recent years. The Presiding Officers entered into a Memorandum of Understanding with the Commissioner of the NSW Police Force in November 2010. A Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption was also entered into in December 2009.
- 1.5 In 2013 the Clerks of the Legislative Council and the Legislative Assembly and the Executive Manager of the Department of Parliamentary Services raised with the Solicitor of the Independent Commission Against Corruption the possibility of reviewing the MOU to address limitations in the 2009 MOU, and as a consequence the Presiding Officers forwarded a draft MOU to the Commission, based on the MOU with NSW Police, inviting comment on any aspect of the Memorandum, but particularly on proposed new clauses referring to ministerial offices, electorate offices and the residence of a member. In early 2014, the Speaker and the President wrote to the new Commissioner, raising further issues.
- 1.6 In May 2014 the Commissioner forwarded a draft MOU, suggesting additional proposed changes to deal with the technicalities involved in copying electronic material. Following discussions between senior officers of the Parliament and the Solicitor to the Commission, further amendments were incorporated to clarify

how claims of privilege would be dealt with, particularly in relation to electronic documents or electronic devices.

- 1.7 On 17 September 2014 the Speaker tabled a draft Memorandum of Understanding on the execution of search warrants in the premises of the 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 (Appendix 1).
- 1.8 The Speaker also tabled correspondence from the Presiding Officers to the Commissioner, the Hon. Megan Latham, which proposed that the draft Memorandum be referred to the Privilege Committees of the Legislative Assembly and the Legislative Council. The Speaker then tabled correspondence from the Commissioner to the Presiding Officers which stated:

I agree with the proposal that the draft memorandum of understanding be tabled in both Houses of the Parliament and be referred to the respective Privileges Committees of both Houses for inquiry and report.<sup>1</sup>

- 1.9 The table below provides an overview of previous memoranda and relevant reports by the Standing Committee on Parliamentary Privilege and Ethics.

Memoranda of Understanding		
Title	Date	Committee report
Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the New South Wales Parliament	Proposed late 2014 (Draft tabled 17 September 2014)	<i>This report</i>
Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the NSW Parliament (NSW Police Force)	Signed November 2010 (Tabled 3 May 2011)	<i>Report on a Memorandum of Understanding with the NSW Police Relating to the Execution of Search Warrants on Members' Premises</i> (Tabled 27 October 2010)
Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption	Signed December 2009	<i>Memorandum of Understanding - Execution of Search Warrants by the Independent Commission Against Corruption on Members' Offices</i> (Tabled 26 November 2009)

<sup>1</sup> Letter from Commissioner Megan Latham to the Presiding Officers of the NSW Parliament, 10 September 2014.

## Chapter Two – Review of the Revised Draft Memorandum of Understanding

- 2.1 The Committee has examined the draft MOU which forms Appendix 1 to this Report.
- 2.2 The Committee has noted the proposed MOU addresses limitations in the existing memorandum, including notably that it only covers the Parliament House offices of members, and not other offices such as ministerial offices, electorate offices and the residence of a member.
- 2.3 The Committee further notes that the MOU clarifies how the Parliament and the Commission will deal with electronic devices, and the contents of electronic devices, providing for a forensic image or forensic report in the event that the contents of an electronic device is listed as falling within the scope of proceedings of Parliament. This new provision will address problems that have been experienced when a Member with an impending matter listed for parliamentary debate has not been able to access computer files.
- 2.4 During consideration of the proposed MOU, the Committee also noted the constrained timeframe (one working day) within which a member can make a claim for parliamentary privilege with respect to an item that is seized. The Committee considers that in the future a further review of the timeframes that apply in making a claim of privilege over a seized item and specified in the MOU may be warranted.

### RECOMMENDATIONS:

- 2.5 Accordingly the Committee recommends:

#### RECOMMENDATION 1

**That the House resolve that the Speaker enter into a Memorandum of Understanding on the execution of search warrants on 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.**

#### RECOMMENDATION 2

**That the House send a message to the Legislative Council requesting the Council to authorise the President to join with the Speaker in entering into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 1 to this report.**

# Appendix One – Draft Memorandum of Understanding



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 things<sup>1</sup>, 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.

---

<sup>1</sup> 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*.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS  
DRAFT MEMORANDUM OF UNDERSTANDING

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 correspondence 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

REVISED MEMORANDUM OF UNDERSTANDING  
DRAFT MEMORANDUM OF UNDERSTANDING

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.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS  
DRAFT MEMORANDUM OF UNDERSTANDING

- 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

REVISED MEMORANDUM OF UNDERSTANDING  
DRAFT MEMORANDUM OF UNDERSTANDING

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.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS  
DRAFT MEMORANDUM OF UNDERSTANDING

- 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.

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS  
DRAFT MEMORANDUM OF UNDERSTANDING

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 LEPRA 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 with 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 LEPR 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 Two – Extracts from Minutes

### **MINUTES OF MEETING NO 20**

4:14 pm, Wednesday 17 September 2014

Room 1136, Parliament House

#### Members present

Mr Anderson, Mr Sidoti (Chair), Mr Zangari

#### Apologies

Apologies were received from Mr Brookes, Mr Patterson and Mr Rohan.

#### 1. Confirmation of Minutes

Resolved, on the motion of Mr Anderson, seconded Mr Zangari,  
'That the minutes of the meeting held on 19 June 2014 (No 19) be confirmed'.

#### 2. Business arising from previous meeting

\*\*\*

#### 3. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President

The Clerk drew attention to the resolution of the House earlier this day that referred the draft MOU to the Committee for inquiry and report. Copies of the draft MOU were circulated, together with the correspondence which had been tabled between the Presiding Officers and the Commissioner, dated 8 September and 10 September respectively.

The Committee resolved, on the motion of Mr Anderson, seconded Mr Zangari, that the secretariat prepare a briefing note on the development of the updated MOU, together with background information on the circumstances that led to the draft.

#### 4. General Business

\*\*\*

Meeting adjourned at 4.37 pm, sine die.

### **MINUTES OF MEETING NO 21**

4.11 pm Wednesday 22 October 2014

Room 1043, Parliament House

#### Members present

Mr Anderson, Mr Brookes, Mr Sidoti (Chair), Mr Rohan and Mr Zangari.

#### Apologies

Apologies were received from Mr Patterson.

1. Confirmation of Minutes

Resolved, on the motion of Mr Anderson, seconded Mr Zangari:

'That the minutes of the meeting held on 17 September 2014 (No 20) be confirmed'.

2. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President

A briefing note drafted by Committee staff regarding the development of the updated Memorandum of Understanding (MOU), together with background information on the circumstances that led to the draft, was circulated and noted by the Committee.

Discussion ensued.

Copies of the Chair's draft report were circulated and noted. The Committee discussed the draft report and draft recommendations regarding the MOU.

The Committee resolved, on the motion of Mr Anderson, seconded Mr Zangari:

'That the Committee note the draft report and that the report be circulated to members of the Committee and be subject to feedback and comment from members, to be received by Wednesday 5 November 2014. Any proposed amendments to the report will be circulated to members for comment and if mutually agreed to, the report will be tabled in the House.'

3. General Business

\*\*\*

Meeting adjourned at 4.28 pm, sine die.

## **MINUTES OF MEETING NO 22**

4.00 pm Wednesday 19 November 2014

Room 1136, Parliament House

### Members present

Mr Brookes, Mr Rohan, Mr Sidoti (Chair) and Mr Zangari.

### Apologies

Apologies were received from Mr Anderson and Mr Patterson.

Due to a division being called in the Legislative Assembly, the meeting was suspended at 4.07 pm while members attended the Chamber for the division. When a quorum of members returned, the meeting resumed at 4.20 pm.

1. Confirmation of Minutes

Resolved, on the motion of Mr Rohan, seconded Mr Brookes:

'That the minutes of the meeting held on 22 October 2014 (No 21) be confirmed'.

2. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President

The Chair's Draft Report, having been previously circulated, was taken as read. Additional copies were circulated to members.

Resolved, on the motion of Mr Rohan, seconded Mr Brookes:

- 1) That the draft report be the report of the Committee and that it be signed by the Chair and presented to the House, or if not sitting, tabled with the Clerk.
- 2) That the Chair and Committee staff be permitted to correct stylistic, typographical and grammatical errors.

**3. General Business**

The Committee noted the report of the Legislative Council Privileges Committee titled: 'A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises', tabled Tuesday 11 November 2014.

\*\*\*

Meeting adjourned at 4.38 pm, sine die.

REVISED MEMORANDUM OF UNDERSTANDING  
EXTRACTS FROM MINUTES