

Standing Committee on  
Parliamentary Privilege and Ethics



LEGISLATIVE  
ASSEMBLY

## Further Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers



Report 5/57 – February 2023



Legislative Assembly

## Standing Committee on Parliamentary Privilege and Ethics

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

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# Membership

<b>Chair</b>	Mr Peter Sidgreaves MP
<b>Deputy Chair</b>	Mr Adam Crouch MP
<b>Members</b>	Mr Kevin Conolly MP (18 June 2019 – 31 March 2022) Mr Alex Greenwich MP (from 31 March 2022) Ms Melanie Gibbons MP (from 25 March 2021) Mr Ron Hoenig MP Mr Michael Johnsen MP (18 June 2019 – 25 March 2021) The Hon. Wendy Tuckerman (18 June 2019 – 31 March 2022)
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## Findings and recommendations

### Recommendation 1 \_\_\_\_\_ 8

That in the absence of any software or other solution to the issues experienced in screening material sought by the Independent Commission Against Corruption (ICAC) in order to identify potential claims of parliamentary privilege, the Speaker and the Clerk discuss with the ICAC Chief Commissioner a compromise process pending further work in the new Parliament on a revised Memorandum of Understanding (MoU) with the ICAC. The interim procedure should balance the investigative needs of the ICAC with the protection of parliamentary privilege and any agreed outcome should include, at a minimum, the following features found in the attached draft protocol (Appendix Two):

- the use of forensic imaging to create copies of the original data extracted and the data from which privileged material has been removed;
- the keeping of access logs recording access to the original data;
- the quarantining and secure storage of the forensic image of the original data and any excluded privileged material, facilitated by ICAC officers with specific responsibility for digital forensics, and the restriction of access by other staff of the ICAC to the excluded privileged material;
- where appropriate final screening by the Clerk at critical points in the ICAC's investigation of a matter to mitigate the risk of potentially privileged material being utilised or introduced in subsequent proceedings of the ICAC, e.g. before material obtained from the Legislative Assembly is tendered at a public inquiry, and before the ICAC publishes its final report on an investigation.

### Finding 1 \_\_\_\_\_ 9

It is the responsibility of the ICAC to ensure that material that may be subject to parliamentary privilege is not accessed or used in its investigations in breach of section 122 of the *Independent Commission Against Corruption Act 1988* (ICAC Act), and that parliamentary privilege is not undermined as a result of its investigations.

### Recommendation 2 \_\_\_\_\_ 10

That the Clerk revise the wording of the current caveat used in correspondence with the ICAC at the time she produces material in response to the ICAC's exercise of statutory powers. The caveat should confirm that the production of the material specified in the notice *does not and cannot* waive parliamentary privilege.

### Recommendation 3 \_\_\_\_\_ 10

That:

- any interim protocol between the Clerk and the ICAC on the production of material pursuant to the ICAC's statutory powers should include reference to material held and produced by third parties (i.e. entities other than the Parliament such as Government departments);

- the interim protocol should also provide that where documents are produced by a third party, the ICAC should consider consulting with the Clerk as to whether questions of parliamentary privilege may be involved;
- third parties should be covered by the revised MoU between the NSW Parliament and the ICAC to be settled in the 58<sup>th</sup> Parliament.

Recommendation 4 \_\_\_\_\_ 12

That:

- where the scope of a notice to produce issued pursuant to section 22 of the ICAC Act is unmanageable and cannot be dealt with in a timely manner by the Clerk given the extent of the resources that would be required to undertake an initial screening of the data specified within the notice for parliamentary privilege; and
- where an extension from the ICAC has not been obtained;

the Clerk is to seek the assistance of the Speaker to resolve the matter with the ICAC Chief Commissioner. Where it is not appropriate for the Clerk to notify the Speaker of any such disagreement, e.g. where the ICAC holds that to do so would be inappropriate or have the potential to compromise the integrity of the investigation, the Clerk should consult with the Deputy Speaker if appropriate.

Recommendation 5 \_\_\_\_\_ 15

That any quarantine and screening processes around parliamentary privilege applicable to section 22 notices should also be observed when dealing with potentially privileged material the subject of a summons under section 35 of the ICAC Act.

Recommendation 6 \_\_\_\_\_ 15

Pending the finalisation of a new expanded MoU with the ICAC in the 58th Parliament, the Clerk formalise a revised interim protocol with the ICAC, notifying the Legislative Standing Committee on Parliamentary Privilege and Ethics and the Speaker of the new procedures put in place for the screening of potentially privileged material and the opportunity for Members or the Clerk (as the most appropriate delegate of the House in the interim period), to make a claim of parliamentary privilege.

Recommendation 7 \_\_\_\_\_ 15

That in the 58th Parliament the Legislative Assembly appoint the membership of the new Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics as a matter of priority, to enable the Committee to commence stakeholder consultation on:

- the scope of compulsory orders and an improved screening process for parliamentary privilege where material is sought by investigative bodies exercising their statutory powers; and
- an amended MoU between the ICAC and the NSW Parliament that covers notices to produce and summonses issued pursuant to sections 22 and 35 of the ICAC Act, and the execution of search warrants; and

that the new Committee report to the House on the outcome of its consultations on a revised, expanded MoU.

Recommendation 8 \_\_\_\_\_ 16

That notices or other orders from the ICAC and other investigative bodies or law enforcement agencies that require the production of information and material held by the Department of Parliamentary Services (Information Technology Services) on behalf of Members of the Legislative Assembly, be issued to the Clerk or other person authorised by the House to receive such notices and orders, and be copied to the Chief Executive of the Department of Parliamentary Services.



# Further Interim Report

## The need for changes to existing procedures

### The Committee's previous Interim Report

1.1 As noted in the interim report of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics for this inquiry, tabled in June 2022, the current procedures in place for the handling of notices issued by the Independent Commission Against Corruption (ICAC) under section 22 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) need revision. The Committee's interim report suggested that the inclusion of several features similar to those found in the protocol between the Crime and Corruption Commission of Western Australia (CCC) and the Parliament of Western Australia would provide better mechanisms, and appropriate checks and balances, to ensure the processes associated with the issuing of such notices adequately provide for claims of parliamentary privilege to be made and resolved. These relevant Western Australian processes included:

- 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 specialist creates the forensic image of the device, and when the same officer undertakes a cull using search terms in order to identify material of relevance to the investigation.
- Having the digital forensic specialist produce a report of the relevant material, which is provided to the Clerk. The Presiding Officer is provided with an opportunity to indicate whether they, or their delegate, Committee, or other authorised individual, will make a claim for parliamentary privilege.
- Enabling the Presiding Officer's authorised delegate to 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 investigative 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 investigative 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 investigative body.<sup>1</sup>

## Recent developments

- 1.2 In the period since the interim report was tabled in June 2022, a number of significant developments and discussions have occurred in relation to:
- the Memorandum of Understanding (MoU) on the execution of search warrants that exists between the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly, which was struck in 2009<sup>2</sup> and was the subject of proposed revisions in 2014; and
  - the protocol that exists between the Clerks and the Chief Executive of the Department of Parliamentary Services, and the Solicitor to the ICAC on notices issued under section 22 of the ICAC Act; and
  - the further arrangements between the Clerk of the Legislative Assembly and the Solicitor to the ICAC concerning section 22 notices and parliamentary privilege.<sup>3</sup>

## Appointment of new ICAC Commissioners

- 1.3 Since June 2022, officeholders at the ICAC have concluded their terms and new Commissioners have been appointed. The Hon John Hatzistergos AM was appointed Chief Commissioner on 7 August 2022 for a five-year term. The Hon Helen Murrell SC was appointed Commissioner on 7 August 2022 for a five-year term, and The Hon Paul Lakatos SC was appointed Commissioner for a five-year term commencing on 12 September 2022 (both Commissioners serving on a part-time basis).

## Legislative Council Privileges Committee inquiry

- 1.4 The Committee also notes the tabling of the Legislative Council Privileges Committee report on the Execution of search warrants by the Australian Federal Police (No.3) on 16 November 2022. The Committee has had regard to the findings and recommendations made by the Legislative Council Privileges Committee (the Council Committee) in its report and does not intend to traverse the same issues in this further interim report, the focus of which is the use of the ICAC's powers under section 22 and section 35 of the ICAC Act to require the production of material, and the process for making claims of parliamentary

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<sup>1</sup> Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Report 3/57, [Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers](#), June 2022, pp4-5.

<sup>2</sup> *Memorandum of understanding on the execution of search warrants in the Parliament House office of Members of the New South Wales Parliament Between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly*, December 2009, see Legislative Council Privileges Committee, Report 71, [A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises](#), 11 November 2014, Appendix 1.

<sup>3</sup> *Protocol regarding section 22 notices between the Clerk of the Parliaments, the Clerk of the Legislative Assembly and the Chief Executive of the Department of Parliamentary Services, and the Solicitor to the ICAC*, August 2019; and *Further arrangements between the Clerk of the Legislative Assembly and the Solicitor to the ICAC concerning section 22 notices and parliamentary privilege*, 18 December 2019.

privilege. The Committee's report does, however, outline its areas of ongoing concern.

- 1.5 On 6 December 2022, the Council Committee forwarded to the Committee copies of correspondence dated 5 December 2022 from the Council Committee Chair to the President, and from the Council Committee Chair to the Australian Federal Police. This correspondence outlined the findings and recommendations of the inquiry into the execution of search warrants by the Australian Federal Police (No. 3) and raised particular issues that resulted from that inquiry.<sup>4</sup>
- 1.6 On 14 December 2022, the Chair of the Committee in turn wrote to the Chair of the Council Committee outlining the matters that, in the Assembly Committee's view, remain the subject of differing opinions with the ICAC, and indicating that the Assembly Committee looks forward to contributing towards the work needed to progress a revised MoU with the ICAC in the new Parliament.<sup>5</sup>

#### **Discussions between the Committee and the ICAC**

- 1.7 On 7 November 2022, the Committee met with the Chief Commissioner and Commissioners of the ICAC and one of the subjects discussed was the issue of parliamentary privilege and the use of the ICAC's statutory powers. Following these discussions, the Chief Commissioner wrote to the Committee, by letter dated 9 November 2022, outlining the ICAC's preparedness to enter into a new MoU that would be extended beyond that currently in place for search warrants. The letter can be found at Appendix One.
- 1.8 The Chief Commissioner indicated the ICAC would be open to entering into a new MoU that would cover search warrants executed on premises used or occupied by a Member (i.e. not confined to a Member's Parliament House office), and other statutory powers used by the ICAC to obtain information, e.g. section 22 notices. The Committee appreciates the Chief Commissioner's willingness to discuss these matters further with the Committee and is hopeful of settling an agreed approach with the ICAC in the new Parliament.
- 1.9 In his letter, the Chief Commissioner noted differences between the ICAC's existing MoU with the NSW Parliament on the execution of search warrants and the Western Australian Parliament's protocol with the CCC (the WA protocol). While the ICAC was supportive of some aspects of the WA protocol there were several that it did not support or consider appropriate, particularly in relation to the CCC's power under section 95 of the *Corruption, Crime and Misconduct Act 2003 (WA)* to order the production of documents and other things, similar to the ICAC's powers under section 22 of the ICAC Act.

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<sup>4</sup> Letter of the Hon Peter Primrose MLC, Chair of the Legislative Council Privileges Committee to the Hon Matthew Mason-Cox MLC, President of the Legislative Council, dated 5 December 2022; Letter of the Hon Peter Primrose MLC, Chair of the Legislative Council Privileges Committee to Mr Reece Kershaw APM, Commissioner of the Australian Federal Police, dated 5 December 2022.

<sup>5</sup> Letter from Mr Peter Sidgreaves MP, Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics to the Hon Peter Primrose MLC, Chair of the Legislative Council Privileges Committee, dated 14 December 2022, in response to issues raised in Mr Primrose's correspondence.

*Issues raised by the ICAC in respect of the Western Australian protocol as it relates to the execution of search warrants*

- 1.10 In his letter, the Chief Commissioner noted the following issues in respect of the WA protocol as it relates to the execution of search warrants by the CCC.
- It was not clear to the ICAC why the WA protocol requires that, wherever operationally possible, the CCC officer executing the search warrant should not be involved in the investigation afterwards (clause 5.5 WA protocol).
  - Under the WA protocol the CCC officer retains possession of material over which a claim of parliamentary privilege is made, whereas under the MoU that exists between the NSW Parliament and the ICAC such material is delivered into the custody of the relevant Clerk (clause 8.1.1 WA protocol).
  - The WA protocol provides for a CCC officer to be sworn in as an officer of the Parliament, or to sign a confidentiality agreement, to undertake any forensic examination of an electronic device, whereas the ICAC is of the view that any forensic examination to identify material subject to parliamentary privilege should be undertaken by a Clerk or delegate, not an ICAC officer (clause 8.3.1 WA protocol).
  - The role of the CCC officers in creating forensic images (set out in section 8.3 of the WA protocol). Forensic images of the devices or data extractions from the device are made, securely stored and segregated within the CCC, relevant material is identified and tagged, and then provided by the Clerk to the individual determining privilege questions. CCC investigators could also be sworn in and sign confidentiality agreements to assist in the further refinement of relevant material. There are no equivalent provisions under the NSW MoU.
  - The referral of disputes between the CCC and the individual determining privilege questions to an independent third party (clause 8.7 WA protocol). There is no equivalent provision under the NSW MoU.
  - The absence in the WA protocol of any provision dealing with the removal of items for inspection (as opposed to seizure) under a similar provision to section 75A(1)(c) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

*Issues raised by the ICAC in respect of the Western Australian protocol as it relates to notices issued under section 95 of the Corruption, Crime and Misconduct Act 2003 (WA)*

- 1.11 In his letter the Chief Commissioner also noted the following issues in respect of the WA protocol as it relates to notices issued under section 95 of the *Corruption, Crime and Misconduct Act 2003*.
- Under the WA protocol, the relevant WA Clerk provides documents to be produced under a section 95 notice, which require a determination with respect to parliamentary privilege, to a 'Privilege Determinator' (i.e. a Presiding Officer, their delegate, or any other person, entity or Committee authorised by the relevant House of Parliament). The ICAC considers the use of a 'Privilege Determinator' is one way to ensure the confidentiality and

integrity of an investigation at a covert stage. Confidentiality is a concern for the ICAC as it may be prejudicial to a particular investigation if the fact that there is an investigation were to become known, either generally or by the person the subject of the investigation. The ICAC also noted that failing to maintain confidentiality may be prejudicial to the reputation of those involved in the investigation if it were to become generally known (clause 9.5.7 WA protocol).

- Under the WA protocol any dispute between the CCC and the Privilege Determinator can be referred to an independent third party (clause 9.5.13 WA protocol). The ICAC is supportive of such a proposal.
- Under the WA protocol, for section 95 notices involving the production of large quantities of records on an electronic device, a CCC Digital Forensics Officer, who is sworn in as an officer of the Parliament, may take a forensic image of the original device and identify material relevant to the investigation, which is then provided to the Clerk. The Presiding Officer then has 14 days to notify the CCC as to whether a ruling is to be sought from the Privilege Determinator (clause 9.6 of the WA protocol). The ICAC prefers for the electronic device to be inspected by the Privilege Determinator for the purpose of identifying material subject to parliamentary privilege and for that material to be excluded from that produced to the ICAC.

The ICAC also noted that as an investigation progresses and new lines of inquiry are identified it may result in the need to return to the forensic image and search against new search terms. The ICAC prefers to have a forensic image from which material subject to a privilege claim has been excluded, rather than observing the WA protocol process each time a new line of inquiry is identified.

#### *Committee Comment*

- 1.12 The Committee considers that the ICAC's preferred approach of excluding material subject to a privilege claim is only feasible in circumstances where the volume of material captured by a section 22 notice is relatively small, making the task of screening for privileged material manageable.
- 1.13 The Committee does not support the ICAC's preferred approach where it relates to large amounts of material on electronic devices, e.g. email accounts for a Member of Parliament over several years. In such cases, the significant volume of material involved will invariably include items subject to a potential claim of parliamentary privilege. The Committee considers the ICAC's preferred approach is neither practical or reasonable, nor does it enable a proper opportunity to identify privileged material. The Committee considers that an alternative approach using aspects of the WA protocol for section 95 notices is warranted, particularly if the scope of similar ICAC notices continues to be cast so wide as to impose onerous amounts of material for review.
- 1.14 The Committee notes section 122(1) of the ICAC Act which provides that nothing shall be taken to affect the rights and privileges of Parliament in relation to freedom of speech and debates and proceedings in Parliament. The ICAC must ensure that all available steps are taken so that material that may be subject to

parliamentary privilege is not accessed or used in its investigations in breach of section 122, and that parliamentary privilege is not undermined as a result of its investigations.

### **Issues experienced to date where large volumes of materials are captured by a section 22 notice**

1.15 Following on from the above discussion, it is relevant to note that in NSW to date a number of issues have arisen in relation to the screening of large volumes of electronic data pertaining to Legislative Assembly Members or former Members:

- Where the notice to produce is subject to confidentiality restrictions, and the fact of the notice cannot be disclosed to the Member or former Member concerned, it currently falls to the senior officer of the House, being the Clerk, to screen the material for items subject to a potential claim of parliamentary privilege. Due to the sensitivity of ICAC investigations and questions of parliamentary privilege, if the Clerk is unavailable the screening task is usually only delegated further to the Deputy Clerk.

Given the small size of the Department of the Legislative Assembly, the level of resources required for the screening exercise is not sustainable. It regularly necessitates extensions to the time specified in the notice for production, deprives the House of the service of its most senior officers for significant periods of time, and imposes untenable workloads for the individuals concerned.

- Conversely, where a Member *has been able to be informed* of the section 22 notice, it has not been the experience to date that they have decided to participate in the screening process themselves or make a claim of parliamentary privilege. Being able to confirm with the Member that the notice has been received does not necessarily resolve the difficulties around privilege issues. Further, even where the Member concerned has declined the opportunity to review material for parliamentary privilege, the Clerk must still screen for privileged items as it is almost certain that such items will be included in the material being sought (given Members' roles as legislators, parliamentary officeholders and Committee chairs and members).

The difficulties in these circumstances are particularly apparent when considering the parliamentary proceedings of joint statutory committees responsible for monitoring and reviewing the exercise of the ICAC's role and functions. Other matters relating to the ICAC's jurisdiction fall within the remit of this Committee, for example, the review of the Code of Conduct for Members of the Legislative Assembly and the Committee's educative work and advice to the Legislative Assembly on ethical standards applicable to its Members. It is noted in this regard that these tasks are undertaken pursuant to statute.

Conceivably an ICAC section 22 notice or section 35 summons arising from an investigation into the conduct of a Member, who is a Member of a parliamentary committee that deals with ICAC matters, risks giving the ICAC access to committee records and other information. In addition to raising

matters of parliamentary privilege, such material should properly remain confidential to the Parliament.

- The ICAC's position on the management of large amounts of material on electronic devices also suggests that there is a straightforward technical process by which the Clerks are able to screen out privileged items from the material caught by a section 22 notice. This has not been the case and extensive enquiry by the NSW Parliament's Information Technology (IT) section has not identified any software with an efficient screening process that, importantly, would ensure that any privileged data can be effectively removed from the emails extracted, so that it is not amongst the material provided to the ICAC. Consequently, there has not been an alternative to the slow searching and removal of privileged material from the mailbox entries extracted by the Parliament's IT section.
- In addition, this long and involved process has failed to give certainty that all privileged material has been excluded. This means the Clerk must use a caveat to indicate that no waiver of parliamentary privilege is involved in providing the material pursuant to a notice.
- As an additional measure to the screening by the Clerk, the Solicitor to the ICAC has undertaken to conduct a further screening exercise to ensure that emails potentially subject to a claim of parliamentary privilege are identified and not used until such time as the Parliament had an opportunity to consider whether they are subject to parliamentary privilege. The remainder of the emails are then made available to the investigation team for use.<sup>6</sup> The Committee notes that this additional measure is designed to prevent any inadvertent use of potentially privileged material, pending the Committee's review of existing protocols. However, the Committee does not consider it appropriate for an ICAC officer to conduct this second review.

1.16 Consequently, the Committee does not support the exclusionary approach preferred by the ICAC, in which the Legislative Assembly is responsible for allocating scarce resources to screening out all potentially privileged items from the material captured by a section 22 notice. Nor does the Committee accept that it is appropriate for the ICAC, as part of the investigative arm of the Executive, to have what is, in effect, unfettered access to material that is potentially subject to a claim of parliamentary privilege. The additional screening and quarantine measures undertaken by the Solicitor to the ICAC, as outlined above, are not a satisfactory permanent solution to the problem as this remains a process internal to the ICAC.

1.17 In this regard, the Committee notes the Council Committee recently recommended that ICAC investigators conduct a cull of material prior to the Clerk of the Legislative Council conducting a privilege review.<sup>7</sup> It is the view of the Committee that any culling procedure undertaken by the ICAC's investigators

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<sup>6</sup> *Further arrangements between the Clerk of the Legislative Assembly and the Solicitor to the ICAC concerning section 22 notices and parliamentary privilege*, 18 December 2019.

<sup>7</sup> Legislative Council Privileges Committee, Report 89, [Execution of search warrants by the Australian Federal Police \(No.3\)](#), November 2022, recommendation 5, p35.

would need stringent safeguards in place to ensure that parliamentary privilege is protected.

### **Committee comment**

- 1.18 The Committee's preference is to reach agreement on appropriate working arrangements that meet the needs of both parties. However, in the event that this does not occur the Committee considers there is a need for a full review of how the ICAC currently exercises the powers available to it. Possible terms of reference for such an inquiry could include an examination of the ICAC's compulsory powers including an examination of the following matters:
- the extent to which the powers to require the production of material under the ICAC Act remain appropriate, particularly having regard to the increased capacity to access and extract large amounts of material stored electronically;
  - mechanisms to regularly monitor the use of such powers by the ICAC and the operation of section 122 of the ICAC Act, and whether the Inspector of the ICAC has the power and sufficient resources to undertake such independent oversight of particular matters;
  - whether there are additional safeguards that should be considered in respect of the use of the ICAC's powers under sections 22 and 35 of the ICAC Act.

### **Recommendation 1**

**That in the absence of any software or other solution to the issues experienced in screening material sought by the Independent Commission Against Corruption (ICAC) in order to identify potential claims of parliamentary privilege, the Speaker and the Clerk discuss with the ICAC Chief Commissioner a compromise process pending further work in the new Parliament on a revised Memorandum of Understanding (MoU) with the ICAC. The interim procedure should balance the investigative needs of the ICAC with the protection of parliamentary privilege and any agreed outcome should include, at a minimum, the following features found in the attached draft protocol (Appendix Two):**

- **the use of forensic imaging to create copies of the original data extracted and the data from which privileged material has been removed;**
- **the keeping of access logs recording access to the original data;**
- **the quarantining and secure storage of the forensic image of the original data and any excluded privileged material, facilitated by ICAC officers with specific responsibility for digital forensics, and the restriction of access by other staff of the ICAC to the excluded privileged material;**
- **where appropriate final screening by the Clerk at critical points in the ICAC's investigation of a matter to mitigate the risk of potentially privileged material being utilised or introduced in subsequent**



**proceedings of the ICAC, e.g. before material obtained from the Legislative Assembly is tendered at a public inquiry, and before the ICAC publishes its final report on an investigation.**

### **Finding 1**

**It is the responsibility of the ICAC to ensure that material that may be subject to parliamentary privilege is not accessed or used in its investigations in breach of section 122 of the *Independent Commission Against Corruption Act 1988* (ICAC Act), and that parliamentary privilege is not undermined as a result of its investigations.**

### **A draft Protocol for discussion in the 58<sup>th</sup> Parliament**

- 1.19        Having considered the ICAC's position as outlined in the Chief Commissioner's correspondence dated 9 November 2022, and with the benefit of advice obtained from Senior Counsel, the Committee has resolved to release for discussion, draft procedures for the handling of section 22 notices and other orders to produce information, and for the making of potential claims of parliamentary privilege. These procedures can be found in the form of a draft protocol at Appendix Two.
  
- 1.20        The Committee intends to write to relevant stakeholders forwarding the draft protocol with a view to obtaining feedback that informs negotiations for a new MoU with the ICAC in the next Parliament. This will provide a period to evaluate any feedback on the draft protocol pending their proposed inclusion as part of an extended MoU between the Parliament and the ICAC on the use of the ICAC's statutory powers to require the production of documents and other things.
  
- 1.21        In recent years, the ICAC has made greater use of section 22 notices in comparison to search warrants. Consequently, while a new MoU should cover search warrants on all premises used or occupied by a Member of Parliament, the Committee considers that priority should be given to settling the processes for section 22 notices and other orders to produce information and material. In the period when the Legislative Assembly is transitioning from one Parliament to the next there will not be an opportunity for it to endorse a revised MoU. In these circumstances, the Committee considers that pending negotiations in the new Parliament and an agreement between the ICAC, the Legislative Council and Legislative Assembly, the draft processes at Appendix Two to this report should be adopted as far as possible for an interim protocol, noting the critical features identified in recommendation 1 of this report.
  
- 1.22        Any disagreements that cannot be resolved by the Clerk and ICAC officers in the first instance may be escalated to the Chief Commissioner of the ICAC and the Speaker but it is the Committee's view that questions of parliamentary privilege remain matters for the House to determine.

### **Next steps**

- 1.23        For the immediate future, the Committee recommends that the Clerk is to institute the measures discussed below, where appropriate, in consultation with the ICAC.

*Inadvertent disclosure*

- 1.24 The Committee notes that where material subject to parliamentary privilege is inadvertently produced to an investigative body, the protection afforded by parliamentary privilege will continue to apply to the material. Therefore, a caveat is not necessary to ensure the preservation of parliamentary privilege. However, the Committee considers that it would be prudent for the Clerk to continue using a caveat at the time material is produced to the ICAC to make it abundantly clear that any inadvertent disclosure in the production of documents pursuant to a statutory notice or summons from the ICAC does not and cannot constitute a waiver of privilege, and that the documents will remain privileged notwithstanding their disclosure.

**Recommendation 2**

**That the Clerk revise the wording of the current caveat used in correspondence with the ICAC at the time she produces material in response to the ICAC's exercise of statutory powers. The caveat should confirm that the production of the material specified in the notice *does not and cannot* waive parliamentary privilege.**

*Production by third parties*

- 1.25 As discussed in the Committee's previous interim report for this inquiry, tabled in June 2022, the issue of third parties has arisen. That is, entities outside the Parliament such as Government departments and agencies holding material and the ICAC ordering that material to be produced, in circumstances where it may include matter that is subject to parliamentary privilege. It is also the case that, to date, material sought by the ICAC from the Parliament has been held on the premises whereas in the future it is likely that the material may be held by a cloud service provider that would fall in the third party category.
- 1.26 In such circumstances, the Committee considers that the notice or order to produce material held externally by a service provider to the Parliament should still be issued to the Clerk, rather than the third party, to enable the proper consideration of matters of parliamentary privilege relevant to the material being sought. The Clerk can liaise with the Parliament's IT section to facilitate provision of the material held by the service provider on behalf of the Legislative Assembly.
- 1.27 The Committee notes that parliamentary privilege is not and cannot be waived by the production of the material by a third party. Although it is, therefore, not necessary for specific measures to be taken to 'preserve' privilege in respect of those documents, it would be prudent to ensure that any interim protocol between the Clerk and the ICAC on section 22 notices, for example, adequately covers material produced by a third party and provides for a mechanism to deal with potential privilege claims.

**Recommendation 3**

**That:**

- **any interim protocol between the Clerk and the ICAC on the production of material pursuant to the ICAC's statutory powers should include**

**reference to material held and produced by third parties (i.e. entities other than the Parliament such as Government departments);**

- **the interim protocol should also provide that where documents are produced by a third party, the ICAC should consider consulting with the Clerk as to whether questions of parliamentary privilege may be involved;**
- **third parties should be covered by the revised MoU between the NSW Parliament and the ICAC to be settled in the 58<sup>th</sup> Parliament.**

*Narrowing the scope of section 22 notices*

- 1.28 While the Clerk can raise concerns that a notice to produce material is overly broad and request that the ICAC narrow the scope or give greater specificity as to the material sought, the Clerk does not have power to *require* the ICAC to narrow its orders for production. It is always possible for a legal challenge to be made to the validity of a particular notice, for example, on grounds that the notice fails to specify with reasonable clarity the documents sought or their relevance, or where the notice has not been issued consistent with the purpose for which the power was conferred. However, the Committee considers it would be unfortunate if it became necessary to pursue such avenues when it should be possible to arrive at a workable agreement which recognises the interests of both parties and ensures that the scope of a notice is not so wide as to impose an onerous amount of material for review by the Clerk.
- 1.29 The Committee notes the advice of the Clerk that, to date, requests have been made to the ICAC concerning section 22 notices seeking the production of large volumes of data e.g. several hundred thousand emails and mailbox items over a period of several years.
- 1.30 In short, attempts by the Clerk and Deputy Clerk to manage the exercise of screening such large amounts of material for parliamentary privilege have led to requests to the ICAC for:
- numerous extensions; or
  - assistance by providing additional search terms that could be used to narrow the material by filtering out only *relevant* emails, which could then be more readily reviewed for parliamentary privilege.
- Requests for extensions have been agreed to but requests to the ICAC to narrow the relevant material to be screened were more problematic.
- 1.31 The Committee considers that the current processes are impractical, giving rise to an unacceptable situation that needs to be resolved as soon as possible in the next Parliament, through an improved MoU with the ICAC. An expanded MoU should cover the use of orders to produce material as well as the execution of search warrants.
- 1.32 The Committee notes that the issue of material subject to parliamentary privilege has primarily arisen in relation to section 22 notices used by the ICAC to order the

production of material as part of the preliminary or confidential investigation phase. However, the same issue has arisen in relation to the ICAC's use of its power under section 35 of the ICAC Act to issue a summons. The position with respect to section 35 summonses is dealt with in the next section of this report.

- 1.33 Where disagreements have arisen in the past in relation to a section 22 notice, depending on the circumstances, there seems to have been some scope to approach the Inspector of the ICAC for advice as an independent third party. This would seem to be a possible independent review mechanism in the event that a new MoU does not resolve the current difficulties. In this regard, the Committee notes that Mr Bruce McClintock SC, a previous Inspector of the ICAC, gave evidence to the NSW Parliament's Committee on the ICAC in 2016 around the use of a section 22 notice to produce forthwith, issued during the course of the ICAC's Operation Hale. Mr McClintock stated:

I would have thought it would be right to audit that and to pull in any other examples of the use of the [notice to produce] procedure outside producing evidence for hearings – which is what it is prima facie intended for – to see whether it is being done properly.<sup>8</sup>

#### Recommendation 4

That:

- **where the scope of a notice to produce issued pursuant to section 22 of the ICAC Act is unmanageable and cannot be dealt with in a timely manner by the Clerk given the extent of the resources that would be required to undertake an initial screening of the data specified within the notice for parliamentary privilege; and**
- **where an extension from the ICAC has not been obtained;**

**the Clerk is to seek the assistance of the Speaker to resolve the matter with the ICAC Chief Commissioner. Where it is not appropriate for the Clerk to notify the Speaker of any such disagreement, e.g. where the ICAC holds that to do so would be inappropriate or have the potential to compromise the integrity of the investigation, the Clerk should consult with the Deputy Speaker if appropriate.**

#### *Power to summon witnesses and take evidence – section 35 of the ICAC Act*

- 1.34 Under section 35 of the ICAC Act, the ICAC can summon a person to appear at a compulsory examination or public inquiry to give evidence or to produce such documents or other things, if any, as are referred to in the summons, or both.
- 1.35 The Committee notes that the ICAC's submission to the Council Committee's inquiry into the execution of search warrants by the Australian Federal Police (No. 3) discussed the issue of a summons to appear at a public inquiry and give

<sup>8</sup> Committee on the ICAC, [Transcript of Proceedings](#), Review of the Inspector's Report to the Premier: the Inspector's Review of the ICAC, 8 September 2016, p.37.

evidence.<sup>9</sup> In its report for the inquiry, the Council Committee referred to section 122(1) of the ICAC Act, as the protection for parliamentary privilege that could be relied upon by a witness asked to produce evidence related to parliamentary proceedings, concluding that this has not been a significant issue to date.<sup>10</sup>

1.36 However, this conclusion fails to recognise that practical difficulties can arise without coming to public attention. Any dealings between the ICAC and the Clerk of the Legislative Assembly in relation to a summons received under section 35 of the ICAC Act pertaining to material concerning a Member, or former Member, of the Legislative Assembly would be matters covered by the confidentiality requirements of the summons in each case.

1.37 The Committee further notes that the ICAC's submission to the Council Committee's inquiry states:

A person receiving a summons requiring them to give evidence and/or produce documents will have time to consider whether any documents required to be produced might be subject to parliamentary privilege or whether any questioning in the compulsory examination or public inquiry might give rise to issues of parliamentary privilege. Such persons have the opportunity to seek legal advice and are also entitled to be represented by an Australian legal practitioner.

Where appropriate the person presiding at the compulsory examination or public inquiry may adjourn proceedings to enable a witness to seek advice on or otherwise consider any issue or potential issue of parliamentary privilege.

The Commission considers that any claims of parliamentary privilege arising from any requirement under s 35 of the ICAC Act to give evidence and/or produce documents or other things can be adequately dealt with during the course of the relevant compulsory examination or public inquiry and it is not necessary to make provision for dealing with such claims in any MOU.<sup>11</sup>

1.38 The Committee notes it is important to appreciate that there is the option under section 35(4A) to provide the material sought in a summons before a person is due to appear, as follows:

A Commissioner may, by notice in writing, excuse a person who has been summoned to appear before the Commission and produce documents or other things from the required appearance on condition that the person (or a person acting on the person's behalf) produces those documents or things in accordance with any directions given by the Commissioner before the time of the required appearance.

1.39 This section provides that the ICAC can specify conditions for the production of the material in advance of the nominated date and time, without the

<sup>9</sup> ICAC, [Submission 1](#) to the Legislative Council Privileges Committee inquiry into the execution of search warrants by the Australian Federal Police (No. 3), p15.

<sup>10</sup> Legislative Council Privileges Committee, Report 89, [Execution of search warrants by the Australian Federal Police \(No. 3\)](#), November 2022, p37.

<sup>11</sup> ICAC, [Submission 1](#) to the Legislative Council Privileges Committee inquiry into the execution of search warrants by the Australian Federal Police (No. 3), p15.

requirement for the individual in receipt of the summons to appear to give evidence.

- 1.40 Consequently, there is the very same potential for problems to arise in relation to the screening of material for parliamentary privilege in response to a section 35 summons, as may occur in relation to a notice to produce under section 22 of the ICAC Act. Further, the issues that have been outlined in relation to section 22 notices and section 35 summonses may arise regardless of whether the power being exercised by the ICAC occurs in the context of a covert phase of an investigation, or the compulsory examination or public hearing phase of investigation. This is because the processes involved in extracting the specified material for production and screening for parliamentary privilege are the same in all contexts.
- 1.41 It is clearly conceivable that the ICAC could seek very large volumes of material by way of a section 35 summons to produce. For example, Members receive an enormous number of emails, and a request to access email accounts covering several years could involve extracting hundreds of thousands of emails where only a small number are ultimately found to be relevant to the ICAC's investigation.
- 1.42 In addition, the Committee considers that the extent of Legislative Assembly resources that have been needed to support the ICAC's execution of its statutory powers impacts the ability of the Legislative Assembly's most senior officers to perform their important core functions of supporting the work of the House, its Members and committees. In short, the expanded and revised MoU with the ICAC should cover both section 22 notices to produce and summonses issued pursuant to section 35, in addition to any revision of the current procedures around the execution of search warrants.
- 1.43 The Committee considers that the application of a protocol to the use of a section 35 summons to produce material is reasonable and warranted. This is given the circumstances already outlined – the same difficulties may arise in relation to the production of large amounts of material and parliamentary privilege regardless of whether the material is being produced pursuant to section 22 or to section 35. The Committee also holds the view that there is a greater potential at the public inquiry stage of an investigation for the material subject to parliamentary privilege to be released into the public domain.
- 1.44 Pending negotiations and agreement upon new procedures, the Committee is of the view that the Clerk should advise the Speaker, wherever appropriate, of notices that cannot be managed within the limited resources available to the Clerk and her office. Where the Speaker and the Clerk are not able to agree upon a process with the ICAC that facilitates potentially privileged material being identified in a manageable way, the Committee notes that legal challenge is

available as an option, as is the ability to utilise other mechanisms, e.g. possibly a complaint to the Inspector of the ICAC about the use of the ICAC's powers.<sup>12</sup>

- 1.45 Ultimately, any inability to reach agreement on improvements to the current situation regarding section 22 notices would raise the question of whether further examination is needed of the ICAC's statutory powers to compel the production of material. However, the Committee is hopeful that new procedures can be devised in consultation with the ICAC and the Legislative Council after the commencement of the new Parliament.

### **Recommendation 5**

**That any quarantine and screening processes around parliamentary privilege applicable to section 22 notices should also be observed when dealing with potentially privileged material the subject of a summons under section 35 of the ICAC Act.**

#### *Draft revised protocol*

- 1.46 As noted earlier, draft processes in the form of a draft revised protocol, can be found at Appendix Two to this report. The intention is that it be published by the Committee as part of its report for consultation purposes and to assist the Clerk in any negotiations over the next few months in the lead-up to the NSW State General Election and the transition to the new Parliament.

### **Recommendation 6**

**Pending the finalisation of a new expanded MoU with the ICAC in the 58th Parliament, the Clerk formalise a revised interim protocol with the ICAC, notifying the Legislative Standing Committee on Parliamentary Privilege and Ethics and the Speaker of the new procedures put in place for the screening of potentially privileged material and the opportunity for Members or the Clerk (as the most appropriate delegate of the House in the interim period), to make a claim of parliamentary privilege.**

#### *A revised MoU in the 58<sup>th</sup> Parliament*

### **Recommendation 7**

**That in the 58th Parliament the Legislative Assembly appoint the membership of the new Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics as a matter of priority, to enable the Committee to commence stakeholder consultation on:**

- **the scope of compulsory orders and an improved screening process for parliamentary privilege where material is sought by investigative bodies exercising their statutory powers; and**

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<sup>12</sup> Under section 57B(1)(b) of the ICAC Act, one of the principal functions of the Inspector is to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the ICAC or officers of the ICAC.

- **an amended MoU between the ICAC and the NSW Parliament that covers notices to produce and summonses issued pursuant to sections 22 and 35 of the ICAC Act, and the execution of search warrants; and**

**that the new Committee report to the House on the outcome of its consultations on a revised, expanded MoU.**

*Information held by the Department of Parliamentary Services*

- 1.47 In terms of the operation of the Parliament, it is the Department of Parliamentary Services (DPS) that supplies the IT support services to Members and staff of the Parliament, the Houses, and to the Parliament's committees. However, the Committee considers that all notices and orders from the ICAC, and other investigative bodies and law enforcement agencies, requiring the production of material relating to the Legislative Assembly or its Members, should be issued to the Clerk of the Legislative Assembly, or any other person authorised by the House to receive such notices and orders.
- 1.48 The Committee supports the current arrangements under the existing protocol regarding section 22 notices between the Clerk of the Parliaments, the Clerk of the Legislative Assembly and the Chief Executive of DPS, and the Solicitor to the ICAC, dated August 2019. It specifies that notices or other orders from the ICAC that involve the production of parliamentary information and material held by IT Services on behalf of Members of the Legislative Assembly, are issued to the Clerk and copied to the Chief Executive of DPS. The Clerk is the permanent officer of the House, with responsibility for providing advice to the Speaker and the Legislative Assembly on matters of parliamentary law, practice and procedure, including questions of parliamentary privilege. The Clerk is the most appropriate person to be issued with a section 22 notice.
- 1.49 The Clerk is responsible for liaising with the Chief Executive as the Head of DPS on the extraction of relevant material from the Parliament's IT and other records and administrative systems, and it is the Clerk who provides the material sought to the ICAC, unless she has arranged for a delegate to deliver the material to the ICAC.
- 1.50 The Clerk has acted as a delegate screening for parliamentary privilege and raising the potential for a claim that may need to be determined. The Clerk also may raise questions of parliamentary privilege with the Speaker.
- 1.51 It is open to the Committee in the next Parliament to make recommendations to the House for the authorisation of other individuals, e.g. an independent third party, to provide advice on questions of privilege or to make determinations about the privileged status of documents or other things relating to the Legislative Assembly. This is particularly the case in relation to the production of material in the covert stages of an investigation, when it is not possible for the Committee or, ultimately, the House to be involved in such matters.

## **Recommendation 8**

**That notices or other orders from the ICAC and other investigative bodies or law enforcement agencies that require the production of information and**



**material held by the Department of Parliamentary Services (Information Technology Services) on behalf of Members of the Legislative Assembly, be issued to the Clerk or other person authorised by the House to receive such notices and orders, and be copied to the Chief Executive of the Department of Parliamentary Services.**

## Appendix One – Letter of the Chief Commissioner of the Independent Commission Against Corruption dated 9 November 2022



INDEPENDENT COMMISSION  
AGAINST CORRUPTION  
NEW SOUTH WALES

Mr Peter Sidgreaves MP  
Chair  
Standing Committee on Parliamentary Privilege and Ethics  
Parliament House  
Macquarie Street SYDNEY NSW 2000

By Email: [ethics.committee@parliament.nsw.gov.au](mailto:ethics.committee@parliament.nsw.gov.au)

Dear Chair

I am writing to thank members of the committee for meeting with the Commissioners on 7 November 2022 and to address one of the issues raised in that meeting, being how to deal with claims of parliamentary privilege arising from the exercise of the Commission's statutory powers.

As you are aware, the Commission currently has a Memorandum of Understanding (MOU) with the President of the Legislative Council and the Speaker of the Legislative Assembly with respect to the execution of search warrants in the Parliament House office of members of Parliament. The MOU dates from 2009 and does not cover circumstances in which a search warrant is executed on other premises used or occupied by a member of Parliament and does not apply to where material is sought under other powers, such as a notice to produce issued under s 22 of the *Independent Commission Against Corruption Act 1988*.

The Commission is open to entering into a new MOU to cover circumstances in which a search warrant is executed in any premises used or occupied by a member of Parliament or where material is sought under a s 22 notice.

The Commission's position on these matters is set out in its February 2021 submission to the Legislative Council Privileges Committee inquiry into the execution of search warrants by the Australian Federal Police No.3 (the Submission). I am enclosing a copy of the Submission, which has been made public by the Privileges Committee.

I note the Parliamentary Privilege and Ethics Committee's June 2022 *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers* examined the protocol between the Western Australian Parliament and the Corruption and Crime Commission of Western Australia for dealing with claims of parliamentary privilege arising from the execution of search warrants on premises occupied by members of Parliament (the CCC Protocol). The CCC Protocol also deals with notices issued under s 95 of the *Corruption, Crime and Misconduct Act 2003*. That section is similar to s 22 of the ICAC Act.

Sections 5 to 8 of the CCC Protocol set out the general procedure to be followed in the execution of search warrants. The procedure is generally consistent with that under the MOU but there are some differences, including:

1. The provision at clause 5.5 of the CCC Protocol that, if operationally possible, the executing officer will not be involved in the investigation after the execution of the warrant. The basis for this provision is not clear;
2. The provision at clause 8.1.1 that the CCC officer retains possession of material over which a claim of privilege is made (under the MOU such material is delivered into the custody of the Clerk of the relevant House);
3. The provision at clause 8.3.1 that a CCC officer may be sworn in as an officer of the Parliament to undertake any forensic examination of an electronic device (the Commission's position is that any forensic examination to identify material subject to parliamentary privilege should be undertaken by a Clerk or delegate, not a Commission officer);
4. The role of CCC officers in creating forensic images as set out in section 8.3;
5. The provision at clause 8.7 for referral of any dispute between the CCC and the "Privilege Determinator" to an independent third party;
6. The absence in the CCC Protocol of any provision dealing with removal of items for inspection (as opposed to seizure) under any provision similar to s.75A(1)(c) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (see page 7 of the Submission).

Section 9 of the CCC Protocol sets out the general procedure to be followed with respect to the production of documents or other things under a notice to produce.

The CCC Protocol notes that (as with some Commission investigations) an investigation may be covert but does not go into any detail as to how the confidentiality of the investigation is to be maintained. While maintaining confidentiality is not an issue with respect to the execution of a search warrant (which is necessarily overt), it is one that will arise with respect to the issuing of a s 22 notice where the investigation is at the covert stage. Maintaining confidentiality in such circumstances is an important issue for the Commission as it may be prejudicial to a Commission investigation if the fact the Commission was conducting the investigation became known, either generally or by the person(s) the subject of the investigation. It may also be prejudicial to the reputation of those involved in the investigation if the fact there was an investigation became generally known. This will be one challenge in developing a suitable protocol for dealing with claims of parliamentary privilege arising out of the issuing of a s 22 notice.

I note that, under clause 9.5.7 of the CCC Protocol, where a determination as to parliamentary privilege is to be made with respect to documents to be produced under a s 95 notice, the Clerk is to provide the records to the "Privilege Determinator". This could be a Presiding Officer, a Presiding Officer's delegate or any other person, entity or Committee authorised by the relevant House of Parliament. Selection of a suitable individual "Privilege Determinator" might be one way of ensuring the confidentiality and integrity of any covert investigation is maintained.


I also note that clause 9.5.13 of the CCC Protocol allows for referral of any dispute between the Corruption and Crime Commission and "Privilege Determinator" to an independent third party. The Commission is supportive of including such a provision in any protocol developed with the NSW Parliament for determining claims of parliamentary privilege arising from the issuing of a s 22 notice.

Clause 9.6 of the CCC Protocol recognises the need for a procedure where large quantities of records are to be produced on an electronic device. In such cases, CCC Digital Forensic Officers may be sworn in as an officer of the Parliament to take forensic images with the original device secured at the CCC's premises. The Digital Forensic Officers identify material relevant to the CCC investigation and provide that information to the Clerk, after which the Presiding Officer has 14 days to notify the CCC whether a ruling is to be sought from the

"Privilege Determinator". The Commission has concerns about any Commission officer being sworn in as an officer of the Parliament for the purpose of identifying material that may be relevant to a Commission investigation. The Commission's preferred position is that the electronic device be inspected by the "Privilege Determinator" to identify material subject to parliamentary privilege and that material be excluded from the material produced to the Commission. The Commission's preferred position also takes into account the changing nature of an investigation. Often, as an investigation progresses, new lines of inquiry are identified which may result in the need to return to the forensic image of an electronic device and search against other search terms. Having a forensic image from which material subject to a claim of parliamentary privilege has been excluded is therefore preferable to having to go through the process envisaged by the CCC Protocol each time a new line of inquiry is identified.

The Commission is happy to engage with the Committee on this matter in general any of the issues discussed in this letter.

Yours sincerely

  
The Hon John Hatzistergos AM  
Chief Commissioner

 . November 2022

## Appendix Two – Draft Protocol

### **Draft Protocol between the NSW Legislative Assembly and the Independent Commission Against Corruption, for section 22 notices and the determination of claims of immunity from production by reason of Parliamentary Privilege<sup>1</sup>**

#### ***Guidance on parliamentary privilege***

Guidance on parliamentary privilege is provided in the current 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 (tabled in the Commonwealth Parliament on 23 November 2021).<sup>2</sup>

If it is necessary to issue a notice to Parliament pursuant to s.22 of the *Independent Commission Against Corruption Act 1988* seeking records relating to a current or former Member of Parliament, the following procedures apply if the Member of Parliament is or was a Member of the Legislative Assembly.

#### **Issuing s.22 notices**

1. The notice shall be addressed and issued to the Clerk of the Legislative Assembly and, where relevant, copied to the Chief Executive, Department of Parliamentary Services. Where the Clerk is unavailable, the notice is to be issued to and dealt with by the Deputy Clerk.
2. Where disclosure of the notice to the relevant Member or former Member might prejudice the Independent Commission Against Corruption (ICAC) investigation, that should be explicitly identified in the non-disclosure box on page 2 of the notice by inserting the following:

INFORMATION ABOUT THIS NOTICE INCLUDING THE EXISTENCE OF THE NOTICE SHOULD NOT BE DISCLOSED TO (NAME OF MP OR FORMER MP) AS TO DO SO MAY PREJUDICE THE COMMISSION'S INVESTIGATION.

#### **Notification to the Member or former Member**

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<sup>1</sup> The draft protocol has been prepared as a stand-alone document for the purposes of the Committee's report and outlines procedures recommended for adoption by the Legislative Assembly and possibly the Legislative Council, if agreed. However, it is the Committee's recommendation that the procedures in relation to section 22 of the *Independent Commission Against Corruption Act 1988* (ICAC Act), to be agreed between the Presiding Officers and the Chief Commissioner of the ICAC in the 58<sup>th</sup> Parliament, should be included in a single, expanded Memorandum of Understanding with the ICAC that also covers summonses pursuant to section 35 of the ICAC Act, and search warrants. Consequently, the draft protocol above does not contain an introduction and preamble. Further guidance on parliamentary privilege can be found in the 2014 *Draft Memorandum of Understanding on the Execution of Search Warrants in the Premises of the NSW Parliament Between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly*, as published in Legislative Council Privileges Committee, Report 89, [Execution of search warrants by the Australian Federal Police \(No.3\)](#), November 2022, Appendix 3.

<sup>2</sup> *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 and the Attorney-General and Minister for Home Affairs*, tabled 23 November 2021, at [Tabled Documents and Advices – Parliament of Australia \(aph.gov.au\)](#)

3. Where there is no restriction on consulting the Member or former Member about the existence of the notice, the Clerk will contact the Member or former Member to advise of the notice and seek confirmation as to whether:
  - a. there may be material potentially subject to a claim of parliamentary privilege included within the scope of the notice; and
  - b. they intend to participate in the process of identifying those items and making a claim of parliamentary privilege.

The Member or former Member may wish to obtain legal advice.

#### **Initial assessment of the s.22 notice**

4. In circumstances where the Member or former Member does not intend to make a claim of parliamentary privilege but they indicate that privileged material may fall within the scope of the notice, or the Clerk independently forms the view that this may be the case, the Clerk will review the material to identify any items that may be the subject of a potential claim (the screening process). In doing so, the Clerk is acting with the authority of the House as per the resolution adopting the Memorandum of Understanding (MoU) with the ICAC and this protocol.
5. Where a Member or former Member indicates that they intend to make a claim of parliamentary privilege, or the Clerk intends to review the material to screen for any potentially privileged items, the Clerk will notify the Solicitor to the Commission and also advise whether it will be possible to conduct the screening process within the period specified in the notice.
6. The scope of the material sought to be produced will determine the time and resources required to undertake the screening process. In circumstances where the ICAC has declined a request by the Clerk for an extension of time to comply with notice, the Clerk is to consult with the Speaker. The Speaker and the Clerk may discuss the matter with the Chief Commissioner of the ICAC.
7. In circumstances where confidentiality is not required, the Speaker may seek to have the House refer any questions of parliamentary privilege or matters relating to the s.22 notice to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.
8. Nothing in this protocol prevents a party from exercising any right it may have to make an application to a court, e.g. to challenge a notice on the grounds that it fails to specify with reasonable clarity the documents sought, it fails to sufficiently disclose the nature of the investigation and how the material relates to the investigation, or that the volume of material or time within which it is to be produced is legally unreasonable.

#### **Identification and handling of material subject to the notice**

9. Without limiting the terms of any agreement that may be reached in any particular matter, the following procedure will be adopted as far as practicable before the records or things are produced to the ICAC in accordance with the s.22 notice.
10. For the avoidance of doubt, any material stored by a third party on behalf of the Legislative Assembly is to be regarded as material in the possession of the Assembly

and its officers. Accordingly, in such circumstances, a s.22 notice covering such material should be issued to the Clerk.

11. Where the material subject to the notice is held by the Department of Parliamentary Services (DPS), the Chief Executive of DPS or their delegate, will arrange for the material to be provided to the Clerk and, in the case of electronic data, in a format that has been approved by the Clerk, after consultation where necessary with the ICAC to ensure that the software is also usable by the ICAC *and potentially privileged material can be excluded*. The responsibility for responding to a s.22 notice in these circumstances rests solely with the Clerk.
12. Items that may be subject to a potential claim of parliamentary privilege are to be removed from the material produced to the ICAC and retained in the custody of the Clerk. A general description of the nature of the redacted items is to be supplied by the Clerk to the ICAC, without disclosing the specific information they contain. The screening process and the process involved where disputes occur over potentially privileged material are set out below.
13. Material that has been assessed by the Clerk as not involving any items that may potentially be subject to a claim of parliamentary privilege will be produced to the ICAC in accordance with the notice.

#### ***Large volumes of material and electronic data***

14. In the case of s.22 notices covering large volumes of data or material contained on electronic devices, the material extracted by the Parliament's Information Technology Services (ITS) section must be captured and formatted in such a way that items subject to a potential claim of parliamentary privilege are capable of being isolated and removed from the material supplied to the ICAC.

#### ***The quarantining process***

15. Where the material covered by the s.22 notice is not able to be processed by the Parliament's ITS section in such a way that potentially privileged material can be isolated and extracted for retention in the Clerk's custody, or where the ICAC has concerns about the integrity of the data after processing by the NSW Parliament's ITS section, the following measures are to apply:
  - a. Before the extracted data or electronic device is produced to the ICAC in accordance with the notice, the ICAC will ensure that the following tasks are undertaken by an ICAC digital forensics officer –
    - i. two forensic images of the electronic device or copies of the extracted data will be made without reviewing the contents.
    - ii. a copy of the forensic image of the device or the extracted data will be securely stored on the ICAC's digital forensics system, segregated from general access by ICAC officers and investigators, with access able to be audited. The extracted data or device will be secured and accessible only by the ICAC's digital forensic officer.



- iii. If requested by the Clerk, the processes outlined at (i) and ii) must be undertaken in the presence of the Clerk and/or a person nominated by the Clerk. A copy of the forensic image of the electronic device or the extracted data will be made available to the Clerk.
  - b. The ICAC's digital forensics officer will identify material of relevance to the ICAC's investigation team by searching the forensic dataset for relevant keywords or search terms or criteria provided by ICAC investigators. It is the digital forensics officer who identifies the material relevant to the ICAC's investigation.
  - c. Any data which satisfies the keywords, search terms or criteria will be automatically tagged and the digital forensics officer will produce a report of all tagged data. If requested by the Clerk, this process must be undertaken in the presence of the Clerk and/or a person nominated by the Clerk.
  - d. Other than in the above circumstances, the ICAC will not access or review any data or record which does not contain a relevant keyword or search term.
16. The Clerk will be provided with the forensic report of tagged data. This data would then comprise, for instance, emails relevant to the investigation that could be more manageably screened by the Clerk for potentially privileged items. The items of interest to the ICAC, as tagged by the digital forensics officer, will be quarantined from further access or use within the ICAC while the Clerk undertakes the screening process for potentially privileged material.

#### *Notification*

17. Within 14 days (or other agreed period) the Clerk will notify the ICAC whether the tagged data contains any items that may be subject to a claim for parliamentary privilege. The process for making a claim of parliamentary privilege as outlined below would then be followed, according to whether the s.22 notice is subject to confidentiality at this stage of the investigation process.
18. If the Clerk does not notify the ICAC within 14 days (or other agreed period) of a claim of immunity from production by reason of parliamentary privilege, the relevant tagged material from the electronic device or extracted data will be produced in compliance with the notice.

#### **Assessing material subject to a potential claim of parliamentary privilege**

19. As noted above the Member or former Member, or the Clerk has 14 days within which to confirm whether they intend to make a claim. Regard should be had to the amount and nature of the material covered by the notice in determining a timeframe within which the exercise of screening for parliamentary privilege can be conducted.

#### ***The screening process***

20. The three-step Senate test<sup>3</sup> is to be used for making an assessment as to whether a document or thing attracts parliamentary privilege, e.g. assessing the purposes for which the document was created or retained by a Member.
21. The test has been summarised by the Senate as follows and has been previously used by the Clerk and agreed to by the Solicitor to the Commission as the appropriate test:
- Step 1: Were the documents *brought into existence* in the course of, or for purposes of or incidental to the transacting of business of a House or a committee?
    - YES → falls within ‘proceedings in Parliament’.
    - NO → move to step 2.
  - Step 2: Have the documents been *subsequently used* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?
    - YES → falls within ‘proceedings in Parliament’.
    - NO → move to step 3.
  - Step 3: Is there any contemporary or contextual evidence that the documents were *retained or intended for use* in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?
    - YES → falls within ‘proceedings in Parliament’.
    - NO → report that there are documents which fail all three tests.
- Note: Individual documents may be considered in the context of other documents.

22. If the Member or former Member, or the Clerk, identifies any of the material as potentially subject to parliamentary privilege, those items will not be accessed or used until such time as the Legislative Assembly has had an opportunity to consider whether they are subject to parliamentary privilege. The balance of any relevant material not considered to be subject to parliamentary privilege is to be made available to the ICAC for access and use. Material that is not relevant to the ICAC investigation is not to be provided to the investigation team or other ICAC staff.

**Material produced by third parties that may be subject to parliamentary privilege**

23. If the ICAC is aware or advised that a s.22 notice requires, or is likely to require, the production of a record or thing that may be immune from production by reason of parliamentary privilege, or if the ICAC becomes aware a record or thing that may be immune from production by reason of parliamentary privilege has been produced to the ICAC pursuant to a notice, it will inform the Clerk and the Speaker as soon as is reasonably practicable.
24. The ICAC is to ensure that there is a reasonable opportunity for the Clerk on behalf of the Legislative Assembly to make an assessment as to whether a claim of parliamentary privilege is appropriate.

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<sup>3</sup> Senate Standing Committee of Privileges, Report 172, [Disposition of Material Seized Under Warrant](#), 26 November 2018, p.5.

**Determinations where a claim of parliamentary privilege has been made**

25. The Clerk, the Speaker and the Chief Commissioner of the ICAC will work cooperatively together to reach agreement on how the records or things will be managed, reviewed and released such that parliamentary privilege is protected and the ICAC's investigation is not frustrated.

***Where confidentiality does not apply to the s.22 notice***

26. Where a s.22 notice is not subject to confidentiality requirements, and the ICAC disagrees with the claim of parliamentary privilege made by a Member or former Member, or the Clerk on behalf of the House, the matter will be determined by the Legislative Assembly.

***Where the s.22 notice is subject to confidentiality and a disagreement arises on a claim<sup>4</sup>***

27. Where confidentiality applies to the ICAC's investigation and questions of parliamentary privilege are therefore not able to be determined by the House, on the advice of the Clerk, an independent third party will be engaged to determine any disagreement between the Clerk and the ICAC on whether material is subject to parliamentary privilege.
28. In such circumstances, the Speaker shall refer material over which a claim of parliamentary privilege has been made to the independent third party, previously appointed, in accordance with a resolution of the House to establish the position on the recommendation of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics. Any proposed appointments to this role by the Speaker must have the support of the Standing Committee, which may consult with the Chief Commissioner of the ICAC. To be eligible to perform this role an individual must be a legal practitioner of at least seven year's standing. The person must not be a Member of a House of Parliament, or legislature of another State or Territory or of the Commonwealth, nor a former Member of the NSW Parliament.
29. The Clerk will provide the independent third party with a list and copy of the material to be reviewed for determination as to whether the relevant material subject to disagreement should be immune from production by reason of parliamentary privilege. The Speaker will advise the Chief Commissioner of the ICAC of the referral to the independent third party.

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<sup>4</sup> It is relevant to note that restrictions on confidentiality in relation to sections 21, 22, and 35 of the ICAC Act are subject to certain exceptions. Disclosure of the existence of a notice issued by the ICAC may compromise or frustrate an investigation. Under the ICAC Act s.114(1), a person who is required under sections 21 or 22 to produce a statement of information, or attend and produce a document or other thing, or under s.35 to give evidence and produce a document or other thing, shall not disclose any information about the notice or summons that is likely to prejudice the investigation to which it relates. The maximum penalty is 50 penalty units or imprisonment for 12 months or both. However, certain exceptions to this prohibition are provided for including disclosure for the purpose of obtaining legal advice (see s.114(3)). Section 114(2) of the ICAC Act also provides that s.114(1) does not apply to a notice or summons unless it specifies that information about the notice or summons must not be disclosed.

30. The independent third party may request the ICAC to provide additional assistance from the digital forensics officer to remove duplicates, spam and other superfluous results, prior to provision of the material for a determination of a claim of parliamentary privilege. Agreement may also be reached between the Chief Commissioner of the ICAC and the independent third party, for the ICAC's investigators to provide additional keywords, search terms or other criteria to the ICAC's digital forensics officer for the purpose of further narrowing the relevant documents or things required by ICAC, thereby reducing the amount of material requiring a determination.
31. The independent third party will assess and determine the claim within 14 days of receiving the relevant documents or things or will consult with the ICAC on an alternative time limit, which is reasonable having regard to the number of documents or things and the complexity of issues involved.
32. Any documents or things determined by the independent third party to be immune from production by reason of parliamentary privilege that are in the possession of the ICAC will be returned to the Clerk forthwith.

**Material produced pursuant to a summons under s.35 of the ICAC Act**

33. Where material subject to a s.35 summons potentially includes material that may be covered by parliamentary privilege, the ICAC will ensure that the procedures outlined in this protocol in relation to s.22 notices are observed.

## Appendix Three – Terms of reference

### EXTRACT FROM LEGISLATIVE ASSEMBLY VOTES AND PROCEEDINGS NO. 78, THURSDAY 19 NOVEMBER 2020, ENTRY NO. 24

#### 24 STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

Mr Mark Speakman moved, by leave, That:

- (1) The Standing Committee on Parliamentary Privilege and Ethics conduct an inquiry into the adequacy of current procedures to protect parliamentary privilege in circumstances where law enforcement and investigative bodies seek to use coercive, intrusive and covert investigatory powers.
- (2) The Committee's initial focus should be the operation of the agreement currently in place with the Independent Commission Against Corruption (ICAC), including:
  - (a) The 2009 Memorandum of Understanding (MoU) on search warrants between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly and the revisions proposed but not adopted in 2014.
  - (b) The protocol currently observed in relation to notices to produce information under s.22 of the *Independent Commission Against Corruption Act 1988*.
- (3) The Committee evaluate the need for a Memorandum of Understanding to be entered into with the NSW Electoral Commission in relation to the investigation of possible offences and breaches of electoral, funding and disclosure, and lobbying laws.
- (4) The Committee should examine any other relevant matter, in light of recent developments in other jurisdictions and also the reports of the Legislative Council's Privileges Committee, entitled 'Execution of search warrants by the Australian Federal Police', dated 13 October 2020, and Report No. 2, dated 18 November 2020.
- (5) A message be sent informing the Legislative Council of the terms of reference for the referred inquiry.

Question put and passed.

## Appendix Four – Extracts from minutes

Please see also **Appendix Two – 'Extracts from minutes' to Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Report 3/57, *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers*, June 2022**, for the extracts from minutes relevant to the inquiry for Committee meetings prior to meeting no. 36.

### **MINUTES OF MEETING NO. 36**

Tuesday 2 August 2022, 2.30pm

Webex/Room 813A, Parliament House

#### **Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

#### **Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 2:34pm.**

#### **1. Apologies**

None received.

#### **2. Confirmation of minutes**

Resolved, on the motion of Mr Hoenig, seconded by Ms Gibbons:

That the draft minutes of meeting no. 35 held on 23 June 2022 be confirmed.

#### **3. \*\*\***

Resolved, on the motion of Mr Greenwich, seconded by Mr Crouch:

That the Committee reorder the items of business at today's meeting to bring forward item 5.2

\*\*\*

#### **5. \*\*\***

##### **5.2 \*\*\***

#### **4. Inquiry into Parliamentary Privilege and the use of investigative and intrusive powers**

#### **4.1 Update regarding legal advice**

The Clerk updated the Committee on seeking legal advice regarding the issues arising around procedures for dealing with potential claims of parliamentary privilege where the Parliament and third parties must respond to statutory requirements to produce documents and things.

Discussion ensued.

#### **4.2 Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers**

The Chair noted that the Interim Report was tabled out of session with the Clerk on 24 June 2022; and that as per previous advice emailed to Committee Members, the report is listed second for the Committee report take note debate to take place in the Legislative Assembly on Wednesday 10 August 2022 at 12:45pm.

5. \*\*\*

5.1 \*\*\*

6. \*\*\*

#### **7. Next meeting**

Committee secretariat to circulate a date for Members' consideration.

**Meeting adjourned at 3:51pm.**

#### **MINUTES OF MEETING NO. 37**

Friday 5 August 2022, 3.00pm

Microsoft TEAMS

#### **Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Ron Hoenig MP

#### **Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

**In the absence of the Chair, the Deputy Chair opened the meeting at 3:02pm, pursuant to Standing Order 284.**

**1. Apologies**

Mr Alex Greenwich MP.

**2. Inquiry into Parliamentary Privilege and the use of investigatory and intrusive powers**

The Committee attended a conference with Mr Stephen Free SC; Mr Brendan Lim of Counsel; Mr Jackson Wherrett, Reader, Eleven Wentworth; and Mr Mark Smyth, Partner, Herbert Smith Freehills concerning legal advice sought by the Committee for the inquiry.

The Chair joined the meeting at 3:15pm, and took the Chair.

**3. Next meeting**

Committee secretariat to circulate a meeting date for Members' consideration.

**Meeting adjourned at 3:46pm.**

**MINUTES OF MEETING NO. 38**

Tuesday 20 September 2022, 1.30pm

Room 1043, Parliament House

**Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Ms Elspeth Dyer, Manager, House and Procedure

**The Chair opened the meeting at 1:36pm.**

**1. Apologies**

None received.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Crouch, seconded by Mr Greenwich:

That the draft minutes of meeting no. 36 held on 2 August 2022; and the draft minutes of meeting no. 37 held on 5 August 2022 be confirmed.

**3. \*\*\***

**4. \*\*\***



5. \*\*\*

6. \*\*\*

Resolved, on the motion of Mr Greenwich, seconded by Mr Crouch:

- That the Chair's draft response to the Hon John Hatzistergos AM, Chief Commissioner of the ICAC \*\*\* proposing a meeting between the Committee and the ICAC, be sent as circulated.

\*\*\*

#### **7. Inquiry into Parliamentary Privilege and the use of investigative and intrusive powers**

The Chair advised the Committee that following receipt of legal advice from Stephen Free SC concerning matters of relevance to the inquiry, the Clerk will draft a further interim report concerning:

- measures that could be taken to help identify material subject to parliamentary privilege held by third parties that are unable to claim privilege when they produce documents to an investigative agency in response to statutory requirements;
- a proposed approach to drafting a memorandum of understanding between the Parliament and the ICAC around the execution of search warrants and the exercise of its other investigative and intrusive powers (i.e. under ss 21, 22, 23 and 35 of the *Independent Commission Against Corruption Act 1988*) – for consultation with the Legislative Council Privileges Committee.

Resolved, on the motion of Mr Crouch, seconded by Ms Gibbons:

That discussion of a further interim report for the Committee's inquiry into parliamentary privilege and the use of investigative and intrusive powers be held over until a later meeting.

8. \*\*\*

9. \*\*\*

#### **10. Next meeting**

Committee secretariat to circulate a date for Members' consideration.

**Meeting adjourned at 2.00pm.**

#### **MINUTES OF MEETING NO. 39**

Monday 10 October 2022, 11:30am

Webex/Room 1254, Parliament House

#### **Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP  
Mr Alex Greenwich MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly  
Ms Carly Maxwell, Deputy Clerk  
Ms Elspeth Dyer, Manager, House and Procedure  
Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 11.36am.**

**1. Apologies**

Mr Ron Hoenig MP.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Crouch, seconded by Mr Greenwich:

That the draft minutes of meeting no. 38 held on 20 September 2022 be confirmed.

**3. \*\*\***

**4. Correspondence**

The Committee noted the following items of correspondence sent:

- Letter to the Hon John Hatzistergos AM, Chief Commissioner of the Independent Commission Against Corruption (ICAC), dated 20 September 2022, regarding a meeting between the ICAC and the Committee \*\*\*

\*\*\*

**5. Inquiry into Parliamentary Privilege and the use of investigative and intrusive powers**

The Chair noted that following receipt of legal advice from Stephen Free SC concerning matters of relevance to the inquiry, the Clerk will draft a further interim report concerning:

- measures that could be taken to help identify material subject to parliamentary privilege in respect of material held by third parties that are unable to claim privilege when they produce documents to an investigative agency in response to statutory requirements;
- a proposed approach to drafting a memorandum of understanding between the Parliament and the ICAC around the execution of search warrants and the exercise of its other investigative and intrusive powers (i.e. under ss 21, 22, 23 and 35 of the *Independent Commission Against Corruption Act 1988*) – for consultation with the Legislative Council Privileges Committee.

The Clerk briefed the Committee on this matter, noting that she would circulate a draft report outline and draft recommendations to the Committee for its input.

**6. \*\*\***

7. \*\*\*

8. \*\*\*

**9. Next meeting**

The Chair noted that a Committee meeting had been scheduled for 7 November 2022 and that if the Committee needed to meet prior to that the secretariat was to circulate a date for Members' consideration.

**Meeting adjourned at 1:05pm.**

**MINUTES OF MEETING NO. 40**

Monday 7 November 2022, 11:00am

Webex/Room 1254, Parliament House

**Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Clerk-Assistant, Research and Operations

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 11:06am.**

**1. Apologies**

None received.

**2. Confirmation of minutes**

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:

That the draft minutes of meeting no. 39 held on 10 October 2022 be confirmed.

3. \*\*\*

4. \*\*\*

**5. Meeting with Independent Commission Against Corruption**

The Chair noted that, as resolved at the Committee's meeting on 20 September 2022, the Committee was to meet with the ICAC Chief Commissioner and the Commissioners. The Chair also noted that the Chief Commissioner had asked that Mr Lewis Rangott, Director, Corruption Prevention, be included in the meeting.

Resolved on the motion of Mr Hoenig, seconded by Mr Greenwich:

That, the Hon John Hatzistergos AM, Chief Commissioner of the ICAC; Commissioners the Hon Helen Murrell SC and Mr Paul Lakatos SC; and Mr Lewis Rangott, Director, Corruption Prevention be authorised to attend the meeting.

The Chief Commissioner, Commissioners and Mr Rangott were admitted at 11:31 am.

Discussion ensued.

The Chief Commissioner, Commissioners and Mr Rangott withdrew at 12:15 pm.

**6. \*\*\***

## **7. General Business**

The Committee discussed its upcoming meetings and progress on the inquiries that it has on foot: \*\*\* and the inquiry into parliamentary privilege and the exercise of investigatory and intrusive powers.

## **8. Next meeting**

The Chair noted that a Committee meeting had been scheduled for 14 November 2022.

**Meeting adjourned at 12:37pm.**

## **MINUTES OF MEETING NO. 41**

Monday 14 November 2022, 1:00pm

Webex/Room 1043, Parliament House

### **Members present:**

Mr Peter Sidgreaves MP (Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

### **Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 1:06pm.**

## **1. Apologies**

Mr Adam Crouch MP (Deputy Chair).

**2. Confirmation of minutes**

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:

That the draft minutes of meeting no. 40 held on 7 November 2022 be confirmed.

**3. \*\*\***

**4. Correspondence**

\*\*\*

The Committee also noted that a letter dated 9 November 2022 had been received from the Hon John Hatzistergos AM, Chief Commissioner, ICAC concerning claims of parliamentary privilege arising from the exercise of the ICAC's statutory powers. The Chair invited the Clerk to provide a briefing concerning this correspondence.

Discussion ensued.

**5. \*\*\***

**6. \*\*\***

**7. \*\*\***

**8. Inquiries of the Committee - Reporting**

The Committee noted that report consideration meetings for the following two inquiries that it has on foot are scheduled to take place after the November 2022 parliamentary sittings:

- Inquiry into parliamentary privilege and the exercise of investigatory and intrusive powers.

\*\*\*

Discussion ensued.

**9. \*\*\***

**10. Next meeting**

The Chair noted that a Committee meeting had been scheduled for 21 November 2022.

Meeting adjourned at 2:00 pm.

**MINUTES OF MEETING NO. 42**

Wednesday 14 December 2022, 3:00pm

Webex

**Members present:**

Mr Peter Sidgreaves MP (Chair)  
Mr Adam Crouch MP (Deputy Chair)  
Ms Melanie Gibbons MP  
Mr Alex Greenwich MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly  
Ms Carly Maxwell, Deputy Clerk  
Mr Simon Johnston, Clerk-Assistant, Research and Operations  
Ms Elspeth Dyer, Manager, House and Procedure  
Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 3:07pm.**

**1. Apologies**

Mr Ron Hoenig MP

**2. Confirmation of minutes**

Resolved, on the motion of Mr Crouch, seconded by Ms Gibbons:

That the draft minutes of meeting no. 41 held on 14 November 2022 be confirmed.

**3. Correspondence**

\*\*\*

The Committee further noted the following correspondence had been received:

- Email from the Legislative Council Privileges Committee ('LC Committee') secretariat dated 6 December 2022 attaching correspondence from the LC Committee Chair to the Commissioner of the Australian Federal Police concerning issues arising from the report of the LC Committee's inquiry into the execution of search warrants by the Australian Federal Police (No. 3).
- Email from the LC Committee secretariat dated 6 December 2022 attaching correspondence from the LC Committee Chair to the President concerning the need for the Parliament to engage with the Independent Commission Against Corruption to enter into a protocol for the execution of search warrants.

The Chair noted that a briefing note and draft letter to the Chair of the Legislative Council Privileges Committee was circulated in the meeting papers.

Resolved, on the motion of Mr Crouch, seconded by Ms Gibbons:

That the draft letter to the Chair of the Legislative Council Privileges Committee be sent as circulated.

**4. \*\*\***

**5. \*\*\***

6. \*\*\*

7. \*\*\*

#### **8. General Business**

The Clerk provided an update on work being undertaken for the Committee's inquiry into parliamentary privilege and the use of investigatory and intrusive powers. The Clerk noted the intention to seek further legal advice concerning matters of importance to the inquiry and the Committee agreed that this would be an appropriate course of action.

\*\*\*

#### **9. Next Meeting**

The Committee secretariat to canvass availability for a mid to late January 2023 meeting.

**Meeting adjourned at 3:40 pm.**

#### **MINUTES OF MEETING NO. 43**

Wednesday 21 December 2022, 3:00pm

Webex

##### **Members present:**

Mr Peter Sidgreaves MP (Chair)

Ms Melanie Gibbons MP

Mr Alex Greenwich MP

Mr Ron Hoenig MP

##### **Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Mr Simon Johnston, Clerk-Assistant, Research and Operations

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Ms Manuela Sudic, Executive Manager, Office of the Clerk

**The Chair opened the meeting at 3.00pm.**

#### **1. Apologies**

Mr Adam Crouch MP (Deputy Chair)

#### **2. Confirmation of minutes**

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:

That the draft minutes of meeting no. 42 held on 14 December 2022 be confirmed.

#### **3. Correspondence**

The Committee noted the following outgoing correspondence:

- Letter to the Hon Peter Primrose MLC, Chair, Legislative Council Privileges Committee, dated 14 December 2022, concerning issues arising from the Legislative Council Privileges Committee's *Report of the inquiry into the execution of search warrants by the Australian Federal Police (No. 3)*.

4. \*\*\*

5. \*\*\*

#### 6. General Business

##### Correspondence

a. The Clerk reported that

[REDACTED]

The Committee noted the correspondence.

##### Interim report on parliamentary privilege and the use of investigatory powers

- b. The Clerk advised that Senior Counsel is on leave until late January 2023 but would be available to consider the draft protocol and provide advice on his return from leave. The advice and any recommended changes to the draft protocol on section 22 notices could then be submitted to the Committee with an Executive Summary, as an interim report, to be considered as soon as possible in early February.

The Committee noted the update and agreed to the proposed approach.

#### 7. Next Meeting

The Committee Secretariat to canvass availability for an early February 2023 meeting.

Meeting adjourned at 3:31pm.

#### MINUTES OF MEETING NO. 44

Tuesday 7 February 2023, 10:00am

Webex

##### Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Ms Melanie Gibbons MP



Mr Alex Greenwich MP

Mr Ron Hoenig MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 10:02am.**

**1. Confirmation of minutes**

Resolved on the motion of Mr Hoenig, seconded Ms Gibbons:

That the draft minutes of meeting no. 43 on 21 December 2022 be confirmed.

2. \*\*\*

3. \*\*\*

**4. Inquiry into parliamentary privilege and the use of investigatory and intrusive powers**

The Chair raised the matter of a draft report for the inquiry: *Further interim report: Parliamentary Privilege and the use of investigatory and intrusive powers*.

Discussion ensued.

Resolved on the motion of Mr Greenwich, seconded by Mr Crouch:

- That the draft report: *Further interim report: Parliamentary Privilege and the use of investigatory and intrusive powers*, and a one page document prepared by the Clerk summarising the draft report, be circulated to Committee Members via email following today's meeting;
- That the Committee reconvene in the week starting 13 February 2023 to formally consider the report.

5. \*\*\*

6. \*\*\*

**7. Next meeting**

The Committee Secretariat to canvass availability for a meeting in the week starting 13 February 2023.

Meeting adjourned at 10:39am.

**UNCONFIRMED MINUTE EXTRACTS OF MEETING NO. 45**

Monday 13 February 2023, 10:00am

Webex

**Members present:**

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Alex Greenwich MP

Mr Ron Hoenig MP

**Officers in attendance:**

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

**The Chair opened the meeting at 10:02am.**

**1. Apologies**

Ms Melanie Gibbons MP

**2. Confirmation of minutes**

Resolved on the motion of Mr Hoenig, seconded Mr Crouch:

That the draft minutes of meeting no. 44 on 7 February 2023 be confirmed.

**3. \*\*\***

**4. Inquiry into parliamentary privilege and the use of investigatory and intrusive powers**

The Chair referred to the Chair's draft report *Further interim report: Parliamentary Privilege and the use of investigatory and intrusive powers*, circulated to Members by email on 7 February 2023, as amended by the Chair's proposed amendments circulated to Members on 10 February 2023.

Discussion ensued.

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:

That the Committee consider the Chair's draft report circulated to Members by email on 7 February 2023, as amended by the Chair's proposed amendments circulated to Members on 10 February 2023 ('the Chair's draft report') *in globo*.

Upon which, Mr Crouch moved, seconded by Mr Greenwich:

That all reference to correspondence

be deleted from Appendix Four of the Chair's draft report.

Question resolved in the affirmative.

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:  
The Committee adopt the Chair's draft report as amended.

Resolved, on the motion of Mr Hoenig, seconded by Mr Greenwich:

That reference to details of correspondence

not be included at Appendix Four of the report as 'unconfirmed minute extracts' when it is tabled.

Resolved on the motion of Mr Greenwich, seconded by Mr Hoenig:

- The report be signed by the Chair and tabled out of session with the Clerk.
- The secretariat be permitted to make appropriate final editing and stylistic changes as required.
- Once tabled, the report be published on the Committee's webpage.
- That the report be provided to the Chief Commissioner of the Independent Commission Against Corruption then circulated to stakeholders, with the proposal that the draft protocol contained in the report form part of the consultations on a new Memorandum of Understanding between the Legislative Assembly, the Legislative Council and the Independent Commission Against Corruption, to be settled in the next Parliament.

5. \*\*\*

## 6. General Business

The Committee agreed that, as a courtesy, the Clerk would advise the Chief Commissioner of the Independent Commission Against Corruption that the Committee would shortly be tabling its report *Further interim report: Parliamentary Privilege and the use of investigatory and intrusive powers*.

\*\*\*

## 7. Next meeting

The meeting was adjourned at 10:18am until a date and time to be determined.