

Standing Committee on
Parliamentary Privilege and Ethics



LEGISLATIVE
ASSEMBLY

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



Report 3/57 – June 2022



Legislative Assembly

Standing Committee on Parliamentary Privilege and
Ethics

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Parliamentary Privilege and the use of investigatory and intrusive powers

"June 2022"

Chair: Peter Sidgreaves MP



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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

Chair	Mr Peter Sidgreaves MP
Deputy Chair	Mr Adam Crouch MP
Members	Mr Kevin Conolly (18 June 2019 - 31 March 2022) Mr Alex Greenwich (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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Interim Report

Background

- 1.1 On 19 November 2020, the Legislative Assembly resolved to refer to the Standing Committee on Parliamentary Privilege and Ethics 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. The terms of reference for the inquiry can be found at Appendix One.
- 1.2 In the period since the Committee commenced its inquiry a number of other referrals were received from the House, on which the Committee has recently reported. Returning to progress this inquiry, the Committee has become aware of certain significant developments, including cases that have led to the formulation of new protocols and procedures in other jurisdictions. These developments have led the Committee to make a brief interim report to the House, outlining its immediate priorities and progress.

Recent Developments

Western Australia

- 1.3 The Western Australian Parliament has recently developed a protocol for the execution of search warrants on premises occupied by Members of Parliament and the determination of claims of parliamentary privilege. The protocol between the Corruption and Crime Commission of Western Australia, the President of the Legislative Council and the Speaker of the Legislative Assembly was signed on 21 December 2021.¹
- 1.4 The agreement followed legal proceedings brought by the Director General of the Department of Premier and Cabinet (DPC) against the President; the Attorney General against the President of the Legislative Council; and the President of the Legislative Council against the Corruption and Crime Commission (CCC). The proceedings stemmed from a disagreement between the CCC and WA Legislative Council Privileges Committee on the procedures that should apply in relation to two notices issued by the CCC to DPC to produce the email accounts for two former Council members, covering a three-year period.² Action taken by the DPC,

¹ "Protocol, the execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and Determination of claims of immunity from production by reason of parliamentary privilege, between the Corruption and Crime Commission of Western Australia and Legislative Council of Western Australia and Legislative Assembly of Western Australia:", dated 21 December 2021: [Protocol - Corruption and Crime Commission, and Legislative Council and Legislative Assembly.pdf \(ccc.wa.gov.au\)](https://www.ccc.wa.gov.au/Protocol-Corruption-and-Crime-Commission-and-Legislative-Council-and-Legislative-Assembly.pdf)

² It is relevant to note that unlike the situation in NSW, the parliamentary email accounts of the Members concerned had been managed off-site by the Department of Premier and Cabinet since 1984, without any written guidelines or protocols in place. The Director General of DPC had engaged the State Solicitor to conduct a review of

without the knowledge of the WA Legislative Council, had led the Council's Privileges Committee to conclude that an "extremely serious intentional breach of parliamentary privilege" had occurred.³ The subsequent decision in the proceedings brought by the President against the CCC in the Supreme Court was delivered by Justice Hall on 13 July 2021.⁴ The decision strongly endorsed the merits of an MoU or protocol between the CCC and the Parliament⁵.

1.5 The Court concluded that:

- Whether documents required to be produced were subject to parliamentary privilege was a question that could only be determined by Parliament, other persons authorised by Parliament or by the courts [5], [179].
- The method used by the Director-General of DPC to determine privilege in this instance did not involve a lawful determination of parliamentary privilege and should not have occurred [5]. The State Solicitor "had no authority to make binding determinations as to privilege" [182]. However, the notices were valid because they did not require immediate production to the CCC, therefore allowing time for claims of parliamentary privilege to be made after the notice was served and before the production of any documents to the CCC [5],[154]-[155], [178], [179], [187].
- The CCC was "a place out of parliament" for the purposes of Article 9 of the Bill of Rights [5], [136]-[137].
- Whilst parliamentary privilege was essentially a privilege against the *use* of material to "impeach or question" parliamentary proceedings, *production* of material also would breach parliamentary privilege at the point of production because the CCC could immediately use that material as part of its investigation in a way that could have adverse consequences for Members [5], [153]-[154]; [140]-[150].

1.6 Other aspects of the judgement included that:

nearly 70,000 electronic documents to identify any subject to parliamentary privilege that would then be excluded from the remaining emails subsequently produced to the CCC pursuant to the two notices. There followed a series of LC Privileges Committee reports critical of the process used by the Director General as an "extremely serious intentional breach of parliamentary privilege". This in turn led to an order by the House for DPC to produce the material provided to the CCC, and a subsequent parliamentary privilege review conducted by the Committee. Separate proceedings were commenced by the Director General DPC and the Attorney General against the President of the LC, and the President in turn took legal action against the CCC.

³ Legislative Council of Western Australia Standing Committee on Procedure and Privileges, *Report 55: A Refusal to Comply with a Summons to Produce Documents*, August 2019, piii, Parliament of Western Australia website: [Report 55 - WA LC Procedure and Privileges Committee](#)

⁴ *President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223.

⁵ [8]-[9]

- Section 3(2) of the *Crime Corruption and Misconduct Act 2003 (WA)* puts beyond doubt that the provisions of the Act are not to be *interpreted* so as to affect the privilege set out in Article 9 of the Bill of Rights – the interpretative principle [107], [115]-[116].
- A court has jurisdiction to determine claims of parliamentary privilege over specific documents ordered to be produced by the CCC [167]-[178].
- Acceptance that parliamentary privilege cannot be waived, and its protection is absolute; that parliamentary privilege belongs to Parliament not its individual members and while a member may make a claim of privilege, they do so on behalf of the Parliament and not for their own benefit [129].
- Parliamentary privilege cannot be displaced except by express words or necessary implication [106].
- There is doubt that Article 9 extends to communications between members and "whistleblowers" [134].

Main features of the Protocol between the WA Parliament and the CCC

- 1.7 The protocol that was developed following this dispute and the Supreme Court decision, was agreed to by the Presiding Officers and the Commissioner of the CCC in December 2021. It covers:
- The execution of search warrants on premises occupied or used by a Member where documents protected by parliamentary privilege are likely to be held;
 - The exercise of s.95 notices under the Corruption, Crime and Misconduct Act 2003 where documents or other things may be immune from production by reason of parliamentary privilege; and
 - Determination of claims of parliamentary privilege over any document or things with a sufficiently close connection with proceedings in Parliament that have been seized by or are to be produced under statute.⁶
- 1.8 The Protocol aims to ensure:
- Search warrants are executed without improperly interfering with the functioning of Parliament or the CCC;

⁶ "Protocol, the execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and Determination of claims of immunity from production by reason of parliamentary privilege, between the Corruption and Crime Commission of Western Australia and Legislative Council of Western Australia and Legislative Assembly of Western Australia:" 21 December 2021 p.4.

- The timely production of material under s.95 of the Act;
- Members, their staff, and the House have a proper opportunity to raise claims of immunity from production on grounds of parliamentary privilege, subject to lawful seizure or production by the CCC;
- The CCC can perform its role and functions while respecting parliamentary privilege.⁷

1.9 In respect of notices to produce issued by the CCC, the protocol makes a distinction between arrangements to produce small or large amounts of material. In respect of the latter, where very large amounts of records are required to be produced on an electronic device, the protocol contains several checks and balances aimed at limiting the access of CCC officers to potentially privileged material (and providing extra safeguards where they do have access). It also leaves decisions about the records that will require a privilege ruling to the Parliament.

1.10 The Committee considers that there are certain features of the protocol that could be desirable to incorporate in the procedures currently used by the Legislative Assembly and investigative bodies when dealing with material potentially subject to parliamentary privilege. These features are:

- Limiting initial access to the material produced to a particular digital forensic specialist within the investigative body, which would not include solicitors or investigators.
- Creating a second forensic image of the device on which the material is held *without reviewing its contents* and storing that image securely on a segregated forensics system, for which the Clerk can obtain audit logs.
- The Clerk being able to be present when the Digital Forensic Officer creates the forensic image of the device, and when the same officer undertakes a cull using search terms to identify material of relevance to the investigation.
- Having the Digital Forensic Officer produce a report of the relevant material, which is provided to the Clerk. The Presiding Officer has an opportunity to indicate whether they, or their delegate, Committee, or other authorised individual, will make a claim for parliamentary privilege.
- As agreed, the Presiding Officer's authorised delegate may assist the CCC with any further narrowing of the identified material to be reviewed for parliamentary privilege. After this review, any remaining

⁷ Ibid, p.4

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 CCC undertakes not to *intentionally* access or review any data within the identified material that does not contain a relevant keyword or search term.
- With respect to third parties the subject of notices to produce, the protocol provides that the CCC 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 CCC.

- 1.11 The WA protocol also recognises the covert powers that can be exercised by the CCC and the potential for disclosures to compromise or frustrate a CCC investigation (section 9.2). It also contemplates disagreements between the CCC and the Parliament over parliamentary privilege and incorporates a process to resolve any such disputes.

MoU with WA Police Force

- 1.12 Similarly, the current Memorandum of Understanding (MoU) between the Western Australia Police Force and the Parliament provides for agreed procedures to be put in place to facilitate determinations of parliamentary privilege. Paragraph 5 of the MoU provides:

WA Police Force officers (excluding officers attached to the Technology Crime Division) must not have access to, or take part in the review of, data or devices that are likely to contain material that is subject to a claim of parliamentary privilege or which otherwise require a determination of parliamentary privilege to be made except, where there is agreement between the parties, to assist in further reducing the number of documents to be reviewed for parliamentary privilege.⁸

- 1.13 Provided the hard copy records and electronic devices are processed, stored, and handled in a matter that “ensures evidential integrity in any future prosecution”, the parties to the agreement may arrange for the storage and review of data and devices at Parliament.⁹

Committee Comment

- 1.14 The Committee notes the developments in Western Australia following the decision in *The President of the Legislative Council of Western Australia*

⁸ “Memorandum of Understanding (MoU) - Determinations of claims of immunity from production by reason of parliamentary privilege”, signed by Chris Dawson APM, Commissioner of Police, The Hon Michelle Roberts MLA, Speaker of the Legislative Assembly and the Hon Alanna Clohesy MLC, President of the Legislative Council on 24 November 2021: [tp+843+\(2021\)+mou+-+wa+police+force,+la+&+lc+\(24+november+2021\).pdf](https://www.parliament.wa.gov.au/tp+843+(2021)+mou+-+wa+police+force,+la+&+lc+(24+november+2021).pdf) ([parliament.wa.gov.au](https://www.parliament.wa.gov.au))

⁹ Paragraphs 6 and 9 of the MoU.

v Corruption and Crime Commission [No. 2] [2021] WASC 223, which ultimately led to the Parliament and CCC adopting new protocols.

- 1.15 The Committee is reassured by the aspects of the WA protocol, which centre on the segregation of material, strict access controls, and parliamentary authorisation for the process by which privilege claims are made. While it intends to give closer consideration to the feasibility of these procedures in the NSW context, the Committee remains of the view that settling such protocols requires decisions about complex questions carrying significant implications for the operation of Parliament, and the integrity of investigations and their outcomes.
- 1.16 While the Western Australian case raised several matters which the Committee had already started to examine and informally discuss with key stakeholders, it is the specific issue of privileged material being produced by third parties that warrants being drawn to the immediate attention of the House. This particular issue had not been prominent in the Committee's discussions and deliberations to date, but it warrants highlighting at this stage of the inquiry because of its increasing significance.
- 1.17 It is not clear that adoption of *identical* protocols and MoUs in NSW would be appropriate, or that such a move would overcome the practical problems currently being experienced by officers of the Legislative Assembly and third parties responding to the use of compulsory powers by investigative bodies. However, an initial review of the Western Australian protocols and MoUs suggests that there are certain features in these agreements that, if adopted, could improve, and strengthen the existing procedures currently relied upon by the NSW Legislative Assembly when dealing with investigative bodies using compulsory powers.
- 1.18 Other features that involve conferring the status of officers of Parliament on the staff of investigative bodies, or the use of confidentiality agreements, are not approaches that the NSW Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics is contemplating.

Next steps

- 1.19 The Committee intends to recommend interim procedures to assist with the resolution of practical issues pending the completion of the inquiry and the Committee's final report to the House.
- 1.20 Having deliberated upon the proposals put to the Committee and the extent of the existing protocols currently in place in other jurisdictions to manage such situations, the Committee has resolved to obtain independent legal advice on several issues discussed below.

Waiving or loss of parliamentary privilege

- 1.21 It remains the case that parliamentary privilege can only be waived by express legislative provision¹⁰ and that claims of parliamentary privilege are matters for the relevant House to determine.
- 1.22 In circumstances where material has been inadvertently provided to an investigative body exercising compulsory powers and that material is subsequently identified as being covered by parliamentary privilege, questions may arise as to whether that privilege has been waived.
- 1.23 Where the material is produced by the Clerk of the Legislative Assembly under existing protocols, steps have been taken to provide some level of safeguards that would help preserve parliamentary privilege and enable potential claims to be made. However, the Committee has concerns about the adequacy of the caveats being used and the procedures in place and intends to report on the operation of the safeguards and possibly strengthening the caveats by changes to the wording.

Production of material by third parties

- 1.24 At present, the Legislative Assembly and the Committee would be unaware of circumstances where third parties are required to provide information to an investigative body on a confidential basis and questions of parliamentary privilege arise.
- 1.25 The Committee also is not aware of any protocol in place that would enable claims of parliamentary privilege to be made in such circumstances, particularly where third parties such as Government departments and agencies are not able to consult with the House. The third parties involved would not be able to consult with the Clerk, relevant Presiding Officer, or individual Member, due to the confidentiality requirements that usually apply. They would not normally be able to disclose the existence and nature of an order to produce information and, in some cases the volume of material being sought could prevent the issue being identified and raised with the investigative body.
- 1.26 It has been suggested to the Committee, based on the WA Supreme Court decision, that where the scope of an order requires the production of large amounts of data and there is no way for the government department or agency concerned to consult with the relevant House, that agency personnel be

¹⁰ For example, under s.122(2) of the Independent Commission Against Corruption Act 1988, The Commission may use a relevant register—

(a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and

(b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure,

and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register.

delegated authority by the House to undertake the initial cull for potentially privileged material. However, the Committee at this stage is not inclined to support such arrangements but will consider the practical difficulties for third parties in greater detail.

Protocols in use in other jurisdictions – The Western Australian Protocol

- 1.27 The Committee is seeking advice on the terms of the new protocol, noting the different administrative and statutory context in Western Australia, where Parliament has enacted the *Parliamentary Privileges Act 1891*. In particular, the Committee will examine the implications in NSW of establishing a mechanism to facilitate claims of parliamentary privilege where material ordered to be produced is not held by the Assembly and it is suggested that third parties could be designated as authorised persons able to make potential claims of parliamentary privilege on the behalf of the House.

Scope of compulsory orders

- 1.28 The Committee has received advice concerning practical difficulties experienced in relation to the procedures in place to deal with potential claims of parliamentary privilege, where extremely large amounts of material are required to be produced in accordance with compulsory orders.
- 1.29 It is the view of the Committee that the procedures in place to enable questions of parliamentary privilege to be properly determined must be able to be utilised effectively *irrespective* of the scope of a compulsory order and the amount of material to be produced.
- 1.30 This is quite a separate and distinct issue from the legal avenues that the Committee understands would be available to any individual in receipt of a compulsory order that is couched so widely as to constitute an oppressive burden.

Conclusion

- 1.31 This interim report is submitted to the House for the purpose of drawing significant developments to the attention of the membership of the Parliament, the Executive, and the public sector more widely.
- 1.32 It is the view of the Committee that the matters raised in relation to third parties, and the efficacy of the processes in place to support the making of potential claims of parliamentary privilege, are critical to the ability of Members of Parliament to carry out their parliamentary duties and for the Parliament to perform its role and functions. Failing to provide adequate safeguards for the preservation of parliamentary privilege where compulsory powers are used, has the potential to: adversely impact on parliamentary processes and proceedings; inhibit the participation of

members, witnesses, and other individuals in parliamentary proceedings; and undermine or obstruct the House and its members in the performance of their functions.

- 1.33 The advice received by the Committee will inform its consultations with relevant agencies and investigative bodies on the most appropriate procedures to adopt in relation to the production of material under compulsory orders, balanced against the preservation of parliamentary privilege and the lawful exercise of powers by investigative agencies. Bringing forward appropriate procedures for this purpose is a priority matter for the Committee, which has reassessed the conduct of its current inquiry accordingly. The Committee intends to consult with key government agencies and investigative bodies with a view to bringing forward possible draft procedures and changes to existing protocols towards **the end of July 2022**.
- 1.34 The Committee notes the NSW Parliament's existing procedures with investigative bodies consist of: joint memoranda between the Presiding Officers and the ICAC, and between the Presiding Officers and the Commissioner of NSW Police; and certain procedures arranged between the Clerks and the ICAC (subject to examination by this committee as part of its current inquiry). Consequently, any proposals put forward by this Committee will be the subject of consultation with the Legislative Council's Privileges Committee. In this regard, the Committee further notes that the Legislative Council referred to its Privileges Committee on 19 November 2020, an Inquiry into the execution of search warrants by the Australian Federal Police No. 3. The inquiry involves an examination of matters arising from previous reports, including the rights available to a staff to make a claim of privilege over documents and, conversely, the rights available to a member to make a claim of privilege over documents held by their staffer, (regardless of any claims of privilege made by the staffer).¹¹

¹¹ Legislative Council Privileges Committee Inquiry into the execution of search warrants by the Australian Federal Police No. 3, Terms of Reference: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2641/Terms%20of%20Reference%20-%20Execution%20of%20search%20warrants%20by%20the%20AFP%20No.%203.pdf>

Appendix One – 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 Two – Extracts from minutes

MINUTES OF MEETING No. 8

Friday 28 August 2020, 10:45am

Jubilee Room, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Michael Johnsen MP

Mr Kevin Conolly MP

Mrs Wendy Tuckerman MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Elspeth Dyer, Manager, Committees

Mr Simon Johnston, Director, House and Procedure

The Chair opened the meeting at 10:50am.

1. Apologies

Mr Adam Crouch MP (Deputy Chair).

2. ***

3. ICAC investigations and parliamentary privilege

The Chair noted that following the resolution at the last meeting, correspondence had been sent to the Chief Commissioner of the Independent Committee Against Corruption (ICAC) inviting the Commissioners to meet with the Committee, copy included in the meeting papers.

The Clerk spoke to the paper included in the meetings papers in relation to ICAC protocols and the three step test on the application of Parliamentary Privilege.

Discussion ensued.

The Committee welcomed the ICAC Commissioners; Hon Peter Hall QC, Chief Commissioner; Ms Patricia McDonald SC, Commissioner; Mr Stephen Rushton QC, Commissioner.

The following matters were discussed:

- the current status of the Memorandum of Understanding (MoU) with the ICAC on the execution of search warrants;
- the operation of the new s.22 protocol; and
- other developments in relation to the use of intrusive powers by investigative bodies and questions concerning parliamentary privilege.

Resolved, on the motion of Mr Johnsen, seconded by Mr Conolly: That the Chair write to the ICAC Chief Commissioner in relation to:

- the desirability of a review of the MoU between the ICAC and the NSW Parliament;
- options for providing a greater degree of particularity for s.22 notices; and
- any additional relevant information the ICAC wishes to provide as a consequence of the meeting with the Committee held 28 August 2020.

Resolved, on the motion of Mr Conolly, seconded by Mr Johnsen: That the Committee consider seeking a reference from the House to –

- undertake a staged review of the adequacy of Memoranda of Understanding between the NSW Parliament and investigative bodies, including the ICAC, the NSW Electoral Commission, NSW Police and the Australian Federal Police;
- Give priority to the review of the existing MoU with ICAC on the execution of search warrants and the protocol on s.22 notices.

The Committee's consideration of any proposed terms of reference for a House referral should take into account the response from the ICAC to the Committee's letter following its 28 August 2020 meeting.

4. ***

5. Next Meeting

The secretariat to canvass Member availability.

Meeting closed at 1:08pm.

MINUTES OF MEETING No. 9

Thursday 22 October 2020, 1:15pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, Committees

Mrs Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 1:17pm.

1. Apologies

None received.

2. Confirmation of Minutes

Resolved, on the motion of Mr Johnsen, seconded by Mr Hoenig: That the Minutes of Meeting No. 8 be confirmed.

3. ***

4. ICAC investigations and parliamentary privilege

The Chair invited the Clerk to distribute and speak to a briefing paper regarding a proposed inquiry referral on parliamentary privilege and issues arising from investigations and inquiries.

Discussion ensued.

The Committee agreed that the Chair write to the Chief Commissioner of the ICAC, thanking the ICAC for attending the meeting on 28 August and advising of the Committee's intention to seek a referral from the House to conduct an inquiry.

Resolved, on the motion of Mr Hoenig, seconded by Mr Conolly: That the Chair on behalf of the Committee, consult the Leader of the House to seek the following:

That,

- a) 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 and intrusive, covert investigatory powers.
- b) the Committee's initial focus should be the operation of the agreement currently in place with the ICAC, including:
 - i. the 2009 Memorandum of Understanding (MoU) 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;
 - ii. the protocol currently observed in relation to notices to produce information under s.22 of the *Independent Commission Against Corruption Act 1988*.
- c) 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.
- d) the Committee should examine any other relevant matters, including issues raised in the report of the Legislative Council's Privileges Committee entitled *Execution of search warrants by the Australian Federal Police*, dated 13 October 2020.

The House resolution should incorporate a message being sent informing the Legislative Council of the terms of reference for the inquiry.

5. ***

6. Next meeting

The secretariat to canvass Member availability for the 1st sitting week in November.

Meeting closed at 2.10pm.

MINUTES OF MEETING No. 10

Thursday 19 November 2020, 1:15pm

Room 1043, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, Committees

The Chair opened the meeting at 1:15 pm.

1. Apologies

None received.

2. Confirmation of Minutes

Resolved, on the motion of Mr Hoenig, seconded by Mrs Tuckerman: That the Minutes of Meeting No. 9 be confirmed.

3. ***

4. ICAC investigations and parliamentary privilege

The Chair invited the Clerk to brief the Committee on the proposed inquiry referral on parliamentary privilege and issues arising from investigations and inquiries.

Discussion ensued.

Resolved, on the motion of Mr Johnsen; seconded by Mr Hoenig; that the Committee note the terms of the proposed referral:

That,

- a) 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.
- b) the Committee's initial focus should be the operation of the agreement currently in place with the Independent Commission Against Corruption (ICAC), including:
 - i. 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;
 - ii. the protocol currently observed in relation to notices to produce information under s.22 of the *Independent Commission Against Corruption Act 1988*.
- c) 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.
- d) 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.
- e) a message be sent informing the Legislative Council of the terms of reference for the referred inquiry.

5. ***

6. Next meeting

The secretariat to canvass Member availability for early 2021.

Meeting closed at 2.00pm.

MINUTES OF MEETING No. 11

Thursday 11 February 2021, 1:15pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Mr Michael Johnsen MP
Mr Ron Hoenig MP
Mrs Wendy Tuckerman MP
Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly
Mr Simon Johnston, Director, House and Procedure
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:20 pm.

1. Apologies

None received.

2. Confirmation of Minutes

Resolved, on the motion of Mr Johnson, seconded by Mr Hoenig: That the Minutes of Meeting No. 10 be confirmed.

3. ***

4. 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

The Chair referred the Committee to the briefing note circulated with the meeting papers.

Discussion ensued.

Resolved, on the motion of Mr Crouch; seconded by Mr Johnsen; that the Committee:

1. accept the referral by the House of 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; and
2. further discuss the approach it would like to take to stage one of the inquiry at its next meeting.

5. ***

6. Next meeting

Proposed for Wednesday, 17 February at 1.15pm. The secretariat to canvass Member availability.

Meeting closed at 2.02pm.

MINUTES OF MEETING No. 12

Wednesday 17 February 2021, 1:15pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 1:16 pm.

1. Apologies

Mr Adam Crouch MP (Deputy Chair).

2. Confirmation of Minutes

Resolved, on the motion of Mr Johnsen, seconded by Mr Conolly: That the draft Minutes of Meeting No. 11 be confirmed.

3. ***

4. ***

5. 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

The Chair referred the Committee to the briefing note provided at its last meeting, noting that the Committee resolved to further discuss the approach it would like to take to stage one of the inquiry.

Discussion ensued.

Resolved, on the motion of Mr Conolly; seconded by Mrs Tuckerman; that the Committee:

1. begin its inquiry by examining the operation of the agreement currently in place with the ICAC (the 2009 MoU and section 22 notice protocol) with a view to tabling an interim report – 'stage one of the inquiry'; before moving onto examine other areas of concern for the inquiry; and
2. further discuss the approach that it would like to take to stage one of the inquiry.

6. ***

7. Next meeting

Committee Secretariat to circulate dates for Members' consideration.

Meeting closed at 2.04pm.

MINUTES OF MEETING No. 13

Monday 1 March 2021, 2:00pm

Webex and Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Michael Johnsen MP

Mr Ron Hoenig MP

Mrs Wendy Tuckerman MP

Mr Kevin Conolly MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer, Office of the Clerk

The Chair opened the meeting at 2:02 pm.

1. Apologies

Mr Adam Crouch MP (Deputy Chair).

2. Confirmation of Minutes

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Johnsen: That the draft Minutes of Meeting No. 12 be confirmed.

3. ***

4. ***

5. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 2.40pm.

MINUTES OF MEETING No. 14

Friday 30 April 2021, 11:30 am

Room 1254, Parliament House and Webex

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Mr Ron Hoenig MP
Mrs Wendy Tuckerman MP
Mr Kevin Conolly MP

Officers in attendance:

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

The Chair opened the meeting at 11:32 am.

1. Apologies

Ms Melanie Gibbons MP.

2. Committee Membership

The Chair noted the appointment of Ms Melanie Gibbons to replace Mr Michael Johnsen, discharged - as reported in the *Legislative Assembly Votes and Proceedings, 25 March 2021*, entry no. 18.

3. Confirmation of Minutes

Resolved, on the motion of Mr Conolly, seconded by Mrs Tuckerman: That the draft Minutes of Meeting No. 13 be confirmed.

4. ***

5. ***

6. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 1.26pm.

MINUTES OF MEETING No. 15

Wednesday 12 May 2021, 1:15 pm
Room 1136, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)
Mr Adam Crouch MP (Deputy Chair)
Mr Ron Hoenig MP
Mrs Wendy Tuckerman MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Director, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

The Chair opened the meeting at 1:19 pm.

1. Apologies

Mr Kevin Conolly MP.

2. Confirmation of Minutes

Resolved, on the motion of Mrs Tuckerman, seconded by Mr Hoenig: That the draft Minutes of Meeting No. 14 be confirmed.

3. ***

4. ***

5. Next meeting

Committee Secretariat to circulate a date for Members' consideration.

Meeting closed at 2.07pm.

MINUTES OF MEETING No. 20

Friday 27 August 2021, 10:00 am

Via Webex videoconference

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Ron Hoenig MP

Mr Kevin Conolly MP

Mrs Wendy Tuckerman MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Carly Maxwell, Deputy Clerk of the Legislative Assembly

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, PO – Projects, Office of the Clerk

Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 10:04 am.

1. Apologies

None received.

2. ***

3. ***

4. ***

5. 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

The Chair noted that this inquiry was referred by the House in November 2020 and at its meeting on 17 February 2021, the Committee resolved to:

- Begin its inquiry by examining the operation of the agreement currently in place with the Independent Commission Against Corruption (the 2009 MoU and section 22 notice protocol) with a view to tabling an interim report – ‘stage one of the inquiry’ – before moving on to examine other areas of concern for the inquiry, and
- Further discuss the approach that it would like to take to stage one of the inquiry.

A briefing note was circulated in the meeting papers outlining the possible action the Committee could take to progress stage one of the inquiry.

The Clerk also noted a briefing note she drafted concerning the section 22 notice protocol that was circulated with the meeting papers and spoke to it.

Discussion ensued.

Resolved, on the Motion of Mr Hoenig, seconded by Mr Crouch, That:

- the Clerk consult with Clerks in relevant jurisdictions, for example Queensland and Western Australia, to assess the suitability of the NSW Parliament’s Memorandum of Understanding (MoU) and section 22 notice protocol with the Independent Commission Against Corruption having regard to comparable arrangements and issues arising in those other jurisdictions;
- the secretariat draft an issues paper for the Committee’s consideration concerning the MoU and the section 22 notice protocol, outlining any limitations, matters of concern and other matters of note arising.

6. ***

7. Next meeting

Committee Secretariat to circulate a date in late September 2021 for Members' consideration.

Meeting closed at 11:00 am.

MINUTES OF MEETING No. 21

Wednesday 20 October 2021, 1:15 pm

Via Webex videoconference and Room 1254

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Kevin Conolly MP

Mrs Wendy Tuckerman MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, A/Clerk-Assistant, House and Procedure

Ms Rickee Murray, PO – Projects, Office of the Clerk

Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 1:15 pm.

1. Apologies

Mr Ron Hoenig MP.

2. Confirmation of Minutes

Resolved, on the motion of Mr Conolly, seconded by Ms Gibbons: That the draft Minutes of Meeting No. 20 held on 27 August 2021 be confirmed.

3. ***

4. ***

5. Next meeting

Committee Secretariat to circulate a meeting date prior to the November sittings for Members' consideration.

Meeting closed at 1:34 pm.

MINUTES OF MEETING No. 24

Wednesday 23 February 2022, 1:15 pm

Room 1245, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

The Hon. Wendy Tuckerman MP

Mr Ron Hoenig MP

Mr Kevin Conolly MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, PO – Projects, Office of the Clerk

Ms Natasha Zammit, PO – Papers, House and Procedure

The Chair opened the meeting at 1:17 pm

1. Apologies

None received.

2. ***

3. ***

4. ***

5. ***

6. ***

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

The Committee noted that at its 17 February 2021 meeting, it resolved to begin its inquiry by examining the operation of the agreement currently in place with the Independent Commission Against Corruption (ICAC) – the 2009 Memorandum of Understanding and section 22 notice protocol – before moving on to examine other areas of concern for the inquiry.

The Committee further noted there is a particular need to progress its examination of the operation of the section 22 notice protocol.

Discussion ensued.

Mrs Tuckerman departed the meeting at 1:53 pm.

8. ***

9. ***

10. ***

11. Next meeting

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

Meeting closed at 2:00 pm.

MINUTES OF MEETING No. 25

Thursday 10 March 2022, 9:00 am

Webex

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Adam Crouch MP (Deputy Chair)

Mr Ron Hoenig MP

Mr Kevin Conolly MP

Ms Melanie Gibbons MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, PO – Projects, Office of the Clerk

The Chair opened the meeting at 9:02 am

1. Apologies

The Hon. Wendy Tuckerman MP.

2. Confirmation of Minutes

Resolved, on the motion of Mr Hoenig, seconded by Ms Gibbons: That the draft Minutes of Meeting No. 24 held on 23 February 2022 be confirmed.

3. ***

4. ***

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

The Committee noted that the Clerk of the Legislative Assembly of Western Australia had provided the Clerk with the following documents, circulated in the meeting papers:

- An MoU and protocol between the Parliament of Western Australia and the Corruption and Crime Commission (CCC) of Western Australia concerning the execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and determination of claims of immunity from production by reason of parliamentary privilege, signed 24 November 2021.
- An MoU and protocol between the Parliament of Western Australia and the Western Australian Police Force concerning the execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and

determination of claims of immunity from production by reason of parliamentary privilege, signed 24 November 2021.

A briefing note concerning the protocol with the CCC, prepared by the secretariat, was also included in the meeting papers.

The Committee further noted that the protocol with the CCC is of particular relevance for the section of the Committee's inquiry concerned with the protocol that the NSW Parliament currently has in place with the Independent Commission Against Corruption (ICAC) surrounding section 22 notices.

Discussion ensued.

The Chair noted that if the Committee were to meet with the ICAC this would provide an opportunity to examine issues of importance to the inquiry, with a view to obtaining formal evidence from the ICAC at a Committee hearing on a later date.

Resolved, on the motion of Mr Conolly, seconded by Ms Gibbons: That the Chair write to the Chief Commissioner of the Independent Commission Against Corruption (ICAC) on behalf of the Committee, inviting the ICAC to attend a meeting to discuss the protocol that the NSW Parliament currently has in place with the ICAC around section 22 notices, and the recently tabled Western Australian MoUs and protocols.

6. ***

7. ***

8. Next meeting

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

Meeting closed at 10:00 am.

MINUTES OF MEETING No. 26

Tuesday 29 March 2022, 1:15pm

Macquarie Room, Parliament House

Members present:

Mr Peter Sidgreaves MP (Chair)

Mr Kevin Conolly MP

Mr Ron Hoenig MP

Officers in attendance:

Ms Helen Minnican, Clerk of the Legislative Assembly

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Apologies:

Mr Adam Crouch MP (Deputy Chair)

The Hon. Wendy Tuckerman MP

Ms Melanie Gibbons MP

The Chair opened the meeting at 1:18pm

1. Confirmation of Minutes

Resolved, on the motion of Mr Conolly, seconded by Mr Hoenig: That the minutes of the meeting no. 25 on 10 March 2022 be confirmed.

2. Correspondence

The committee noted the following correspondence had been sent and received:

- Letter to the Hon. Peter Hall QC, Chief Commissioner, Independent Commission Against Corruption (ICAC) dated 17 March 2022, requesting ICAC meet with the Committee to discuss matters of relevance to the Committee's inquiry into the adequacy of current procedures to protect parliamentary privilege.
- Response from Chief Commissioner, ICAC, dated 21 March 2022 agreeing to a meeting between the Committee and ICAC officers to discuss matters of relevance to the Committee's inquiry into the adequacy of current procedures to protect parliamentary privilege.

3. ***

4. ***

5. Next meeting

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

Meeting adjourned at 1.30pm.

MINUTES OF MEETING No. 28

Thursday 7 April 2022, 2:30pm

Room 1254, Parliament House and 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

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 2:29pm.

1. Apologies

Ms Melanie Gibbons MP

2. Committee Membership

The Committee noted that on 31 March 2022, the House resolved that:

(1) The Standing Committee on Parliamentary Privilege and Ethics have a membership of five Members.

(2) Alexander Hart Greenwich be appointed to serve on the Committee.

(3) Wendy Margaret Tuckerman and Kevin Francis Conolly be discharged from the Committee.

(Votes and Proceedings, 31 March 2022, entry no.18).

3. Confirmation of minutes

Resolved, on the motion of Mr Hoenig, seconded by Mr Crouch: That the minutes of the meeting no. 26 held on 29 March 2022 be confirmed.

4. ***

5. ***

6. ***

7. ***

8. Next meeting

The Committee agreed that owing to:

- limited dates in April when the Chief Commissioner of the Independent Commission Against Corruption (ICAC) and Members could meet to discuss issues of relevance to the Committee's inquiry concerning parliamentary privilege and the use of investigatory and intrusive powers; and
- the 31 March referral of an inquiry concerning options available to the House regarding the withholding of remuneration and other entitlements of a member suspended from the service of the House, and the need to progress work on that inquiry;

the secretariat is to examine available dates for the meeting with ICAC in late May 2022.

Further, the Committee agreed that the Committee Secretariat is to circulate a date for the next meeting of the Committee for Members' consideration.

Meeting adjourned at 3.39pm.

MINUTES OF MEETING No. 29

Wednesday 27 April 2022, 9:30am
Macquarie Room, Parliament House and 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 of the Legislative Assembly
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 9:49am.

1. Confirmation of minutes

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

- ***
- That the draft minutes of meeting no. 28 on 7 April 2022 be confirmed.

2. ***

3. ***

4. ***

5. Next meeting

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

Meeting adjourned at 11:20am.

MINUTES OF MEETING No. 33

Thursday 9 June 2022, 1:15pm
Room 1254, Parliament House

Members present:

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
Mr Jonathan Elliott, Clerk-Assistant, Scrutiny and Engagement
Mr Simon Johnston, Clerk-Assistant, House and Procedure
Ms Elspeth Dyer, Manager, House and Procedure
Ms Rickee Murray, Parliamentary Officer

In the absence of the Chair, the Deputy Chair opened the meeting at 1:20pm, pursuant to Standing Order 284.

1. Apologies

Mr Peter Sidgreaves MP (Chair).

2. ***

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

The Committee noted correspondence [REDACTED]

The Clerk briefed the Committee on the issues raised by the correspondence.

Discussion ensued.

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

- The secretariat arrange for [REDACTED] to meet with the Committee to discuss the issues raised [REDACTED]
- The Clerk draft a letter to the Independent Commission Against Corruption (ICAC) for the Committee's consideration:
 - Noting the Committee's inquiry into parliamentary privilege and the exercise of investigative and intrusive powers.
 - Raising the processes in place to provide for potential claims of parliamentary privilege to be made where documents are being produced in response to statutory requirements; including discussion of issues arising from the current protocol between the ICAC and the NSW Parliament relating to section 22 notices.
 - Asking what procedures the ICAC has in place surrounding third party release of material that might be subject to parliamentary privilege.
 - Inviting the ICAC to meet with the Committee to discuss matters of relevance to the Committee's inquiry.

4. ***

5. ***

6. Next meeting

Committee secretariat to circulate a date for Members' consideration.

Meeting adjourned at 1:42pm.

MINUTES OF MEETING No. 34

Friday 17 June 2022, 11:00am

Room 1254, Parliament House and Webex

Members present:

Mr Peter Sidgreaves (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

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

Ms Rickee Murray, Parliamentary Officer

The Chair opened the meeting at 11:04am.

1. Apologies

None received.

2. Confirmation of minutes

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

That the draft minutes of meeting no. 33 held on 9 June 2022 be confirmed.

3. ***

Mr Greenwich joined the meeting at 11:14am.

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

(a) Meeting with [REDACTED]

The Chair noted that on 9 June 2022, the Committee resolved to [REDACTED] to a meeting to discuss issues [REDACTED] concerning [REDACTED] parliamentary privilege [REDACTED]

The Committee noted a briefing note drafted by the Clerk for the information of the Committee, and circulated in the meeting papers, regarding the issues raised [REDACTED]

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

That [REDACTED]
[REDACTED] be authorised to attend the Committee's meeting on 17 June 2022.

[REDACTED] was admitted to the meeting at 12:30pm and welcomed by the Chair.

Discussion ensued.

Mr Crouch departed the meeting at 12:47pm.

Ms Gibbons departed the meeting at 1:09pm.

[REDACTED] withdrew at 1:17pm.

Further discussion ensued.

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

- The Clerk draft an interim report for the Committee's consideration:
 - outlining issues relating to the protection of parliamentary privilege where the material required to be produced is held by third parties, including Government agencies and ministerial offices;
 - noting recent developments in other jurisdictions relevant to the review of current protocols in place between the NSW Parliament and investigative bodies and law enforcement agencies with the power to compel the production of information;
 - noting features of the protocol in place between the Corruption and Crime Commission of Western Australia and the Parliament of Western Australia for the determination of claims of immunity from production by reason of parliamentary privilege; and whether elements of this protocol may be suitable for adoption in the NSW context.
- The Clerk seek 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.
- Based on the legal advice, the Clerk commence work on possible interim measures to enable claims of parliamentary privilege to be made (where the material required to be produced is held by either Parliament or third parties), and for existing protocols in this regard to be strengthened.

(b) *Draft letter to the Independent Commission Against Corruption*

On 9 June 2022, the Committee resolved that the Clerk draft a letter to the ICAC for the Committee's consideration:

- Noting the Committee's inquiry into parliamentary privilege and the exercise of investigative and intrusive powers.
- Raising the processes in place to provide for potential claims of parliamentary privilege to be made where documents are being produced in response to statutory requirements; including discussion of issues arising from the current protocol between the ICAC and the NSW Parliament relating to section 22 notices.
- Asking what procedures the ICAC has in place surrounding third party release of material that might be subject to parliamentary privilege.
- Inviting the ICAC to meet with the Committee to discuss matters of relevance to the Committee's inquiry.

The Committee noted that the letter had not yet been drafted for today's meeting on the basis that Committee may wish to further discuss the surrounding issues following today's meeting.

Resolved, on the motion of Mr Greenwich, seconded by Mr Hoenig:
That consideration of the agenda item concerning the draft letter to the Independent Commission Against Corruption be deferred until the next meeting.

5. ***

6. ***

7. Next meeting

Committee secretariat to circulate a date for Members' consideration.

Meeting adjourned at 1:29pm.

UNCONFIRMED MINUTE EXTRACTS OF MEETING No. 35

Thursday 23 June 2022, 5:00pm

Room 1254, Parliament House

Members present:

Mr Peter Sidgreaves (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

Mr Simon Johnston, Clerk-Assistant, House and Procedure

Ms Elspeth Dyer, Manager, House and Procedure

The Chair opened the meeting at 5:02pm.

1. Apologies

Mr Alex Greenwich MP.

2. Confirmation of minutes

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

That the draft minutes of meeting no. 34 held on 17 June 2022 be confirmed.

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

3.1 Update regarding legal advice

The Clerk updated the Committee on action taken to obtain legal advice regarding the issues raised by the inquiry.

3.2 Consideration of Chair's Draft Report

The Chair referred to the Chair's draft report, *Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers*, circulated to Committee Members by e-mail on Thursday 23 June 2022.

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

That the Committee consider the Chair's draft report *in globo*.

Upon which, Ms Gibbons moved, seconded by Mr Crouch:

- That all reference to correspondence received from [REDACTED] concerning matters relating to the inquiry be deleted from Appendix Two of the Chair's draft report.

Discussion ensued.

Question resolved in the affirmative.

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

- the Committee adopt the Chair's draft report as amended;
- the Clerk be permitted to do a final review of the report as adopted by the Committee, and distribute any proposed minor amendments to Members via email for consideration;
- if Members concur with any amendments proposed and circulated by the Clerk, the report be adopted, as further amended;
- any amendments included by concurrence be attached to the minutes of the meeting;
- reference to details of correspondence received [REDACTED] in relation to the interim report not be included at Appendix Two of the report as 'unconfirmed minute extracts' when it is tabled;

- the Committee secretariat be permitted to make appropriate final editing and stylistic changes as required;
- the report, as finally adopted, be signed by the Chair and tabled as soon as possible, either in the House or out of session;
- once tabled, the report be published on the Committee's webpage.

3.3 Draft Letter to the Independent Commission Against Corruption (ICAC)

The Chair noted that on 9 June 2022, the Committee resolved that the Clerk draft a letter to the ICAC for the Committee's consideration:

- Noting the Committee's inquiry into parliamentary privilege and the exercise of investigative and intrusive powers.
- Raising the processes in place to provide for potential claims of parliamentary privilege to be made where documents are being produced in response to statutory requirements; including discussion of issues arising from the current protocol between the ICAC and the NSW Parliament relating to section 22 notices.
- Asking what procedures the ICAC has in place surrounding third party release of material that might be subject to parliamentary privilege.
- Inviting the ICAC to meet with the Committee to discuss matters of relevance to the Committee's inquiry.

Since then, the Committee has resolved that the Clerk seek legal advice on the issues raised by the inquiry.

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

That the Committee defer any action on the draft letter to the Independent Commission Against Corruption concerning matters of relevance to its inquiry into parliamentary privilege and the use of investigative and intrusive powers until after it has received legal advice on the issues raised by the inquiry.

4. ***

5. ***

6. Next meeting

Committee secretariat to circulate a date for Members' consideration.

Meeting adjourned at 5:28pm.

ATTACHMENT TO MINUTES OF MEETING NO. 35: AMENDMENTS PROPOSED AND CIRCULATED BY THE CLERK OF THE LEGISLATIVE ASSEMBLY FOLLOWING MEETING NO. 35, 23 JUNE 2022, AND INCLUDED IN THE REPORT BY CONCURRENCE

without the knowledge of the WA Legislative Council, had led the Council's Privileges Committee to conclude that an "extremely serious intentional breach of parliamentary privilege" had occurred.³ The subsequent decision in the proceedings brought by the President against the CCC in the Supreme Court was delivered by Justice Hall on 13 July 2021.⁴ The decision strongly endorsed the merits of an MoU or protocol between the CCC and the Parliament⁵.

1.5 The Court concluded that:

- Whether documents required to be produced were subject to parliamentary privilege was a question that could only be determined by Parliament, other persons authorised by Parliament or by the courts: [5], [179].
- The ~~process utilised~~ method used by the Director-General of DPC to determine privilege in this instance did not involve a lawful determination of parliamentary privilege and should not have occurred [5]. The State Solicitor "had no authority to make binding determinations as to privilege" [182]. However, the notices were valid because they did not require immediate production to the CCC, therefore allowing time for claims of parliamentary privilege to be made after the notice was served and before the production of any documents to the CCC [5],[154]-[155], [178]-, [179], [187].
- The CCC was "a place out of parliament" for the purposes of Article 9 of the Bill of Rights [5], [136]-[137].
- Whilst parliamentary privilege was essentially a privilege against the *use of information material* to "impeach or question" parliamentary proceedings, *production of information material to the CCC* also would breach parliamentary privilege at the point of production because the CCC could immediately use that *information material* as part of its investigation into Members, in a way that could have adverse consequences for Members. [5], [153]-[154]; [140]-[150].

1.6 Other aspects of the judgement included that:

- Section 3(2) of t~~he~~ *Crime Corruption and Misconduct Act 2003 (WA)* required puts beyond reasonable doubt that the provisions of the Act are not to be *interpreted so* as to affect the privilege set out in Article 9 of the Bill of Rights ~~(as distinct from the~~

³ Legislative Council of Western Australia Standing Committee on Procedure and Privileges, Report 55: A Refusal to Comply with a Summons to Produce Documents, August 2019, piii, Parliament of Western Australia website: Committee Details (parliament.wa.gov.au)

⁴ *President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No 2] [2021] WASC 223.

⁵ [8]-[9]

~~express provision found in s.122 of the Independent Commission Against Corruption Act 1988 (NSW)~~ – the interpretative principle [107], [115]-[116].

- A court has jurisdiction to determine claims of parliamentary privilege over specific documents ordered to be produced by the CCC [167]-[178].
- Acceptance that parliamentary privilege cannot be waived, and its protection is absolute ~~[129]~~; that parliamentary privilege belongs to Parliament not its individual members and while a member may make a claim of privilege, they do so on behalf of the Parliament and not for their own benefit, [129].
- Parliamentary privilege cannot be displaced except by express words or necessary implication [106].
- There is doubt that Article 9 extends to communications between members and "whistleblowers" [134].

Main features of the Protocol between the WA Parliament and the CCC

1.7 The protocol that was developed following this dispute and the Supreme Court decision, was agreed to by the Presiding Officers and the Commissioner of the CCC in December 2021. It covers:

- The execution of search warrants on premises occupied or used by a Member where documents protected by parliamentary privilege are likely to be held;
- The exercise of s.95 notices under the Corruption, Crime and Misconduct Act 2003 where documents or other things may be immune from production by reason of parliamentary privilege; and
- Determination of claims of parliamentary privilege over any document or things with a sufficiently close connection with proceedings in Parliament ~~and~~ that have been seized by or are to be produced under statute.⁶

1.8 The Protocol aims to ensure:

- Search warrants are executed without improperly interfering with the functioning of Parliament or the CCC;
- The timely production of material under s.95 of the Act;

⁶ "Protocol, the execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and Determination of claims of immunity from production by reason of parliamentary privilege, between the Corruption and Crime Commission of Western Australia and Legislative Council of Western Australia and Legislative Assembly of Western Australia:" p.4.