

Privileges Committee

**A revised memorandum of
understanding with the
ICAC relating to the
execution of search warrants
on members' premises**

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Terms of reference

1. That this House notes the revised draft 'Memorandum of Understanding on the execution of search warrants on the premises of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly' tabled by the President on Tuesday 16 September 2014.
2. That the Privileges Committee inquire into and report on the provisions of the revised draft Memorandum of Understanding.
3. That the Committee report by Thursday 6 November 2014.
4. That a message be forwarded to the Legislative Assembly informing it of the terms of reference agreed to by the House.

These terms of reference were referred to the Committee by the House on Wednesday 17 September 2014.

On Thursday 6 November the House further resolved:

That the reporting date for the Privileges Committee's inquiry into a revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises be extended to Tuesday 11 November 2014.

Committee membership

The Hon Trevor Khan MLC	The Nationals	Chair
The Hon Amanda Fazio MLC	Australian Labor Party	Deputy Chair
The Hon David Clarke MLC	Liberal Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	
The Hon Peter Primrose MLC	Australian Labor Party	

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Chair's foreword

This is the sixth inquiry by the Privileges Committee concerning the execution of search warrants on the premises of members of Parliament. The earlier inquiries concerned the execution of a search warrant on the office of a member of the Legislative Council (2003, 2004), a draft protocol for the execution of search warrants by law enforcement and investigative agencies (2006), a Memorandum of Understanding with the Independent Committee Against Corruption (ICAC) concerning the execution of search warrants on members' offices at Parliament House (2009) and a Memorandum of Understanding with the New South Wales Police concerning the execution of search warrants on members' premises generally including those outside Parliament House (2010).

In this inquiry the Committee examined a revised draft of the Memorandum of Understanding with the ICAC developed through negotiations between the Clerks of both Houses of Parliament and the ICAC and tabled by the President of the Legislative Council in the House in September 2014. The revised draft extends beyond the execution of search warrants at Parliament House to include any premises occupied or used by a member. It also includes new procedures which enable a member who was not present at the execution of a warrant to make a claim of parliamentary privilege over items that have been seized and enables a member to claim parliamentary privilege over items which have been removed by an ICAC officer for examination at another location to determine whether they may be seized under a warrant.

The Committee supports the proposed new procedures but recommends changes to the proposed timeframes within which members may make claims of parliamentary privilege where items have been seized or removed for examination from one working day to three working days. Subject to this change, the Committee recommends that the revised draft Memorandum be formally adopted.

I thank the other members of the Committee for their contributions to this inquiry and also thank the Committee Secretariat for its support.

The Hon Trevor Khan MLC
Chair

Summary of recommendations

Recommendation 1

13

That the revised draft Memorandum of Understanding with the Commissioner of the ICAC be amended by:

- replacing 'one working day' with 'three working days' in paragraphs 7(a) and 8(e)
- replacing 'one working day' with 'two working days' in paragraph 8(a)
- replacing 'that working day' with 'the two working days' in paragraph 8(a)

Recommendation 2

14

That the House resolve that the President join with the Speaker in entering into the revised draft Memorandum of Understanding with the Commissioner of the ICAC, as amended in accordance with Recommendation 1.

Recommendation 3

14

That the House send a message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the revised draft Memorandum of Understanding with the Commissioner of the ICAC, as amended in accordance with Recommendation 1.

Chapter 1 Introduction

A search warrant, if otherwise valid, can be executed in premises occupied or used by a member of Parliament including at Parliament House. However, documents and other material in the possession of a member are immune from seizure if their compulsory disclosure would involve impermissible inquiry into ‘proceedings in Parliament’ under Article 9 of the Bill of Rights 1689.¹ To ensure that such material is not seized in practice, procedures have been developed for the execution of search warrants in members’ premises in various jurisdictions, including New South Wales.

This chapter outlines the procedures for the execution of search warrants on members’ premises which apply in New South Wales and the establishment of the current inquiry which concerns revised draft procedures for the execution of search warrants by the Independent Commission Against Corruption (ICAC).

Procedures for the execution of search warrants on members’ premises in New South Wales

Memorandum of Understanding with the ICAC dated 2009

- 1.1 The first attempt to regulate the execution of search warrants in members’ premises in New South Wales was made in response to a case in 2003 in which documents were seized under a warrant from the parliamentary office of a member of the Legislative Council, the Hon Peter Breen, by officers from the ICAC. In that case, following two inquiries by the Privileges Committee,² the Legislative Council ultimately found that some of the documents which had been seized by the ICAC officers under the warrant were within the scope of ‘proceedings in Parliament’ and thus protected by parliamentary privilege and ordered that those documents be returned to Mr Breen.
- 1.2 In 2006, in response to the case involving Mr Breen, the Privileges Committee recommended the adoption of a protocol for the execution of search warrants on members’ offices by law enforcement agencies and investigatory bodies.³ The recommended protocol included procedures to be followed where a member claims that documents in his or her possession are immune from seizure by virtue of parliamentary privilege and the investigating agency disputes that claim, and included criteria to be applied to determine whether the documents form part of ‘proceedings in Parliament’. It also provided for the validity of disputed privilege claims to be determined by the House.

¹ Article 9 applies in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969* (NSW).

² Standing Committee on Parliamentary Privilege and Ethics, New South Wales Legislative Council, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003; Standing Committee on Parliamentary Privilege and Ethics, New South Wales Legislative Council, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004.

³ Privileges Committee, New South Wales Legislative Council, *Protocol for execution of search warrants on members’ offices*, Report No. 33, February 2006.

- 1.3 Before the Legislative Council had responded to the Committee's report the ICAC itself adopted revised procedures for the execution of search warrants on members' offices largely based on the Committee's recommended protocol. The revised procedures were documented in section 10 of Procedure 9 of the ICAC's *Operations Manual*. Section 10 of Procedure 9 did not include every aspect of the Committee's recommended protocol and in particular did not include the criteria for determining whether documents are within the scope of 'proceedings in Parliament'. However, it did include an express acknowledgement that where the ICAC disputes a claim of privilege the issue is to be determined by the House.
- 1.4 Some years later, in 2009, in evidence to the joint parliamentary Committee on the Independent Commission Against Corruption, the ICAC suggested that it did not support the criteria for determining whether documents are within the scope of 'proceedings in Parliament' adopted in the protocol recommended by the Privileges Committee in 2006 and would consider seeking judicial review if it disagreed with the House's determination on a disputed privilege claim. In response to this evidence the Legislative Council referred an inquiry to the Privileges Committee concerning the development of an appropriate memorandum of understanding with the ICAC on the execution of search warrants on members' offices at Parliament House.
- 1.5 In its report on that inquiry the Privileges Committee noted that there were differences of views between the ICAC and the Committee concerning issues relating to the determination of privilege claims which had come to light in the evidence to the Committee on the ICAC. However, the Committee also noted that the ICAC's views on such matters were not reflected in section 10 of Procedure 9 of its *Operations Manual* which as noted was based on the Committee's own recommendation. As the adoption of that protocol represented such an advance on the process which had been followed by the ICAC in the case involving Mr Breen, the Committee recommended that a memorandum of understanding be entered into for the execution of search warrants on members' Parliament House offices incorporating Procedure 9 of the ICAC's *Operations Manual*.⁴
- 1.6 The Legislative Council subsequently authorised the President to enter into the memorandum of understanding recommended by the Privileges Committee and sent a message to the Assembly requesting it to authorise the Speaker to do the same. The Assembly agreed to the Council's request following a report by its Standing Committee on Parliamentary Privilege and Ethics.⁵
- 1.7 In December 2009 the Presiding Officers and the ICAC Commissioner entered into the recommended memorandum of understanding, which provides that the agreed process for executing search warrants on the Parliament House offices of members is that contained in Procedure 9 of the ICAC's *Operations Manual*. The President tabled the Memorandum of Understanding with the ICAC in the House in May 2011.⁶ A copy of the Memorandum of Understanding is provided at Appendix 1.

⁴ Privileges Committee, New South Wales Legislative Council, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report 47, November 2009.

⁵ Standing Committee on Parliamentary Privilege and Ethics, New South Wales Legislative Assembly, *Report on a memorandum of understanding with the Independent Commission Against Corruption relating to the execution of search warrants on the Parliament House offices of members*, November 2009.

⁶ *Minutes*, Legislative Council, 5 May 2011, p 54.

Memorandum of Understanding with the New South Wales Police dated 2010

- 1.8** Following on from the adoption of a Memorandum of Understanding with the ICAC in 2009, in 2010 each House of Parliament referred an inquiry to its privileges committee to consider the development of a memorandum of understanding on the execution of search warrants on the premises of members with the New South Wales Police and any other relevant agencies.
- 1.9** In its report on that inquiry the Legislative Council Privileges Committee recommended the adoption of a memorandum of understanding concerning the execution search warrants by the New South Wales Police, but did not consider it necessary to recommend the adoption of a similar memorandum with other agencies at that time.⁷ This approach was also recommended by the Legislative Assembly Privileges and Ethics Committee in its report.⁸
- 1.10** Each House subsequently authorised its Presiding Officer to enter into the recommended memorandum with the Police, which was signed by the Presiding Officers and the Commissioner of Police in November 2010. The Memorandum of Understanding was later tabled by the President in the House.⁹ A copy of the Memorandum is provided at Appendix 2.
- 1.11** The Memorandum of Understanding with the Police is based on the 2009 Memorandum with the ICAC and additional provisions drawn from the Memorandum of Understanding between the Commonwealth Government and the Presiding Officers of the Commonwealth Parliament concerning the execution of search warrants on premises occupied by members of the federal Parliament entered into in 2005.¹⁰ Notably, unlike the Memorandum with the ICAC, the Memorandum with the Police covers all premises occupied by members including the Parliament House office of a member, the ministerial office of a member (if applicable), the electorate office of a member and a member's residence, and includes procedures for executing search warrants on non-Parliament House premises as well as parliamentary offices.

Establishment of this inquiry

- 1.12** During 2013 the ICAC executed search warrants on the home and electorate offices of a former member of the Legislative Assembly and the electorate offices of a number of sitting members. The execution of these search warrants was not covered by the current Memorandum of Understanding with the ICAC which, as noted, only extends to the execution of search warrants on members' offices at Parliament House.
- 1.13** In 2014 the President and the Speaker authorised the Clerks to enter into discussions with the ICAC with a view to developing a revised Memorandum of Understanding based on the form

⁷ Privileges Committee, New South Wales Legislative Council, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report 53, September 2010.

⁸ Standing Committee on Parliamentary Privilege and Ethics, New South Wales Legislative Assembly *Report on a memorandum of understanding with the NSW Police relating to the execution of search warrants on members' premises*, October 2010.

⁹ *Minutes*, Legislative Council, 5 May 2011, p 54.

¹⁰ *Memorandum of understanding on the execution of search warrants in the premises of members of Parliament between the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate*, 2005.

of the 2010 Memorandum of Understanding with the Police covering not only the Parliament House offices of members but also other premises used and occupied by members including the electorate offices of members of the Legislative Assembly.¹¹

- 1.14** On 16 September 2014 the President tabled in the Legislative Council a revised draft memorandum of understanding developed through those discussions together with an exchange of correspondence between the Presiding Officers and the ICAC Commissioner.¹² In that correspondence the Presiding Officers and the ICAC Commissioner agreed that it would be appropriate for the draft memorandum of understanding to be tabled in each House and referred to the respective privileges committees of the Houses for inquiry and report. A copy of the revised draft Memorandum of Understanding with the ICAC is provided at Appendix 3.
- 1.15** On 17 September 2014 the Speaker tabled the revised draft memorandum of understanding with the ICAC in the Legislative Assembly. On the same day the Legislative Assembly referred terms of reference to its Standing Committee on Parliamentary Privilege and Ethics to inquire into and report on the revised draft and sent a message to the Legislative Council informing it of those terms.¹³
- 1.16** Following receipt of the message from the Legislative Assembly, the Legislative Council referred similar terms of reference to its Privileges Committee, on the motion of the Leader of the Government in the Council and Leader of the House, the Hon Duncan Gay.¹⁴ The terms of reference for the inquiry are shown on page iv of this report. On 6 November 2014 the House resolved that the reporting date for the inquiry be extended to Tuesday 11 November 2014.¹⁵
- 1.17** The following chapter of this report examines the provisions of the revised draft memorandum of understanding with the ICAC.

¹¹ *Hansard*, Legislative Council, 16 September 2014, p 4.

¹² *Minutes*, Legislative Council, 16 September 2014, pp 71-72; *Hansard*, Legislative Council, 16 September 2014, p 4.

¹³ *Minutes*, Legislative Council, 17 September 2014, p 81.

¹⁴ *Minutes*, Legislative Council, 17 September 2014, p 89.

¹⁵ *Minutes*, Legislative Council, 6 November 2014, p 244.

Chapter 2 The revised draft Memorandum of Understanding with the ICAC

This chapter examines the provisions of the revised draft Memorandum of Understanding with the ICAC referred to in the terms of reference for this inquiry and notes the key variations from the current Memorandum of Understanding with the ICAC entered into in 2009. The chapter concludes with a recommendation that the revised draft Memorandum be adopted.

Overview

- 2.1** The current Memorandum of Understanding with the ICAC contains a number of formal sections, such as a preamble and procedures for varying and revoking the Memorandum, and a substantive operative provision.¹⁶ The key formal section is the preamble which provides that the Memorandum applies to the execution of search warrants on members' offices at Parliament House. The substantive section provides that the agreed process for the execution of search warrants on members' premises is 'spelt out in the attached Procedure 9 of the ICAC's Operations Manual entitled "Procedures for obtaining and executing search warrants"'.¹⁷
- 2.2** The revised draft Memorandum also contains formal sections and a substantive provision.¹⁸ The main innovation in the formal sections lies in the preamble which no longer limits the operation of the Memorandum to members' Parliament House offices but extends to other premises used or occupied by members including the ministerial office, electorate office or residence of the member. The substantive provision omits the current reference to the ICAC's *Operations Manual* and instead provides that the agreed process for the execution of a search warrant is 'spelt out in the attached "Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament"'.¹⁹

Procedures for executing search warrants under the revised draft Memorandum

- 2.3** The 'Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament' attached to the revised draft Memorandum comprise eight sections which concern introductory matters (sections 1-4), the process to be followed for the execution of search warrants on members' Parliament House offices (section 5), the process to be followed for the execution of search warrants on members' premises not at Parliament

¹⁶ *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 and the President of the Legislative Council and the Speaker of the Legislative Assembly*, December 2009, tabled by the President in the Legislative Council on 5 May 2011, *Minutes*, 5 May 2011, p 54.

¹⁷ Section 2, 'Execution of search warrants'.

¹⁸ Revised draft *Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly*, tabled by the President in the Legislative Council on 16 September 2014, *Minutes*, 16 September 2014, pp 71-72 (hereafter referred to as the 'Revised draft Memorandum').

¹⁹ Section 2, 'Execution of search warrants'.

House (section 6) and certain new processes which apply whether a search warrant is executed at Parliament House or elsewhere (sections 7 and 8).

Introductory matters (sections 1-4)

- 2.4** Section 1 includes an acknowledgement that the documents and things with respect to which parliamentary privilege may be claimed include 'electronic documents'. Under the current Memorandum with the ICAC such documents are captured due to the definition of 'document' in the *Interpretation Act 1987*²⁰ but the issue is not expressly acknowledged in the terms of the Memorandum itself.
- 2.5** Sections 2 to 4 are modelled on the introductory sections of the procedures attached to the Memorandum of Understanding with the New South Wales Police²¹ which in turn are modelled on the procedures attached to the Memorandum of Understanding between the Commonwealth Parliament and the Australian Federal Police concerning the execution of search warrants on the premises occupied by members of the federal Parliament.²² Under these sections:
- the agreed procedures for the execution of search warrants on members' premises are to apply to members' Parliament House offices, ministerial offices, electorate offices and 'any other premises used by a member for private or official purposes at which the ICAC has reason to suspect that material covered by parliamentary privilege may be located' (section 2)
 - the legal framework for the execution of search warrants on members' premises including the nature of parliamentary privilege is described in some detail (section 3)
 - certain preliminary procedures are to be observed before a warrant is executed on the premises of a member, namely, the warrant is to be approved by the Commissioner, or Deputy Commissioner in the Commissioner's absence, and drafted with care to ensure it does not cover a wider range of documents that is necessary to advance the relevant investigation (section 4).

²⁰ Under section 21 of the *Interpretation Act 1987*, 'document' means 'any record of information', including: '(a) anything on which there is writing, or (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or (d) a map, plan, drawing or photograph'.

²¹ *Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly*, November 2010, tabled by the President in the Legislative Council on 5 May 2011 (*Minutes*, 5 May 2011, p 54), Attachment, 'Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament', paragraph 2 ('Application of these procedures'), section 3 ('Parliamentary privilege'), paragraph 4 ('Procedure prior to obtaining a search warrant').

²² *Memorandum of understanding on the execution of search warrants in the premises of members of Parliament between the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate*, dated 2005, Annexure A, *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*, section 2 ('Legal background'), section 4 'Application of the guideline', section 5.1 ('Procedure prior to obtaining a search warrant').

Execution of search warrants at Parliament House (section 5)

- 2.6** Section 5 sets out the process to be followed for the execution of search warrants on members' Parliament House offices. It is in similar terms to section 10 of Procedure 9 of the ICAC's *Operations Manual* which is attached to the current Memorandum with the ICAC.²³ A similar process also applies under the Memorandum of Understanding for the execution of search warrants by the New South Wales Police.²⁴
- 2.7** Like the existing Memoranda with the ICAC and the Police, section 5 includes provisions concerning the notification of the Presiding Officer of the proposed execution of the warrant, the presence of the member or his or her staff during the search, opportunities for the member to seek legal advice and claim parliamentary privilege, and the handling of disputed privilege claims.
- 2.8** Section 5 also includes new procedures concerning the role of parliamentary officials in relation to the search and the handling of electronic material. Under those procedures:
- The Presiding Officer or other parliamentary officer who is notified of the proposed execution of the warrant is not to advise the member concerned unless the Executive Director, Legal, of the ICAC has agreed (section 5(c)).²⁵
 - The Clerk is to ensure the 'forensic integrity' of items subject to a claim of privilege so they are not lost, damaged, altered or destroyed (section 5(k)).²⁶
 - Where the ICAC contests a claim of privilege and the relevant material is stored on an electronic device a forensic image of the device or a forensic report of its contents is to be prepared by a suitably qualified person agreed to by the Clerk and the ICAC and the image or report is to be examined in relation to the claim rather than the device itself (section 5(o)). If after examination only some of the contents of the device are identified as within the scope of parliamentary proceedings the balance of the contents are to be copied from the imaged device onto another storage medium or a copy of the report redacting the privileged material is to be prepared and the image or copy of the report as relevant is to be provided to the ICAC (section 5(q)).

²³ See ICAC, *Operations Manual*, Procedure 9, 'Procedures for obtaining and executing search warrants, 22 July 2009, pp 16-17, section 10, 'Execution on parliamentary office'.

²⁴ *Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly*, November 2010, tabled by the President in the Legislative Council on 5 May 2011 (*Minutes*, 5 May 2011, p 54), Attachment, 'Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament', paragraph 5, 'Execution of a warrant on the Parliament House office of a member'.

²⁵ However, the ICAC itself is to consider whether it is feasible to contact the member to arrange a time for the search unless compliance would compromise the integrity of the investigation (paragraph 5(d)).

²⁶ This requirement builds on the existing requirement for the Search Team Leader to request the Clerk to secure any items over which parliamentary privilege has been claimed (paragraph 5(k)).

Execution of warrants in members' premises not at Parliament House (section 6)

- 2.9** Section 6 is modelled on the equivalent provision of the Memorandum of Understanding with the Police concerning the execution of search warrants on members' premises not located at Parliament House.²⁷ Like that Memorandum, it includes provisions concerning the presence of the member or his or her staff during the execution of the warrant, opportunities for the member to seek legal advice and claim parliamentary privilege and the handling of disputed privilege claims.
- 2.10** Section 6 also includes certain new requirements concerning the notification of parliamentary authorities in relation to the proposed execution of a warrant. Similar requirements apply under the procedures for executing search warrants at Parliament House in the Memorandum with the ICAC and the Memorandum with the Police where the premises to be searched are at Parliament House. Under these new requirements:
- The Search Team Leader will notify the Presiding Officer (or Clerk or Deputy Clerk if the President is unavailable) of the proposed search.
 - The Presiding Officer will then inform the Clerk (or Deputy Clerk) and the Executive Manager, Parliamentary Services.
 - The purpose of such contact is 'to facilitate timely and informed privilege claims' (section 6 (b)).
- 2.11** Section 6 also includes provisions concerning the circumstances in which the Presiding Officer may notify the member of the proposed search, the role of the Clerk is safeguarding privileged items and the handling of electronic material, similar to those in paragraph 5 outlined at paragraph 2.8 above (sections 6(b), (g), (l), (n), (p)).

Where the member did not have an opportunity to claim privilege before items were seized (section 7)

- 2.12** Section 7 introduces an entirely new process which is not addressed in the existing Memoranda with the ICAC or the Police. This process enables a member who was not present at the execution of the warrant and consequently did not have the opportunity to make a claim of parliamentary privilege over items that were seized to make such a claim after the event. The process applies whether the warrant was executed at Parliament House or elsewhere.
- 2.13** The new process is intended to supplement rather than override the procedures in sections 5 and 6. For example, a member's right to make a claim of privilege over items which have been seized under section 7 does not absolve the ICAC of its obligations under sections 5 and 6 to execute the warrant as far as possible when the member or his or her staff is present and to

²⁷ *Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of Police, the President of the Legislative Council and the Speaker of the Legislative Assembly*, November 2010, tabled by the President in the Legislative Council on 5 May 2011 (*Minutes*, 5 May 2011, p 54), Attachment, 'Procedures for the execution of search warrants in the premises of members of the New South Wales Parliament', paragraph 6, 'Execution of a warrant on premises used or occupied by a member (not being at Parliament House)'.

allow the member a reasonable opportunity to claim parliamentary privilege at the time of the search.

- 2.14** Under the new process, where the member is not present during the execution of the warrant an item will not be seized if it is clear to the ICAC officer that the item is subject to parliamentary privilege. If the member subsequently wishes to make a claim of parliamentary privilege over any item that has been seized the member is to advise the ICAC within one working day and provide a list of the items covered by the claim. If the ICAC does not object to the claim of privilege it will return the items in accordance with the instructions of the occupier of the premises.²⁸ If the ICAC objects to the claim of privilege the procedures for determining privilege claims in paragraph 5 will apply.

Removal of items for examination to determine whether they should be seized (section 8)

- 2.15** Section 8 introduces another new process which has no equivalent in the existing Memoranda with the Police. This process applies where officers executing a search warrant whether at Parliament House or elsewhere decide to remove an item from the premises for examination at another location to determine whether or not it may be seized under the warrant.

The power to remove items for examination

- 2.16** Section 75(A)(1)(c) of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides that a person executing a search warrant may move a thing found on the premises to another place, for up to seven working days, to determine whether it is or contains a thing that may be seized if the occupier of the premises consents or if:
- i. it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
 - ii. there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

- 2.17** The Act also provides that an eligible issuing officer²⁹ may authorise the removal of the thing for an additional period not exceeding seven working days at any one time if satisfied the additional period is required to determine whether it is or contains a thing that may be seized

²⁸ The occupier has certain rights under the general procedures governing the execution of search warrants such as the right to receive a notice of the warrant, see a copy of the warrant, be present during the search, obtain a receipt for things seized and request a copy of any document seized: ICAC, *Operations Manual*, Procedure 9, section 8.10; *Independent Commission Against Corruption Act 1988*, Part 4, Division 4; *Law Enforcement (Powers and Responsibilities) Act 2002*, Part 5, Division 4.

²⁹ *Law Enforcement (Powers and Responsibilities) Act 2002*, section 75A(2). 'Eligible issuing officer' is defined in section 46(1) of the Act as, in the case of a warrant other than a covert search warrant or a criminal organisation search warrant, an 'authorised officer'. 'Authorised officer' is defined in section 3 as: '(a) a Magistrate or a Children's Magistrate, (b) a registrar of the Local Court, or (c) an employee of the Attorney General's Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office'.

under the warrant. Further, where an application for an additional period is made the occupier of the premises may make submissions to the eligible issuing officer in relation to the matter.³⁰ Moreover, the removal of a thing for more than 28 days may only be authorised in exceptional circumstances.³¹

2.18 The power to remove items for examination under section 75A of the *Law Enforcement (Powers and Responsibilities) Act 2002* is referred to in Procedure 9 of the ICAC's *Operations Manual* which is attached to the current Memorandum with the ICAC. However, the issue is addressed in section 8 of Procedure 9³² which applies to the execution of search warrants generally by the ICAC rather than in section 10 which specifically applies to the execution of warrants in members' offices.

2.19 Consequently, under the current Memorandum with the ICAC, officers executing a search warrant have the statutory right to remove things for examination and exercise that right in accordance with section 8 of Procedure 9. However, there are no additional procedures regulating the exercise of the right and the protection of the material subject to parliamentary privilege.

The proposed new process

2.20 As with section 7 the process in section 8 is intended to intersect with rather than displace the procedures prescribed in sections 5 and 6. That is, the obligations imposed on ICAC officers by sections 5 and 6 before and during the execution of the warrant continue to apply until a decision is made (if such a decision is made) to remove an item for examination. Where such a decision is made the key procedures are as follows:

- An item may not be removed if it is clear to the ICAC officer that the item is subject to parliamentary privilege except in accordance with the procedures prescribed by section 8.³³
- Where an ICAC officer wishes to remove a thing for examination and that thing is subject to a claim of parliamentary privilege the thing may only be removed to the custody of the Clerk.³⁴
- If an item is removed and the member later wishes to make a claim of parliamentary privilege the member will notify the ICAC of the claim within one working day.³⁵ If the ICAC does not object to the claim it will return the item in accordance with the instructions of the occupier of the premises.³⁶ If the ICAC objects to the claim the procedures for determining claims of privilege in paragraph 5 will apply.³⁷

³⁰ *Law Enforcement (Powers and Responsibilities) Act 2002*, section 75A(3).

³¹ *Law Enforcement (Powers and Responsibilities) Act 2002*, section 75A(4).

³² ICAC, *Operations Manual*, Procedure 9, section 8.7, 'Removal for Inspection'.

³³ Revised draft Memorandum, section 8.

³⁴ Revised draft Memorandum, section 8.

³⁵ Revised draft Memorandum, section 8(e).

³⁶ Revised draft Memorandum, section 8(f).

³⁷ Revised draft Memorandum, section 8(g).

- If a claim of parliamentary privilege is made and the claim relates to only a part of the contents of the item the member will provide the ICAC with a list of the parts which are subject to the claim.³⁸ If the ICAC does not object to the claim it will return those contents to the occupier or if it is not possible to separate those contents from the whole will ensure that those contents are not used in the event the item is seized.³⁹ If the ICAC objects to the claim the procedures for determining claims of privilege in paragraph 5 of the draft 'Procedures' will apply.⁴⁰
- If the member needs time to consider whether to make a claim of privilege in relation to an item which has been removed for examination the member will advise the ICAC within one working day that he or she is considering making a claim of privilege.⁴¹ If the member needs to identify the contents of the item to decide whether to make a claim the ICAC will provide the member with a list of the contents.⁴² The ICAC will not use the item until the expiry of one working day from the member's advice or the provision of the list or until the member advises that no claim of privilege will be made, whichever first occurs.⁴³
- If, after consideration, the member decides to make a claim of privilege the member will provide the ICAC with a list of the things or subject matter over which the claim is made, and the matter will be dealt with in accordance with the procedures to be applied where a member makes a claim of privilege over items which have been removed described above.⁴⁴

Comment

- 2.21** The Committee notes that the draft Memorandum was developed through discussions between the Clerk of the Houses and the ICAC following authorisation by the Presiding Officers. It includes variations to the existing procedures for executing search warrants on members' offices at Parliament House and new procedures which are not addressed in the current Memorandum with the ICAC.
- 2.22** The proposed variations to the existing procedures for the ICAC executing warrants at Parliament House clarify the roles to be performed by parliamentary officials in relation to searches of members' offices. The variations also minimise the potential for delays to the conduct of ICAC investigations where electronic material is involved, while enhancing the established procedures for the protection of parliamentary privilege under the current Memorandum with the ICAC.
- 2.23** The main new procedure provides for the execution of search warrants by ICAC officers on members' premises not located at Parliament House. This procedure parallels that in the Memorandum of Understanding with the New South Wales Police adopted in 2010 which

³⁸ Revised draft Memorandum, section 8(e).

³⁹ Revised draft Memorandum, section 8(h).

⁴⁰ Revised draft Memorandum, section 8(i).

⁴¹ Revised draft Memorandum, section 8(a).

⁴² Revised draft Memorandum, section 8(b).

⁴³ Revised draft Memorandum, section 8(a) and (c).

⁴⁴ Revised draft Memorandum, section 8(d).

recognises that a member may hold material that is protected by parliamentary privilege at premises outside Parliament such as a ministerial office or home office.

- 2.24** The other new procedures proposed by the draft provide for cases where a member was not present at the execution of the warrant and wishes to make a claim of parliamentary privilege over an item which has been seized and cases where the executing officer removes an item to another location for examination to determine whether or not it may be seized. The absence of procedures covering such cases in the current Memorandum is a significant gap in the protections available to members. Currently, for example, while ICAC officers have the right to remove items for examination there are no agreed procedures by which a member may make a claim of parliamentary privilege with respect to such items.
- 2.25** The Committee supports the adoption of these two further new procedures which extend the circumstances in which claims for parliamentary privilege may be made. However the Committee has concerns in relation to the time limits which are currently proposed for the making of claims of parliamentary privilege over items which have been seized or removed.
- 2.26** In that regard, under draft paragraph 7(a), where a member was not present at the execution of the warrant and wishes to make a claim of privilege over items which have been seized the member is to advise the ICAC within one working day of the seizure and provide a list of the items over which the claim is made. Similarly, under draft paragraph 8(e), where an item has been removed for examination to determine whether it should be seized the member is to advise the ICAC within one working day of the removal of the thing that the member claims parliamentary privilege and provide a list of the items or subject matters over which the claim is made.
- 2.27** In addition, under draft paragraphs 8(a)-(c), where an item has been removed for examination and the member needs time to consider whether to make a claim for parliamentary privilege, the member is to advise the ICAC of that fact within one working day of the removal of the thing. In such a case the ICAC is not to use the item until after one working day from the member's advice, or one working day from the provision by the ICAC to the member of a list of the contents of the item (if applicable), or until the member advises the ICAC that no claim will be made, whichever first occurs. This effectively means that where an item has been removed for examination a member has two working days to make a claim for parliamentary privilege and to provide a list of the things or subjects covered by the claim (provided that within the first working day the member notifies the ICAC that he or she is considering making a claim).
- 2.28** While mindful of the need not to unnecessarily delay ICAC investigations of members' conduct the Committee is concerned that the period of one working day under paragraphs 7(a) and 8(e) or two working days under paragraph 8(a)-(c) may not be sufficient for a member to make a meaningful claim for parliamentary privilege and to provide the required list of things or subjects in every case. There may be practical difficulties, for example, if the member is travelling overseas during the relevant working day or otherwise out of email or mobile phone access, or if the member needs to obtain advice before deciding whether to include particular items in the list.
- 2.29** Instead of one working day the Committee considers that a reasonable timeframe for the making of claims of parliamentary privilege where items have been seized or removed would be three working days. The Committee also considers that, if the member needs time to

consider whether to make a claim for parliamentary privilege under paragraph 8(a)-(c) the member should be expected to notify the ICAC within two working days rather than one working day as at present and the ICAC should be expected not to use the item for a further one working day, as at present, to allow the member to decide whether to pursue a claim or not.

2.30 In making these observations the Committee notes that under the *Law Enforcement (Powers and Responsibilities) Act 2002* an item may only be removed by the executing officer for examination for up to seven working days. This period may be extended by an eligible issuing officer by a further seven days and may only be extended beyond 28 days in exceptional circumstances. The Committee believes that the proposed new timeframe of three working days for making a claim of privilege would still enable the ICAC to comply with the time limits applying to the removal of items. The Committee also notes that there is the potential for the usual statutory time limits to be exceeded if a claim of parliamentary privilege over items which have been removed for examination is disputed and therefore needs to be determined by the House (if, for example, the House is not scheduled to sit for more than 28 days). However, this is an issue which may arise whether the timeframe for making a privilege claim is one, or three, working days.

2.31 The Committee therefore recommends:

Recommendation 1

That the revised draft Memorandum of Understanding with the Commissioner of the ICAC be amended by:

- replacing ‘one working day’ with ‘three working days’ in paragraphs 7(a) and 8(e)
 - replacing ‘one working day’ with ‘two working days’ in paragraph 8(a)
 - replacing ‘that working day’ with ‘the two working days’ in paragraph 8(a)
-

2.32 Subject to the issues addressed in Recommendation 1 the Committee supports the adoption of the revised draft Memorandum in the form in which it was tabled by the President in the House. The Committee notes that the current Memorandum with the ICAC will continue until any further Memorandum on the execution of search warrants in the Parliament House office of members is concluded between the Presiding Officers and the Commissioner of the ICAC.⁴⁵ In addition, the revised draft Memorandum is expressed to ‘replace’ the Memorandum adopted in 2009.⁴⁶ As a result, the adoption of the revised draft Memorandum will automatically terminate the current Memorandum without any need for it to be separately revoked.

2.33 The Committee therefore recommends:

⁴⁵ *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 and the President of the Legislative Council and the Speaker of the Legislative Assembly*, December 2009, page 1, section 4, ‘Variation of this Memorandum of Understanding’.

⁴⁶ Revised draft Memorandum, page 1, section 1, ‘Preamble’.

Recommendation 2

That the House resolve that the President join with the Speaker in entering into the revised draft Memorandum of Understanding with the Commissioner of the ICAC, as amended in accordance with Recommendation 1.

Recommendation 3

That the House send a message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the revised draft Memorandum of Understanding with the Commissioner of the ICAC, as amended in accordance with Recommendation 1.

**Appendix 1 Current 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 ICAC and the
President of the Legislative Council and
the Speaker of the Legislative Assembly,
December 2009**

**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**

1. Preamble

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

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

2. Execution of Search Warrants

The agreed process for the execution of a search warrant by the ICAC over the premises occupied or used by a member is spelt out in the attached Procedure 9 of the ICAC's Operations Manual entitled 'Procedures for obtaining and executing search warrants'.

The document covers the following issues:

- Procedures prior to obtaining a search warrant
- Procedures prior to executing a search warrant
- Procedures to be followed during the conduct of a search warrant
- Obligations at the conclusion of a search.

3. Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the Independent Commission Against Corruption.

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

4. Variation of this Memorandum of Understanding

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

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants in the Parliament House office of members is concluded between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly.

The Commissioner of the ICAC will consult with the President of the Legislative Council and the Speaker of the Legislative Assembly in relation to any revising of Section 10 of the attached Procedure 9 of the ICAC's Operations Manual, or any other provision of Procedure 9 which specifically relates to the execution of search warrants at Parliament.

Revocation of agreement to this Memorandum of Understanding

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

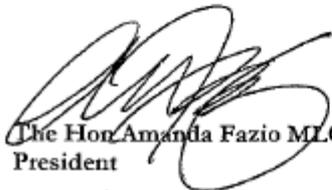
Signatures



The Hon David Ipp AO QC
Commissioner

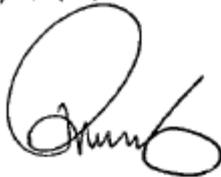
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11 / 12 / 2009



The Hon Amanda Fazio MLC
President

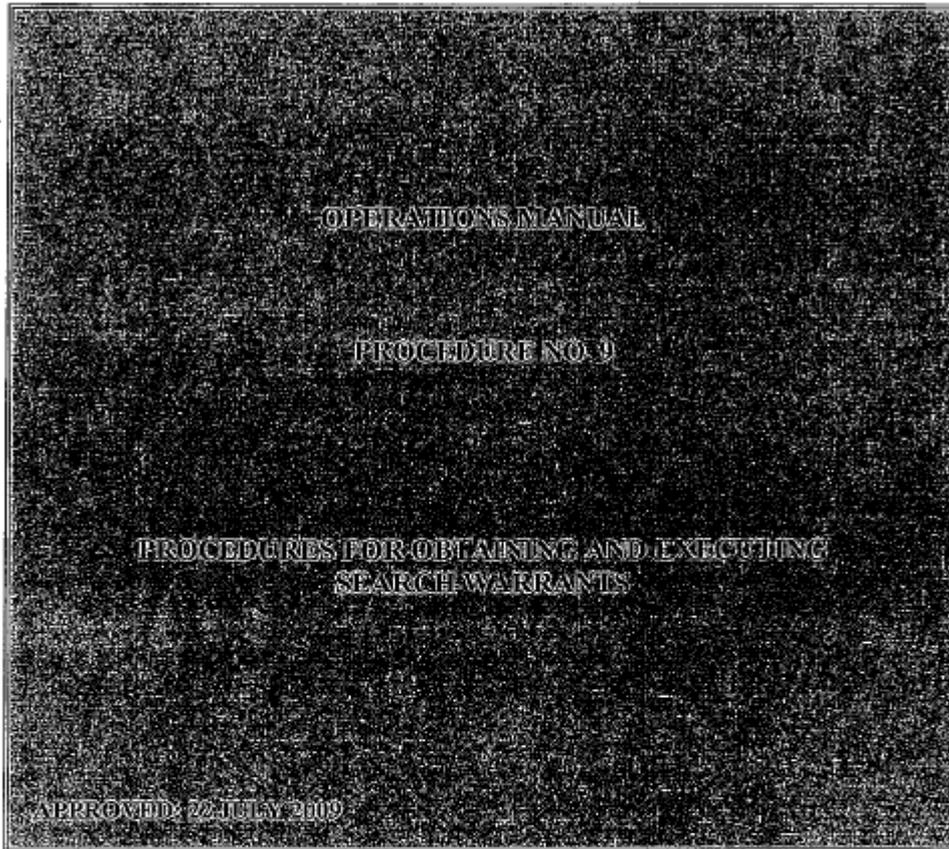
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The Hon Richard Torbay
Speaker

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PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

01 GENERAL

1.1 Search warrants issued in New South Wales

Division 4, Part 5 of the *ICAC Act* and Division 4, Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (Except ss.69-73) apply to Commission search warrants.

Section 40 (4) of the *ICAC Act* provides for an officer of the Commission to make application to an authorised officer (as defined in the *Law Enforcement (Powers and Responsibilities) Act 2002*) or the Commissioner for a search warrant.

It is Commission policy that warrants be sought from authorised officers, and not the Commissioner.

1.2 Extra-territorial search warrants

The ICAC is enabled to make an application for extra-territorial search warrants under several interstate statutes:

VIC *Crimes Act 1958*
ACT *Crimes Act 1900*
WA *Criminal Investigation (Extra-territorial Offences) Act 1987*
SA *Criminal Investigation (Extra-territorial Offences) Act 1984*
TAS *Criminal Investigation (Extra-territorial Offences) Act 1987*
NT *Criminal Investigation (Extra-territorial Offences) Act 1985*
QLD *Police Powers and Responsibilities Act 2000*

Assistance may be sought in obtaining interstate warrants from the Fraud Squad State Crime Command of the NSW Police. The Fraud Squad has template documents for use in making these applications and these can be readily adapted to suit an ICAC application. In addition, NSW Police has liaison officers in each of the above jurisdictions.

1.3 General warrants are invalid

It is a fundamental proposition that a general warrant is bad at law. A warrant that purports to permit an unqualified search is likely to be struck down by a court as a general warrant. Evidence obtained under the purported authority of such warrants is obtained unlawfully. Courts insist on a high degree of specificity in a warrant not only in respect of the things for which the search is to be conducted, but also specificity in relation to the place from which the things are to be seized and the times within which the search and seizure may take place.

An example is a case in which search warrants obtained by the Royal Commission into the NSW Police Force failed on their face to indicate any connection with a matter under investigation by the Commission and so failed to delimit the scope of the search. As a consequence the warrants were held to be invalid, as general warrants: see *MacGibbon & Anor v Warner & Ors*; *MacGibbon & Anor v Ventura & Ors*; *MacGibbon & Anor v O'Connor & Ors* (1997) 98 A Crim R 450.

02 APPLYING FOR A WARRANT

The applicant for a search warrant must have reasonable grounds for believing that:

- i) a thing is on the premises or will be within 72 hours; and
- ii) the thing is connected with a matter that is being investigated under the *ICAC Act*.¹

Reasonable belief is more than an idle wondering whether it exists or not. Reasonable belief requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

2.1 Drafting and Approval

The Case Officer may use the Case Officer's Checklist at Appendix B as an aid to ensure all steps required by this Procedure are taken. Use of this checklist is not mandatory.

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.
2. All applications must be approved by the Executive Director, Investigation Division. If approved the Case Officer will arrange for the Executive Director, Investigation Division to sign the Authorisation Checklist (Appendix A).
3. The senior investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In the case of a search warrant to be executed on a parliamentary office approval must be obtained from the Commissioner or Deputy Commissioner.
4. The Case Officer will be responsible for drafting the search warrant application using the legal macro¹. A separate application must be prepared for each warrant sought. The application must address:

¹ It is important to put all relevant information before the authorised officer, who must make a decision based upon reasonable grounds. The person making the application should have a thorough knowledge of the facts to support the information provided.

It is an offence to give false or misleading information to an authorised officer.

- the authority of the applicant to make an application for a warrant;
- the grounds on which the warrant is sought;
- the address and description of the premises;²
- a description of the thing being searched for and if known its location;³ and
- if a previous application was made and refused, the details of that application and its refusal and additional information that justifies the issue of a warrant.

The issuing officer is also required to consider:

- the reliability of the information;
 - the nature and source of the information (see informers); and
 - whether there is sufficient connection between the thing(s) sought and the matter under investigation.
5. The Case Officer is responsible for ensuring that all information contained in the application is true and correct and all relevant matters are disclosed.
 6. The Case Officer will also draft the warrant⁴, Occupier's Notice and if needed, the cl.11 Certificate, using the legal macros.
 7. The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief

Some common law cases have stated that there is a strict duty of disclosure of material facts by the applicant seeking the warrant. The facts may be ones that may (or may not) have affected the exercise of the authorised officer's discretion to issue the warrant. To avoid a warrant being struck down, it is sensible to include all material facts (in favour or against the issue of a warrant).

² 'Premises': includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof.

More than the address should be given. It should include a description of the premises, street number, unit number office location, any outbuilding, for example, garage, shed, granny flat and the common property, if applicable. It is advisable to conduct a visual sighting of the premises before conducting the search to ensure that there are no complicating factors.

If vehicles at the premises are to be searched, the warrant should say so and include details of vehicle make, colour, registration number, and owner, if known.

³ The warrant must identify:

- (i) the relevant documents or things believed to be on the premises; and
- (ii) state that these documents or things are connected with the matter under investigation.

The matter that is being investigated needs to be specified in the warrant. The reason is to let the occupier of the premises know the scope and purpose of the search, and also to set the bounds to the area of the search which the execution of the warrant will involve as part of the investigation.

⁴ In order to retain the greatest flexibility in operations a number of Commission officers should be named as authorised to execute each particular warrant.

Investigator, to the Case Lawyer for review and settling.⁵ The Case Lawyer is to ensure the documents comply with the relevant provisions of the *ICAC Act* and *Law Enforcement (Powers and Responsibilities) Act 2002* and Regulation and is to identify any policy or other issues which the Case Lawyer believes should be brought to the attention of the Executive Director, Legal, that may affect approval. In the case of a search warrant to be executed on a parliamentary office the Case Lawyer should ensure as far as possible that the documents described in the warrant are not likely to be subject to parliamentary privilege.

8. The draft documentation and Authorisation Checklist will be referred to the Executive Director, Legal, for approval, both as to the documentation and the making of the application.
9. If the Executive Director, Legal, does not approve the documentation it is to be returned to the Case Lawyer for appropriate amendment. If the Executive Director, Legal, does not approve the making of the application he/she will discuss with the Executive Director, ID; and the Commissioner or Assistant Commissioner responsible for the investigation to resolve the issue.
10. If approved, the documentation is to be returned to the Case Lawyer who will provide it and the Authorisation Checklist to the Case Officer for submission to the Senior Property Officer for numbering. The Senior Property Officer will return the original warrant to the Case Officer and retain a copy. The Authorisation Checklist will be retained with the other records by the Senior Property Officer.
11. The Case Officer will then arrange for swearing and issue. A copy of the original signed application including the authorised officer's record of the application is to be obtained for Commission records.
12. Where the search warrant affects premises occupied by a public authority as defined in the *ICAC Act*, consideration shall be given as to whether any prior liaison should take place with a public official. Prior liaison shall not occur without the express approval of the Executive Director, ID.

03 SEARCH WARRANT APPLICATION BY TELEPHONE

Section 61 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides for an application to be made by telephone, radio, telex or other communication device where the warrant is required urgently and where it is not practicable for the application to be made in person.

Section 61(3) provides that an application must be made by facsimile if the facilities to do so are readily available.

⁵ It is important all documents contain identical descriptions of the premises and of the documents and other things to be searched for. This can most readily be achieved by copying that material from the application into each of the other documents.

The approval of a Chief Investigator is a pre-requisite to an application for the issue of a search warrant by telephone (or facsimile).

Where a Search Warrant is issued upon application made by telephone, the issuing officer will advise the terms of the warrant and the date and time it was approved. The Case Officer must then ensure that a written warrant is completed in those terms.

Although s.46 of the *ICAC Act* does not distinguish between telephone warrants and others it is unlikely that an issuing officer would allow more than 24 hours for the execution of a warrant obtained by telephone application.

04 DISCLOSING IDENTITY OF INFORMANT

The identity of a registered informant on whose information the application for a warrant is based, should if possible be omitted from the application. If such information is relied upon it should be indicated in the application that the information is from a registered informant. Consideration should also be given to whether there are any operational reasons why the identity of any other person who has supplied information should not be disclosed.

In each case before attending the authorised officer the Case Officer will discuss these issues with the Team Chief Investigator and a decision made whether or not to disclose the identity if pressed to do so by the issuing officer.

Where a decision is taken not to disclose identity and the issuing officer insists on knowing the application is to be withdrawn. The matter is to be reported to the Executive Director, ID and the Executive Director, Legal, so that consideration can be given to taking further action.

05 PREVENTING INSPECTION OF DOCUMENTS

The court is required to keep copies of the application for the warrant and the Occupier's Notice, together with the report to the authorised officer on execution of the warrant. The original search warrant is attached to that report. Generally, these documents are available for inspection by the occupier or by any other person on his behalf (Clause 10, *Law Enforcement (Powers and Responsibilities) Regulation 2005*).

Clause 10 permits an issuing officer to issue a certificate to the effect that the issuing officer is satisfied that:

- (a) such a document or part of such a document contains matter:
 - (i) that could disclose a person's identity, and
 - (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or
- (b) a document or part of a document contains matter that, if disclosed, may seriously compromise the investigation of any matter.

If the issuing officer is so satisfied, then the document or part of the document to which the certificate relates is not to be made available for inspection.

06 **COVERT SEARCH WARRANT**

Section 47 of the *Law Enforcement (Powers & Responsibilities) Act 2002* makes specific provision for the granting of a covert search warrant. However, s.46C of that Act limits the class of persons who can apply for a covert search warrant to certain authorised police officers, certain officers of the Police Integrity Commission and certain officers of the NSW Crime Commission.

Commission officers are not authorised under the Act to apply for a covert search warrant and therefore the Commission cannot make use of the covert search warrant provisions.

07 **BRIEFING**

The Case Officer allocated the responsibility for the execution of a Search Warrant/s (Search Team Leader) shall be accountable to the Commission for the entire operation. The Search Team Leader shall:

- (a) assess personnel required and allocate tasks, e.g. group leaders, document and property recorder, photographer, video and audio recording operator, etc;
- (b) ensure Team members are skilled in the operation of equipment to be used and that such equipment is in working order and ready for immediate use;
- (c) assess the need for equipment which will be required to accompany the search team, e.g. camera, video recorder, notebooks, property seizure sheets, containers and seals to secure seized property and documents, and equipment to gain access to the premises if force is likely to be required;
- (d) establish the search team/s under his/her personal direction; prepare operational orders, brief the search team/s and Case Lawyer on the proposed execution of the warrant, ensure that each search team member reads and understands the authority of the warrant and is aware of his/her role and any potential risks. The Executive Director, ID shall be advised beforehand of the briefing session and attend if he/she considers it appropriate or necessary;
- (e) arrange for the search team/s to physically study the address and precise premises to be searched and be aware of the address and detail, i.e. whether brick or fibro house, office building, etc, and of special landmarks or peculiarities which readily identify them. In short, the search team/s must be fully aware of the exact location and description of the premises to be searched, including entrances and other accesses to ensure that only the premises mentioned in the Warrant are entered.

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The Team Property Officer is responsible for:

- (a) making themselves aware of the property control procedure as it applies to Team Property Officers as set out in Procedure No. 27 (Registration, Control and Disposal of Property);
- (b) the composition, care and control of the search kits - including ensuring that the search kit contains adequate consumables for the search;
- (c) maintaining the seizure records in the field including:
 - (i) Property Seizure Sheets (Appendix 'D');
 - (ii) General Receipts (Appendix 'C');
- (d) control of seized or volunteered property until such time as it is registered with Property.

The Case Lawyer is responsible for providing advice on any legal issues relating to the proposed execution of the warrant.

08 EXECUTION OF WARRANT

Under s.46 of the *ICAC Act* a search warrant ceases to have effect:

- (i) one month after issue (or such earlier time as specified); or
- (ii) if it is withdrawn by the person who issued it; or
- (iii) when it is executed

whichever first occurs.

The Search Warrant authorises any person named in the Warrant to:

- (a) enter the premises, and
- (b) search the premises for documents or other things connected with any matter that is being investigated under the *ICAC Act*, and
- (c) seize any such documents or other things found in or on the premises and deliver them to the Commission.

A member of the Police Force, or a designated "senior Commission investigator", named in and executing a search warrant may search a person found in or on the premises whom the member of the Police Force or "senior Commission investigator" reasonably suspects of having a document or other thing mentioned in the warrant. This power does not extend to Special Constables.

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8.1 Person(s) named in the warrant must execute the warrant

At least one of the persons named in the warrant must be in attendance at the premises to be searched at the time the warrant is executed. In *Hartnett & Ors v State of New South Wales* (SC unrep 31.3.99) warrants were held not lawfully executed because the only person named in the warrants did not attend any of the premises to be searched at the time the warrants were executed. The officer was, instead, co-ordinating the operation from a command post and was not physically involved in any of the searches.

8.2 Times between which warrant can be executed

Search warrants issued under the *ICAC Act* can only be executed between 6:00 am and 9:00 pm and cannot be executed outside of those hours unless the warrant expressly authorises that the warrant may be executed outside of those hours.

When proposing the execution of a search warrant, officers should be conscious of the presence of young children on the premises. The potential for young children to become distressed should be considered. In appropriate cases the Search Team Leader should suggest to the parents that they explain what is happening. If the presence of young children is considered a particular risk to the execution of the warrant the Executive Director, ID should be consulted.

A search conducted under a warrant which does not authorise an out-of-hours search is unauthorised by the warrant and evidence obtained out-of-hours is obtained unlawfully. In *Myers Stores Limited v Soo* (1991 2 VR 597) police officers who executed a warrant between 6:00 am and 9:00 pm, but continued to search after 9:00 pm without any express authority on the warrant, were held to have conducted an unlawful search as regards that part of the search conducted after 9:00 pm. This decision was applied by the NSW District Court in *Winter v Fuchs* (June 99) in similar circumstances.

8.3 Entry Announcement

Searches must not be conducted of unoccupied premises unless exceptional circumstances exist. If it is known that the premises will be unoccupied this fact must be made known to the authorised Justice at the time of application.

Pursuant to s68 of the *Law Enforcement (Powers and Responsibilities) Act 2002* one of the persons executing a warrant must announce that they are authorised to search the premises and provide the occupier with an opportunity to allow entry onto the premises.

This requirement need not be complied with if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the warranted is not frustrated. In such circumstances, reasonable force may be used to gain entry.

Upon access being gained to the premises mentioned in the Warrant, the Search Team Leader (usually the senior ICAC officer present) shall:

- (i) identify the search team as members of the Independent Commission Against Corruption;
- (ii) read and explain the Search Warrant to the occupier and produce it for inspection if requested (NOTE: The Search Team Leader must retain possession of the Search Warrant);
- (iii) serve the Occupier's Notice. If the occupier is not present, the notice shall be served as soon as practicable after executing the warrant;
- (iv) invite the co-operation of the occupier;
- (v) execute the warrant;
- (vi) advise the Search co-ordinator of time of entry and exit.

8.4 Service of the Occupier's Notice

A person executing a warrant is required, on entry onto the premises or as soon as practicable after entry onto the premises, to serve the Occupier's Notice on the person who appears to be the occupier and who is over 18 years of age (s.67 LEPR).

If no such person is present the Occupier's Notice must be served on the occupier within 48 hours after executing the warrant (s.67(4) LEPR).

If an Occupier's Notice cannot be practicably served within these time limits the eligible issuing officer who issued the warrant may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the Occupier's Notice to the attention of the occupier. Such an order may direct that the Occupier's Notice be taken to have been served on the occupier on the happening of a specified event or on the expiry of a specified time.

In *Black v Breen* (unreported, SCNSW, 27 October 2000) His Honour Ireland AJ held that the failure of the police officers to hand to the plaintiff a complete Occupier's Notice meant that the execution of the warrant was contrary to law. In that case the first page of the notice had been given to the occupier but not the second page.

8.5 Execution

In executing the warrant ICAC officers must:

- (i) use the minimum amount of force, where force is required;

- (ii) cause the least amount of damage necessary in the course of the search and entry;
- (iii) not unduly restrict the movement of occupants of searched premises, unless they are hindering the search;
- (iv) wear the approved ICAC identification jacket unless exempted by the Search Team Leader (such exemption only to be given in exceptional circumstances);
- (v) if not wearing an ICAC identification jacket, display prominently the ICAC official identification badge during the execution;
- (vi) only break open receptacles in the premises if reasonably necessary for the purpose of the search;
- (vii) use such assistants as considered necessary.

It is the responsibility of the Search Team Leader to ensure strict compliance with the property seizure procedure. If property is volunteered then it is to be receipted using the form of receipt at Appendix 'C'. If property is seized then it is to be receipted using the form of the Property Seizure Sheet at Appendix 'D'.

In most cases it will be useful for a rough sketch of the floor plan to be drawn on the reverse side of the property seizure sheet and notations made as to where the relevant property was found. The interior of the premises should be photographed or video taped, particularly the areas where the documents or other things were found. Photography or video recording should be done with the occupier's consent whenever possible.

The use of video recording of the search should be done whenever possible. This protects the occupier and Commission officers against spurious allegations. If the occupier refuses consent that refusal should be recorded if possible prior to the audio of the device being switched off. Consent is not required for video taping.

If in the execution of the warrant the warrant holder considers it appropriate to audio tape any conversations with the occupier the warrant holder must gain permission of the occupier to audio tape these conversations.

In the event there is a conversation, consideration should be given to whether, in the circumstances, a caution should be given.

Questions put to the occupier or any other person on the premises concerning documents or things seized and any replies should be appropriately recorded. All such persons must first be told the conversation will be recorded.

Once the execution of the warrant has commenced at least one of the persons named in the warrant should remain on the premises until the search is completed.

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8.6 Operation of Electronic Equipment

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to bring onto premises and operate any electronic and other equipment reasonably necessary to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant. The operation of equipment already at the premises to examine a thing is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

The Search Team Leader will determine what equipment should be used.

8.7 Removal for Inspection

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to remove a thing found on the premises to another place for up to seven working days for examination to determine whether it is or contains a thing that may be seized under the warrant;

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

If a thing is moved to another place for examination the officer who issued the search warrant may extend the period of removal for additional periods not exceeding seven working days at any one time.

Where an item is removed the person executing the warrant must advise the occupier that the occupier may make submissions to the issuing officer and must give the occupier a reasonable opportunity to do so.

The Search Team Leader will determine whether any items are to be removed from the premises for the purpose of examination.

8.8 Access to and Downloading of Data

Section 75B of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to operate equipment at the premises being searched to access data (including data held at other premises) if that person believes on reasonable grounds that the data might

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be data that could be seized under the warrant. The equipment can be used to put any data that could be seized in documentary form so that it may be seized in that form.

The person executing or assisting in the execution of the warrant may;

- copy any accessed data to a disk, tape or other data storage device brought to the premises (or, with the consent of the occupier, copy the data onto such a storage device already at the premises) and
- take the storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.

The operation of equipment already at the premises to access data is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or data.

Any data obtained under section 75B that is not data that could be seized under the warrant must be removed from the Commission's data holdings and any other reproduction destroyed.

8.9 When is a Warrant Executed?

A warrant is executed when the search is completed and those authorised under the warrant have left the premises. It is not possible to execute a warrant with multiple entries, searches and seizures during the period that the warrant remains in force. A person cannot be denied access to any part of their property, so rooms etc cannot be locked up.

Where the Search Team Leader has executed a Search Warrant and is satisfied that the documents and things described in the warrant:

- (a) have been located and seized, or
- (b) are not on the premises

he/she shall terminate the search.

If at any stage the search team leave the premises, there is no right of re-entry.

8.10 Rights of Occupier

The occupier of premises has the following rights:

- to see a copy of the warrant;

- to be present during the search and observe, provided they do not impede it. (NOTE: There is no power for the investigators to require a person to remain on the premises, unless they have been arrested);
- to be given a receipt for things seized;
- to request a copy of any document seized or any other thing that can be readily copied;
- to receive the occupiers notice.

09 EXECUTION ON LAWYER'S OFFICE

In executing a warrant on a lawyer's office care must be taken regarding any claim for legal professional privilege. Documents covered by legal professional privilege cannot be made the subject of a search warrant (*Baker v Campbell* (1983) 153 CLR 52).

Legal professional privilege attaches to communications only if the communication is for the dominant purpose of a lawyer providing legal advice or services for the purpose of existing or contemplated legal proceedings or obtaining legal advice. It does not protect:

- (a) documents prepared for other purposes, even if they are held for the purposes of legal proceedings or obtaining advice; eg title deeds, trust account records, business records, or photocopies of any unprivileged document,
- (b) communications made for a criminal purpose,
- (c) documents concerning the identity of a client or the fact of their attendance at their solicitor's office.

Guidelines for the execution of search warrants on legal offices have been agreed between the NSW Police Force and the NSW Law Society. These guidelines (with some minor modifications) are set out below and must be followed by Commission officers executing a search warrant on a lawyer's office.

1. Upon attendance at the premises of the lawyer or Law Society, the Search Team Leader should explain the purposes of the search and invite the lawyer or Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of an offence the Search Team Leader should say so.

Identification of all members of the search team should be provided.

2. If no lawyer, or representative of the Law Society, is in attendance at the premises then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the Search Team Leader in his discretion considers reasonable in all the circumstances to enable any lawyer

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or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.

3. The lawyer or Law Society should be provided with a copy of the search warrant in addition to being shown the original warrant, if production thereof is demanded by them.
4. A reasonable time should be allowed to the lawyer to enable him or her to consult with his or her client(s) or to the Law Society to enable it to consult with the legal representatives of the persons to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his or her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.
5. Having informed his or her client(s) of the position or the Law Society having informed the legal representatives of the persons to whose affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his or her client's/clients' instructions or the instructions of the legal representatives of the persons to whose affairs the documents relate, co-operate in locating all documents which may be within the warrant.
6. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:
 - (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the Search Team Leader as potentially within the warrant, the Search Team Leader should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents. If the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the Search Team Leader grounds upon which the claim is made and in whose name the claim is made.
 - b) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines set out below. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.
7. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the Search Team Leader be placed by the lawyer and/or his or her staff, or the Law Society and/or its representatives, in a container which shall then be sealed. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the

Search Team Leader and at the expense of the lawyer or Law Society before they are placed in the container.

8. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.
9. That list and the container in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the Search Team Leader, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his or her client(s) or the Law Society on behalf of the persons to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the clerk of the magistrate who issued the warrant or other independent party agreed upon by the lawyer or Law Society and the Search Team Leader (referred to below as the "third party") pending resolution of the disputed claims.
10. The list and the container in which the documents have been sealed shall then be signed by the Search Team Leader and the lawyer or a representative of the Law Society.
11. The Search Team Leader and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.
12. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the Search Team Leader or his agent or the third party or his or her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client or clients on whose behalf the lawyer asserted the privilege, or from the person or persons on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:
 - (i) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or
 - (ii) proceedings to establish the privilege have failed; or
 - (iii) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.
13. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third

party into the possession of the registrar of the court in which the said proceedings have been commenced. The documents shall be held by the registrar pending the order of the court.

14. Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him or her as to the happening of those matters and shall request him or her, by consent, to release into the possession of the Search Team Leader all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him or her should be released, those documents.

15. In those cases where the lawyer or Law Society refuses to give co-operation, the Search Team Leader should politely but firmly advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant. The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the Search Team Leader considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

10 EXECUTION ON PARLIAMENTARY OFFICE

In executing a warrant on the office of a Member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any document which falls within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee.

Parliamentary privilege belongs to the Parliament as a whole, not individual members.

This procedure is based on the protocol recommended by the Legislative Council Privileges Committee in February 2006 (Report 33).

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The

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Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.
5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.
16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the Commission.
17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

11 SEARCH OF PERSONS

11.1 Personal Search Power

Section 41(2) of the *ICAC Act* provides that a member of the Police Force, or a "senior Commission investigator", named in and executing a search warrant, may search a person found in or on the premises who is reasonably suspected of having a document or other thing mentioned in the warrant.

Commission investigators who have received training in searching persons will be designated as "senior Commission investigators" pursuant to s.41(3) of the Act. That fact will be endorsed on the back of their identification certificates.

11.2 Guidelines for Personal Searches

Any person should be asked if they have any items on their person before a search is commenced. Only Frisk and Ordinary searches should be performed.

'Frisk search': means a search of a person or of articles in the possession of a person that may include:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

'Ordinary search': means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove their overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items.

If a Senior Commission investigator believes that a **Strip** search is necessary approval should be obtained from the Executive Director, ID.

'Strip search': means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her garments for examination; and
- (b) an examination of the person's body (but not of the person's body cavities).

The search is to be conducted by a person of the same sex as the person to be searched. The search should be conducted in private with another person of the same sex as a witness to the search. If a witness of the same sex is not available within the search team then an independent witness should be arranged. Arrangements should be made through the Search Co-ordinator.

Persons under the age of 18 should not be searched without the approval of the Executive Director, ID. Wherever possible parents should be present during any such search.

The following details must be entered in the 'Search of Persons Register' held by the Executive Director, ID:

- (a) Full name of person searched
- (b) Date of birth of person searched
- (c) Sex of person searched
- (d) Date of search
- (e) Time of search (Start/Finish)
- (f) Place where search was conducted

- (g) Category/ies of search conducted
- (h) Name of investigator conducting search
- (i) Name of witness (contact details if an independent witness)
- (j) Reason for search (including reason for change of search category, if required)
- (k) Warrant Number
- (l) Description of any property located

12 SEIZURE – SPECIAL PROVISIONS

If, during the execution of the warrant a document or other thing is found that would be admissible in a prosecution for an indictable offence against the law of the Commonwealth, a State or Territory, the officer executing the warrant may seize the document or other thing if he/she believes on reasonable grounds that seizure is necessary to prevent its concealment, loss, mutilation or destruction or its use in committing such an offence (s.47, ICAC Act). The document or other thing does not have to be seized via the warrant.

13 DAMAGE TO PROPERTY

Where damage is caused to any property on the premises during the execution of a Search Warrant, the Search Team Leader shall cause:

- a note to be made of the location and extent of the damage;
- if necessary prepare a plan of and/or photograph the damage;
- make an official record of the circumstances as soon as practicable;
- arrange for the attendance of a senior Commission officer not connected with the execution of the Warrant to note and record details of the damage; and
- arrange for the premises to be secured if the occupants are not present.

The Executive Director, Legal is to be notified of any damage and provided with a copy of the report.

14 RECEIPT OF PROPERTY AT COMMISSION

The Team Property Officer shall be responsible for the conveyance to the Commission of any documents or other property seized as a result of the execution of the Search Warrant until such time that it is registered with Property. The property and the property seizure sheets (and/or property receipt) shall be deposited with Property for recording. In the event that a Property Officer is unavailable because of short notice, lateness of the hour, i.e. night time, weekends etc, the property shall be securely stored and transferred to Property as soon as practicable.

15 RETURN OF SEIZED DOCUMENTS

Seized documents should be photocopied and either the original or a copy returned to the owner in accordance with the Commission's property procedures. An occupier requiring the prompt return of particular documents which are said to be vital to the conduct of the business/company shall be accommodated subject to the return not hindering the investigation. At the first opportunity following the execution of a search warrant, the Case Officer shall consult with the Case Lawyer and relevant members of the investigation team to cull the documents. Where there is any doubt as to the correctness of returning a document or providing a copy, the Case Officer shall confer with the Executive Director, ID.

16 REPORT TO ISSUING OFFICER

Irrespective of whether or not the warrant is executed the Case Officer will, in consultation with the Case Lawyer and using the Legal macro, prepare and forward to the issuing officer a written report stating whether or not the warrant was executed and, if it was, setting out the matters required by s.74 of the *Law Enforcement (Powers and Responsibilities) Act 2002* within ten days after the execution of the Warrant or the expiry date of the Warrant whichever first occurs. Copies of the Property Seizure sheets must accompany the Report to the issuing officer.

17 DEBRIEF

As soon as practicable following the execution of a Search Warrant, the Case Officer shall convene a debriefing session attended by the search team, the Team Chief Investigator, Case Lawyer, and any other personnel the Team Chief Investigator considers appropriate.

18 FILING WITH PROPERTY

The Case Officer is to ensure that copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer form are filed in Property.

The Case Officer will be responsible for providing the Senior Property Officer with the details required to be recorded on the Formal Powers data base.

APPENDIX 'A'

AUTHORISATION CHECKLIST**THIS FORM MUST ACCOMPANY EACH STAGE OF THE APPLICATION**

Item	Name & Date	Signature
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate.		
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to and approved by Executive Director, Legal.		

ONCE COMPLETED THIS CHECKLIST MUST BE FILED WITH PROPERTY AND RETAINED WITH THE RELEVANT SEARCH WARRANT DOCUMENTATION

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APPENDIX 'B'

CASE OFFICER'S CHECKLIST

WARRANT HOLDER

NAME	POSITION

PREMISES SEARCHED

ADDRESS	SUBURB

DESCRIPTION OF PREMISES:

--

INDEPENDENT OFFICER

NAME	POSITION	LOCATION	CONTACT NUMBER

EXECUTION

TIME OF ENTRY	DATE
TIME OF DEPARTURE	DATE

OCCUPIERS NOTICE: Served Yes/No

NAME	DOB	POSITION

OTHER PERSONS ON THE PREMISES AT TIME OF EXECUTION

NAME	POSITION	ORGANISATION

VEHICLES PRESENT AT LOCATION:

REG NO.	STATE	DESCRIPTION	SEARCHED
			YES/NO
			YES/NO
			YES/NO

MEMBERS OF SEARCH TEAM/PERSONS ASSISTING COMMISSION OFFICERS

NAME	POSITION

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Item
Case Officer consults with Case Lawyer whether sufficient legal basis for search warrant
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate
Case Officer has identified all resources (people/equipment, non ICAC personnel, police, and computer forensic officers) necessary to conduct the search and has obtained approval to use those resources. All equipment needs to be checked to ensure it is in a serviceable condition
Case Officer prepares the draft Application, Warrant, Occupier's Notice and, if required, cl.11 Certificate and submits to Chief Investigator for review
Operations Adviser to liaise with NSW Police re any police assistance required
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to Case Lawyer who reviews and settles documentation
Case Lawyer provides all documents to Director of Legal for review and approval
Originals of all documents and Authorisation Checklist submitted to Property Manager for registration.
Case Officer makes an appointment with authorised officer, then attends court and swears the warrant. A copy of the application should be requested from the Justice once their notations have been included and it has been sworn. This copy is to be provided to the Property Manager
Case Officer to prepare Operational Orders and brief search teams on the proposed execution and their roles
Report to issuing officer completed by Case Officer in consultation with Case Lawyer. Copy given to Senior Property Officer
Case Officer ensures copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer forms are filed in Property.

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APPENDIX 'C'

INDEPENDENT COMMISSION AGAINST CORRUPTION

RECEIPT

PROPERTY RECEIVED BY: _____

AN OFFICER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ON _____

ON THIS DATE, PROPERTY AS LISTED HEREBUNDER/
DESCRIBED IN ATTACHMENT

WAS RECEIVED FROM _____ OF

SIGNED: _____

TITLE: _____

DATE: _____

APPENDIX 'D'

PROPERTY SEIZURE SHEET

OPERATION: _____

ADDRESS: _____

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____ _____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____ _____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____ _____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____ _____		

Name/Signature - Occupier

Name/Signature - Property Officer

Date: _____

A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises

Appendix 2 Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of the Police, the President of the Legislative Council and the Speaker of the Legislative Assembly, November 2010



**MEMORANDUM OF UNDERSTANDING
ON THE EXECUTION OF SEARCH WARRANTS
IN THE PREMISES OF
MEMBERS OF THE NEW SOUTH WALES PARLIAMENT
BETWEEN
THE COMMISSIONER OF POLICE
THE PRESIDENT OF THE LEGISLATIVE COUNCIL
AND
THE SPEAKER OF THE LEGISLATIVE ASSEMBLY**

1. Preamble

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the NSW Police Force.

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

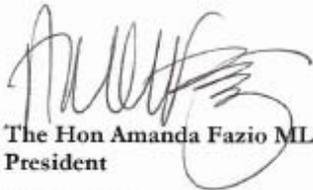
Any party to this Memorandum of Understanding may revoke their agreement to this Memorandum. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures



**Mr Andrew P Scipione APM
Commissioner**

29 November 2010



**The Hon Amanda Fazio MLC
President**

23 November 2010



**The Hon Richard Torbay
Speaker**

16.11. 2010

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

However, in executing a warrant on the office of a member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any material, including electronic documents, which falls within the scope of 'proceedings in Parliament', as specified in Article 9 of the *Bill of Rights 1689*. Article 9 applies in New South Wales under the *Imperial Acts Application Act 1969*.

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

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

In the context of the execution of a search warrant on the premises of a member, material in the possession of members that may fall within the scope of 'proceedings in Parliament' may include

notes, draft speeches and questions prepared by the member for use in Parliament, correspondence received by the member from constituents if the member has or is seeking to raise the constituent's issues in the House, correspondence prepared by the member again if the member has or is seeking to raise the issue in the correspondence in the House, and submissions and other material provided to the member as part of his or her participation in committee inquiries.

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

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

4. Procedure prior to obtaining a search warrant

An officer of the NSW Police Force who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval from the Commissioner or the Commissioner's delegate before applying for the warrant.

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer shall then inform the Clerk or the Deputy Clerk. If the Presiding Officer is not available the Search Team Leader will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

5. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 5(9) below, should not seek to access, read or seize the document.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
17. In the event the NSW Police Force dispute the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President

of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

1. A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant.
3. The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.
4. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.
5. On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.
6. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
7. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 6(8) below, should not seek to access, read or seize the document.
8. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.
9. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.

10. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.
11. The Search Team Leader should deliver any documents over which parliamentary privilege is claimed to the Clerk of the House.
12. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.
13. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
14. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.
15. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.
16. In the event the NSW Police Force disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

Appendix 3 Revised draft Memorandum of Understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of the ICAC and the President of the Legislative Council and the Speaker of the Legislative Assembly, September 2014



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

1. Preamble

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

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

5. Term of this Memorandum of Understanding

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

6. Revocation of agreement to this Memorandum of Understanding

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

Signatures

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

2014

**The Honourable Don Harwin MLC
President**

2014

**The Honourable Shelley Hancock MP
Speaker**

2014

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Member requires time to consider making a claim of parliamentary privilege

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

Member makes a claim of parliamentary privilege

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

ICAC seeks authorisation for additional period

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

ICAC decides to seize the document or thing

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

Appendix 4 Minutes

Minutes No. 39

Thursday 18 September 2014

Members' Lounge, Parliament House, Sydney, at 1.15 pm

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Miss Gardiner

Mrs Maclaren-Jones

Mr Primrose

Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Rebecca Main, Sarah Henderson.

2. Apologies

Mr Clarke

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Primrose: That minutes no. 38 be confirmed.

4. Correspondence

5. ***

6. Inquiry into a revised Memorandum of Understanding with the ICAC relating to the execution of search warrants on members' premises

The Chair tabled the terms of reference of the inquiry, as referred to the Committee by the House on 17 September 2014.

The committee deliberated.

Resolved, on the motion of Ms Fazio: That the committee secretariat prepare a draft report on the revised draft MOU.

7. Adjournment

The Committee adjourned at 2.29 pm *sin die*.

Stephen Frappell

Clerk to the Committee

Minutes No. 42

Wednesday 5 November 2014

Members' Lounge, Parliament House, Sydney, at 7.17 pm.

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Clarke

Miss Gardiner

Mrs Maclaren-Jones

Mr Primrose

In attendance: Steven Reynolds, Stephen Frappell, Rebecca Main.

2. Apologies

Revd Mr Nile

3. Confirmation of minutes of previous meetings

Resolved, on the motion of Mr Primrose: That minutes no. 41 be confirmed.

4. ***

5. Next meeting

6. Correspondence

7. ***

8. Inquiry into a revised Memorandum of Understanding with the ICAC relating to the execution of search warrants on members' premises

The chair tabled his draft report entitled 'A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises'.

Resolved, on the motion of Mr Primrose: That the committee secretariat further examine the times allocated in the memorandum for members to lodge a claim of privilege over documents seized by the ICAC.

Resolved, on the motion of Ms Fazio: that the Committee Chair seek an extension of the committee reporting date in the House to Tuesday, 11 November 2014.

9. Adjournment

The committee adjourned at 7.38 pm until noon on Tuesday, 11 November 2014.

Stephen Frappell

Clerk to the Committee

Minutes No. 43

Tuesday 11 November 2014

Rm 1136, Parliament House, Sydney, at 12.05 pm.

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Clarke

Miss Gardiner

Dr Kaye (for items 1 to 2)

Mrs Maclaren-Jones

Revd Mr Nile

Mr Primrose

In attendance: Steven Reynolds, Stephen Frappell, Velia Mignacca.

2. *****3. Confirmation of minutes of previous meetings**

Resolved, on the motion of Ms Fazio: That minutes no. 42 be confirmed.

4. Correspondence

The committee noted the following item of correspondence:

Sent

- ***

Received

- Email dated 7 November 2014 from Mr Roy Waldon to the secretariat in relation to the deadlines for members to make claims of privilege under the revised Memorandum of Understanding with the ICAC relating to the execution of search warrants on members' premises.
- Email dated 11 November 2014 from Mr Roy Waldon to the secretariat in relation to the deadlines for members to make claims of privilege under the revised Memorandum of Understanding with the ICAC relating to the execution of search warrants on members' premises.

5. Inquiry into a revised Memorandum of Understanding with the ICAC relating to the execution of search warrants on members' premises

The chair's draft report entitled 'A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises', having been previously circulated, was taken as being read.

The Chair tabled a revised 'Chair's Foreword' and 'Committee Comment'.

Resolved, on the motion of Ms Fazio, that the committee adopt the revised 'Committee Comment'.

Resolved, on the motion of Mr Clarke:

1. That the draft report, as amended, be the report of the committee and that the committee present the report to the House;
2. That the correspondence relating to the inquiry be tabled in the House with the report; and
3. That upon tabling, all correspondence and minutes of proceedings be made public, in accordance with the resolution of the committee.

6. Adjournment

The committee adjourned at 12.40 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

