

Privileges Committee

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

Ordered to be printed 24 November 2009

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

New South Wales. Parliament. Legislative Council. Privileges Committee.

A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices / Legislative Council, Privileges Committee. [Sydney, N.S.W.] : The Committee, 2009. – [100] p. ; 30 cm. (Report / Privileges Committee ; no. 47)

“November 2009”

Chair: Kayee Griffin.

ISBN 9780980404197

1. New South Wales. Parliament
2. Legislators—New South Wales—Privileges and immunities.
3. Warrants (Law)—New South Wales.
 - I. Title
 - II. Griffin, Kayee.
 - III. Series: New South Wales. Parliament. Legislative Council. Privileges Committee. Report ; no. 47

328.944 (DDC)

How to contact the committee

Members of the Privileges Committee can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Clerk

Privileges Committee

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au

Email privilege@parliament.nsw.gov.au

Telephone 9230 2323

Facsimile 9230 2761

Terms of Reference

1. That the Privileges Committee inquire into and report on the development of a Memorandum of Understanding between the President and the Commissioner of the Independent Commission Against Corruption (ICAC) covering the execution of search warrants by the ICAC on the Parliament House offices of members, with particular reference to:
 - (a) the draft protocol recommended by the Privileges Committee in its Report No. 33 of February 2006 entitled "Protocol for execution of search warrants on members' offices",
 - (b) the ICAC protocol entitled "Procedures for Obtaining and Executing Search Warrants", with particular reference to section 10, and
 - (c) recent Answers to Questions on Notice concerning the execution of search warrants at Parliament House provided by the ICAC to the Committee on the Independent Commission Against Corruption as part of its Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption.
2. That the Committee report by the last sitting day in November 2009.
3. That a message be forwarded to the Legislative Assembly informing of the terms of reference agreed to by the House, and requesting that the Legislative Assembly Privileges and Ethics Committee be given a similar reference.¹

¹ *LC Minutes* (10/9/2009) 1364.

Committee Membership

The Hon Kaye Griffin MLC *Chair*

Australian Labor Party

The Hon Jenny Gardiner MLC *Deputy Chair*

The Nationals

The Hon Greg Donnelly

Australian Labor Party

The Hon Amanda Fazio MLC

Australian Labor Party

The Hon Don Harwin MLC

Liberal Party

Revd The Hon Fred Nile MLC

Christian Democratic Party (Fred Nile Group)

The Hon Ian West MLC

Australian Labor Party

Table of Contents

	Chair's Foreword	viii
	Summary of Findings and Recommendations	ix
Chapter 1	Introduction	1
	Background to the inquiry	1
	Establishment of current inquiry	3
	Conduct of inquiry	3
	Structure of this report	4
Chapter 2	Parliamentary privilege and search warrants in NSW	5
	The scope of parliamentary privilege	5
	Application of parliamentary privilege to search warrants	6
Chapter 3	Recent developments in other jurisdictions	10
	Extension of protocol applying to members of the Commonwealth Parliament	10
	Australian Capital Territory	11
	New Zealand	11
	House of Commons	12
	House of Lords	14
	Scotland	14
Chapter 4	A protocol for the execution of search warrants on members' offices in NSW	15
	The draft protocol recommended by the Privileges Committee in 2006	15
	The ICAC's protocol	16
	Public interest immunity	17
	The criteria for determining claims of privilege	18
	The determination of disputed privilege claims	20
	Conclusion	21

Chapter 5	A Memorandum of Understanding	23
	The development of a Memorandum of Understanding	23
	Recommended action	24
Appendix 1	Committee on the ICAC, <i>Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption</i> , Answer to question on notice no. 43, p. 30	26
Appendix 2	Comparison of the draft protocol recommended in the Committee's 2006 report with the protocol adopted by the Independent Commission Against Corruption (s. 10, Procedure 9)	28
Appendix 3	Letter from the Chair to the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, dated 23 September 2009	38
Appendix 4	Letter from the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption to the Chair, dated 8 October 2009	44
Appendix 5	Letter from the Chair to the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, dated 28 October 2009	48
Appendix 6	Letter from the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption to the Chair, dated 2 November 2009	51
Appendix 7	Recommended Memorandum of Understanding	53
Appendix 8	Minutes of the Committee's proceedings	84

Chair's Foreword

This report is the latest in a series of inquiries conducted by the Privileges Committee over the past six years concerning the execution of search warrants on members' offices. The previous inquiries concerned the seizure of documents from the office of the Hon Peter Breen MLC by the Independent Commission Against Corruption (ICAC) (2003), a disputed claim of privilege by Mr Breen arising from the seizure of such documents (2004), and the development of a draft protocol for the execution of search warrants by law enforcement and investigative agencies (2006). The present inquiry required the Committee to develop a Memorandum of Understanding between the Parliament and the ICAC to regulate the execution of warrants on members' offices by ICAC.

The Committee's report examines the relationship between statutory investigatory powers and parliamentary privilege, recent developments in other Parliaments, and the ICAC's own protocol for the execution of search warrants on parliamentary offices which is contained in Procedure 9 of the ICAC's *Operations Manual*. The ICAC protocol incorporates the key measures recommended by this Committee in its draft protocol of 2006 and as such represents a significant step towards the protection of parliamentary privilege in the context of the seizure of members' documents. The report concludes that Procedure 9 is a suitable basis for the execution of search warrants on members' offices by the ICAC, and recommends a Memorandum of Understanding incorporating that Procedure.

The Committee would like to thank the Independent Commission Against Corruption for assisting with the development of the Memorandum of Understanding. I would also like to thank my fellow Committee members for their constructive participation and the Committee secretariat for their efforts.

Hon Kayee Griffin MLC

Chair

Summary of findings and recommendations

Finding 1**Page 22**

That Procedure 9 of the Commission's *Operations Manual*, and in particular Section 10, provides a suitable basis for the execution of search warrants on members' offices by the Independent Commission Against Corruption.

Recommendation 1**Page 25**

That the House resolve that the President enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices set out in Appendix 7 of this report.

Recommendation 2**Page 25**

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 Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices.

Chapter 1 Introduction

Background to the inquiry

1.1 This inquiry concerns the development of a Memorandum of Understanding between the Independent Commission Against Corruption and the Parliament on an agreed protocol for the execution of search warrants on members' offices. This chapter provides an overview of events over the past six years leading to the current inquiry.

The Breen matter

1.2 The need for a protocol was brought to the attention of the House in 2003, when a search warrant was executed on the office of a member of the Legislative Council, the Hon Peter Breen MLC, by the Independent Commission Against Corruption. That matter led to two inquiries by this Committee, the first in 2003 and the second in 2004. In these inquiries the Committee found that the seizure under warrant of documents which fall within the scope of proceedings in parliament constitutes a breach of the immunities of the House, and recommended that the House refer a further inquiry to the Committee to inquire into the development of a protocol for the future execution of search warrants on members' offices.²

1.3 Following on from this recommendation, in April 2005 the House referred to the Committee an inquiry into the appropriate protocols for the execution of search warrants on members' offices to be adopted by law enforcement agencies and investigatory bodies, with particular reference to the procedures to be followed when obtaining and executing a search warrant, claims for privilege or immunity, and procedures to be followed for the resolution of disputed claims of privilege.³

1.4 The Committee's report, tabled in February 2006, recommended the adoption of a draft protocol which had been developed following consultation with various investigatory bodies, including the Independent Commission Against Corruption, and comprised elements of:

- the protocols followed by the Australian Federal Police for the execution of search warrants on the offices of members of the Commonwealth Parliament,
- the procedure adopted by the Legislative Council in 2003 for determining a claim of privilege by the Hon Peter Breen, and
- the test adopted by the Privileges Committee for determining whether a member's documents fall within the scope of 'proceedings in Parliament' in its second report arising from the Breen matter in 2004.⁴

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

³ *LC Minutes* (6/4/2005) 1313.

⁴ Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No. 33, February 2006.

- 1.5 Of particular relevance to the present inquiry, the recommended protocol incorporated procedures to be followed in cases where privilege or immunity has been claimed by a member. These procedures were based on the understanding that members' documents are protected by parliamentary privilege if they are brought into existence, used or retained for the purposes of or incidental to the transacting of business of the House. This is consistent with section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), as is further discussed in Chapter 2.

Protocols adopted by the Independent Commission Against Corruption

- 1.6 Since the resolution of the Breen matter, the Commission has adopted its own new practices to deal with issues of parliamentary privilege where they arise in the execution of search warrants at Parliament House. The development of these procedures culminated in the adoption in August 2008 of Procedure 9 of the Commission's Operations Manual entitled *Procedures for obtaining and executing search warrants*.⁵ In particular, section 10 of that document outlines the procedure for the execution of a search warrant on a parliamentary office.
- 1.7 During this time the Legislative Council Procedure Committee had also given consideration to the issue, including by undertaking an analysis of the draft protocol recommended by the Privileges Committee and the protocol adopted by the Commission. These issues were still under review by that Committee at the time of establishment of the current Privileges Committee inquiry.

Answers provided to the Committee on the Independent Commission Against Corruption

- 1.8 In August 2009, the Committee on the Independent Commission Against Corruption⁶ submitted several questions on notice to the Commission as part of a review of the Commission's 2007-2008 Annual Report. One of the questions sought to determine the extent to which the procedures adopted by the Commission were based on the draft protocol recommended by the Privileges Committee.
- 1.9 In response to this question, the Commission made comments suggesting it did not support the test that the Privileges Committee had recommended in its draft protocol for determining whether particular documents are subject to parliamentary privilege.⁷
- 1.10 The Commission also made reference in these answers to the possibility of seeking 'judicial review' of any such claim of privilege made by a member, suggesting it may dispute the established right of the House to determine the status of documents subject to a claim of privilege (Appendix 1).⁸

⁵ The current version of this Procedure, referred to for the purposes of this report, is dated 22 July 2009.

⁶ The Committee on the Independent Commission Against Corruption is a joint statutory committee established under s 63 of the *Independent Commission Against Corruption Act 1988*. One of the key functions of the Committee is to examine and report to each House of Parliament on each annual report of the Commission and of the Inspector.

⁷ Committee on the ICAC, 'Questions on Notice, Inspectorate's Breen Report, ICAC inspector's report on Breen Complaint (Breen Report), Answer to question 43, p. 30:
www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/F43C075758D743E8CA257612000BF78B

⁸ *Ibid*

Establishment of current inquiry

- 1.11** On 8 September 2009, the Privileges Committee met to discuss the new search warrant procedures adopted by the Independent Commission Against Corruption, and the answers provided to the Committee on the Independent Commission Against Corruption regarding the draft protocol proposed by the Privileges Committee.⁹ The Committee resolved to seek a reference from the House to make further inquiry into the issue, with a view to developing a Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption.
- 1.12** In accordance with that resolution, on 10 September 2009 the Chair of the Committee moved a motion in the House to establish the current inquiry. On the motion being agreed to, a message was sent to the Legislative Assembly conveying the terms of reference and requesting that similar terms of reference be given to the Legislative Assembly Privileges and Ethics Committee.¹⁰
- 1.13** The Legislative Assembly responded by message of 22 September 2009, advising of the adoption of similar terms of reference.¹¹

Conduct of inquiry

- 1.14** In September 2009, the Committee undertook a comparison of the draft protocol recommended in its 2006 report with the current protocol adopted by the Commission, building upon the work already commenced by the Procedure Committee (Appendix 2).
- 1.15** Following this review, the Committee prepared a draft Memorandum of Understanding on the execution of search warrants on members' offices as a basis for consultation, incorporating the protocol adopted by the Commission.
- 1.16** On 23 September 2009, the Committee wrote to the Hon Jerrold Cripps QC, Commissioner of the Independent Commission Against Corruption (Appendix 3), to request comment on:
- the draft Memorandum of Understanding
 - the concerns of the Committee in relation to the Commission's answers to written questions from the Committee on the Independent Commission Against Corruption with regard to:
 - (a) the status of documents retained by a member for the purposes of or incidental to the transacting of business in the House or a committee, and
 - (b) the role of the House as the arbiter of disputed claims of privilege,

⁹ Correspondence had also been received from the Chair of the Legislative Assembly Privileges and Ethics Committee dated 30 June 2009, raising the issue of a protocol for the execution of search warrants.

¹⁰ *LC Minutes* (10/9/2009) 1364-5.

¹¹ *LC Minutes* (22/9/2008) 1387-8.

- any other matter relevant to the terms of reference for the Committee's inquiry, upon which the Commissioner might wish to comment.

1.17 Following receipt of the Commissioner's response dated 8 October 2009 (Appendix 4), the Committee undertook further consultation with the Commissioner (Appendix 5 and Appendix 6), as a result of which agreement was reached on the content of the Memorandum of Understanding.

Structure of this report

1.18 The report consists of five chapters.

1.19 Chapter 2 provides an overview of the scope of parliamentary privilege, and recent developments in the law and practice regarding the execution of search warrants on members' offices.

1.20 Chapter 3 outlines protocols for the execution of search warrants on members' offices adopted in Australasia and the United Kingdom since the publication of the Privileges Committee Report No. 33 in February 2006.

1.21 Chapter 4 compares the most recent protocol adopted by the Independent Commission Against Corruption with that recommended by the Privileges Committee in its 2006 report and makes the finding that the Commission's protocol is a suitable basis for the execution of search warrants on members' offices.

1.22 Chapter 5 recommends the adoption of a Memorandum of Understanding between the Commission and the Parliament based on the Commission's protocol.

Chapter 2 Parliamentary privilege and search warrants in NSW

An understanding of the impact of parliamentary privilege on statutory powers of search and seizure is critical to the development of a protocol for the execution of search warrants on members' offices. Recent developments in the relevant law and practice confirm that documents covered by parliamentary privilege are immune from seizure, and that procedures should be put in place to ensure that protected documents do not come into the possession of the executive. This chapter provides a brief overview of parliamentary privilege and its application to search warrants as this issue is discussed in greater depth in the Committee's earlier reports.¹²

The scope of parliamentary privilege

- 2.1** Parliamentary privilege refers to the powers and immunities possessed by each House of the Parliament which are necessary for the House to carry out its functions. The powers include the power to conduct inquiries and the power to deal with contempts. The chief immunity is the immunity of proceedings in Parliament from impeachment or question in the courts and tribunals.¹³
- 2.2** The immunity of proceedings in Parliament is in essence a safeguard of the separation of the powers: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.¹⁴ The purpose of the immunity is to:
- enhance deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of Members, particularly against threats or reprisals from the Executive ...¹⁵
- 2.3** As the immunity attaches to 'proceedings in Parliament', individual members of Parliament are only protected to the extent of their participation in such proceedings. In particular, members as such have no immunity from investigation under statutory authority,¹⁶ or compulsory processes such as subpoenas and search warrants.¹⁷

¹² Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003; Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004.

¹³ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003.

¹⁴ Evans H (ed), *Oggers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p 33.

¹⁵ Walker B SC, 'Search warrant on offices of the Hon Peter Breen MLC', 9 October 2003, paragraph 8, reproduced in Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and the seizure of documents*, Report 25, December 2003, Appendix 3, p. 71

¹⁶ *Ibid*

¹⁷ *Oggers', op cit*, p. 46.

2.4 The immunity attaching to parliamentary proceedings was given a statutory form in Britain in Article 9 of the Bill of Rights of 1689, which declares:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.¹⁸

2.5 The Commonwealth Parliament has defined aspects of the law of article 9 as it applies to the Commonwealth in section 16 of the *Parliamentary Privileges Act 1987* (Cth). For example, section 16(2) provides in part that, for the purposes of article 9, 'proceedings in Parliament' means 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee ...' This definition extends beyond words spoken and acts done in the course of proceedings in the Houses and their committees, to include words spoken and acts done 'for purposes of or incidental to' such proceedings. The definition reflects the case law on the interpretation of article 9 which has developed in Britain and Australia since 1689.¹⁹

2.6 The immunity in article 9 applies to court proceedings as well as to the proceedings of certain other bodies with coercive powers, including the Independent Commission Against Corruption. Section 122 of the *Independent Commission Against Corruption Act 1988* expressly provides that:

Nothing in this 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.²⁰

Application of parliamentary privilege to search warrants

2.7 Article 9 prohibits the 'impeaching' or 'questioning' of proceedings in Parliament rather than the mere disclosure of such proceedings. In some contexts, however, the effect of the immunity is to provide a basis for a lawful refusal to provide evidence at all without going to the use to which the evidence may be put. The Clerk of the Senate has noted, for example, that:

... if a senator were to be asked to give evidence in court about the sources of information contained in the senator's speech in the Senate, the senator could refuse to answer any questions about the speech on the basis that answering in itself would facilitate a questioning of proceedings in Parliament, regardless of any other use to which the answers might be put.²¹

¹⁸ Article 9 applies in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*. It also applies in the Commonwealth under section 49 of the Commonwealth Constitution: *Odgers*, *op cit*, p. 34.

¹⁹ *Prebble v Television NZ Limited* 1994 3 NZLR 1, and other authorities cited in Harry Evans, 'Parliamentary privilege and search warrants: will the US Supreme Court legislate for Australia?', *Papers on Parliament*, No 48, January 2008, p. 111, footnote 2.

²⁰ Similar provisions are contained in the *Police Integrity Commission Act 1996* (section 145) and the *Protected Disclosures Act 1994* (section 23).

²¹ *Parliamentary privilege: seizure of documents under search warrant*, Submission on behalf of the Senate to the Federal Court of Australia in *Crane v Getbing* (2000) 97 FCR 9, paragraph 3.

- 2.8** This aspect of the immunity which prevents the *disclosure* of proceedings in Parliament has been applied to members' documents. In *Brown and Williamson Tobacco Corp v Williams* 1995 62 F 3d 408, the United States Court of Appeals held that a member of Congress could not be compelled by the discovery of documents process to reveal documents associated with the member's legislative activities.²² In *O'Chee v Rowley* (1997) 150 ALR 199, the majority of the Queensland Court of Appeal held that a senator could not be compelled by discovery to produce documents prepared for the purpose of parliamentary proceedings.²³
- 2.9** In a submission to the Federal Court of Australia in 1999, the Australian Senate argued that the same principle which had been applied by the courts to the discovery of documents in *Brown* and *O'Chee* also applied to the seizure of documents under a search warrant.²⁴ The rationale for this view was that senators would be impeded in their free participation in parliamentary proceedings if the documents connected with those proceedings could be compulsorily disclosed or seized by law enforcement agencies, even where the documents could not be subsequently used in legal proceedings.²⁵ A judge of the Federal Court ultimately found, however, that the Court did not have jurisdiction to determine whether parliamentary privilege prevented the seizure of documents, as only the House concerned and the executive could resolve such an issue.²⁶
- 2.10** Although the Court did not uphold the Senate's argument about the way in which parliamentary privilege applies, the Commonwealth Government subsequently adopted a procedure for the execution of search warrants which reflects the Senate's argument. Under that procedure, searches in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. This procedure was formalised in a Memorandum of Understanding with the Commonwealth Presiding Officers, and national guidelines for the Australian Federal Police, which were tabled in the Commonwealth Parliament in 2005.²⁷
- 2.11** In 2003 and 2004 the New South Wales Legislative Council also asserted that documents which are subject to parliamentary privilege are immune from seizure under a search warrant.²⁸
- 2.12** These parliamentary precedents which assert that parliamentary privilege prevents the seizure (and not just the subsequent use in proceedings) of a member's documents under a search warrant, are supported by recent judicial authority in the United States, where the basis for the

²² Evans H, 'Parliamentary privilege and search warrants: will the US Supreme Court legislate for Australia?', *Papers on Parliament*, No 48, January 2008, p. 111.

²³ *Ibid*, p 112.

²⁴ *Parliamentary privilege: seizure of documents under search warrant*, Submission on behalf of the Senate to the Federal Court of Australia in *Crane v Gething* (2000) 97 FCR 9, paragraph 8.

²⁵ Evans H, 'Parliamentary privilege and search warrants: will the US Supreme Court legislate for Australia?', *Papers on Parliament*, No 48, January 2008, p. 111.

²⁶ *Odgers*, *op cit* p. 47.

²⁷ *Ibid*

²⁸ *LC Minutes* (4/12/2003) 493-495; (1/4/2004) 650.

immunity is the 'speech and debate' clause in article 1 of the Constitution.²⁹ The case in question was brought before the courts following the first instance in which documents have been seized by the executive from the office of a sitting member of Congress.³⁰

- 2.13** In that case, the relevant executive agency had put in place certain procedures in an attempt to ensure that legislative material was not seized, including the provision of all seized material to a team of government officials to determine whether any of the seized documents were subject to legislative immunity or other privilege.³¹ Despite the precautions employed by the executive, however, the US House of Representatives maintained that the congressman should have been allowed to filter immune material *before* any documents were seized. In making that submission, the House of Representatives drew upon earlier cases about orders for the discovery of documents, as well as the Australian Senate's precedents concerning search warrants, and the precedents of the New South Wales Legislative Council which successfully asserted parliamentary privilege following the seizure of a member's documents in 2003.³²
- 2.14** In a judgment delivered in August 2007, the Court of Appeals held that the search and seizure of material from the congressman's office violated the legislative immunity provided by the Constitution as the congressman should have been allowed to claim immunity for particular documents before they were seized.³³ On that basis the Court concluded that the congressman was entitled to the return of any privileged legislative materials.³⁴ In April 2008, the US Supreme Court declined to review the judgment of the Court of Appeals.³⁵
- 2.15** The Court of Appeals judgement therefore stands as the law and establishes that:
- ... not only are members' documents' associated with their parliamentary duties immune from seizure, but searches of members' offices should be accompanied by procedures to ensure that protected documents do not come into the possession of executive agencies.³⁶
- 2.16** This law is consistent with the position argued by the Australian Senate in the Federal Court in 1999,³⁷ and with procedures agreed to by the Australian Government in 2005, whereby claims

²⁹ Section 6 of article 1 of the US Constitution provides that: '... for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other place'.

³⁰ *US v Rayburn Office Building Room 2113 Washington DC 20515*, 3 August 2007, p 11.

³¹ *Ibid*, pp 5-6.

³² Evans H, 'Parliamentary privilege and search warrants: will the US Supreme Court legislate for Australia?', *Papers on Parliament*, No 48, January 2008, pp. 113-4. A number of former members of Congress also made submissions to the Court, one of whom specifically recommended the Australian procedures.

³³ *US v Rayburn Office Building Room 2113 Washington DC 20515*, 3 August 2007, pp. 15, 17.

³⁴ *Ibid*, pp. 21-23

³⁵ <http://www.supremecourtus.gov/docket/07-816.htm>; Evans H, *Recent developments in parliamentary privilege*, Paper for ANZACATT 2009 Professional Development Seminar Norfolk Island 28-30 January 2009, p. 4.

³⁶ Evans H, *Recent developments in parliamentary privilege*, Paper for ANZACATT 2009 Professional Development Seminar Norfolk Island 28-30 January 2009, p. 5.

³⁷ Evans H, 'Parliamentary privilege and search warrants: will the US Supreme Court legislate for Australia?', *Papers on Parliament*, No 48, January 2008, pp. 114.

of parliamentary privilege may be made over particular documents before material is seized. It is also consistent with the draft protocol recommended by this Committee in 2006 and procedures subsequently adopted by the Independent Commission Against Corruption discussed later in this report.

Chapter 3 Recent developments in other jurisdictions

When reporting on the development of a draft protocol for the execution of search warrants on members' offices in February 2006 (Report No 33), this Committee examined protocols or guidelines then in place in a range of other Parliaments. The most developed precedents at the time were to be found in the Australian Commonwealth Parliament and certain Canadian jurisdictions; these provided for documents subject to parliamentary privilege to be protected from seizure and for disputes about claims of parliamentary privilege to be resolved by the House or the courts.

In this chapter, the Committee considers protocols for the execution of search warrants on members' offices adopted in Australasia and the United Kingdom since publication of the Committee's 2006 report. The relevant protocols in Australia and New Zealand have been modelled on the guidelines for the execution of warrants on the offices of members of the Australian Commonwealth Parliament. The House of Commons has adopted a somewhat different approach, which allows conditions to be attached by the Speaker to protect parliamentary privilege, although their procedure in relation to search warrants is currently under review.

Extension of protocol applying to members of the Commonwealth Parliament

- 3.1 In 2005 the Australian Government and the Presiding Officers of the Commonwealth Parliament agreed on the procedures to be followed by the Australian Federal Police when executing search warrants on premises occupied or used by senators or members of the House of Representatives.³⁸ The agreed procedures are set out in the Australian Federal Police's *National guideline for execution of search warrants where parliamentary privilege may be involved*. This guideline allows for claims of parliamentary privilege to be made by a member, and for any such claims to be determined by the House concerned.
- 3.2 In 2006 a similar agreement was entered into between the Presiding Officers of the Commonwealth Parliament and the Government of Tasmania.³⁹ This agreement applies where Tasmanian Police propose to execute a search warrant on premises of a member of the *Commonwealth* Parliament. The agreed procedures are set out in the Tasmanian Police's *Guideline for Execution of Search Warrants on Federal Members of Parliament*, which is modelled on the Australian Federal Police *National guideline*.
- 3.3 In 2007 the Clerk of the Senate reported that the Presiding Officers of the Commonwealth Parliament had written to other states and territories asking them to consider the adoption of arrangements similar to those between the Tasmanian Government and the Australian Federal Police.⁴⁰ The Attorney General of the Australian Capital Territory had indicated that that

³⁸ Odgers', *op cit*, p 47.

³⁹ *Memorandum of Understanding on the execution of search warrants on federal members of Parliament between the Minister for Police and Emergency Management for Tasmania, the Attorney-General for Tasmania, the Speaker of the House of Representatives and the President of the Senate*, tabled in the Australian Senate on 15 August 2006: Senate Journals 15/8/2006, 2496

⁴⁰ Evans, H, 'Search warrants', *Parliament Matters*, Bulletin of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT), Issue 18, August 2007, p 3.

jurisdiction would follow the federal agreement; the Victorian Government had advised that an agreement was unnecessary in light of existing police procedures in that state. The other states and territories had not replied.⁴¹

Australian Capital Territory

3.4 In May 2007 the Speaker of the ACT Legislative Assembly tabled a Memorandum of Understanding between the Speaker and the Australian Federal Police. This Memorandum sets out agreed arrangements for the conduct of policing functions within the precincts of the Assembly. The Memorandum provides that such functions are to be carried out in accordance with an ACT 'Policing Practical Guide' entitled *Execution of Search warrants where parliamentary privilege may be applied – execution of search warrants and interviews with members of the Legislative Assembly*.

3.5 The ACT Guide closely follows the Australian Federal Police *National guideline for execution of search warrants where parliamentary privilege may be involved*.⁴² It also incorporates provisions relating to the conduct of police interviews with members, such as requirements to obtain approval at a certain level within the Australian Federal Police, and notify the Speaker.

New Zealand

3.6 On 27 October 2006 New Zealand police executed a search warrant on the parliamentary office of Taito Phillip Field MP. The search was conducted in accordance with an interim procedure set out in an agreement between the Speaker and the Commissioner of Police.⁴³ On 7 November 2006 the Speaker presented the interim agreement to the House of Representatives, and advised:

The interim agreement was designed to ensure that the search warrant was executed without improperly interfering with the functioning of Parliament, and that any claim of parliamentary privilege in relation to physical or electronic documents that the police may have wanted to seize could be raised and properly resolved. Such a situation had not arisen before, and an interim agreement was required to provide for the immediate circumstance.⁴⁴

3.7 The Speaker also indicated that she intended to have the Privileges Committee consider the interim agreement once the police investigation and any subsequent action had concluded. However, it appears that the matter has not yet been discussed by that Committee.

⁴¹ Evans, H, 'Search warrants', *Parliament Matters*, Bulletin of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT), Issue 18, August 2007, p 3

⁴² There are some differences between the federal Guidelines and the ACT Guide. For example, the federal Guidelines allow a member to seek a ruling in relation to a claim of privilege from the House, while the ACT Guide allows such a ruling to be sought from the Speaker: section 10 (b) (iv).

⁴³ *Execution of Search Warrants on Premises Occupied or Used by Members of Parliament, An Agreement between the Speaker of the House of Representatives of New Zealand and the Commissioner of the New Zealand Police*, October 2006.

⁴⁴ *Parliament matters*, Issue 17, February 2007, p. 38.

- 3.8 The interim agreement was modelled on the procedure agreed between the Parliament of Australia and the Australian Federal Police,⁴⁵ with some variations.⁴⁶

House of Commons

- 3.9 On 27 November 2008 police searched the offices, including the Westminster office, of an Opposition member, Mr Damian Green, and seized computer files and other documents. The police were investigating leaks of information from a government department which appeared to be finding their way to Mr Green. It subsequently transpired that the police had no search warrant for the raid on the Westminster office and that the Sergeant at Arms had given permission for the search after consulting the Speaker but not the Clerk of the House.⁴⁷
- 3.10 Immediately after the seizure, the Clerk of the House, acting on the Speaker's behalf, wrote to the Metropolitan Police warning them that any privileged material in their possession would have to be returned to the member. With the agreement of both parties and so as not to interfere with the criminal investigation, officers of the House made a preliminary inspection of both the hardcopy and electronic material to identify such of it that might be protected by parliamentary privilege. Material so identified was returned to Mr Green by the Metropolitan Police. The handling of the matter in this way was specifically designed to avert any interference with the criminal process.⁴⁸
- 3.11 On 8 December 2008 the Speaker issued a protocol concerning the execution of search warrants on members' offices which, among other things, required that a warrant would be required for any future searches.⁴⁹ On the same day the House of Commons agreed to the setting up of a Speaker's committee to inquire into the matter of the search of the member's office. The committee was not to proceed to substantive business until any police inquiry was concluded.⁵⁰
- 3.12 On 3 February 2009 Mr Damian Green MP wrote to the Speaker arguing that the Clerk had adopted a narrow interpretation of what items may attract privilege, which 'appears to take no

⁴⁵ *Ibid*

⁴⁶ For example, under the New Zealand protocol, the Speaker may direct that the relevant premises be sealed and secured before the warrant is executed, to ensure that the risk of evidence being tampered with or disposed is minimal (section 6.1 (c)). Further, the Clerk, or person or authorised by the Clerk, should be present during the search (section 7.1 (c)). It is also specified that, while the Speaker may agree to a search within the precincts of Parliament, nothing in the interim agreement amounts to a waiver of parliamentary privilege in respect of material seized (section 10).

⁴⁷ This summary of the facts is drawn from Evans H, 'Recent developments in parliamentary privilege', ANZACATT professional development seminar, Norfolk Island, 28-30 January 2009, p. 5. See also Gay O, *Parliamentary privilege and individual Members*, House of Commons Library, Standard Note: SN/PC/04905 Last updated: 23 July 2009.

⁴⁸ These facts are recorded in Clerk of the House of Commons, 'Arrest of members and searching of offices in the parliamentary precincts', memorandum to the Committee on Issue of Privilege (Police Searches on Parliamentary Estate, 14 September 2009, p. 6, paragraph 20.

⁴⁹ *Mr Speaker's protocol on the execution of a search warrant in the precincts of the House of Commons*, Clerk of the House of Commons, *op cit*, Appendix 1.

⁵⁰ House of Commons, *Votes and Proceedings*, No. 3, 8 December 2008, item 2

account of material which originated outside Parliament but was then used in parliamentary proceedings or in connection with my parliamentary work'. On that basis, he requested that the material which had been taken from his parliamentary office be referred to the Standards and Privileges Committee for a decision about which parts of the material attract parliamentary privilege.⁵¹

3.13 On 4 February 2008 the Speaker replied that he considered himself bound by the decision taken by the House on 8 December 2009 to set up a committee on the matter, which was not to proceed to substantive business until the conclusion of the police investigation. In light of this, the Speaker did not feel able to allow the matter raised by Mr Green to have precedence over the Orders of the Day.⁵²

3.14 On 13 July 2009 the House rescinded the order of 8 December 2008 relating to the establishment of a Speaker's committee and agreed to the appointment of a select committee with somewhat broader terms of reference. This committee is required to review the internal processes of the House administration for granting permission to the search of a member's office on the parliamentary estate by the police and the seizure of material; to consider any matter relating to privilege arising from the police operation; and to make recommendations for the future. The committee is to report to the House by 31 December 2009.⁵³

3.15 The Clerk of the House of Commons has described the protocol issued by the Speaker as follows:

... the protocol makes explicit that the Speaker is to be the main decision-maker relating to the execution of any search warrant and that a warrant will always be required. In addition, it provides for the Speaker to seek the advice of the Attorney General and Solicitor General, where necessary, and it addresses the issue of the handling by police of material which may be covered by parliamentary privilege or, in the case of data relating to individual constituents, which is not privileged, require 'the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office'.⁵⁴

3.16 In relation to parliamentary privilege, the protocol provides that:

- The Speaker may attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved.⁵⁵
- The Speaker may attach conditions to a search which require the police to describe to a senior parliamentary official the nature of any material being seized which may

⁵¹ Green, D, MP, Correspondence to the Speaker of the House of Commons, 3 February 2009, House of Commons Committee on Issue of Privilege (Police Searches on Parliamentary Estate) http://www.parliament.uk/parliamentary_committees/policesearches.cfm. Various other aspects of the matter were addressed in Mr Green's letter, and in the Speaker's subsequent reply.

⁵² Martin, M, Rt Hon, Correspondence to Mr Damian Green MP, 4 February 2009, House of Commons Committee on Issue of Privilege (Police Searches on Parliamentary Estate).

⁵³ House of Commons, *Votes and Proceedings*, No. 110, 13 July 2009, p 783

⁵⁴ Clerk of the House of Commons, *op cit*, p. 9, paragraph 26.

⁵⁵ *Mr Speaker's protocol on the execution of a search warrant in the precincts of the House of Commons, op cit*, paragraph 7

relate to a member's parliamentary work and may therefore be covered by parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material removed until such time as any issue of privilege has been resolved.⁵⁶

- The execution of a warrant shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police.⁵⁷

3.17 The particular nature of the conditions which the Speaker may attach to a search or to the handling of privileged material is not specified in the protocol. Further, as noted earlier, the issue of parliamentary privilege is to be considered by the committee currently investigating matters arising from the police operation which resulted in the seizure of documents from the office of a member in November 2008.

House of Lords

3.18 In response to the execution of a search warrant on the office of a member of the House of Commons in November 2008, the House of Lords adopted a protocol governing police requests for access to the precincts of the House of Lords with a view to arresting a member or searching a member's office.⁵⁸ The protocol was recommended by the Lords' House Committee in April 2009.⁵⁹

3.19 The protocol has similarities to the Speaker's protocol in the House of Commons. These similarities include provision for the Black Rod to attach conditions to a search which require the police to describe the nature of any material being seized which may be covered by parliamentary privilege, and to maintain the confidentiality of that material until any issue of privilege has been resolved.

Scotland

3.20 In June 2009 the Scottish Parliament agreed to a Memorandum of Understanding about the execution of search warrants in members' offices with the Procurator Fiscal and the Crown Office and the Borders and Lothian Police.⁶⁰ It appears that a search warrant has been executed at Holyrood on only one occasion.⁶¹

3.21 The Scottish protocol includes provision for the Presiding Officer to be advised when a warrant has been granted for the search of premises used by a member at Parliament House, and for the member, or the member's staff, to be present during the search to 'facilitate and observe the execution of the search warrant on behalf of the Scottish Parliament'.

⁵⁶ *Ibid*, paragraph 8.

⁵⁷ *Ibid*, paragraph 10.

⁵⁸ Gay O, *op cit*, pp 11-12.

⁵⁹ House of Lords, House Committee, *Police access to the precincts: protocol*, 1st report of session 2008-09.

⁶⁰ http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/25_06_09_holyroodmemo.pdf

⁶¹ Gay O, *op cit*, p 15.

Chapter 4 **A protocol for the execution of search warrants on members' offices in NSW**

This chapter compares the protocol for the execution of search warrants on members' offices recommended by the Privileges Committee in February 2006 with the protocol contained in Procedure 9 of the *Operations Manual* of the Independent Commission Against Corruption. The Commission's protocol incorporates most of the key features recommended by the Privileges Committee and as such, represents a significant step towards protecting parliamentary privilege in relation to the execution of a search warrant on members' offices.

The draft protocol recommended by the Privileges Committee in 2006

4.1 The draft protocol recommended by the Privileges Committee in 2006 sets out the procedures to be followed by investigating officers prior to obtaining a warrant, prior to executing a warrant, during the execution of the warrant, and at the conclusion of the search.⁶² Notable features of those procedures include:

- The President is to be notified of the proposed search of the member's office before the warrant is executed⁶³
- The Clerk is to arrange for the member's office to be sealed
- A reasonable time is to be allowed for the member and the Clerk to seek legal advice in relation to the search warrant prior to its execution and to arrange for a legal adviser to be present during execution of the warrant
- A reasonable opportunity is to be given for the member to claim parliamentary privilege, or public interest immunity, prior to the search
- The warrant is to be executed in the presence of the member or the member's staff and the Clerk or the Deputy Clerk unless compliance would affect integrity of the investigation.

4.2 The recommended protocol also includes procedures to be followed where claims of parliamentary privilege are made. These include:

- The member and the Clerk are to identify any documents which fall within the scope of 'proceedings in Parliament', according to the definition in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth).
- A document will be considered to fall within the scope of 'proceedings in Parliament' if it was:
 - (a) brought into existence

⁶² Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report No. 33, February 2006.

⁶³ Alternatively, the Clerk, Deputy Clerk, or relevant Committee Chair may be notified.

(b) subsequently used or

(c) retained

for purposes of or incidental to the transacting of business in a House or a committee.

- The investigating agency may dispute any claim of privilege made by the member and provide written reasons in support of the dispute.
- Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides.

The ICAC's protocol

4.3 Following the publication of the Privileges Committee Report 33 in 2006, the Independent Commission Against Corruption adopted revised procedures for the execution of search warrants, which reflected the draft protocol recommended by the Committee.⁶⁴ Subsequently, in August 2008, the Commission adopted Procedure 9 of its *Operations Manual*, entitled 'Procedures for obtaining and executing search warrants'.⁶⁵ A revised version of Procedure 9 was issued in July 2009.

4.4 Procedure 9 sets out the procedures to be followed by Commission officers when applying for a search warrant, executing a search warrant, and handling seized material. It consists of 18 sections, beginning with Section 1, 'General', and concluding with Section 18, 'Filing with Property'.

4.5 Section 10 of Procedure 9, entitled 'Execution on parliamentary office', contains most of the provisions of Procedure 9 which specifically relate to the execution of search warrants on members' offices. Certain other references to the execution of search warrants on such offices appear in Section 2, 'Applying for a warrant'. A copy of Procedure 9 can be found in Appendix 7 of this report. In this inquiry the Committee has referred to Section 10 of Procedure 9, and the relevant provisions of Section 2, as constituting the Commission's protocol for the execution of search warrants on members' offices.

4.6 Appendix 1 to this report contains a table comparing the terms of the Commission's protocol with the draft protocol recommend by the Privileges Committee in 2006. This comparison indicates that the Commission's protocol includes the key measures recommended by the Privileges Committee in 2006, with the following exceptions:

- The Commission's protocol does not acknowledge that members may make claims of public interest immunity (as well as claims of parliamentary privilege)
- The Commission's protocol does not refer to the criteria to be applied to determine whether a document is subject to parliamentary privilege

⁶⁴ Office of the ICAC, *Special report on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Honourable Peter Breen, MLC*, September 2008, p. 47.

⁶⁵ *Ibid*

- The Commission's protocol does not refer to the procedures to be followed in the House for resolving disputed privilege claims.

4.7 Each of these differences is discussed in turn below, by reference to the terms of the respective protocols, comments made by the Commission where applicable, and the views of the Committee concerning the points of contention in each case.

Public interest immunity

Terms of the protocols

4.8 The Committee's draft protocol allows a member to make a claim of public interest immunity in relation to the execution of a warrant, as well as a claim parliamentary privilege. While the protocol does not address the manner in which public interest immunity claims are to be determined, or any resulting disputes resolved, it obliges Commission officers to allow such claims to be made before any material is seized. The Commission's protocol, by contrast, makes no reference to public interest immunity, and only acknowledges the making of claims of parliamentary privilege.

4.9 Despite the omission of any reference to public interest immunity, the Commission's protocol maintains the requirement contained in the Committee's draft protocol for the member and the Clerk to be able to seek legal advice in relation to the search and to arrange for a legal adviser to be present during execution of the warrant.⁶⁶

Committee's view

4.10 The Committee would prefer the Commission to include recognition of public interest immunity within its procedures. However, the Committee is reassured by the provision in the Commission's protocol which allows members to seek legal advice prior to the execution of a warrant. Under this provision, a member has access to professional advice in relation to the potential application of public interest immunity in the context of the search. If a claim of public interest immunity is identified through that process, it is open to the member to seek to enforce the claim in the courts.

4.11 The Committee considers that the more pressing question is the need to protect from seizure documents subject to parliamentary privilege, rather than public interest immunity, and notes that this is achieved by other provisions of the Commission's protocol. The focus of the Committee's activities in relation to this matter over the past six years has been on upholding parliamentary privilege in the face of the execution of search warrants by the Independent Commission Against Corruption. Further, public interest immunity is more likely to arise in relation to documents held by Ministers than in relation to documents held by the majority of members of the House.

⁶⁶ ICAC, *Operations Manual*, Procedure 9, Section 10, paragraph 4

The criteria for determining claims of privilege

Terms of the protocols

- 4.12 The Committee's draft protocol includes a definition of 'proceedings in Parliament' in the terms of section 16(2) of the *Parliamentary Privileges Act 1987* (Cth). It also includes a particular test for determining whether documents are protected by parliamentary privilege. This test provides that a document is privileged if it was created, used, or retained for purposes of or incidental to the transacting of business in a House or committee. In the context of the provisions of the Committee's draft protocol, the test operates as a guide for the member and the Clerk when seeking to identify documents which fall within the scope of the definition of 'proceedings in Parliament' in the federal Act.
- 4.13 The Commission's protocol does not refer to the definition in the federal Act, the three-step test devised by the Committee, or any other criteria for determining whether particular documents are subject to parliamentary privilege.

Comments by the Commission

- 4.14 Although the Commission's protocol excludes any reference to the definition of 'proceedings in Parliament' in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), the Commission has advised that it accepts that definition.⁶⁷ However, the Commission does not, and has never, accepted the three-step test devised by the Committee.⁶⁸ In particular, the Commission objects to the third limb of that test, which concerns the retention of a document by a member.⁶⁹ That part of the test provides that the retention of a document for purposes of or incidental to the transacting of business in a House or committee is within the scope of 'proceedings in Parliament'. A document which is within the scope of proceedings in Parliament is covered by parliamentary privilege and thus immune from seizure under a search warrant.
- 4.15 The Commission does not assert that the retention of a document will *never* be covered by privilege.⁷⁰ However, it is concerned about the way in which the retention aspect of the test might be applied in particular cases, and thus whether a member could successfully claim that any document was privileged by merely *claiming* he or she intended to use it at some future time for the purposes of or incidental to the transacting of relevant business.⁷² Further,

⁶⁷ Correspondence from the Commissioner of the ICAC to the Privileges Committee, 8 October 2009, p. 2.

⁶⁸ Committee on the ICAC, 'Questions on Notice, Inspectorate's Breen Report, ICAC inspector's report on Breen Complaint (Breen Report), Answer to question 43, p. 30 (www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/F43C075758D743E8CA257612000BF78B); letter from the Commissioner of the ICAC to the Privileges Committee dated 8 October 2009, p. 3.

⁶⁹ *Ibid*

⁷⁰ Correspondence from the Commissioner of the ICAC to the Privileges Committee, 8 October 2009, p. 3.

⁷¹ *Ibid*

⁷² *Ibid*

according to the Commission, a successful claim of privilege could be made even where the intended parliamentary use of a retained document was only marginal in nature, which could adversely affect the conduct of a Commission investigation.⁷³

Committee's view

- 4.16** The Committee finds it difficult to reconcile the Commission's avowed support for section 16(2) of the federal Privileges Act with its rejection of the three step test, given that there is judicial authority in support of the view that the retention of a document for purposes of or incidental to parliamentary business is an 'act done' for such purposes within the terms of section 16(2).⁷⁴ Further, the Committee believes that the Commission's arguments concerning the application of the retention test are difficult to sustain, given that the procedures followed by the House in the Breen case incorporated various measures to balance a member's subjective assertion of a claim of privilege. For example, under the relevant resolution of the House in that case, documents claimed to be privileged were to be identified by both the member and the Clerk, and the Commission was to have the right to dispute any such claim and provide reasons in support of the dispute.⁷⁵ Further, when assessing a claim of privilege subsequently made by Mr Breen, this Committee accepted that the member had established 'an *objective* basis' for his claim that the relevant documents had been retained for purposes of or incidental to the transacting of business in a House or committee (emphasis added).⁷⁶
- 4.17** Nevertheless, the Committee notes that the Commission has accepted that retention of a document may be covered by privilege in at least some cases. Moreover, the differences between the Commission and the Committee on this issue do not concern the actual terms of the Commission's protocol itself, but matters which may, or may not, arise in practice when that protocol is implemented.

⁷³ *Ibid*

⁷⁴ In *O'Chee v Rowley* (1997) 150 ALR 199, Senator O'Chee claimed that certain documents were immune from production under section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) because the documents had been 'created, prepared, brought into existence or came into [his] possession for the purposes of or incidental to the transacting of business in the Senate'. Some of these documents consisted of documents received by the senator from other persons or sources. In relation to those documents, McPherson JA said (at 209):

'Generally, it seems to me that if documents like these came into the possession of Senator O'Chee and he **retained** them with a view to using them, or the information they contain, for the purpose of Senate questions or debate on a particular topic, then it can fairly be said that his procuring, obtaining or **retaining** possession of them were 'acts done ... for purposes of or incidental to the transacting of business' of that House. Although 'acts done' is not specially apt to describe what happens when a possibly unsolicited document arrives through the mail or by other forms of communication, a member who becomes aware that the document has arrived **and elects to keep it** for purposes of transacting business of a House, may properly be said to have done an 'act' or 'acts' for purposes of, or incidental to, the transacting of that business' (emphasis added).

⁷⁵ *LC Minutes* (4/12/ 2003)

⁷⁶ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report No. 28, March 2004, p. 10, paragraph 5.8.

The determination of disputed privilege claims

Terms of the protocols

- 4.18** The Committee's draft protocol includes a description of the procedures to be followed by the House where a claim of privilege by the member is disputed.⁷⁷ The Commission's protocol omits any reference to such procedures of the House. It acknowledges, however, that claims of privilege may be disputed by the Commission, and that such disputes are to be determined by the House. In that regard, paragraph 17 of Section 10 of Procedure provides:

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.

Comment by the Commission

- 4.19** Although the Commission's protocol acknowledges that disputed privilege claims are to be determined by the House, the Commission has indicated that it would consider seeking judicial review if it disagreed with the House's determination in a particular case. In that regard, the Commission stated in a written answer to the Committee on the Independent Commission Against Corruption:

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.⁷⁸

Subsequently, the Commissioner advised this Committee that:

While the Commission anticipates that any dispute as to privilege in relation to documents seized during the course of the execution of a search warrant may be satisfactorily resolved by the relevant House, the Commission nevertheless wishes to reserve its right in appropriate cases to seek judicial determination.⁷⁹

⁷⁷ For example, the Privileges Committee draft protocol specifies that any documents not subject to a dispute are to be returned to the member, that consideration of the disputed material is to be set down for consideration by the House, and that any material which the House determines is within the scope of proceedings in Parliament is to remain in the custody of the Clerk until the House otherwise decides.

⁷⁸ Committee on the ICAC, 'Questions on Notice, Inspectorate's Breen Report, ICAC inspector's report on Breen Complaint (Breen Report), Answer to question 43, p. 30: www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/F43C075758D743E8CA257612000BF78B

⁷⁹ Correspondence from the Commissioner of the ICAC to the Privileges Committee, 8 October 2009, p 3

Committee's view

- 4.20** The Committee disagrees with the Commission's assertion that determinations of the House regarding privilege should be open to judicial review. Such a view is inconsistent with resolutions adopted by the Legislative Council in 2003 and 2004 in relation to the Breen case which affirmed that the House is the appropriate forum for the resolution of issues of parliamentary privilege.⁸⁰ These resolutions reflect the broader, well-established principle that it is for the courts to determine the existence of a privilege but it is solely for the House to determine the manner of the exercise of a privilege. In the event of any suggestion of judicial review of a particular determination of the House, the Committee would expect that the House would vigorously assert this principle.
- 4.21** However, the Committee is encouraged by the fact that the Commission expects any disputes concerning privilege claims to be satisfactorily resolved by the House. In addition, the Committee notes that the availability or otherwise of judicial review is a separate question to the issue of the procedures which should be followed by investigating officers to ensure that material subject to parliamentary privilege is not seized under a warrant, and that differences of views concerning the former need not impede the reaching of agreement on the latter.

Conclusion

- 4.22** The protocol recommended by the Privileges Committee in 2006 was developed following a detailed and careful inquiry in which the Committee considered the experiences of a number of Parliaments in relation to the execution of search warrants on members' offices and consulted with a range of investigative and law enforcement agencies. The resulting draft incorporated safeguards for the protection of parliamentary privilege before, during, and after execution of the warrant, as well as measures to ensure that the integrity of the external investigation would not be compromised by the making or resolution of privilege claims.
- 4.23** The subsequent adoption by the Independent Commission Against Corruption of a protocol based on the Committee's recommended draft represented a significant advance for the protection of parliamentary privilege in New South Wales. It also marked a considerable departure from the procedures employed by the Commission in relation to the execution of a search warrant on the office of the Hon Peter Breen in 2003. In that case, for example, the Commission denied that parliamentary privilege prevented the seizure under warrant of all privileged documents, and asserted that the effect of the parliamentary immunity is only to prevent seized material being subsequently used in an improper way.⁸¹ By contrast, section 10 of Procedure 9 of the Commission's *Operations Manual* allows for claims of parliamentary privilege to be made before material is seized, and provides for disputed claims of privilege to be determined by the House rather than the Commission, or its officers.
- 4.24** There remain differences between the Commission and the Committee concerning issues relating to the determination of privilege claims. However, the Commission's views in relation

⁸⁰ *LC Minutes* (4/12/2003) 494; (1/04/2004) 650.

⁸¹ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003, pp. 26-29.

to these matters are not reflected in the terms of the Commission's protocol itself. The actual procedures set out in that protocol, which concern the steps to be followed by Commission officers in practice when seeking to execute warrants on members' offices, incorporate the key measures for the protection of privileged material recommended by this Committee.

4.25 In these circumstances, the Committee supports the protocol contained in Procedure 9 of the Commission's *Operations Manual*, and in particular Section 10, for the execution of search warrants on members' offices by the Independent Commission Against Corruption.

4.26 The Committee therefore finds:

Finding 1

That Procedure 9 of the Commission's *Operations Manual*, and in particular Section 10, provides a suitable basis for the execution of search warrants on members' offices by the Independent Commission Against Corruption.

Chapter 5 A Memorandum of Understanding

In this chapter, the Committee recommends the adoption of a Memorandum of Understanding between the Independent Commission Against Corruption and the Parliament based on Procedure 9 of the Commission's *Operations Manual*.

The development of a Memorandum of Understanding

- 5.1 As a first step towards the development of Memorandum of Understanding for the purposes of this inquiry, the Committee prepared a draft Memorandum of Understanding between the Parliament and the Commission as a basis for consultation. This draft Memorandum provided that the agreed process for the execution of a search warrant by the Commission over premises occupied or used by a member is that spelt out in Procedure 9 of the Commission's *Operations Manual*.
- 5.2 The terms of the draft Memorandum were modelled on the text of the Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government concerning the execution of search warrants by the Australian Federal Police (AFP). That Memorandum provides that the agreed process to be followed is contained in the AFP's *National guideline for execution of search warrants where parliamentary privilege may be involved*.
- 5.3 Both the federal Memorandum of Understanding and the draft prepared by this Committee include a requirement for the relevant agency to consult with the President Officers before making any changes to the agreed procedures. In the Committee's draft Memorandum, this requirement is contained in Section 4 which is entitled 'Variation of this Memorandum of Understanding'. The relevant paragraph of Section 4 provides:

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 the attached Procedure 9 of the ICAC's *Operations Manual*, as it relates to the execution of search warrants at Parliament.

- 5.4 When invited by the Committee to comment on the draft Memorandum of Understanding, the Commissioner of the Independent Commission Against Corruption identified a difficulty with the possible operation of this paragraph, in that it appeared to contemplate consultation with respect to changes to any provisions of Procedure 9, including provisions beyond Section 10 of Procedure 9 which specifically concerns parliamentary offices:

The other sections of Procedure 9 may require amendment from time to time to reflect legislative change, court decisions or changed operational practices. It may not always be practicable and may prove onerous to consult with the President and Speaker each time it was proposed to amend or revise these sections or add other sections.

In order to clarify the position the Commission requests Clause 4 of the draft MOU be amended to limit the requirement for consultation to any proposed changes or revision to Section 10 of Procedure 9.⁸²

- 5.5 In response to this concern, the Committee advised the Commission that it was its intention to provide for consultation in relation to changes to the provisions of Procedure 9 which specifically relate to the execution of search warrants on parliamentary offices. Those provisions are contained in Section 10 of Procedure 9, which encompasses the various stages in the execution of a warrant, and paragraphs 3 and 7 of Section 2.1, which concern matters to be considered before deciding to involve other investigative agencies, and the need to ensure that the documents described in a warrant are not likely to be subject to parliamentary privilege.
- 5.6 To clarify the intended operation of the consultation requirement of the draft Memorandum of Understanding, the Committee proposed the following changes to the relevant paragraph of Section 4:

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 as it which specifically relates to the execution of search warrants at Parliament.

- 5.7 The Commissioner subsequently advised that the Commission concurred with these changes. The Commissioner also advised that the Memorandum of Understanding as a whole is acceptable to the Commission.⁸³

Recommended action

- 5.8 Procedure 9 of the Commission's *Operations Manual*, and in particular Section 10, incorporates the key measures for the execution of search warrants on members' offices recommended by the Privileges Committee in its draft protocol of 2006. There are differences between the Commission and this Committee in relation to certain issues concerning the determination of privilege claims, as discussed in chapter 4, but these differences arise from written comments by the Commission rather than from the terms of the Commission's protocol itself. Such differences should not therefore impede the reaching of agreement on the critical question of the implementation of procedures to protect material which is subject to parliamentary privilege from seizure under a warrant.
- 5.9 The incorporation of the protocol within a Memorandum of Understanding with the Parliament would enhance the protections available as a result of the Commission's adoption of Procedure 9, including by providing for the Commission to consult with the Presiding Officers before making any changes to the agreed procedures. The Commissioner of the Independent Commission Against Corruption has advised that the Memorandum of Understanding prepared by this Committee is acceptable to the Commission.

⁸² Correspondence from Commissioner of the ICAC to the Privileges Committee, 8 October 2009, pp. 1-2.

⁸³ Correspondence from Commissioner of the ICAC to the Privileges Committee, 2 November 2009.

5.10 The Committee therefore recommends:

Recommendation 1

That the House resolve that the President enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices set out in Appendix 7 of this report.

Recommendation 2

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 Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices.

Appendix 1 Committee on the ICAC, *Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption*, Answer to question on notice no. 43, p. 30

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

Investigators are not provided with specific training or professional development in relation to the issue of parliamentary privilege. In the event a search warrant was to be executed on premises used or occupied by a Member of Parliament then, apart from the requirements in Procedure 9, Commission officers executing the warrant would have available internal legal advice and guidance. The Commission considers this to be sufficient given the rarity of events likely to involve execution of a search warrant on premises used or occupied by a Member of Parliament.

43. The ICAC now has a search warrant procedure in place for the execution of a search warrant on a parliamentary office, namely section 10 of Procedure no. 9 -Procedures for Obtaining and Executing Search Warrants.

a. To what extent is the procedure based on the Protocol recommended by the Legislative Council in 2005?

The Legislative Council published a recommended protocol in February 2006 (Report 33). Section 10 of Procedure 9 of the Commission's Operations Manual essentially replicates the sections of the recommended protocol in relation to the execution of a search warrant on premises used or occupied by a Member of Parliament.

The Legislative Council recommended protocol also set out a procedure for resolving disputes as to whether documents are protected by parliamentary privilege which included a basis for classifying whether or not particular documents are subject to privilege. This provides that documents will be classified as privileged where the Clerk and member claim the documents were brought into existence, subsequently used or retained for the purposes of or incidental to the transacting of business in a House or Committee. The Commission has not adopted this classification as it does not accept that a claim that documents that were not brought into existence or actually used for the purposes of or incidental to the transacting of business, but merely retained for that purpose, unless supported by other material evidence, necessarily makes those documents privileged. This could potentially allow a member to claim any document was privileged by merely claiming he or she intended to use it at some future time for the purposes of or incidental to the transacting of business in a House or Committee.

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.

b. Does the term 'parliamentary office' in the abovementioned procedure include electorate offices?

Procedure 9 applies to any premises used or occupied by a member.

c. What changes were made on 7 August 2008 to the ICAC's procedures for executing search warrants on parliamentary offices? (see Breen report p.47).

The change made to Procedure 9 in August 2008 removed the requirement to complete the "progressive checklist" and made it a guide. A new "authorisation checklist" was included. This

Appendix 2 Comparison of the draft protocol recommended in the Committee's 2006 report with the protocol adopted by the Independent Commission Against Corruption (s. 10, Procedure 9)

2006 DRAFT PRIVILEGES COMMITTEE PROTOCOL	ICAC PROTOCOL
<p>Procedure prior to obtaining a search warrant</p> <p>An officer who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval at a senior level within the agency/body before applying for the warrant.</p> <p>If approval is given, the officer should obtain legal advice before applying for a search warrant.</p> <p>Care should be taken when drafting a search warrant to ensure that it <u>does not cover a wider range of material than is necessary to advance the relevant investigation.</u></p>	<p>2.1(2) All applications must be approved by the Executive Director, Investigation Division.</p> <p>2.1(1) Case officer must discuss with Case Lawyer if there is sufficient legal basis to make an application for a warrant</p> <p>2.1(4) The Case Officer will be responsible for drafting the search warrant application using the legal macro. A separate application must be prepared for each warrant sought. The application must address:</p> <ul style="list-style-type: none"> - 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; - a description of the thing being searched for and if known its location; 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. <p>The authorised officer is also required to consider:</p> <ul style="list-style-type: none"> - the reliability of the information; - the nature and source of the information (see informers); and - <u>whether there is sufficient connection between the thing(s) sought and the matter under investigation.</u> <p>2.1(7) 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.</p>

<p>Procedure prior to executing a search warrant</p> <p>If the premises to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If the Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the Chair of that committee.</p> <p>To minimise the potential interference with the performance of the member's duties, the executing officer 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 search warrant.</p> <p>The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.</p> <p>A reasonable time should be allowed to the member and the Clerk 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.</p> <p>Officers from the agency, including the executing officer, will then meet with the Clerk of the House and the member or a senior member of his/her staff or their nominated representative. The officers will outline any obligations under the warrant, the nature of the allegations being investigated, the nature of the material the agency considers is located in the member's office, and the relevance of that material to the investigation.</p>	<p>10.2. 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.</p> <p>10.3 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.</p> <p>10.2 The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.</p> <p>10.4 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.</p> <p>10.6 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.</p>
---	--

<p>Based on that information the member will be afforded a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.</p> <p>Executing the search warrant</p> <p>Unless, in the opinion of the relevant Commissioner, compliance would affect the integrity of the investigation, the executing officer must comply with the following procedures:</p> <ul style="list-style-type: none"> (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day, or on a day on which a parliamentary committee, involving the member, is meeting, (b) a search warrant should be executed at a time when the member, or a senior member of his/her staff, will be present, (c) the member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed, (d) the member may have a legal adviser present during the execution of the, search warrant, and (e) the Clerk of the relevant House, or if the Clerk is not available, the Deputy Clerk, should also be present during the search. 	<p>10.7 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.</p> <p>10.8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.</p> <p>10.1 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.</p> <p>10.3 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.</p> <p>10.4 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.</p> <p>10.4 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.</p> <p><u>(IMPLICIT IN 10.10 BUT NOT EXPLICIT)</u></p>
--	---

<p>If the member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the member, or member's staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.</p> <p>There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.</p> <p>As part of that process, the executing officer should consider inviting the member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.</p> <p>Procedure to be followed if privilege or immunity is claimed</p> <p>If the member, or member's staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the member, or member of staff, to identify the basis for the claim. The executing officer should then follow Procedure A, unless the executing officer considers the claim to be arbitrary, vexatious or frivolous, in which case Procedure B should be followed.</p> <p>Procedure A</p> <p>The executing officer should ask the member, or member's staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:</p>	<p>10.7 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.</p> <p><u>(NOTE: ISSUE OF PUBLIC INTEREST IMMUNITY. ICAC DISPUTES WHETHER A CLAIM OF PUBLIC INTEREST IMMUNITY WOULD BE UPHELD IN THE COURTS. THE CLAIMING OF PUBLIC INTEREST IMMUNITY OVER DOCUMENTS IS ULTIMATELY A MATTER FOR THE MEMBER CONCERNED.)</u></p> <p><u>NOT COVERED</u></p> <p><u>NOT COVERED</u></p> <p>(ICAC DEFAULTS TO PROCEDURE A IN ALL SITUATIONS – see below)</p>
---	---

<ul style="list-style-type: none"> • The relevant document or documents should be placed in audit bags in accordance with the ICAC guidelines or NSW Police Standard Operating Procedures on exhibits. A list of the documents should be prepared by the executing officer with assistance from the member or member of staff; • The member, or member's staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer; • The items so secured should be delivered into the safekeeping of the Clerk; <p>The member has three working days (or other agreed period) from the delivery of the items to the Clerk to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained</p> <ul style="list-style-type: none"> • When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the Clerk until the disposition of the items is determined in accordance with the ruling; and • If the member has not contacted the executing officer within three working days (or other agreed period), the executing officer and the Clerk will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the Clerk will be entitled to deliver the items to the executing officer. 	<p>10.9 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.</p> <p>10.11 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.</p> <p>10.9 The member, or member's staff, should be given an opportunity to take copies before the documents are secured.</p> <p>10.10 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.</p> <p>(THE TIME FRAME OF THREE DAYS IS NOT COVERED)</p> <p>10.14. 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.</p> <p>(ICAC IS ESSENTIALLY LEAVING THIS TO THE INTERNAL PROCESSES OF THE HOUSE)</p>
---	---

If the member, or member's staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the circumstances of the case to minimise the extent to which the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

Procedure B

In some cases a member, or member's staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and that, therefore, the proposed search should not proceed in any form. If that occurs, the executing officer should consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the member, or member's staff, that he/she intends to proceed to execute the search warrant unless the member, or member's staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.

The executing officer is to consult with the relevant Presiding Officer when determining whether a claim of privilege is arbitrary, vexatious or frivolous. The Clerk of the relevant House is to be present during the execution of the warrant in these circumstances.

The agency/body will notify the Attorney General (in his/her capacity as First Law Officer) and the Minister responsible for the agency/body (if different) in any case where a claim of parliamentary privilege has been made by or on behalf of a member.

Obligations at the conclusion of a search The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the member does not hold copies

(ICAC DEFAULTS TO PROCEDURE A)

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.

The executing officer should inform the member that the agency/body 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. The agency/body should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

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

Procedure for resolving disputes as to whether documents are protected by parliamentary privilege

When a member seeks a ruling as to whether documents are protected by parliamentary privilege, the member, the Clerk, and a representative of the agency/body will jointly be present at the examination of the material. The member and the Clerk will identify material which falls within the scope of proceedings in Parliament, that is:

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 of a committee, including:

- (a) the giving of evidence before a House or a committee and evidence so given,
- (b) the presentation or submission of a document to a House or a committee,
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business, and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

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.

<p>In determining whether or not documents are privileged, the Clerk and the member will apply the following tests:</p> <p>(1) Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?</p> <p><input type="checkbox"/> YES → falls within 'proceedings in Parliament'.</p> <p><input type="checkbox"/> NO → move to question 2.</p> <p>(2) Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or a committee?</p> <p><input type="checkbox"/> YES → falls within 'proceedings in Parliament'.</p> <p><input type="checkbox"/> NO → move to question 3.</p> <p>(3) Have the documents been retained for the purposes of or incidental to the transacting of business in a House or a committee?</p> <p><input type="checkbox"/> YES → falls within 'proceedings in Parliament'.</p> <p><input type="checkbox"/> NO → does not fall within 'proceedings in Parliament'.</p> <p>A list of material considered to be within the scope of proceedings in Parliament (referred to as "privileged material") will then be prepared by the Clerk and provided to the member and the agency/body.</p> <p>Any material not listed as falling within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.</p> <p>The agency/body may, within a reasonable time, in writing to the President of the Legislative Council, dispute any material considered to be privileged material, and may provide written reasons for the dispute.</p> <p>Any privileged material not identified by the agency/body as being in dispute will be returned to the member.</p> <p>The President will immediately inform the member of any dispute, at which time the member may provide written reasons in support of the member's claim.</p>	<p>10.15 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.</p> <p>10.16 Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.</p> <p>10.17 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.</p> <p>(AGAIN ALL THESE POINTS ARE LEFT TO THE INTERNAL PROCESSES OF THE HOUSE)</p>
---	---

<p>The President will inform the House at its next sitting of any disputed claim, and table any documents provided by the agency/body or member relating to the dispute.</p> <p>The President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.</p> <p>Any material which the House determines is not within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.</p> <p>Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides, with a copy to be made available to the member.</p> <p>If a dispute concerning a claim of privilege occurs when the House is in an extended recess, or has been prorogued for a general election and Council periodic election, an independent legal opinion may be obtained by the Clerk from a suitably qualified person, such as a Senior Counsel or retired Supreme Court judge, to determine whether there is a claim of privilege.</p> <p>The legal opinion is to be made available to both parties, and tabled in the relevant House at its next sitting.</p>	
---	--

Appendix 3 Letter from the Chair to the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, dated 23 September 2009



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

23 September 2009

The Honourable Mr Jerrold Cripps, QC
 Commissioner
 Independent Commission Against Corruption
 GPO Box 500
 SYDNEY NSW 2001

Dear Justice Cripps

Inquiry into a memorandum of understanding with the Independent Commission Against Corruption concerning the execution of search warrants on members' offices

On 10 September 2009 the Legislative Council referred the following inquiry to the Privileges Committee:

1. That the Privileges Committee inquire into and report on the development of a Memorandum of Understanding between the President and the Commissioner of the Independent Commission Against Corruption (ICAC) covering the execution of search warrants by the ICAC on the Parliament House offices of members, with particular reference to:
 - (a) the draft protocol recommended by the Privileges Committee in its Report No. 33 of February 2006 entitled "Protocol for execution of search warrants on members' offices",
 - (b) the ICAC protocol entitled 'Procedures for Obtaining and Executing Search Warrants', with particular reference to section 10, and
 - (c) recent Answers to Questions on Notice concerning the execution of search warrants at Parliament House provided by the ICAC to the Committee on the Independent Commission Against Corruption as part of its Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption.
2. That the Committee report by the last sitting day in November 2009.
3. That a message be forwarded to the Legislative Assembly informing of the terms of reference agreed to by the House, and requesting that the Legislative Assembly Privileges and Ethics Committee be given a similar reference.

As you are aware, the draft protocol recommended by the Privileges Committee in 2006 was developed in response to issues arising from the execution of a search warrant by officers from the Independent Commission Against Corruption on the Parliament House office of the Hon Peter Breen MLC in 2003. In developing the draft protocol, the Committee examined the procedures which have been adopted in relation to the execution of search warrants on members' offices in a number of Parliaments, and consulted a range of investigative and law enforcement agencies, including the Independent Commission Against Corruption. The particular procedures provided by the draft protocol drew on elements of:

- the procedures followed by the Australian Federal Police (AFP) for the execution of search warrants on the offices of members of the federal Parliament, which are embodied in the *Memorandum of Understanding on the execution of search warrants in the premises of members of Parliament* implemented in the federal Parliament in 2005
- the procedure adopted by the Legislative Council for determining a claim of privilege made by the Hon Peter Breen, which reflected recommendations by the Privileges Committee in its Report 25 entitled *Parliamentary privilege and seizure of documents by ICAC* (December 2003)
- the test adopted by the Privileges Committee for determining whether a member's documents fall within the scope of 'proceedings in Parliament' in its Report 28 entitled *Parliamentary privilege and seizure of documents by ICAC No. 2* (March 2004).

In 2005, the Independent Commission Against Corruption itself adopted new procedures in respect of the execution of search warrants on the offices of members of Parliament.¹ Subsequently, following the publication of the Privileges Committee Report 33 in February 2006, the Commission adopted further revised procedures on 28 June 2006, reflecting the draft protocol recommended by the Privileges Committee.² Finally, in August 2008, the Commission adopted Procedure 9 of the Commission's Operations Manual entitled 'Procedures for obtaining and executing search warrants'.³ Section 10 of that document deals with execution of a search warrant on a parliamentary office.

The Commission's protocol adopted in August 2008 includes the key measures recommended by the Privileges Committee in its draft 2006 protocol, with the following exceptions:

- 1) The Commission's protocol excludes reference to the fact that members may make a claim of public interest immunity over documents in their possession.
- 2) The Commission's protocol does not refer to the criteria to be applied to determine whether a document is subject to parliamentary privilege, or the procedures to be followed in the House for resolving disputes as to whether documents are privileged. However, the protocol expressly recognises that where the Commission disputes a claim of privilege the 'issue will then be determined by the relevant House' (paragraph 17 of Section 10).

As the Commission's protocol embodies the most relevant key protections recommended by the Privileges Committee in 2006, the Committee considers that it may provide a suitable basis for the development of a Memorandum of Understanding within the terms of reference for the Committee's

¹ Office of the Inspector of Independent Commission Against Corruption, *Special Report on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Honourable Peter Breen MLC*, September 2008, p. 47, para 3.12.5

² Ibid

³ Ibid

current inquiry. To this end, the Committee has prepared a draft Memorandum of Understanding which provides that the agreed processes for the execution of search warrants on members' offices are those set out in Procedure 9 of the Commission's 'Operations Manual'. The terms of the draft Memorandum are modelled on the provisions of the Memorandum of Understanding governing the execution of search warrants by the AFP on the offices of members of the federal Parliament. A copy of the draft Memorandum is attached.

However, while the Committee considers that the Commission's protocol includes appropriate procedures, the Committee would like to clarify certain issues relating to the implementation of that protocol. These issues arise from comments contained in a written answer provided by the Commission to the Committee on the Independent Commission Against Corruption as part of that Committee's current review of the Commission's 2007-2008 Annual Report.

The relevant question from the Committee on the Independent Commission Against Corruption was as follows:

The ICAC now has a search warrant procedure in place for the execution of a search warrant on a parliamentary office, namely section 10 of Procedure no. 9 - Procedures for Obtaining and Executing Search Warrants.

To what extent is the procedure based on the Protocol recommended by the Legislative Council in 2005?⁴

The written response provided by the Commission is reproduced below (emphasis added):

The Legislative Council published a recommended protocol in February 2006 (Report 33). Section 10 of Procedure 9 of the Commission's Operations Manual essentially replicates the sections of the recommended protocol in relation to the execution of a search warrant on premises used or occupied by a Member of Parliament.

The Legislative Council recommended protocol also set out a procedure for resolving disputes as to whether documents are protected by parliamentary privilege which included a basis for classifying whether or not particular documents are subject to privilege. This provides that documents will be classified as privileged where the Clerk and member claim the documents were brought into existence, subsequently used or retained for the purposes of or incidental to the transacting of business in a House or Committee. The Commission has not adopted this classification as it does not accept that a claim that documents that were not brought into existence or actually used for the purposes of or incidental to the transacting of business, but merely retained for that purpose, unless supported by other material evidence, necessarily makes those documents privileged. This could potentially allow a member to claim any document was privileged by merely claiming he or she intended to use it at some future time for the purposes of or incidental to the transacting of business in a House or Committee.

⁴ Committee on the Independent Commission Against Corruption, 'Questions on Notice, Inspectorate's Breen Report, ICAC inspector's report on Breen Complaint (Breen Report), Answer to question 43, p. 30: www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/F43C075758D743E8CA257612000BF78B

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.⁵

The Committee is troubled by the apparent implications of this written answer. The understanding that members' documents are protected by parliamentary privilege if they are brought into existence, used or retained for the purposes of or incidental to the transacting of business of the House is based on section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), which provides in part:

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:...

The Commission, in this written answer, appears to not accept this definition, and raises the possibility that a member could potentially claim that any document was privileged by merely claiming he or she intended to use it at some future time for the purposes of or incidental to the transacting of business in a House or Committee. This is a misunderstanding of the provisions of Article 9 of the Bill of Rights and section 16 of the *Parliamentary Privileges Act 1987* (Cth). Members certainly retain many documents, however not all of them pertain to 'proceedings in parliament'. For example, it is certainly not the case that all correspondence to members, even if retained by the member, would attract absolute privilege.

Moreover, by referring to the possibility of seeking judicial review of any such claim of privilege, the Commission appears to put into doubt the right of the House to be the arbiter of disputes concerning claims of privilege. This would appear to be at odds with paragraph 17 of Section 10 of the Commission's protocol which states that, where the Commission disputes a claim of privilege, the issue is to be 'determined by the relevant House'. It also seems inconsistent with resolutions adopted by the Legislative Council on 4 December 2003 and 1 April 2004 concerning the seizure of documents of the Hon Peter Breen, which affirmed that the House is the appropriate forum for the resolution of issues of parliamentary privilege, including issues concerning documents and things seized by search warrant from the parliamentary office of Mr Breen.⁶ Such resolutions reflect the broader well-established principle that it is for the courts to determine the existence of a privilege but it is solely for the House to determine the manner of the exercise of a privilege.

The Committee would like to seek clarification from the Commission in relation to these matters, in the context of addressing the issues which have been referred to it in its current inquiry.

The Committee therefore invites you to comment on:

- (1) The attached draft Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption concerning the execution of search warrants by the Commission on the Parliament House offices of members.
- (2) The concerns expressed by the Committee in relation to the Commission's written answer to the Committee on the Independent Commission Against Corruption with regard to:

⁵ Ibid

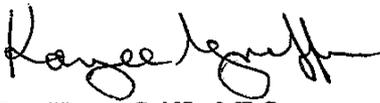
⁶ *LC Minutes* (4/12/2003) 494; (1/04/2004) 650

- (a) the status of documents retained by a member for the purposes of or incidental to the transacting of business in a House or a committee
 - (b) the role of the House as the arbiter of disputed claims of privilege.
- (3) Any other matter relevant to the terms of reference for the Committee's inquiry upon which you might wish to comment on.

The Committee would be pleased to receive your comments by 16 October 2009.

If you would like to discuss any aspect of this matter, please contact the Clerk to the Committee and Deputy Clerk of the Legislative Council, Mr David Blunt on (tel) 9230 2024 or david.blunt@parliament.nsw.gov.au

Yours sincerely



Hon Kayee Griffin MLC
Chair

**Appendix 4 Letter from the Hon Jerrold Cripps QC,
Commissioner, Independent Commission
Against Corruption to the Chair, dated
8 October 2009**



8 October 2009

The Hon. Kayee Griffin MLC
 Chair
 Privileges Committee
 Parliament House
 Macquarie Street
 Sydney NSW 2000

Dear Chair,

RE: Inquiry into a memorandum of understanding with the Independent Commission Against Corruption concerning the execution of search warrants on members' offices

I am writing in response to your letter dated 23 September 2009.

The draft Memorandum of Understanding proposed by the Committee provides that the agreed process for the execution of a search warrant by the Commission over premises occupied or used by a member is spelt out in Procedure 9 of the Commission's Operations Manual. Section 10 of Procedure 9 specifically relates to the execution of search warrants on a parliamentary office and is based on the Legislative Council's Protocol for the execution of search warrants on members' offices (Legislative Council Report 33, February 2006) (the 2006 Protocol).

Clause 4 of the proposed MOU would restrict the Commission from unilaterally amending Procedure 9 "as it relates to the execution of search warrants at Parliament" without first consulting the President and the Speaker.

It is not clear whether the MOU Clause 4 consultation process is meant to be limited to section 10 of Procedure 9 or whether it is meant to apply to the entirety of Procedure 9.

The other sections of Procedure 9 may require amendment from time to time to reflect legislative change, court decisions or changed operational practices. It may not always be practicable and may prove onerous to consult with the President and Speaker each time it was proposed to amend or revise these sections or add other sections.

Level 21, 133 Castlereagh Street
 Sydney NSW 2000
 GPO Box 500, Sydney NSW 2001
 T 02 8281 5999 F 02 9264 5364
 E icac@icac.nsw.gov.au
www.icac.nsw.gov.au

In order to clarify the position the Commission requests Clause 4 of the draft MOU be amended to limit the requirement for consultation to any proposed changes or revision to Section 10 of Procedure 9.

You also raised concerns in relation to the Commission's written answer to a question on notice from the Parliamentary Committee on the ICAC. You have advised that the Privileges Committee is "troubled by the apparent implications of this written answer" and seeks clarification from the Commission. In particular, it appears that the Committee is concerned that:

- the Commission does not accept the definition of proceedings in Parliament set out in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) or has misunderstood that provision, and
- by referring to the possibility of seeking judicial review of any such claim of privilege the Commission appears to put into doubt the right of the House to be arbiter of disputes concerning claims of privilege and to be at variance with the resolutions adopted by the Legislative Council on 4 December 2003 and 1 April 2004 (concerning the seizure of documents in the Breen matter) which affirmed that the House is the appropriate forum for the resolution of issues of parliamentary privilege.

Section 16(2) of the *Parliamentary Privileges Act 1987* provides that the term "proceedings in Parliament" means "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 of a committee..." The Legislative Council adopted the definition in the 2006 Protocol to identify whether material falls within the scope of proceedings in Parliament. The Commission previously accepted the definition as being appropriate (see enclosed copy letter dated 11 October 2005 to the Chair of the Privileges Committee). The Commission continues to accept this definition.

The 2006 Protocol however went on to propose a three-point test for determining whether documents are privileged (Clause 3.23 of the 2006 Protocol). The test provides that documents will be privileged where they are:

- **brought into existence** for the purposes of or incidental to the transacting of business in a House or Committee, or
- **subsequently used** for the purposes of or incidental to the transacting of business in a House or Committee, or
- **retained** for the purposes of or incidental to the transacting of business in a House or Committee.

The Commission has never accepted this test and has twice notified the then Chair of the Privileges Committee that it did not accept this test (see enclosed copy letters of 11 October 2005 and 3 May 2006).

The Commission has particular concern in relation to the third part of the test. The Commission does not assert that documents retained for the purposes of or incidental to the transacting of business will never be covered by privilege. The Commission's concern has always been the way in which any test may be applied in any particular case and whether any determination by Parliament is final. The test could potentially allow a member to successfully claim any document was privileged by merely claiming he or she intended to use it at some future time for the purposes of or incidental to the transacting of business in a House or Committee. Another concern is that any use or proposed use of a retained document might only be marginal but still result in a successful claim of privilege. This would be of particular concern to the Commission in cases where the document was of significant relevance to the Commission's investigation and any inability to use the document would materially adversely affect the conduct of the investigation.

In the event any issue of privilege should arise in the future the Commission's intention is to cooperate with the Parliament to resolve the issue. While the Commission anticipates that any dispute as to privilege in relation to documents seized during the course of the execution of a search warrant may be satisfactorily resolved by the relevant House, the Commission nevertheless wishes to reserve its right in appropriate cases to seek judicial determination.

Yours faithfully



The Hon. Jerrold Cripps QC
Commissioner

Appendix 5 Letter from the Chair to the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, dated 28 October 2009



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

28 October 2009

The Honourable Mr Jerrold Cripps, QC
 Commissioner
 Independent Commission Against Corruption
 GPO Box 500
 SYDNEY NSW 2001

Dear Justice Cripps

Inquiry into a memorandum of understanding with the Independent Commission Against Corruption concerning the execution of search warrants on members' offices

Thank you for your letter dated 8 October 2009 which comments on a requirement for consultation contained in the draft Memorandum of Understanding prepared by the Committee; the three step test devised by the Committee for determining whether documents are covered by parliamentary privilege; and the determination of disputed claims of privilege arising from the seizure of members' documents.

With regard to the requirement to consult, it is not the Committee's intention to propose consultation in relation to changes to procedures which do not specifically apply to the Parliament. The Committee only intends to provide for consultation in relation to provisions of Procedure 9 of the Commission's Operations Manual which specifically apply to Parliament. The provisions of Procedure 9 which specifically apply to parliamentary offices are all of the provisions of Section 10, and paragraphs 3 and 6 of subsection 2.1 of Section 2. Paragraph 3 of subsection 2.1 provides:

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 (emphasis added).**

Paragraph 6 of subsection 2.1 provides in part:

... 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 (emphasis added).**

Parliament House
 Macquarie Street
 NSW 2000 Australia

Telephone (02) 9230 2323
 Facsimile (02) 9230 2761
 david.blunt@parliament.nsw.gov.au

To clarify the Committee's intentions in relation to this issue, the Committee proposes to amend the third paragraph of clause 4 of the draft Memorandum of Understanding as follows:

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 as it which specifically relates to the execution of search warrants at Parliament (eg paragraphs 3 and 6 of subsection 2.1).

The Committee invites you to comment on whether these amendments address the Commission's concerns in relation to the matter, and on whether the amended draft Memorandum of Understanding as a whole is acceptable to the Commission.

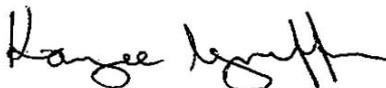
As to the other issues raised, you confirm that the Commission rejects the three-step test developed by the Committee, particularly in relation to the retention of a document, and reserves a right to seek judicial review of determinations of privilege claims by the House. You also advise that the Commission does not assert that documents retained for relevant purposes will *never* be covered by privilege, and that it anticipates any disputes which arise may be satisfactorily resolved by the House.

Whilst differences remain between the Committee and the Commission in relation to the determination of privilege claims, the Committee does not believe these differences are such as to preclude the reaching of agreement in relation to the procedures to be followed in the execution of search warrants on the offices of members. In those circumstances the Committee proposes to recommend to the House the draft Memorandum of Understanding previously provided to the Commission, with the amendments to clause 4 set out in this letter, and to note the Commission's views concerning the determination of privilege claims in its report to the House.

The secretariat is currently preparing a draft report, which the Committee hopes to consider during the next sitting week, in anticipation of tabling the report in late November. The Committee would therefore be pleased to receive any comments by Wednesday 4 November 2009.

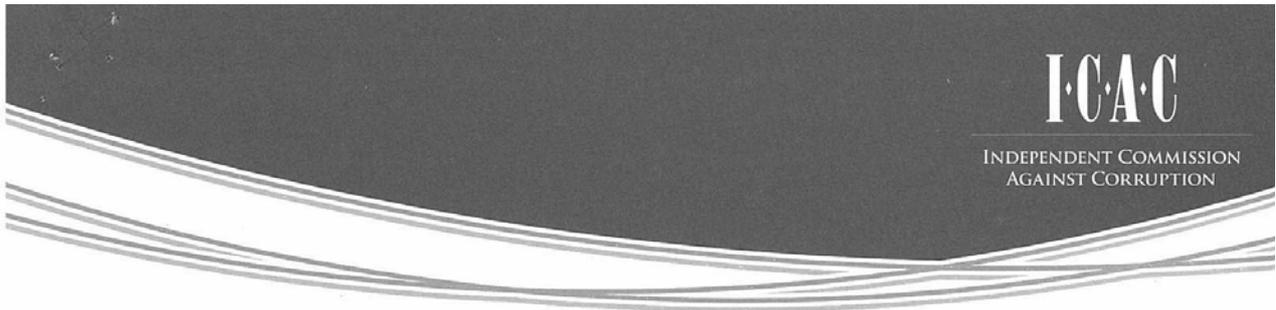
If you would like to discuss any aspect of this matter, please contact the Clerk to the Committee and Deputy Clerk of the Legislative Council, Mr David Blunt on (tel) 9230 2323 or david.blunt@parliament.nsw.gov.au

Yours sincerely



Hon Kayee Griffin MLC
Chair

**Appendix 6 Letter from the Hon Jerrold Cripps QC,
Commissioner, Independent Commission
Against Corruption to the Chair, dated
2 November 2009**



7 November 2009

The Hon. Kayee Griffin MLC
Chair
Privileges Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Chair,

RE: Inquiry into a memorandum of understanding with the Independent Commission Against Corruption concerning the execution of search warrants on members' offices

I am writing in response to your letter dated 28 October 2009.

Your letter refers to paragraph 6 of subsection 2.1 of Procedure 9 of the Commission's Operations Manual. The enclosed copy of Procedure 9 indicates the quoted passage is from paragraph 7 of subsection 2.1.

Subject to amending the relevant paragraph number, the Commission agrees with the proposed change to clause 4 of the draft Memorandum of Understanding and advises that the Memorandum of Understanding is acceptable to the Commission.

Yours faithfully

A handwritten signature in black ink, appearing to read 'J. Cripps', is written over the typed name of the Commissioner.

The Hon. Jerrold Cripps QC
Commissioner

Level 21, 133 Castlereagh Street
Sydney NSW 2000
GPO Box 500, Sydney NSW 2001
T 02 8281 5999 F 02 9264 5364
E icac@icac.nsw.gov.au
www.icac.nsw.gov.au

Appendix 7 Recommended Memorandum of Understanding

**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

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

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**

**The Hon Peter Primrose MLC
President**

**The Hon Richard Torbay
Speaker**

OPERATIONS MANUAL

PROCEDURE NO. 9

**PROCEDURES FOR OBTAINING AND EXECUTING
SEARCH WARRANTS**

APPROVED: 22 JULY 2009

D10165525

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

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*.

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.

D10165525

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.

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.

D10165525

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

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;

13

- 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

D10165525

- 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

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

20

- (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.

D10165525

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**

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

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.

D10165525

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 HEREUNDER/

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: _____

Appendix 8 Minutes of the Committee's proceedings

Note: Asterisks indicate text which has been deleted as it is not relevant to this inquiry.

Minutes No. 14

Tuesday, 8 September 2009, Members' Lounge, Parliament House at 6.33 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Ms Fazio
Mr Harwin
Revd Mr Nile
Mr West

In attendance: David Blunt, Stephen Frappell, Jenelle Moore.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Fazio: That minutes no. 13 be confirmed.

3. Correspondence from the Legislative Assembly Privileges and Ethics Committee

The Chair tabled correspondence from the Chair of the Legislative Assembly Privileges and Ethics Committee concerning four issues in relation to parliamentary privilege.

The Committee deliberated.

Resolved, on the motion of Ms Fazio:

- 1) That the Chair of the Privileges Committee give a notice of motion in the House seeking a reference from the House to inquire into and report on an appropriate Memorandum of Understanding between the President (or Presiding Officers) and the Commissioner of the ICAC covering the execution of search warrants by the ICAC on the Parliament House offices of members, drawing on the Committee's Report 33 of February 2006 entitled 'Protocol for execution of search warrants on members' offices' and the August 2008 ICAC protocol entitled 'Procedures for obtaining and executing search warrants.
- 2) That, should the House resolve to refer this matter to the Privileges Committee, the Chair of the Committee move that a message be sent to the Legislative Assembly informing that House of the reference, and requesting the Assembly Privileges and Ethics Committee be given a similar reference.

4. Adjournment

The Committee adjourned at 6.45 pm *sine die*.

David Blunt
Clerk to the Committee

Minutes No. 15

Wednesday, 23 September 2009, Members' Lounge, Parliament House at 1.02 pm.

1. **Members present**

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Ms Fazio
Mr Harwin
Revd Mr Nile
Mr West

In attendance: David Blunt, Stephen Frappell, Jenelle Moore.

2. **Confirmation of minutes of previous meeting**

Resolved, on the motion of Ms Fazio: That minutes no. 14 be confirmed.

3. **Correspondence**

The Committee noted the following item of correspondence sent:

Letter dated 10 September 2009 from the Chair to Mr Paul Pearce MP, Chair of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, responding to his letter of 30 June 2009 and advising that the Legislative Council had referred terms of reference relating to an inquiry into a memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices.

4. **Inquiry into a memorandum of understanding with the Independent Commission**

Against Corruption relating to the execution of search warrants on members' offices

The Chair tabled a briefing paper relating to the inquiry, and a draft letter to the Commissioner of the Independent Commission Against Corruption.

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That the Committee approve the terms of the letter to the Commissioner of the Independent Commission Against Corruption.

5. **Adjournment**

The Committee adjourned at 1.09 pm *sine die*.

David Blunt
Clerk to the Committee

Minutes No. 16

Tuesday 27 October 2009, Members' Lounge, Parliament House at 7.50 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Ms Fazio
Revd Mr Nile
Mr West

In attendance: David Blunt, Stephen Frappell, Jenelle Moore.

2. Apologies

Mr Harwin

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 15 be confirmed.

4. Correspondence

The Committee noted the following item of correspondence sent and received:

Correspondence sent:

Letter dated 23 September 2009 from the Chair to the Hon. Mr Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, inviting the Commissioner to make a submission to the inquiry into a memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices.

Correspondence received:

Letter dated 8 October 2009 from the Hon Jerrold Cripps QC, Commissioner of the Independent Commission Against Corruption, responding to a letter from the Committee Chair dated 23 September 2009.

5. Inquiry into a memorandum of understanding with the Independent Commission Against Corruption relating to the execution of search warrants on members' offices

The Committee considered the draft correspondence from the Chair to the ICAC Commissioner, and a briefing paper prepared by the secretariat.

The Committee deliberated.

Resolved, on the motion of Ms Fazio:

- 1) That the Committee approve the terms of the attached letter to the Commissioner of the Independent Commission Against Corruption.

- 2) That the Committee provide to the Legislative Assembly Privileges and Ethics Committee a copy of the Committee's letter to the Commissioner dated 23 September 2009, the Commissioner's response dated 8 October 2009, this Briefing Paper, the letter to be sent by the Committee as outlined above, and any eventual response from the Commissioner.

6. Adjournment

The Committee adjourned at 7.56 pm *sine die*.

David Blunt
Clerk to the Committee

Minutes No. 17

Thursday 12 November 2009, Members' Lounge, Parliament House at 1.07 pm.

1. Members present

Ms Griffin (Chair)
Miss Gardiner (Deputy Chair)
Mr Donnelly
Mr Harwin
Revd Mr Nile
Mr West

In attendance: David Blunt, Beverly Duffy, Jenelle Moore.

2. Apologies

Ms Fazio

3. Confirmation of minutes of previous meetings

Resolved, on the motion of Mr Donnelly: That minutes no. 16 be confirmed.

4. Correspondence

The Committee noted the following item of correspondence sent and received:

Correspondence sent:

- Letter dated 28 October 2009 from the Chair to the Hon. Mr Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, responding to his letter of 8 October 2009.
- Letter dated 28 October 2009 from the Chair to the Chair of the Legislative Assembly Privileges and Ethics Committee providing correspondence and a briefing paper relevant to the current inquiry into a protocol to guide the execution of search warrants on members' offices.

Correspondence received:

- Letter dated 2 November 2009 from the Hon Jerrold Cripps QC, Commissioner of the Independent Commission Against Corruption, responding to a letter from the Committee Chair dated 28 October 2009, attaching the most recent version of procedure 9 (July 2009)

5. **Inquiry into a memorandum of understanding with the Independent Commission Against Corruption relating to the execution of search warrants on members' offices**

The Committee considered the Chair's draft report.

Resolved on the motion of Mr Harwin:

- 1) That line 5 of the second paragraph of Chapter 3 be amended by omitting the word 'slightly' and inserting instead 'somewhat'
- 2) That the following paragraphs be inserted after paragraph 3.11

On 3 February 2009 Mr Damian Green MP wrote to the Speaker arguing that the Clerk had adopted a narrow interpretation of what items may attract privilege, which 'appears to take no account of material which originated outside Parliament but was then used in parliamentary proceedings or in connection with my parliamentary work'. On that basis, he requested that the material which had been taken from his parliamentary office be referred to the Standards and Privileges Committee for a decision about which parts of the material attract parliamentary privilege.

On 4 February 2008 the Speaker replied that he considered himself bound by the decision taken by the House on 8 December 2009 to set up a committee on the matter, which was not to proceed to substantive business until the conclusion of the police investigation. In light of this, the Speaker did not feel able to allow the matter raised by Mr Green to have precedence over the Orders of the Day.

Resolved on the motion of Mr Harwin:

- 1) That the report (as amended) be the report of the Committee and be presented to the House.
- 2) That pursuant to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and under the authority of Standing Order 223, the Committee authorises the publication of all correspondence and minutes.

Resolved on the motion of Rev Nile, that:

- 1) Following the tabling of the committee's report, the Chair give a notice of motion in the House to facilitate the implementation of the committee's recommendation.
- 2) The Chair's notice of motion incorporate the text of the proposed memorandum of understanding, so as to ensure the full text of the memorandum of understanding is conveyed in the message to the Legislative Assembly.

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

6. Adjournment

The Committee adjourned at 1.30pm sine die

David Blunt

Clerk to the Committee