

Submission
No 1

**INQUIRY INTO EXECUTION OF SEARCH WARRANTS BY
THE AUSTRALIAN FEDERAL POLICE NO. 3**

Name: NSW Independent Commission Against Corruption

Date Received: 19 February 2021

Partially
Confidential



INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

NSW INDEPENDENT COMMISSION AGAINST
CORRUPTION SUBMISSION TO THE
LEGISLATIVE COUNCIL PRIVILEGES
COMMITTEE INQUIRY INTO THE EXECUTION
OF SEARCH WARRANTS BY THE
AUSTRALIAN FEDERAL POLICE NO. 3

February 2021

Table of Contents

Introduction	3
Part 1: Overview of the Commission’s role and relevant statutory provisions	4
Part 2: Execution of search warrants	6
_Development of the 2009 MOU	6
_Steps taken to develop a new MOU	7
Part 3: Arrangements for production of documents and other things under s.22 of the ICAC Act	11
Part 4: Access to documents and other things under other sections of the ICAC Act	14
_Section 21 notices	14
_Section 23 authorisations	14
_Section 35 of the ICAC Act	15
Appendix 1: Inquiry terms of reference	16
Appendix 2: The September 2014 draft MOU	17

Introduction

This is the submission of the NSW Independent Commission Against Corruption (“the Commission”) with respect to paragraph (1)(e) of the terms of reference of the Legislative Council Privileges Committee (“the Privileges Committee”) inquiry into the execution of search warrants by the Australian Federal Police No. 3.

Paragraph (1)(e) of the terms of reference is in the following terms:

(1) That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:

(e) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members’ homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC.

The full terms of reference for the inquiry are set out at Appendix 1 of this submission.

In summary, the Commission is open to entering into a new Memorandum of Understanding (“MOU”) to cover searches of members’ parliamentary offices, homes or other locations outside of the parliamentary precincts where relevant documents and other things are kept. The Commission considers that the September 2014 draft MOU previously considered by the Commission, the Legislative Council Privileges Committee and the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics provides an appropriate basis for dealing with claims of parliamentary privilege arising out of the execution by Commission officers of a search warrant on premises occupied by members of Parliament.

The Commission is open to including in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 22 of the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).

For the reasons set out in Part 4 of this submission, the Commission does not consider that it is necessary to include in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 21 of the ICAC Act, authorities issued under s 23 of the ICAC Act or any requirement under s 35 of the ICAC Act to give evidence and/or produce documents or other things to the Commission.

Part 1: Overview of the Commission's role and relevant statutory provisions

The Commission's mandate under s 2A of the ICAC Act is to investigate, expose and prevent corruption involving or affecting public authorities and public officials and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community. The Commission also investigates conduct that may involve certain specified criminal offences that the NSW Electoral Commission refers to the Commission for investigation under s 13A of the ICAC Act.

Corrupt conduct is defined in s 7, s 8 and s 9 of the ICAC Act.

Section 12 of the ICAC Act provides that, in exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its "paramount concerns".

Section 12A of the ICAC Act stipulates that, in exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.

The Commission may conduct an investigation on its own initiative, on a complaint made to it, on a report made to it or on a reference made to it.¹ An investigation may be in the nature of a preliminary investigation.²

Since the commencement of its work in 1989, the Commission has conducted numerous investigations. The Commission has published over 190 investigation reports under s 74 of the ICAC Act and has made in excess of 1,300 corrupt conduct findings against approximately 850 individuals. Relatively few of the Commission's investigations involve members of Parliament. Parliamentary privilege has not been an issue in all investigations involving members of Parliament. Of more recent investigations undertaken by the Commission, two have required consideration of parliamentary privilege. The matters that arose in these investigations are considered in more detail in Part 3 of this submission.

The Commission has various powers under the ICAC Act and other legislation to enable it to obtain information for the purposes of its investigations. The most relevant of these to the inquiry's terms of reference are the power to:

- require a public official to produce a statement of information (s 21 of the ICAC Act)
- obtain documents or other things by serving a written notice (s 22 of the ICAC Act)
- enter and inspect any premises occupied or used by a public official to inspect documents and other things in or on the premises and take copies of any document (s 23 of the ICAC Act)
- summon a person to appear before the Commission at a compulsory examination or public inquiry to give evidence and/or to produce such documents or other things as are referred to in the summons (s 35(1) of the ICAC Act)

¹ Section 20 of the ICAC Act.

² Section 20A of the ICAC Act.

- require a person appearing at a compulsory examination or public inquiry to produce a document or other thing (s 35(2) of the ICAC Act)
- apply for the issue of a search warrant (s 40 of the ICAC Act).

The ICAC Act does not abrogate parliamentary privilege.

Section 122(1) of the ICAC Act provides that nothing in the ICAC 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.

Part 2: Execution of search warrants

As noted in Part 1 of this submission, an officer of the Commission may apply to an authorised officer or a Commissioner for a search warrant. Such application may be made only if the Commission officer has reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under the ICAC Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises (s 40(4) of the ICAC Act).

The Commission does not have power to execute a search warrant covertly. Search warrants are therefore only sought in circumstances where the Commission considers that knowledge of the Commission's investigation by those being investigated would not prejudice its investigation.

Only one search warrant has been executed on the parliamentary office of a member of Parliament by Commission officers. This occurred in October 2003 when officers of the Commission executed a search warrant on the parliamentary office of the Hon Peter Breen MLC (Operation Athens).

The execution of this search warrant resulted in two inquiries by the Legislative Council Standing Committee on Parliamentary Privilege and Ethics, one in 2003³ and the other in 2004.⁴

Development of the 2009 MOU

In 2005, the Legislative Council Privileges Committee commenced an inquiry into developing a protocol for the execution of search warrants on members' offices.⁵ The catalyst for this inquiry was the receipt by the President of the Legislative Council of correspondence from the then Commissioner (and the receipt by the Speaker of the Legislative Assembly of similar correspondence) proposing that a protocol be developed for the exercise of the Commission's powers with respect to members of Parliament.⁶ The outcome of that inquiry was a recommendation that the Legislative Council adopt a protocol for the execution of search warrants on members' offices by law enforcement and investigatory agencies.⁷

The Privileges Committee conducted a further inquiry in 2009.⁸ The purpose of this inquiry was to develop a Memorandum of Understanding between the Parliament and the Commission to regulate the execution of search warrants on members' offices by Commission officers. The Committee's report concluded that Section 10 of Procedure 9 of the Commission's Operations Manual, which deals with the execution of search warrants, incorporated the key measures recommended by the Committee in its draft protocol of 2006 and was a suitable basis for the execution of search warrants on members' offices by Commission officers. The Committee recommended a Memorandum of Understanding incorporating that procedure.⁹

³ See report *Parliamentary privilege and seizure of documents by ICAC*, 3 December 2003.

⁴ See report *Parliamentary privilege and seizure of documents by ICAC No.2*, 31 March 2004.

⁵ See report *Protocol for execution of search warrants on members' offices*, 28 February 2006.

⁶ *Ibid*, page 2.

⁷ *Ibid*, page viii.

⁸ See report *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, 24 November 2009.

⁹ *Ibid*, page viii.

In December 2009, as a result of the Committee's recommendation, the Commission entered into a Memorandum of Understanding with the President of the Legislative Council and the Speaker of the Legislative Assembly with respect to the execution by Commission officers of search warrants in the Parliament House office of members of the NSW parliament ("the 2009 MOU").

The 2009 MOU remains in force.

Steps taken to develop a new MOU

Discussions commenced in 2013 with a view to revising the 2009 MOU to include execution of search warrants on any premises used or occupied by a member of Parliament, including a parliamentary office, ministerial office, electorate office or residence of a member.

In July 2013, the then Presiding officers of the Parliament provided the Commission with a draft revised MOU ("the July 2013 draft MOU") seeking input and comments from the Commission. The Presiding Officers noted that should agreement be reached between them and the Commission on a revised draft, it would most likely be necessary to refer it to the respective privileges committees of both Houses for inquiry and report.

Subsequent to receiving the July 2013 draft MOU, Commission officers executed search warrants on the home and electorate offices of a former member of the Legislative Assembly and the electorate offices of a number of sitting members. These search warrants were executed for the purpose of the Commission's Operation Spicer investigation concerning Liberal Party electoral funding for the 2011 NSW election. The execution of these search warrants was not specifically covered by the 2009 MOU as it deals with the execution of search warrants on the Parliament House offices of members.

The experience in Operation Spicer indicated the desirability for any MOU to also cover how a claim of parliamentary privilege should be dealt with in two particular circumstances not covered by the 2009 MOU or the July 2013 draft MOU. These were:

- a) where the member was not present at the time of seizure to make a claim of parliamentary privilege but subsequently wished to make such a claim; and
- b) when items were not seized but were removed from premises for inspection.

The Clerks of the Legislative Council and the Legislative Assembly also indicated the desirability of addressing these matters in any revised MOU.

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

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

Section 75A(2) of LEPRA provides that if a thing is removed to another place for examination an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding seven

working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant.

On 4 March 2014, the then Commissioner wrote to the Presiding Officers and provided a revised draft of the July 2013 draft MOU with changes proposed by the Commission (“the March 2014 draft MOU”). Most of the changes proposed by the Commission were minor. However, the Commission also proposed adding two new sections.

One new section set out a procedure where a member who was not present at the execution of the warrant wished to make a claim of parliamentary privilege after items had been seized. This provided that any claim should be made within one working day of the seizure.

The other new section set out a procedure for where things were removed from premises for examination in order to determine whether they should be seized. In summary, it provided that a member would have one working day in which to consider making a claim. Once the member had indicated he or she was considering whether to make a claim, the member would have one working day in which to make a claim.

By letter dated 27 March 2014, the Presiding Officers provided comments to the Commission on the March 2014 draft MOU and invited further discussion.

The Commission considered these comments and on 22 May 2014 the then Commissioner wrote to the Presiding Officers enclosing a further revised draft MOU which sought to address those comments and which included some additional changes to deal with the technicalities involved in copying electronic material.

Further discussions between the Solicitor to the Commission and parliamentary officers ensued. This resulted in the development of a further revised draft (“the September 2014 draft MOU”).

A copy of the September 2014 draft MOU is at Appendix 2.

Section 7 of the September 2014 draft MOU deals with the procedure for a member, who was not present when items were seized, making a claim of privilege.

Section 8 of the September 2014 draft MOU deals with the procedure for making claims where items have been removed under LEPR for examination but not seized.

On 8 September 2014, the Presiding Officers advised the Commission that they would table the September 2014 draft MOU in both Houses of Parliament and refer it to the respective privileges committees of both Houses for inquiry and report. The Commission agreed with these proposals.

On 5 November 2014, the September 2014 draft MOU was considered by the Legislative Council Privileges Committee. The Committee expressed agreement with most of the terms of the September 2014 draft MOU but expressed concern over the one working day deadline for members to make a claim of privilege over items seized when they were not present and over items that were removed under LEPR. The Committee suggested the number of working days be extended to five.

For the following reasons the Commission did not support the extensions in time suggested by the Committee:

- (a) With respect to where a member was not present to claim privilege over items seized – the Commission needs to know as soon as possible whether privilege will be claimed so that it can proceed with its investigation. A five working day period for notification of a claim (with further time needed to then determine any claim made) could potentially prejudice an investigation where there was an urgent need to access and review the seized material.
- (b) With respect to items removed but not seized under LEPR – the items likely to be removed for examination are electronic databases which require time to effectively examine. Under LEPR, such items can only be removed for up to seven working days. Allowing a five working day period for notification (with further time needed to then determine any claim made) would not provide sufficient time to determine any claim or for the Commission to undertake forensic examination of the electronic database. While the Commission could apply under s 75A(2) of LEPR for an additional period of time, there is no guarantee that such an application would be granted.

In November 2014, the Commission indicated it was prepared to agree to a three working day period of notification of a claim of parliamentary privilege where a member had not been present to claim privilege over items seized.

The Commission remained of the view that, because of the LEPR time limit, a one working day notification period where items had been removed was appropriate.

This continues to be the Commission's position.

On 11 November 2014, the Legislative Council Privileges Committee published its report on a revised MOU.¹⁰ The Committee recommended the September 2014 draft MOU be formally adopted but recommended changes to the proposed timeframes within which members may make claims of parliamentary privilege where items have been seized or removed for examination. The proposed changes would:

- (a) give a member, who did not have an opportunity to make a claim of privilege before items were **seized**, three working days from the date of seizure to make a claim; and
- (b) where things were **removed** for examination (but not seized), give a member two working days in which to consider making a claim (during which the Commission would not use the thing).

The Commission remains agreeable to proposal (a) above. Adoption of this change would require a suitable amendment to clause 7(a) of the September 2014 draft MOU.

The Commission remains concerned about proposal (b) above. Adoption of proposal (b) would mean that a member would have up to two working days to consider whether or not to make a claim for parliamentary privilege. Thereafter, if the member notified the Commission he or she was considering making a claim, the member would have at least one further working day to make a claim during which the Commission would not be able to access the item removed. If a claim was made, the procedure in section 8(f) to (i) would apply. If the Commission objected to any claim, further time would be required

¹⁰ A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises, 11 November 2014.

to deal with the objection. This would most likely mean that any claim for parliamentary privilege or for the Commission to undertake forensic examination of any electronic database would not be completed within the seven working days provided for in s 75A(1)(c) of LEPR.

On 28 November 2014, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics published its report on a revised MOU. In its report, the Committee noted “the constrained timeframe (one working day) within which a member can make a claim for parliamentary privilege with respect to an item that is seized. The Committee considers that in future a further review of the timeframes that apply in making a claim of privilege over a **seized** item...may be warranted” (emphasis added). The Committee however made no recommendations to change any provisions of the September 2014 draft MOU but resolved that the Speaker enter into the MOU.

The matter progressed no further as there was a NSW State election on 28 March 2015 and the issue of developing and agreeing to a new MOU was not pursued by the Parliament or the Commission.

The Commission has also considered the Australian Federal Police *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.¹¹ The procedures set out in that document are similar to those in the September 2014 draft MOU but do not address situations where a member who was not present during the execution of the warrant wishes to consider making a claim of parliamentary privilege or situations arising from the application of LEPR. The Commission considers that the September 2014 draft MOU sets out a more comprehensive set of procedures.

The Commission considers that, subject to changing to three working days the time in which a member should make a claim of parliamentary privilege and updating the MOU to reflect changes to the Commission’s structure, the September 2014 draft MOU provides an appropriate basis for dealing with claims of parliamentary privilege arising out of the execution by Commission officers of a search warrant on premises occupied by members of Parliament.

¹¹ See Appendix 3 of the Legislative Council Privileges Committee report *Execution of search warrants by the Australian Federal Police*, 13 October 2020.

Part 3: Arrangements for production of documents and other things under s.22 of the ICAC Act

Under s 22 of the ICAC Act the Commission may, by notice in writing served on a person, require the person:

- (a) to attend, at a time and place specified in the notice, before a person (being a Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
- (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.

When seeking production of parliamentary electronic databases, such as email accounts, a s 22 notice will usually be served on both the Clerk of the relevant House and the Department of Parliamentary Services. This is because the Commission understands that electronic databases are held by the Department of Parliamentary Services rather than by individual members. The Commission's purpose of also serving the notice on the Clerk of the relevant House is to alert the Clerk to the notice so that consideration can be given to whether a claim for parliamentary privilege should be made over any of the contents of the relevant database.

In some cases, the Commission will have no objection to the relevant member being made aware of the notice. If this is the case, the Commission will inform the relevant Clerk and the member can be involved in determining whether any contents of the database are subject to parliamentary privilege. In other cases, however, it may prejudice the Commission's investigation if the member under investigation becomes aware of the Commission's investigation. In such circumstances it would not be appropriate for the member to be informed of the existence of the notice.¹²

¹² It is an offence under s 114 of the ICAC Act for a person required to attend and produce documents or other things specified in a s 22 notice to disclose any information about the notice that is likely to prejudice the investigation to which it relates.

The Commission is open to including in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 22 of the ICAC Act.

¹³ Privileges Committee report *Execution of search warrants by the Australian Federal Police No.2*, 18 November 2020, page7.

¹⁴ NUIX is a software product used by the Commission to store and search electronic evidence.

Part 4: Access to documents and other things under other sections of the ICAC Act

As noted in Part 1 of this submission, the Commission may also obtain information through the exercise of its powers under s 21, s 23, s 35(1) and s 35(2) of the ICAC Act.

Section 21 notices

Section 21 of the ICAC Act provides that, for the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of information.

A notice issued under this section will specify a time for compliance. The time for compliance is fixed by the Commission taking into account the time likely to be required to provide the statement of information. The time for compliance may be extended by the Commission where the person receiving the notice requests additional time to prepare the statement of information.

A member of Parliament or other public official receiving such a notice will be in a position to identify if any information sought by the notice might be subject to parliamentary privilege and, if so, to ensure that information is not included in the statement of information.

In these circumstances, the Commission does not consider that it is necessary to include in any MOU a procedure for dealing with claims of parliamentary privilege arising from notices issued under s 21 of the ICAC Act.

Section 23 authorisations

Section 23(1) of the ICAC Act provides:

- (1) For the purposes of an investigation, a Commissioner or an officer of the Commission authorised in writing by a Commissioner may, at any time:
 - (a) enter and inspect any premises occupied or used by a public authority or public official in that capacity, and
 - (b) inspect any document or other thing in or on the premises, and
 - (c) take copies of any document in or on the premises.

No authorisations have been issued under s 23 of the ICAC Act authorising a Commission officer to enter premises occupied by a member of Parliament.

Section 25(2) of the ICAC Act provides that the powers under s 23 of the ICAC Act shall not be exercised if it appears to a Commissioner or authorised officer that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist inspection of the premises or

production of the document or other thing and it does not appear to the Commissioner or authorised officer that the person consents to the inspection or production.

In these circumstances, the Commission does not consider that it is necessary to include in any MOU a procedure for dealing with claims of parliamentary privilege arising from any authorisations issued under s 23 of the ICAC Act.

Section 35 of the ICAC Act

Section 35(1) of the ICAC Act provides that a Commissioner may summon a person to appear before the Commission at a compulsory examination or public inquiry at a time and place named in the summons to give evidence, and/or to produce such documents or other things (if any) as are referred to in the summons.

A person receiving a summons requiring them to give evidence and/or produce documents will have time to consider whether any documents required to be produced might be subject to parliamentary privilege or whether any questioning in the compulsory examination or public inquiry might give rise to issues of parliamentary privilege. Such persons have the opportunity to seek legal advice and are also entitled to be represented by an Australian legal practitioner.¹⁵

Section 35(2) of the ICAC Act provides that the person presiding at a compulsory examination or public inquiry before the Commission may require a person appearing at the compulsory examination or public inquiry to produce a document or other thing.

While s 37(2) of the ICAC Act provides that a witness summoned to attend before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground of privilege, that section must be read in conjunction with s 122(1) of the ICAC Act. Accordingly, a witness may refuse to answer a question or to produce a document or other thing in circumstances where the answer or production would infringe parliamentary privilege.

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

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

¹⁵ Section 33 of the ICAC Act.

Appendix 1: Inquiry terms of reference

- (1) That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:
 - (a) the rights available to a staffer to make a claim of privilege over documents,
 - (b) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,
 - (c) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege,
 - (d) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
 - (e) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
 - (f) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
 - (g) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
 - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
 - (i) any other related matter.
- (2) That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.

Appendix 2: The September 2014 draft MOU

1. Preamble

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

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

5. Term of this Memorandum of Understanding

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

6. Revocation of agreement to this Memorandum of Understanding

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

Signatures

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

2014

**The Honourable Don Harwin MLC
President**

2014

**The Honourable Shelley Hancock MP
Speaker**

2014

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

1. Purpose of these procedures

These procedures are designed to ensure that officers of the ICAC execute search warrants on the premises of members of the New South Wales Parliament in a way which does not amount to a contempt of Parliament and which gives a proper opportunity to members to raise claims of parliamentary privilege in relation to documents and things¹⁶, including electronic documents, that may be on the search premises.

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

¹⁶ The Independent Commission Against Corruption Act 1988 refers to seizure of "documents or other things". The Law Enforcement (Powers and Responsibilities) Act 2002 refers to "thing". 'Document' means 'any record of information'. See the definition of 'Document' in section 21 of the *Interpretation Act 1987*.

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

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

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

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

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

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

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

- a) A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Deputy Commissioner or, in their absence, the Executive Director Investigation Division is satisfied that compliance with this restriction would affect the integrity of the investigation.
- b) The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is not available the Search Team Leader will notify the Clerk or Deputy Clerk. The purpose of this contact is to facilitate timely and informed claims of privilege to be made. Where the Search Team Leader advises the

Presiding Officer (or Clerk or Deputy Clerk) that the integrity of the investigation would be affected by notifying the member in advance of the intention to execute a search warrant, the Presiding Officer and other parliamentary officers informed about the search warrant will not advise the member or the member's staff that officers of the ICAC intend to execute a search warrant.

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

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

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

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

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

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

- a) If the member wishes to make a claim for parliamentary privilege with respect to any item seized the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the seizure and provide a list of the items over which the claim is made.

- b) For those items where the ICAC does not object to the claim, the ICAC will return the items in accordance with the return instructions of the occupier.
- c) For those items where the ICAC objects to the claim, the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

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

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

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

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

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

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

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

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

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

No ICAC officer will remove for examination a thing from the Parliament House office of a member or other premises used or occupied by a member unless the ICAC has complied with its relevant obligations in section 5 or section 6 of this Memorandum of Understanding, as relevant.

The following procedures are to be observed where a person executing or assisting in the execution of a search warrant on premises used or occupied by a member exercises the power under LEPR to remove from the premises a thing (which has not been identified by the person as subject to parliamentary privilege or is not at the time the subject of a claim of parliamentary privilege) for the purpose of examination and the member subsequently wishes to consider whether to make a claim of parliamentary privilege or wishes to claim parliamentary privilege with respect to the thing or part of the contents of the thing.

Member requires time to consider making a claim of parliamentary privilege

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

Member makes a claim of parliamentary privilege

- e) Where the member does not require time to consider whether to make a claim for parliamentary privilege, the member will, within one working day from the removal of the thing, notify the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal that the member claims parliamentary privilege with respect to the thing or part of the contents of the thing. In the event the claim relates to part of the contents of the thing, the member will provide the ICAC with a list of the items or subject matter over which the claim is made.

- f) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC does not object to the claim, the ICAC will return the thing in accordance with the return instructions of the occupier.
- g) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.
- h) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC does not object to the claim, the ICAC will either return those contents in accordance with the return instructions of the occupier or, if it is not possible to separate the contents from the whole thing, will ensure that those contents the subject to the claim are not used by the ICAC in the event that the thing is seized under the warrant.
- i) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

ICAC seeks authorisation for additional period

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

ICAC decides to seize the document or thing

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