REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

INQUIRY INTO PARLIAMENTARY PRIVILEGE AND THE SEIZURE OF DOCUMENTS BY THE INDEPENDENT COMMISSION AGAINST CORRUPTION

At Sydney on Monday 10 November 2003

The Committee met at 10.00 a.m.

PRESENT

The Hon. Peter Primrose (Chair)

The Hon. Amanda Fazio
The Hon. Patricia Forsythe
The Hon. Jennifer Gardiner
The Hon. Kayee Griffin
Reverend The Hon. Fred Nile

HARRY EVANS, Clerk of the Senate, affirmed and examined:

CHAIR: In what capacity are you appearing before the committee—as a private individual or as a representative of your organisation?

Mr EVANS: As Clerk of the Senate.

CHAIR: If you should consider at any stage during your evidence that certain evidence or documents you might wish to present should be heard or seen in private by the Committee, the Committee will consider your request. However, the Committee or the Legislative Council may subsequently publish that evidence if they decide that it is in the public interest to do so. I take this opportunity to advise the media that the Standing Committee on Parliamentary Privilege and Ethics has previously resolved that the press and public be admitted to proceedings of the Committee and that the media may broadcast sound and video excerpts of its public proceedings.

In accordance with the Legislative Council's guidelines for the broadcast of proceedings, only members of the Committee and witnesses may be filmed or recorded. People in the public gallery should not be the primary focus of any filming or photographs. In recording the proceedings of this Committee you must take responsibility for what you publish or what interpretation is placed on anything that is said before the Committee. I invite the witness to make an opening statement if he wishes to do so.

Mr EVANS: The matters with which you are engaged are very serious matters, something of which I am sure you are well aware. If law enforcement agencies are able to seize all a member's documents, including those documents that are related to the member's participation in parliamentary proceedings either in a House or in a committee, that is a serious matter and it could have a significant and chilling effect on those parliamentary proceedings, as courts and cases have recognised. Of course, you want members of Parliament to be subject to proper criminal investigation as would be any other citizen, but there is an area of members' activities that must be protected from enforced disclosure of documents. That area includes not only their participation in proceedings; the documents and information that lie behind those proceedings and inform those proceedings should also be protected. I think it is a significant matter for the operations of parliaments everywhere.

Reverend the Hon. FRED NILE: Some time ago I received a confidential document from a public servant outlining waste in a government department. If public servants knew that documents were able to be accessed by individuals such as the police and other bodies, could that hinder the public in sending information to members of Parliament and, therefore, affect their role?

Mr EVANS: It certainly could. The disclosure of information to a member of Parliament may well be protected by another kind of privilege other than parliamentary privilege in particular circumstances. But when a member has gathered information for the purpose of parliamentary proceedings and has actually used that information in parliamentary proceedings, or it is otherwise closely connected with parliamentary proceedings, it is highly desirable that the provision of that information and the information itself be protected by absolute parliamentary privilege and not just by whatever other kind of privilege may attach to it. But there has to be a connection with proceedings in Parliament to attract parliamentary privilege.

CHAIR: I refer to part (a) of our reference which deals with the definition of "privilege" and "contempt". By way of preface, paragraph (a) of the Committee's terms of reference requires the Committee to inquire into and report on "whether any breaches of the immunities of the Legislative Council or contempts were involved in the execution of a search warrant by the Independent Commission Against Corruption on the Parliament House office of the Hon. Peter Breen on 3 October 2003".

In order to determine whether there has been a breach of the immunities of the House or a contempt, the Committee must first clarify the meaning of those terms. Bearing in mind the differences in context between consideration of these questions in New South Wales and at the Commonwealth level, as a result of the absence of privileges legislation in New South Wales and the

existence of the Parliamentary Privileges Act 1987 at the Commonwealth level, what do you see as the key elements and principle purpose of parliamentary privilege?

Mr EVANS: Parliamentary privilege consists of two things. The first is the legal immunities of Houses and their members, which are recognised as part of the law by the courts. The second is the contempt jurisdiction to which the terms of reference of the committee refer—the ability of Houses to prevent improper obstructions of their operations. In the area that you are looking at with the execution of search warrants your terms of reference state: Was there any breach of the immunity? Was there any contempt?" I think it is necessary to distinguish carefully between those two. If documents were seized which should not have been seized because they were protected from seizure by parliamentary privilege that is a breach of the immunity of itself. But that does not necessarily mean that there has been a contempt, which is an improper obstruction of a member or the House.

With the execution of search warrants, in order to establish contempt you would have to show that there was something more than just the seizure of documents that should have been protected from seizure. I think you would have to show that there was some improper use of the search warrant process, some intention on the part of the law enforcement authorities to obstruct a member or improperly obstruct the House. So a breach of the immunity would not necessarily amount to a contempt.

CHAIR: Does there need to be intention for a contempt to be found?

Mr EVANS: Normally, yes. You would have to establish that the executing authority, the law enforcement authority, had some improper intention; that it was intending to obstruct a member by the execution of the search warrant or it was intending to seize documents that had nothing to do with its proper criminal investigation. It is possible that you could find that such an authority was so reckless or negligent in obtaining and executing a search warrant that that amounts to a contempt. In other words, there is no guilty intention but there is such a degree of recklessness or negligence that that would amount to a contempt. But I think there has to be some culpable intention of that sort to establish a contempt.

CHAIR: So the intention may be by way of omission rather than commission?

Mr EVANS: Yes, certainly. If they are simply careless to a degree that they should not be you could say that that was an improper obstruction of a member and that that amounted to a contempt.

CHAIR: Can a contempt occur without a breach of privilege?

Mr EVANS: Yes, certainly. A breach of privilege or, as I prefer to call it, a breach of the legally recognised immunities of the Houses, as I have said, is not necessarily a contempt and a contempt is not necessarily a breach of immunity. Such contempts as threatening a witness, for example, or threatening a potential witness could clearly be a contempt of Parliament, but it is difficult to say what immunity is breached. You could say that it was a breach of the immunity of the freedom of speech, but it is more appropriately seen as a contempt that is not linked to a particular immunity.

The Hon. PATRICIA FORSYTHE: You referred earlier to threatening a witness. What about a staff member who seeks to stand up for what he or she see as the rights of his or her member and says, "You cannot access certain documents"?

Mr EVANS: If staff members are seeking to protect their members' documents in that way, they are acting appropriately but they have to make sure that that they are on strong ground in doing so.

The Hon. PATRICIA FORSYTHE: Bearing in mind the differences in the New South Wales and Commonwealth contexts that were referred to earlier, with particular reference to the definition of "proceedings in Parliament" in section 16 (2) of the Parliamentary Privileges Act, faced with a set of documents over which a claim of parliamentary privilege had been made, how would you go about the task of determining which of those documents are proceedings in Parliament, in particular, "for the purposes of or incidental to" the transaction of business?

Mr EVANS: Do you mean if I had the job of sorting the documents?

The Hon. PATRICIA FORSYTHE: Yes.

Mr EVANS: As I have said, you would have to show that there is some link between the documents and some proceedings in Parliament, or at least some strong potential link. It has to be a letter from a constituent, for example, asking a member to raise a matter, providing information to a member, and asking the member to raise that matter in the House or in a committee. That is the clearest possible case. If it is just a letter from a constituent passing on rumours and gossip without any suggestion of a request for parliamentary action, it is not protected. There is a lot of grey area in between. You really cannot decide without looking at the individual document and saying, "What is the purpose of this document? What is its connection with parliamentary proceedings, if any?

CHAIR: Would the reverse apply if it included material after a member had written to a body asking to raise a matter in the House?

Mr EVANS: Yes. Again, you would have to look at the letter and say, "Is this letter for the purposes of or incidental to parliamentary proceedings?" If the member, for example, says, "Please provide me with this information because I am serving on a parliamentary committee and I want to ask some witnesses some questions about that", that is the clearest possible link and he would be protected.

The Hon. PATRICIA FORSYTHE: The tenth edition of Odgers makes reference to the dominant purpose test. Could you explain that?

Mr EVANS: Yes. In looking at individual documents you are bound to get documents that have different purposes. The letter from a constituent might, in its first two paragraphs, ask the member to raise a matter in a committee or in the House and be providing information for that purpose. In the last two paragraphs of the letter it may be simply exchanging information that has no connection with any actual or potential parliamentary proceedings. In that case the person sorting the documents would have to look at that and say, "What is the primary purpose of this? What is the dominant purpose of this document?" If it is predominantly for the purpose of proceedings in Parliament, it is protected. The reason I mention that is that courts have gone through that sort of exercise in relation to legal professional privilege.

The Hon. PATRICIA FORSYTHE: Could you provide some examples of the sorts of documents in a member's office that are clearly "proceedings in Parliament" or "for the purposes of or incidental to" the transaction of business and the sorts of documents that are clearly not "proceedings in Parliament"?

Mr EVANS: I have given some examples of the kinds of documents. Another example of the kinds of documents that would be protected would be, for example, briefing notes prepared by a member's staff for the purpose of a debate in the House or a hearing of a committee. Those sorts of document clearly are protected. The sorts of documents that are not protected are purely administrative documents. Travel allowance claims, for example, are clearly not connected with proceedings in Parliament.

The Hon. PATRICIA FORSYTHE: The constituent letter issue is one of the most interesting—an unsolicited letter sent from a constituent to a member which does not ask for something to be raised in Parliament but is relevant to a bill or a matter that is before the House.

Mr EVANS: With that sort of document you simply have to exercise a judgment. One would have to say that although the person does not actually ask for something to be done in Parliament, the matter is so clearly connected with actual or potential proceedings that there is a very strongly implied connection with Parliamentary proceedings and, therefore, the document should be protected.

The Hon. PATRICIA FORSYTHE: Without reference to a particular case, can you identify any grey areas in which it might be difficult to determine whether a document has been created or retained for the purposes of all incidental to the transaction of parliamentary business?

Mr EVANS: As I said before, there is bound to be a very big grey area. I imagine members get lots of correspondence from constituents where it is not clear what the purpose of the correspondence is. Is it for the purpose of getting the member to do something in the course of parliamentary proceedings? Is it simply, as I say, to pass on gossip? One simply has to make that judgment on individual documents. When we went through the first exercise of getting someone to sort the documents for us—I mean the Senate—the person performing that task, Mr Skehill, came back and said "I should also identify those documents which are not covered by the terms of the warrant and return them to the Senator." The Senate agreed with that and, I suspect, there were a lot of documents which were in that grey area.

Are they or are they not protected by parliamentary privilege? By saying "Well, they may or may not be protected by parliamentary privilege but they have clearly got nothing to do with the criminal investigation and the purpose of the search warrant." This made it easier to put them into the bundle that was returned to the member.

The Hon. PATRICIA FORSYTHE: In your submission you say "we may proceed on the assumption" that documents or other materials regarded as "proceedings in Parliament" are immune not only from examination or admission into evidence but from seizure itself. Can you explain why this assumption should be made? Was this issue addressed in any of the litigation involving Senator Crane or others?

Mr EVANS: It has never been addressed. We have no cases where courts have been clearly confronted with the question "are some documents immune from seizure under a search warrant because they are protected by parliamentary privilege?" But I think in other cases there are fairly strong indications that there is a protection from the compulsory production of documents which are closely connected with some parliamentary proceedings. The cases that we have are concerned with court subpoenas and discovery of documents, not search warrants. It may be that if the question ever arose some superior court would say that there is something different about search warrants. That is, in effect, what Justice French did in the Crane case. He said search warrants are different, they are not a legal process for gaining access to documents, but that finding, as you know, has been much criticised. We cannot point to a specific case but the indications are fairly strong that parliamentary privilege would be taken to protect that category of documents from seizure under a search warrant.

The Hon. PATRICIA FORSYTHE: Has the existence of the Parliamentary Privileges Act 1987 made it easier to eliminate some of the grey areas?

Mr EVANS: Yes, it has. The inclusion in the Act of the expression which makes it clear that proceedings in Parliament not only includes the actual proceedings but matters for the purposes of, and incidental to, makes it clear that there is an area outside the actual proceedings which is also protected. In effect, the Act declares that it always was protected but it had just never been statutorily declared before. It is very useful to have that expression in the Act.

Reverend the Hon. FRED NILE: Could you outline for the committee the recent experience of the Senate, in relation to the execution of search warrants in respect of the offices of Senator Crane, including: the chronology of events; the questions addressed in the matter; the involvement of the Senate Privileges Committee; the circumstances leading to the appointment of Mr Skehill as an independent arbiter; and the results of his examination?

Mr EVANS: Off the top of my head I cannot give you a detailed chronology with accurate dates but basically what happened was the Federal police were investigating alleged misuse of travel entitlements. They took out a search warrant and executed it on the on the premises of Senator Crane. Senator Crane consulted us in the Senate Department and was made aware of the possibility of a claim of parliamentary privilege in relation to the documents that were seized. In the course of seizing the documents they took virtually everything. They adopted this practice which seems to be now standard practice of copying everything off the computer so there was a large volume of documents.

I advised Senator Crane that he could wait to see what use the Federal police or the prosecuting authorities proposed to make of the documents and then contest any dubious use of them in any court proceedings or he could go to court and try to get a finding from the court that some of

these documents were immune from seizure. He chose the latter course. Senator Crane went to the Federal Court using parliamentary privilege as one of the grounds and the other grounds were basically an attack on the warrants themselves. The matter eventually came to judgment after a long delay I should say, as these cases always seem to involve. We had this judgment by Justice French that the issuing of and execution of a search warrant is an entirely executive act and not subject to judicial examination, and the Senate and the police would have to sort out the question of parliamentary privilege.

The court also ordered that all of the documents be sent back to the Senate. The Senate had the custody of the documents. The Senate was confronted with the problem of what to do with these documents. Do we give them to the police and allow them access to them or do we engage in some exercise designed to see whether any of them are protected by parliamentary privilege? After some deliberations the Senate decided to appoint the independent arbiter, Mr Skehill, to go through the documents and determine which were protected by parliamentary privilege and which were not. He was required to give the ones that were not protected to the police, and to return the ones that were protected to the Senator.

But halfway through the exercise Mr Skehill came back and said that he should be sorting out the documents that are not covered by the warrant as well because it would be anomalous if he were to give those back to the police when they are not authorised to have them and they have been seized illegally. The Senate with some reluctance agreed to have him do that. It was with some reluctance because that is really is a question for the courts and not for the Senate to determine. But Mr Skehill then completed that enormous task - because he had to look at every document—and there were a huge number of documents on Senator Crane's computer which the police had simply copied.

Eventually he did them up in two bundles and one lot went back to Senator Crane and one lot went back to the police. So the police had access to the documents and eventually it was announced that no prosecution would be instituted against Senator Crane. The evidence clearly was not there for any criminal offence. The police had no choice but to accept this arrangement because the documents were in the custody of the Senate and they were not going to get them back unless the Senate gave them back to them. In that particular case the Senate was able to impose its own solution on the whole matter.

Reverend the Hon. FRED NILE: You said a large amount of documents were sent to Mr Skehill and I imagine the exercise would have cost a great deal of money?

Mr EVANS: It did. I thought someone might ask that question. Just to examine and sort the documents in the Crane case cost nearly $62,000. That consists of the time of Mr Skehill's staff in getting the documents off the computer—and that led to problems too because there were all sorts of technical problems in getting the things off the computer—and then his time in examining them. As it turned out, the Harris case cost us even more at just over $80,000. Obviously Senator Harris was more of a bower bird than Senator Crane and had many more documents on his computer. I think there were also more technical difficulties in accessing those documents. It was an expensive exercise.

Reverend the Hon. FRED NILE: From what you say all the documents on the computer were taken. Would those documents date back many years?

Mr EVANS: I presume so, yes.

Reverend the Hon. FRED NILE: Obviously they would go back to the time when they were elected?

Mr EVANS: I do not know how long it went back. It probably goes back to the last change of software. Obviously they would have been accumulated over some time. It just reinforces the point that members deal with lots of documents.

Reverend the Hon. FRED NILE: You mentioned that you gave advice to Senator Crane about different options open to him. I assume that there is no way in which those court costs would be met by the Senate? You suggested that he could go to court and have the matter tested. Were the costs met by the Senator privately?

Mr EVANS: No, the Senate instructed Counsel to appear in the hearing in the Federal Court to assist on the point of parliamentary privilege, but there was never any suggestion that the Senate pay for Senator Harris's costs. He, of course, was mounting a quite separate attack on the whole exercise, on the validity of the warrants and so on, so it was not just the parliamentary privilege point.

Reverend the Hon. FRED NILE: Was there any assistance given to Senator Crane? You just mentioned Senator Harris.

Mr EVANS: No, that was Senator Crane I was talking about. With Senator Harris the situation was different. In that case it was State police who executed a warrant and seized his documents—again copying a vast volume of documents off his computer. I wrote to the Queensland police and said to them that I think it would be best if they adopt the course of action that was adopted in the Crane case and all the documents were sealed up until the parliamentary privilege point can be determined. The Queensland police agreed to that course. The documents were sealed up and held by the solicitor.

Subsequently, the Queensland police agreed to the procedure of having a neutral third party—again Mr Skehill—go through all the documents and sort them. In that case the documents were not in the custody of the Senate, but were in the custody of the Queensland police. So we had to get both Senator Harris and the Queensland police to agree to a neutral third party scrutiny course of action which they did, and it was fortunate. Senator Harris was going to commence an action in the courts and he may have had some legal costs, but basically the costs of sorting the documents were borne by that Senate.

Reverend the Hon. FRED NILE: You have mentioned matters relating to Federal and State police. Is it desirable to have a specialised body that handles allegations of corruption concerning members of Parliament, such as the Independent Commission against Corruption in New South Wales?

Mr EVANS: I find that question difficult to answer. There is no solution to the problem of having Federal members investigated by State agencies, and State members investigated by Federal agencies. I think that is just a fact of the Constitution and that situation is going to arise. If you are asking me about whether there should be specialised law enforcement bodies, I think that is a very difficult question. I am inclined to think that creating those sorts of specialised bodies and investing them with greater powers than the normal law enforcement agency creates problems, but one of the biggest problems it creates is the problem of oversight. Because they have greater powers and are potentially more active in law enforcement, they have to be subjected to greater scrutiny. There are very strong difficulties in making sure they are adequately subjected to parliamentary scrutiny, so that is a very big and difficult question.

Reverend the Hon. FRED NILE: Just following up the matter of the Crane issue, could you explain to the Committee the nature of the submission of the Senate in the matter of *Crane v Gething* and the decision of Justice French in response to that submission?

Mr EVANS: Basically the Senate submission—I have given the Committee a copy of a written submission that was made—said that some documents obtained by a senator are protected from seizure under search warrant by parliamentary privilege, and we think it is the job of the court to determine which documents that have been seized are protected and which are not. It was a valiant effort to get the court to go through the exercise of sorting the documents, but then Justice French decided that that was not the court's job because of the nature of a search warrant and it had to come back to the Senate. I should add, just for the sake of completeness, that in the Harris case, Mr Skehill determined that none of the documents seized in the office of Senator Harris were covered by the search warrant. None of the documents were authorised for seizure by the search warrant and they were all returned to Senator Harris. They were all seized illegally, every last one of them, which I think is a significant point.

The Hon. PATRICIA FORSYTHE: So the basis of their being returned, though, was not the basis of privilege?

Mr EVANS: In effect, Mr Skehill did not have to determine the question of privilege. I mean, lots of them probably were protected by parliamentary privilege.

The Hon. PATRICIA FORSYTHE: But that was not the basis upon which they were returned.

Mr EVANS: He did not have to determine that because he simply said that none of them are covered by the terms of the search warrant. None of them were authorised for seizure by the warrant. That made his task that much easier.

Reverend the Hon. FRED NILE: Following the decision in *Crane v Gething*, what options were considered for determining the status of the documents in question?

Mr EVANS: Well, in the federal sphere anyway, we are now stuck with that judgment so that whenever this sort of case arises, the only way of determining the question of whether the documents that have been seized are protected by parliamentary privilege is to go through this same exercise because, as I say, we are virtually stuck with the French judgment, which remains the law as long as it stands. A senator whose documents are seized could go to court in the hope of getting the French judgment overturned, but there is not a very great incentive for any senator to do so because that would cost a great deal of money. In one sense it is far easier to throw the question back into the Senate and go through this neutral third party exercise. So I think we are stuck with that option, in the federal sphere anyway, for the time being.

Reverend the Hon. FRED NILE: Obviously you would have to give some definitions to Mr Skehill as to what is a privileged document. Not all lawyers would understand automatically what is privileged and what is not privileged.

Mr EVANS: Well, what we did was to provide Mr Skehill with various past court judgments which are relevant to the matter and which, as I said, do not deal specifically with search warrants, and with a briefing about the nature of parliamentary privilege and why it is thought that some documents are protected from seizure. Just going on that, he had to make his own determination.

CHAIR: Before I ask Hon. Jennifer Gardiner to talk about the Senator Harris matter, can I just refer back to the issue of the search warrant again. I have read, like all Committee members, through Justice French's comments in the Crane matter, in a submission to us the Independent Commission Against Corruption [ICAC] has made the following comment which I think is also relevant to what Justice French said. I quote from the ICAC submission:

The present position of the ICAC in respect of the issuing, searching and seizing is that, based on available judicial authority, these actions do not contravene Article 9 because they do not constitute an impeaching or questioning of freedom of speech in debates or proceedings of Parliament in any court or place out of Parliament.

I am just wondering if you can comment on that?

Mr EVANS: Well, that is their view, and it has no greater weight than anybody else's view because it has not been tested. I think that there is a slight misstatement in that statement, if I can put it that way. What we say is that the act of executing a search warrant and seizing documents of itself does not breach Article 9; it is the seizure of documents, the compulsory production of which is prevented by parliamentary privilege, that is prevented by parliamentary privilege. In other words, there is a category of documents which, just as they cannot be forced to be produced in response to a court subpoena, cannot be lawfully seized under a search warrant. In relation to that category of documents, a search warrant does not legally run.

CHAIR: There has been a suggestion that was put in another submission to us that it is not the case, it is argued, that the records or evidence relating to parliamentary privilege may not be disclosed or produced in a court or a tribunal but, rather, there are strict limits on the use that can be made of them in a court or tribunal; that the nature of privilege relates to the use that can be made of the records, rather than protection from disclosure.

Mr EVANS: Yes. We covered this point in the submission to the Federal Court in the Crane matter. You can say that parliamentary privilege is purely a use immunity, as it is called. It goes to the use that evidence of proceedings of Parliament can be put to in legal proceedings, but it is clear there is an area which the United States courts have called the testimonial privilege. There is an area in which it is not a matter of what use this evidence is to be put to; it is a matter that this evidence cannot be produced at all because the mere act of adducing this evidence amounts to impeaching and questioning of parliamentary proceedings. The most obvious example of that is if a member is giving evidence in legal proceedings and questions are asked about their statements and speeches in the House. We say those questions cannot be asked at all. Regardless of what use you were going to put that evidence to, those sorts of questions cannot be asked at all because the mere act of asking them amounts to a questioning of the parliamentary proceedings of itself.

In those United States cases the courts have very clearly said that the testimonial privilege also extends to documents. There are some documents which members have and the mere production of those documents would of itself amount to calling into question the parliamentary proceedings, regardless of what use those documents are put to in the legal proceedings. So parliamentary privilege is not simply a use immunity. It is, as the American courts have called it, a testimonial immunity as well. I think there is clearly an area there where questioning of the parliamentary proceedings is not permissible, regardless of the use it is going to be put to, and I think it is fairly clear that it does extend to documents in the possession of a member. That is the way we argued it in the Federal Court, and that is the way we would argue in any future cases.

The Hon. JENNIFER GARDINER: Mr Evans, we have already touched on the case involving Senator Harris but I might, for the sake of completeness, run through some of the questions and you can fill in the gaps as you think it necessary for the Committee, and we will move on to the next item. Firstly, the chronology of events in relation to the Senator Harris issue. You have probably covered that, do you think?

Mr EVANS: Yes. Basically his premises were searched and I immediately wrote to the Queensland Police saying that some of the material could be protected by parliamentary privilege, and that "I think you should seal it up and wait for the question to be determined". The Queensland Police agreed to that. They sealed the material and it was held by the Queensland Police solicitor's office. The Senate referred to the privileges committee whether there was any contempt involved in the issuing and execution of the search warrant. They found at that stage that the Queensland Police had behaved appropriately because they had agreed to sealing up the documents and allowing the question of privilege to be determined. But there then ensued a long period of negotiation between the police and Senator Harris about narrowing down the scope of the documents for which he was claiming parliamentary privilege. When I say "negotiation" I think the police would probably say that there was not much negotiation involved: It was simply Senator Harris insisting that he was maintaining all his claim of privilege in relation to all the documents. So the police and Senator Harris came to an impasse and they in effect both came back to the Senate and said that the Senate will have to resolve it. Because the Privileges Committee had a reference about Senator Harris's case, the Privileges Committee was able to commission Mr Skehill and get him to undertake examination of the documents.

Reverend the Hon. FRED NILE: You said "premises". Was that his Senate office, or his home?

Mr EVANS: His electorate office.

Reverend the Hon. FRED NILE: Or his office at Parliament House in Canberra?

Mr EVANS: No, his State office, his State electorate office. It was searched.

The Hon. JENNIFER GARDINER: Is there any difference in searching an electorate office compared to an office in the parliamentary precinct?

Mr EVANS: Legally, no. As I think I have said in the submission, legally law enforcement agencies are entitled to take a search warrant in relation to Parliament House premises and to execute it in the same way as they can execute it in any other premises. I think I mentioned in the submission

that there is a convention at the federal level whereby police do not enter Parliament House for any investigations without consulting the Presiding Officers, and in fact do not undertake any investigations in relation to a senator at all without asking the Presiding Officers, but they are not legally obliged to do that. Obviously there is greater sensitivity about Parliament House offices than about other premises.

The Hon. JENNIFER GARDINER: In its 105th report, the Senate Privileges Committee stated that the question of the seizure of documents over which the claim of privilege is not made, that is, the question whether the seizure of such documents is beyond the authorisation of the warrants, is a matter for the courts and not for the Senate or the Senate Privileges Committee. But the chair of the committee made similar comments in the Senate on 14 February 2002. However, the Senate Privileges Committee subsequently engaged Mr Skehill to examine whether the documents seized by the Queensland Police Service were, firstly, immune from seizure by being protected by parliamentary privilege and, secondly, immune from seizure by being beyond the scope of the warrants. Can you say why Mr Skehill was asked to examine the documents in relation to the question of whether they were immune from seizure as a result of being beyond the scope of the warrant? Was that not more appropriately a matter for resolution directly between the senator and the police?

Mr EVANS: Yes. The view of the Senate is that it was a matter more appropriately for him to determine but, as I said, Mr Skehill in the Crane matter came back to the Senate and in effect said, "Look, it would be very anomalous for me to be giving these documents back to the police when I believe that they are not authorised for seizure by the terms of the warrant." Now he could have said, "Well, I'm just giving these back to the police and I'll give a list of the ones concerned to Senator Crane, and Senator Crane will then have to challenge the seizure of those documents separately, as a separate exercise, through the court."

He said, in effect, it would be anomalous to do that and he might as well give back to Senator Crane the documents not covered by the warrant. The Senate agreed to that. Having done that in the Crane case, I think they felt they had to treat the Harris case in the same way so as not to discriminate between senators, apart from anything else. That decision was vindicated by the fact that none of the documents were authorised for seizure and they were all returned to Senator Harris. The position of the Senate is it does not concede that it is a matter for the Senate to determine, even though in those two cases it did determine it. It was forced to determine it virtually.

CHAIR: How long did it take Mr Skehill to ascertain that the documents were outside the terms of the warrant?

Mr EVANS: Some months. He had to extract all the documents from the disks that they had been copied onto, and there were problems involved in that. He was required by the terms of the resolution to have all the documents printed. It took a considerable time, some months, for him to get the documents in hard form and then go through them.

CHAIR: The Committee will ask some questions on protocols, guidelines and the independent arbiter process.

The Hon. KAYEE GRIFFIN: A range of draft guidelines and protocols are under development concerning the execution of search warrants on the offices of members and senators. Would you explain the status of the guidelines and the difference between them?

Mr EVANS: I do not think there is any substantive difference between them. Supposedly the Attorney-General's Department at the Federal level is working up some guidelines which will be provided in draft form to the presiding officers. The presiding officers will then consider them with a view to entering into an agreement between the Federal law enforcement agencies and the two Houses that these are the guidelines that will apply to searches of members' offices. These guidelines have been a long time coming. The Senate Privileges Committee has been showing some impatience with the time it has taken for them to be drafted. How it got into the hands of the Attorney-General's Department is, I suppose you could say, a matter of accident. We could sit down and draft a set of guidelines now. It would not take long and there would be no great complications. But it has to be agreed between the law enforcement agencies and the presiding officers. In effect, the presiding

officers said, "You have to agree to it, so you might as well draft the guidelines." But it has taken some time.

Basically all that is required of these guidelines is that a mechanism is provided for a senator or member to identify the documents for which privilege might be claimed. In other words, there has to be some arrangement for a senator, member or their staff to be present when the search is undertaken. Once the claim of privilege is raised, there have to be guidelines for the documents to be sealed and held by a neutral third party until the question of their privileged status is determined. Then there needs to be a procedure for the member or senator and the law enforcement agency to negotiate about particular documents, to exchange lists and so on, in an attempt to narrow down the documents for which privilege is claimed. There also needs to be a mechanism for determining the status of the documents where disputes still exist. There needs to be an opportunity for the law enforcement agency to look at a list of documents and say, "These documents"—and there should be a lot of them in normal circumstances—"have nothing to do with our investigation, so we are not interested in them." That would be a fundamental step toward solving this problem.

CHAIR: Would it be normal practice as part of that protocol for the seizure, and aspects of it, to be videotaped?

Mr EVANS: That is not strictly necessary, but it could be an additional safeguard.

CHAIR: I note that the Australian Federal Police in one of the draft protocols talks about videotaping as a matter of course.

Mr EVANS: Yes, that is to ensure independent evidence of what actually went on at the search. That is an additional safeguard.

The Hon. KAYEE GRIFFIN: Given that you said the guidelines are under development, have you had an opportunity to see any of the recommendations or to make any comment on the proposed guidelines?

Mr EVANS: The Senate department has commented on the initial drafts that have been provided. We suggested changes in areas where we thought they were too heavily weighted in favour of the law enforcement agency and less in favour of the member or senator. There are balancing decisions to be made, and we have made those sorts of comments. As I said before, it is not a difficult or complicated task to draw up these guidelines. There can be disputes about the details, but it is not a difficult process.

The Hon. KAYEE GRIFFIN: Given your involvement in these issues in the Senate, do you advise that similar guidelines be developed for the execution of search warrants by the New South Wales Police or other investigating agencies on the offices of members of the New South Wales Parliament?

Mr EVANS: Certainly, those sorts of guidelines should be developed for all law enforcement agencies. I think I said in the submission it would be highly desirable to have them uniform, simply because there will be cases where State agencies investigate Federal members, as in the Harris case, and presumably cases where Federal agencies investigate State members. So it would be highly desirable for the guidelines to be uniform across the country. We would not want a State agency saying, "This is what we do with a State member but when it comes to a Federal member we will follow the Federal guidelines." That would be too confusing. Although we hope there are not too many of these cases in the future, it would be very useful to have a uniform set of guidelines.

Reverend the Hon. FRED NILE: It may be preferable to have the guidelines produced by Parliamentary Officers rather than by the Federal police. It may be a major mistake to hand it over to the Attorney-General's Department.

Mr EVANS: Yes, or allow them to initiate the process.

Reverend the Hon. FRED NILE: Would you consider requesting that procedure?

Mr EVANS: We might get to the stage where we will draft a document and say, "You have taken so long to produce your draft, here is our draft. How about we proceed on the basis of this draft?"

Reverend the Hon. FRED NILE: That would be more desirable.

Mr EVANS: Yes, we may get to that stage.

The Hon. PATRICIA FORSYTHE: What advice do you have for the Committee in relation to the use of an independent arbiter to determine whether documents are immune from seizure by being protected by parliamentary privilege?

Mr EVANS: If the task of determining what documents are protected is not to go back to the courts, then it is desirable for a completely neutral third party, who is at arm's length from both the law enforcement agencies and the members, to undertake the task.

Reverend the Hon. FRED NILE: It has been suggested that the decision should be made by parliamentary officers, such as the Clerks of the Senate or the Legislative Assembly, who have experience in and understand privilege. Would it be preferable if it is an in-house separation?

Mr EVANS: The difficulty with that is that parliamentary officers might not be seen to be completely neutral in the whole affair. Parliamentary officers could be seen by the law enforcement agencies to be too close to the members and too inclined to favour the members in that sort of exercise. Parliamentary officers spend a great deal of their time and effort safeguarding the interests of their members, so that is not an unreasonable apprehension. For the sake of the sorter of the documents being seen to be at arm's length by both parties, it is best that it be done by a neutral person, not by parliamentary officers.

Reverend the Hon. FRED NILE: You said that parliamentary officers have a duty or feel they have a duty to protect members. Could it be argued that they have a duty to protect the Legislative Council and Legislative Assembly and, therefore, would be more suitable in that role?

Mr EVANS: That is certainly so. That may be the very reason that the law enforcement agencies do not regard the parliamentary officers as being entirely neutral in the whole matter and that they may be too inclined to favour the members and have bias towards them. There is also the problem of public perception. The public has to be satisfied that everything is above board. If parliamentary officers go through documents in cases such as these, there would be bound to be allegations that it is an in-house job, that it is one of those internal investigations and not at arm's length. How can the public be satisfied that members are not being unduly protected? It is better to be done entirely out of house and via the neutral third party that we resorted to.

CHAIR: Is it a matter of the Senate accepting the umpire's decision? What do you imagine would be the case in the probably unlikely event that the Senate disagreed with the independent arbiter's final decision about the privilege of certain documents?

Mr EVANS: In the cases we have been talking about there was no opportunity for the Senate to disagree because no one on behalf of the Senate looked at the documents. It was entirely left to the decision of Mr Skehill to look at the documents and decide which category they fell into. No-one else was looking at them. The Senate and the senators simply had to accept the soundness of his decision, and they did. There was no opportunity to question his decision. If the matter goes before a court there would, no doubt, be a right of appeal. But ultimately you are stuck with the decision of the judge one way or the other.

CHAIR: Advice has been received from the Canadian parliaments that suggest when presiding officers are informed by the police of their intention to execute a search warrant on a member's office detailed consideration is given to the lawfulness of the search, including the procedural sufficiency of the warrant and the precise description of the documents being sought. Do you have any comment on this approach? When advised of the proposed execution of a search warrant, should a presiding officer obtain legal advice from a specialist in criminal law as to the

procedural sufficiency of the warrant? What responsibilities do presiding officers and clerks have in this regard?

Mr EVANS: In an ideal world there should be an opportunity for presiding officers to initially scrutinise warrants to see that there is nothing amiss with them. Certainly that has not been done in any of the Federal cases that have occurred. There has not been that preliminary scrutiny of the warrants. If we are going to have high-powered law enforcement agencies resorting more and more to search warrants, ideally that task should be undertaken.

CHAIR: The Committee has received advice from the Parliament of British Columbia, which states:

> British Columbia has experienced situations similar to New South Wales on two occasions. The cases clearly demonstrate that the use of electronic surveillance, even though it may be legally sanctioned, is seen to be a grave contempt of the House. The cases differ from the situation in New South Wales, as they do not involve the seizure of print documents but instead relate to the electronic interception of private telephone conversations by members. In both cases the House was not made aware of the search warrant or the resulting processes until after the results of the surveillance had been publicly disclosed.

In relation to an electronic surveillance of members and the seizure of electronic information in this regard, does the Senate have any protocols in place?

Mr EVANS: The answer is no, we do not, and we have not really encountered the problem. But I can see why the legislature of British Columbia was so stirred up about it because telephone tapping and electronic surveillance pose even bigger problems than search warrants. It means that the law enforcement agency immediately has access to conversations which may well fall into this protected area, and it is not a matter of having documents that you can look at and then determine their status, it is conversations which are recorded somewhere, presumably, and you have all the problems of listening to tapes and looking at tapes and determining how they relate to the actual conversation that took place. So the problems are multiplied.

I think if that sort of thing is to become common, if law enforcement agencies are going to be making more and more use of that sort of thing, then Houses of Parliaments may well have to say, as the British Columbia legislature seems to be saying, there is to be no telephone tapping or electronic surveillance of members without the approval of a presiding officer at least, and they have the opportunity for a presiding officer or a presiding officer' s advisers to scrutinise it in advance, because it does raise enormous problems.

CHAIR: In relation to Senator Crane you indicated that following the decision of Justice French the fact that the documents are in the custody of the Senate meant that the Senate was able to impose the solution of the independent arbiter. However, in the Senator Harris matter the documents were in the custody of the Queensland police. In your view, how important is the location of custody of the documents in resolving a matter such as this? For example, and in our particular brief, should the New South Wales Legislative Council be insisting on the return of the Hon. Peter Breen's documents before they are examined, to determine which are privileged?

Mr EVANS: The answer to that is basically yes. In the Senator Harris matter fortunately the Queensland police agreed to go along with the neutral third party exercise and they gave assurances that immediately after they received my letter they sealed up the documents and put them in the possession of their solicitor. But I think Senator Harris has made the point well: how does he know that? They copied all the documents on his computer onto disks. He has no assurance that the police have not had access to those documents and do not still have access to those documents. Disks can be copied and by copying disks you can immediately copy huge numbers of documents. How does he know that those documents are not still in the possession of the Queensland police, or copies of the documents are not still in the possession of Queensland police?

The answer is he does not, that is where it is important for documents which are the subject of a privilege claim to be identified at the point of search and at that point sealed up and put in the possession of the neutral body or some agency of the House concerned because, otherwise, how do you know where they have got to? That is a necessary part of these guidelines which should be developed. I have no doubt that the law enforcement agencies will say, "How can we go through enormous numbers of documents on a computer while the search is being undertaken?" It is much

easier for them to copy the documents, take them away and look at them later. That simply raises the problem of the law enforcement agency having immediate access to them and being able to copy them and keep them and refer to them in the future.

So some solution has to be found to that problem. It may be that the legislature will have to say to law enforcement agencies, "If you want to access documents on a computer you will have to go through them at the time of search", and if that takes days, so be it.

The Hon. PATRICIA FORSYTHE: Do you see a role for proactive education and training of staff of investigation agencies by officers of the Parliament in relation to Parliamentary privilege in minimising the recurrence of the sorts of problems that emerged in respect of the execution of the search warrants in the offices of Senators Crane and Harris, or is the problem more about the practice of investigating agencies in conducting dragnet searches and fishing expeditions?

Mr EVANS: Certainly getting law enforcement agencies into the appropriate mode of thought in relation to this question is important and the guidelines will have an educative effect in that regard. I must say that the law enforcement bodies that we have dealt with, namely the Federal police and the Queensland police, have shown a very ready appreciation. They, in effect, have accepted that there is an immunity of some documents from seizure under search warrant. They have not argued the toss with us on the legal point. They have immediately accepted that and they have accepted that the appropriate thing to do with them is to seal them up and have them independently scrutinised. I think the reason why they have so readily accepted that is because they are familiar with the analogous problem of legal professional privilege in searching lawyers' offices and they have got their guidelines in relation to that. I think the thought process was that they thought that this is the same as legal professional privilege and that is why they did not have to be educated terribly much at the beginning.

But certainly the guidelines, when we get some, will have that educative effect and will make sure these things are appropriately dealt with. But there is a problem, obviously, with law enforcement bodies thinking that they can just grab up everything in an office. They have got a search warrant that authorises them to search for material relating to particular suspected offences, but they obviously think that that authorises them to grab everything and copy everything, take it away and then spend some months looking at it. That is obviously a big problem and one that will have to be dealt with by the legislatures around the country sooner or later.

Reverend the Hon. FRED NILE: You can still have the police go to the material on a computer, it is printed on a disk and the disk is given to the arbiter at that point. You do not have to go through each document on the disk, just hand the disk to the arbiter?

Mr EVANS: Yes. That is what happened in the Crane and Harris cases. In each case there were paper documents seized, but there were electronic documents which had been copied from the senators' computers onto the disks and it was those disks that our neutral third party was looking at. Getting access to the documents on the disks was part of the problem, and printing them all off was part of the reason for the long delay and cost in the whole thing.

CHAIR: Do any other members have any other questions? Is there anything you would like to add, Mr Evans?

Mr EVANS: No. I think we have just about covered every point from my point of view.

CHAIR: Can I say how much we appreciate your attendance here today. Certainly I have found it very enlightening personally. Thank you very much for taking the time to appear before us.

(The witness withdrew)

(Short adjournment)

STEPHEN FRANCIS MICHAEL SKEHILL, Solicitor, Mallesons Stephen Jacques, sworn and examined:

CHAIR: Welcome, Mr Skehill. I must advise you that if you should consider at any stage during your evidence that certain evidence or documents you may wish to present should be heard or seen in private by the Committee the Committee will consider your request. However, the Committee or the Legislative Council may subsequently publish the evidence if they decide it is in the public interest to do so. Do you wish to make a brief opening statement prior to questioning?

Mr SKEHILL: I provided the Committee with a short submission. I presume that members have read that submission so I will not labour the points in it, other than to say that these issues are quite complex. There is no easy solution—I guess if there were this Committee would not need to conduct this hearing. I think there is an increasing question about the suitability of the law under which police and other investigative agencies operate to deal with modern office procedures, particularly the use of computers. The failure of the law to keep pace with changing technology means that there is a great risk, first, that individual rights will be infringed; and, secondly, that prosecutions that should otherwise succeed will fail. Neither of those things is in the public interest. In that context, I think the Committee's deliberations provide a good opportunity to focus on those two issues.

CHAIR: We have a series of questions, of which I understand you have a copy. Could you please outline the nature of your involvement in the two recent cases that have arisen in the Senate concerning the execution of search warrants, including the results of your assessment of the relevant documents in each case?

Mr SKEHILL: The two cases to which you refer involve, first, Australian Federal Police [AFP] execution of a search warrant on the premises of former Senator Winston Crane; and, secondly, Queensland police execution of a search warrant on the premises of Senator Len Harris. The two cases were essentially similar in the bottom line of what had to be done, although they got there via slightly different routes. In the Crane case the Senate itself resolved that I should be appointed to determine whether the documents that had been taken by the AFP were subject to parliamentary privilege. The resolution was later amended so that I determined not only whether the documents were subject to parliamentary privilege but also whether they were within the scope of the warrant. In the Harris matter, I was asked from the outset to determine both whether the documents were within the warrant and whether they were subject to parliamentary privilege. The Harris matter differed also in that I was appointed by the Senate Privileges Committee rather than by the Senate as a whole.

There was one other difference. In the Crane matter that police had taken a number of documents—pieces of paper—and they had taken electronically the contents of Senator Crane's computers. In the Harris matter no documents were taken but simply images of the computers. As to the results, in the Harris matter I examined more than 74,000 pages of material, none of which fell within the warrant. Therefore, the question of whether there was any need to claim the protection of parliamentary privilege did not arise. In the Crane matter, from memory, there were 25,000 documents or pages of documents of which about 1,400 were found to be within the warrant and not protected by parliamentary privilege. The balance was probably all beyond the warrant. I do not think any were within the warrant and protected by privilege.

CHAIR: In terms of the seizure of documents outside the warrant—independent of whether they were covered by parliamentary privilege—are there any particular legal principles or authorities, whether at Federal or State level, governing the conduct of investigating officers in the execution of search warrants that are relevant when determining whether documents seized under warrant are outside the scope of the warrant? For example, are there any particular requirements concerning the relationship that must exist between material searched and material seized?

Mr SKEHILL: Essentially, I think that is usually a question of commonsense and plain statutory interpretation. It is necessary to look at the legislation that authorises the issuing of the warrant and to ascertain what prerequisites it provides for the issuance and, once the warrant is properly issued, whether there are any constraints imposed by the legislation on what can be done in accordance with the warrant. That is a matter of straight statutory interpretation. Once a warrant is issued it is a matter of interpreting the warrant itself—which is essentially a matter of reading the

plain words of the documents—and what it allows to be taken. The point that most concerns me arising from the two cases with which I have been involved is that the provisions authorising the issuance of the warrant and what can be done under the warrant do not cope with the situation that arose in those cases, and that I think arose at least in part in the case that led to this inquiry. That is, when the documents so-called are not on paper but in some electronic form and what is taken is a hard drive in its entirety—that is "the thing" that the warrant would authorise the taking of. The problem in that context is that "the thing" may include material within the warrant and also material outside the warrant, some of which may be privileged.

We can liken that to a case where a warrant authorises the taking of material that evidences the commission of an offence and you find a diary that contains a diary admission of the offence but also a lot of other unrelated entries. The law would allow the taking of the diary. The difference here is when the computer may contain material relating to the nominated offence but also contains other material, some of which is privileged. Ordinarily other material in a diary will not be privileged, so privilege adds a layer of complication when "the thing" that is taken contains both material within warrant and privileged material.

The more particular problem occurs when what is taken is not the hard drive or the laptop but an image of what is there. None of the laws that I have looked at allow the copying of the contents of the hard drive; they force the taking of the hard drive itself. None of the laws that I have looked at allow the copying of part only. The sensible thing I would think would be for the law to say that in execution of a search warrant the investigative authority can look at the electronic content of a computer and may download copies of any material on it that is within the warrant. Of course you might need to build on a process for dealing with claims of parliamentary privilege for material within warrant. So there are difficulties in interpreting the law and of the law often not accommodating the type of factual situation that the investigative authority faces—the investigative authority goes into premises, finds a computer that may contain material but it is in electronic form and not replicated on paper elsewhere in the office.

One thing is fairly clear: None of the laws that I have seen authorise the taking of the hard drive or the mirroring of the hard drive without examination, that is, against the prospect that it might contain something within warrant. That seems to have been a common practice in a number of cases. Quite apart from questions of parliamentary privilege, I was present in a solicitor capacity when search warrants were executed on a client's premises by the Australian Securities and Investments Commission [ASIC] and the Australian Federal Police. On that occasion the police, ASIC and I decided upon inquiry on the premises on the day regarding the sort of material that fell within warrant. We authorised the examination of computers, looking for that material. The police did that by running a program with buzz words. It is a fairly long, tedious process but it identified documents that related to subject matter. We then called them up on the screen and we either agreed that it was within warrant and printed a copy or that it was outside warrant and the police did not pursue it further. A deal of that process was not specifically authorised by the law but it was a very sensible outcome. I think the law, if it is to reflect reality, should embody processes such as that.

CHAIR: I think you have already addressed most of these issues but I would like to give you the opportunity to add some further comments. On pages 1 and 2 of your submission you highlight the difficulties that you have just outlined to us and talk about the possible compromising of subsequent prosecutions that rely on information that was wrongfully seized. You indicated that all relevant laws should be examined and, if necessary, amended to make specific provisions. What do you mean by "all relevant laws"?

Mr SKEHILL: That is a catch-all phrase designed to cover the Search Warrants Act of New South Wales and specific powers under which other warrants are issued, such as the ICAC Act. In the Commonwealth sphere, where I practice more frequently, a raft of regulatory authorities can issue warrants, conduct searches and so on. Similar principles arise in relation to them—for example, making sure that the law reflects the realities of life, when material is often stored in electronic form not in paper form and when, in that form, it is mixed with other material that will be beyond warrant. When we are talking about members of Parliament there is the added complexity of parliamentary privilege. Any law that authorises the issuance of a warrant, search of premises and taking away of material is the type of law that I had in mind.

The Hon. PATRICIA FORSYTHE: In the Crane and Harris cases, if I understand them correctly, the approach followed in assessing the relevant documents was, first, to determine whether the particular document was within the authority of the warrant and only then, if the answer to that question was yes, to consider whether the document was covered by parliamentary privilege. Why was it necessary to deal with the issues in that particular order?

Mr SKEHILL: That is certainly the order in which we did it in Harris. It was not the case in Crane, because the task originally assigned to us by the Senate was to determine whether every document taken was subject to parliamentary privilege. When the Harris matter arose, we decided that the far more efficient process was simply to look at the documents that were within warrant and then, if there were any, determine whether they were subject to parliamentary privilege. That was purely for efficiency. There is little point in considering the privilege of documents that are irrelevant to the search in question. Harris provides a very good example of that efficiency: 74,000 pages of documents, none within warrant. If I had additionally looked at whether each one of those was subject to privilege, it would be a job that would see me through to retirement and beyond, I suspect. Fascinating though it may be, it is a task that I was not too keen to take on.

Reverend the Hon. FRED NILE: Is there a problem with the way in which the warrant was worded?

Mr SKEHILL: The warrant in Harris was worded quite clearly, quite sensibly and quite appropriately. The problem was that there were not any of the documents in the office, in the computer. And that was compounded by the fact that the police had taken an image of the computer without examining the computer to see whether there were any in there. If they had applied some buzz word searches or, God forbid, examined every document, they would have found that there were none within the warrant. It is this global taking that is the problem. It is like walking in and taking every document in an office when you only have authority to take specified documents and you do not look to see whether there are any specified documents there. The warrant was fine.

The other problem in Harris was that the Queensland law did not authorise the imaging. If there had been an examination of the hard drive and documents within the warrant had been found, it may have authorised taking the hard drive, but it did not authorise taking an image copy of the hard drive. So there were essentially two problems in Harris: the process of taking and the manner of taking, and the substance of what was taken. None of it was within warrant.

Reverend the Hon. FRED NILE: So some of the warrants actually specified that the hard drive could be taken?

Mr SKEHILL: No, a warrant would not necessarily do that. It would authorise the taking of documents or things ordinarily, and a hard drive is a thing. In the same way, if we found a paper diary that had an admission of an offence, the fact that it recorded all sorts of extraneous things would not ordinarily be a problem; it would allow you to take the diary.

If it was the diary of a member of Parliament, and within the one document there was something relating to the alleged offence and material that was subject to parliamentary privilege, you then have a problem of what prevails against the whole document. Is it the material that is privileged that stops you taking the whole thing, or does the existence of something that is within warrant allow you to take the whole thing notwithstanding privilege? It is a quandary that the law does not clearly deal with.

It may be—and I think this is the submission that is put to you in the ICAC submission as I read it—that in that circumstance the taking would be permissible notwithstanding privilege, although subsequent use may be limited by privilege. I am not sure whether that is right or wrong. There is a lot of uncertainty in this whole area.

CHAIR: I have a copy of the warrant that was issued by the ICAC. I would be interested in hearing your views on what it would allow to be seized, but I am also loathe to simply present you with a lengthy document and ask for your immediate comments. Would it be appropriate to ask you to perhaps have a look at the document at your leisure and indicate to us at some point your views as to what it allows?

Mr SKEHILL: I am happy to take it on notice, but with the rider that I might say that it is inappropriate for me to comment. I do not want to make comment on something when I am not fully across the facts. And I certainly do not know the full facts of what has happened in this particular case. I can glean some of them from the documents, but I do not know whether that is a precise understanding.

CHAIR: Given that we are discussing the content of the search warrants, if you would be good enough to perhaps take the question on notice. The Committee would understand if you chose not to respond. We are interested in hearing your comments on what you believe the warrant would allow to be seized. I will make a copy available to you. We would be indebted to you if you could comment on it, but we would fully understand if you are not able to do so.

Mr SKEHILL: Thank you, Mr Chairman.

The Hon. PATRICIA FORSYTHE: One of the things we would be careful about as a committee is to ensure that the rights of ordinary citizens are not seen to be less than the rights of a member of Parliament, except with regard to privilege. I am fascinated by your comments about search warrants, where we have moved to with technology, and that they would seem to be perhaps not dealing with modern circumstances.

Mr SKEHILL: Yes. On the laws that I have had cause to look at, this is a general issue; it is an issue quite apart from privilege. Privilege adds another layer of complexity to it, but there is a real question about whether, when documents are taken electronically, that is authorised by a warrant. I think a very good case could be made for a policy of allowing documents to be taken electronically, but if that taking is not permitted by the warrant then there is a risk that the defence will defeat a prosecution that is otherwise justifiable and maintainable, and that would not be in the public interest.

So I think there is a real need for laws of this nature to cope with the fact that we now have so much material that is only kept electronically. The very nature of those electronic images probably means that you need to have laws that very specifically deal with issues about authenticating the electronic version that is taken and preventing claims later being made that it has been changed, either by the police or, where what is taken is a copy but it is not a true copy, the allegation may be that the original has been changed by the defendant. There is quite a lot of complexity there, and need for, firstly, clear authority for the taking, and also protection for the authenticity of what is taken so that it can be properly relied upon.

The Hon. PATRICIA FORSYTHE: Are you aware of any challenges to the law on the execution of search warrants in respect of the imaging of computers?

Mr SKEHILL: I am not personally. I do not practise in an area where that is likely to arise. My involvement, I guess, has come about because of my peculiar antecedents. But certainly in the case where I was personally involved, I was fairly alert to the possibility, and if we had not achieved agreement with the police it would have been on for young and old.

The Hon. PATRICIA FORSYTHE: Are you aware of any judicial authority supporting the concerns that you have raised about the practice?

Mr SKEHILL: Personally I am not, no.

The Hon. PATRICIA FORSYTHE: Are you aware of any reviews being undertaken within government at State or Federal level to update the law with regard to this?

Mr SKEHILL: No, I am not. I had hoped that that might flow from the Harris matter, but, so far as I am aware, it has not, and the committee there was more focused on the privilege aspects than on the general law issues. It is the sort of issue that might be appropriate for consideration within the Standing Committee of Attorneys General, to try to seek some sort of nationally common legislation that would quite efficiently deal with the types of issues.

Reverend the Hon. FRED NILE: It is generally accepted that the expression "proceedings in Parliament" within article 9 of the Bill of Rights 1689 applies not only to statements and documents which are part of the formal transaction of business in the House or its committees but also the documents having a sufficiently close connection with the transaction of such business.

In the Federal sphere, this view is expressly enshrined in section 16 (2) of the Parliamentary Privileges Act 1987, which provides that the proceedings in Parliament includes words spoken and acts done for the purposes of or incidental to the transaction of business. What is your understanding of the meaning of "proceedings in Parliament", and in particular the phrase, "for the purposes of or incidental to" the transaction of parliamentary business?

Mr SKEHILL: That phrase "purposes of or incidental to" certainly makes the issue clearer at the Commonwealth level than it is when reliance is placed only on the Bill of Rights. But I think the jurisprudence is that, where only the Bill of Rights applies, what constitutes proceedings in Parliament is not confined to what is said on the floor of the Chamber but also extends to some ancillary material. I think you can conjure up quite readily some examples of that. On the floor of the Chamber, a member reads a speech. Back in the office is the penultimate draft and preceding drafts of that speech, and they are probably all ancillary, and I would have thought they would all certainly have been prepared for the purposes of and incidental to the making of the speech.

When you step a little further back from the speech itself, a member or his or her support staff would have conducted research and gathered together material. Behind that might be a constituent who has come in and said various things that have actually led to the cause for making it a speech. You can see a chain of relationship that would probably have all of those things being "for the purposes of or incidental to", and maybe even ancillary to, the proceedings of the Parliament.

You can get some nice questions arising where, for example, a constituent raises a matter with a member and the member writes a letter to the Minister. It is ordinary constituent correspondence, with no expectation that the matter will be raised in the Parliament. The correspondence is not written for the purpose of raising it in the Parliament, but then the Minister's response might be so unsatisfactory that the member resolves to raise the matter in the House. Does that suddenly bestow on that material the categorisation of "for the purposes of or incidental to"? I do not know about that. Then, as you go through all the detritus that you find in a member's office—as I have had to do on a couple of occasions—you find things that really are on a spectrum from being purely personal up to being at the high point of privilege: the speech, the Act, or whatever it is, on the floor of the Parliament.

It is clearly possible to identify the purely personal—the guest list for the daughter's wedding or that sort of stuff. But quite often, as you go along that spectrum, you find material and it is quite difficult to know whether there is that sort of incidental connection. That gives rise to the problem to which I also averted and to which one of these questions relates. In this referee position that I have been in, how do you answer that question about whether it is "incidental to" when you just do not know the circumstances in which the document arose?

In the Crane case I needed to sit down with the senator and his advisers to work out the antecedence of particular documents in order to form a judgment. That is a process that I felt it necessary to go through but, because of the very informal way in which these things have been done, it leaves open the risk that someone might assert that I had been too close to the senator. The police might be concerned about what transpired in a room between a senator and me in talking about these issues. Those are the sorts of concerns that I have averted to in the submission.

Reverend the Hon. FRED NILE: That would occur only in some doubtful grey areas. Would there be a limited number of documents, for example, one, 10 or 20 documents?

Mr SKEHILL: We are speaking about experience based on two inquiries, so it is a little hard to be definitive. Very often, as you go through the documents, about 80 or 90 per cent probably fall pretty clearly on one side of the line or the other. You can usually pick the personal and the party material, the Electoral Commission material and the administrative material relating to being a member of Parliament, such as acquitting your stamp allowance, employing staff, or getting approval

for overtime—all that sort of administrative side of running a parliamentary office. You can usually pretty clearly identify the constituent correspondence. You can certainly clearly identify the speeches and the drafts of those speeches.

But particularly with the research material unless you are very familiar from your own background with what was hot at the time in the Parliament, it is often difficult to know whether it was material prepared or obtained for the "purposes of or incidental to". That is where you may need to take advice and make inquiries. Sensibly, you will only need to do that if it is material that is within the warrant. In Crane, because of the way that matter evolved, I had to do it generally, which on reflection we concluded was inefficient. We avoided that problem in the way we set up the Harris inquiry.

CHAIR: There is line of argument relating to the topic that we are talking about—the relationship between parliamentary privilege and search warrants. That line of argument is as follows. In relation to the term "proceedings in Parliament" under article 9 we are talking about a prohibition against certain actions, essentially, actions that would impeach or question proceedings in Parliament rather than a protection against disclosure. As a consequence, the result is not that records or evidence relating to parliamentary proceedings may not be disclosed or produced in courts or other tribunals; rather that there are strict limits on what that court or tribunal can do with them. The Independent Commission Against Corruption [ICAC], in its submission to us—I presume on that line of evidence—said:

> The present position of the ICAC in respect of the issuing, searching and seizing is that based on available judicial authority these actions do not contravene article 9 because they do not constitute the impeaching or questioning of freedom of speech, debates, or proceedings in Parliament in any court or place out of Parliament.

I ask you, first, to comment on that relationship proposal, and, second, to state whether you are aware of what available judicial authority there may be for it?

Mr SKEHILL: The passage from the ICAC submission from which you read is the one to which I was referring earlier. I think that is an assertion that the taking and the holding does not infringe article 9 because it is not a questioning or an impeaching. I think that certainly runs for impeaching. I am not too sure whether it runs for questioning. The law there, as I read it, is not entirely clear. That is where an Act of Parliament might be helpful in putting action of this nature either on one side of the wall or on the other. There are a whole lot of policy issues behind which way you jump on that issue. I understand the propositions put there but I am not too sure whether they are right or wrong.

CHAIR: A fundamental bedrock issue that we have to address is whether article 9 applies to search warrants.

Mr SKEHILL: So far as the authorities are concerned, I read the submission to you from John Evans. I am not aware of any jurisprudence beyond what he has mentioned there. One of the unsatisfactory issues is that there are so many questions that you cannot answer with great clarity.

CHAIR: I note that there was some elusion to the proposal in Justice French's decision in Crane?

Mr SKEHILL: Yes.

Reverend the Hon. FRED NILE: Does ICAC use material that may not be used in the courts if criminal charges are laid?

CHAIR: The suggestion is that simply seizing the material using a search warrant is not covered by article 9 because it has not been taken to a tribunal. That is a fundamental issue.

Mr SKEHILL: I am sure that when ICAC representatives appear before you they will be able to expand and put more clearly what they intend by that phrase. But, as I read it, it is an assertion by them that it is okay for them to take it. What they can subsequently do with it may be constrained if it is privileged. It is certainly the case that privilege will put constraints on what can subsequently be done. I am not so sure whether privilege will allow a taking of it. As the chairman suggested earlier,

there is a suggestion in Justice Finn's judgment in Crane that privileged material is not amenable to the warrant in any sense. That is really the issue.

CHAIR: The ICAC's comment was that it was basing its views on "available judicial authority". You are suggesting that available judicial authority may not be as clear as what the ICAC is suggesting?

Mr SKEHILL: That is my reading of it. I do not put the position categorically one way or the other. My reading is that it is a matter where there is not great clarity. Equally, I do not want to assert that I have read and analysed every piece of jurisprudence in the area across multiple jurisdictions and so forth. I do not put myself to you as an expert on this area of the law. Perhaps I am a bit more expert on actually doing the task of allocating documents as between privilege and unprivileged and between warrant and outside of warrant. That is more where I think I can be of benefit to you.

Reverend the Hon. FRED NILE: ICAC is stating that if it decides to use certain documents it would be happy to have an arbiter at that point decide whether or not those documents were privileged? Do you think that would work?

Mr SKEHILL: I am not too sure whether it is saying that. I think the protocol that it is proposing would have questions of privilege identified at the time of search, as I understand it. That may well be more sensible. In the usual case I suspect that documents that are the subject of privilege are probably not going to be of much interest to an investigative body. You can conceive circumstances in which the contrary would be the case. For example, the Harris matter was about claims for public contribution to election expenses. It is difficult to see how a document that was subject to privilege would be relevant to that. So in that sort of a case I think at the time of search if there were a process there you would pretty quickly get agreement that something was beyond the warrant and whether it was privileged would probably be irrelevant. But that is not always going to be the case.

Reverend the Hon. FRED NILE: You mentioned in your submission to the Committee that one of the issues raised by this inquiry is whether the claims that have been made in respect of documents seized under search warrant should be decided in the courts or in the Parliament or, in your case, by an independent arbiter. What are your views on that? What would you recommend?

Mr SKEHILL: I know that Harry Evans put the view that it should be the courts; that it is a matter of law. Justice Finn suggests to the contrary—I think not without the support of other jurisprudence—that it is a matter for the courts to say whether a privilege exists but for the Parliament to say whether that privilege has been exercised. If I am coming at it from a policy perspective and I am saying, "Which should it be?" it might depend on whether or not I was a member of Parliament. I would have thought that members of Parliament would probably prefer to have the Parliament decide whether their documents were privileged. But then others—the community or the investigative authorities—might take a different view. I think there are competing reasons for jumping either side there. But as Harry Evans suggested in his submission, it is probably a question that is either going to be decided by the Finn judgment being contested and overturned at the Federal level by someone with deeper pockets than have been available hitherto, or it is going to be decided by legislation specifically conferring jurisdiction. I think it is very much a matter of judgment as to which would be the best outcome in policy terms.

The Hon. JENNIFER GARDINER: Mr Skehill has just answered question 10.

Mr SKEHILL: Yes, I think so.

The Hon. JENNIFER GARDINER: At the bottom of page three of your submission you raise a number of questions relating to specific aspects of the role of an independent arbiter who may be appointed to determine matters relating to the scope of a search warrant and the application of parliamentary privilege. The issues raised are: whether safeguards should be introduced against the risk of error by the arbiter; what protection should be afforded to the arbiter in the performance of their role; and what procedural safeguards could be implemented to avoid any perception of bias in the performance of the arbiter's role? Have you formed any views as to what possible safeguards or

procedures could be implemented to address each of those issues, or as to the nature of legislation that could be introduced to address them whether at a State or Federal level?

Mr SKEHILL: When I was doing—not so much the Harris matter because all the documents were beyond warrant—the Crane matter where some were within warrant and not privileged, I was very aware that it was my judgment that was determinitative of the issue in the way those inquiries have been established by the Senate. The Senate and the police had agreed to abide by my judgment. But what if I got it wrong? If I got it wrong and gave material to the police that they should not have had, the potential consequences were significant for the Senator. And if I withheld material from the police and they were thereby denied the opportunity of prosecution, the consequences for them and the public interest were equally significant.

I have to say that that is a burden that I felt. Depending on which way I jumped, there was no immediately obvious opportunity for a party aggrieved to challenge what I had done. That sort of issue would be addressed by legislation, that they may have a right of appeal or a right of process. Again, as I mentioned earlier, at one stage in order to understand how documents had come into being I met with the Senator and his advisers, and the police were not present nor were their legal advisers present. I could imagine circumstances in which they might be concerned about what happens in that room. Yet, if they had been present they would clearly be gaining access to material, and maybe material beyond that which they could have accessed during the execution of the search warrant. So there are a lot of competing pressures in there.

I think it would be desirable for there to be legislation preferably or, if not, agreed protocols that deal with these issues. The issues need to be thought through—I do not profess to have done that comprehensively—and answers need to be arrived at that strike a balance between the competing interests in these matters. I think the present state is relatively unsatisfactory.

Reverend the Hon. FRED NILE: Did the Senate give you some sort of immunity if Senator Crane was not happy with your decision?

Mr SKEHILL: To be truthful, I do not recall. It would be unusual for me to have taken it on without any immunity. That is one of the issues that ought to be thought through.

The Hon. JENNIFER GARDINER: If the warrants were clear as to what could be seized, how is it that officers executing that warrant seized so much material that was found to be beyond the terms of the warrant?

Mr SKEHILL: The answer is obvious: They just copied the computer. They did not look at what was on there before they copied it, they just mirrored the entire contents of the computer. I think to take it away and look at it later has been a not infrequent practice.

CHAIR: Did that apply to the Crane matter as well?

Mr SKEHILL: My belief is that that was the case, yes. Subsequently I understand the police have used the buzzwords "searching program" to try to identify documents and then taken the electronic copies of documents that met that profile. In fact, they may not have authority to take the electronic copy, which is one of the areas where the statute could be well clarified.

The Hon. JENNIFER GARDINER: As you know, New South Wales does not have a privileges Act. Would the legislation that you suggest we should consider be part of such a privileges Act or would it be in addition to something like the Commonwealth privileges Act?

Mr SKEHILL: What I am suggesting would probably lead to two streams of legislation. Firstly, there would be legislation to clarify and probably expand, certainly make certain, the powers of police and bodies such as ICAC to deal with the electronic material. Then the issues that are particularly pertinent to privilege would probably be in something like the Parliamentary Privileges Act of the Commonwealth. But going beyond that Act, because that Act does not make any provision for the type of exercise that I have been called on to do in the Crane and Harris matters, and I think there would be good sense in that being a clear statutory process with rights and protections for the parties.

The Hon. KAYEE GRIFFIN: You mentioned that when you were looking at the documents you needed to make some additional inquiries about where the documents fitted in. Could you elaborate on having to make additional inquiries in cases where it is not clear whether a particular document is subject to parliamentary privilege? How can these additional inquiries be made? You said it could be difficult if you or someone else were trying to research and not all the parties involved were present.

Mr SKEHILL: We have largely covered this. In my experience, limited though it might be, it tends to be where you find what looks like research material, it is factual background, and you either do not know why it is was created at all, or you may know that that subject has been the subject of a debate in Parliament, but you do not know whether this document was prepared for that purpose or obtained and retained for that purpose. So it is a matter of trying to ascertain the antecedents of the document. That is where I have previously had to make further inquiries and really the only people who can tell you the answer to that are the member or the staff. Of course, they are the people claiming privilege so you are talking to one side, perhaps without the other side knowing and/or being present and, therefore, they are potentially disadvantaged. It is something on which a clear position, preferably in the statute, would be helpful.

The Hon. KAYEE GRIFFIN: You said that one of the difficulties which arises with the application of parliamentary privilege in the context of the execution of the search warrant is that once material has been seized it has already come into the hands of the investigators and has already been seen by them. Would it be possible to address these issues by the adoption of protocols or procedures for the execution of search warrants in members' offices which provide for the sealing of the member's office until such time as questions about the immunity of documents from seizure can be resolved?

Mr SKEHILL: The answer is "yes, it is possible to address the issues". The real issue is how you address them. There are really two types of circumstances that I have observed. The first is where a hard drive is either taken or imaged, without examining its content at all, with a view to later examination. I would expect that is beyond the scope of the power of the warrant. and yet had it been examined on the premises at the time of the execution, the observing of the contents would have been within power. The second circumstance is where material is seen, the view is taken that it is within the warrant and it is taken either on a hard drive—and that I think would be within power but subject to the qualification of whether it is overridden by privilege—or parts of the electronic media are mirrored and the only taking is an electronic version that is within warrant, and then there is a claim of privilege. If it is sealed and held securely and there is an independent examination of it then that seems to be a sensible process. So there is then a question of how that process takes place and the types of issues about which we have spoken with striking a balance between the rights of each of the parties who are interested in the outcome, the protection of the arbiter and the processes for inquiries and so on.

Reverend the Hon. FRED NILE: The controversy between the rights of the citizen and the rights of members of Parliament arises. The member of Parliament may want to claim privilege for some of the documents and rather than seal the whole office could he or she be advised that a search warrant has been issued and be there when the warrant is served, so that they can then indicate those documents for which he or she does or does not claim privilege? Then there will only be a debate about the one that is claiming privilege over. Is it fair that the member of Parliament be involved at the point of the warrant being served?

Mr SKEHILL: I think if you are okay to proceed down the protocol approach, it is obviously best to try and limit the taking to what is within warrant, and to try and identify at the earliest possible time whether any of the material that is within the warrant is material in respect of which there is a claim of privilege, and then hive that off in a protective way so that there can be an examination of the claim, yes.

CHAIR: There are a couple of questions I would like to ask. In the ordinary course of events and leaving aside the issues of privilege, what avenues are available to a person whose documents or material have been seized under search warrant and who believes that some or all of the material is not entitled to be seized? In particular for instance, what sort of legal proceedings would be available to such a person, and what sort of relief could be sought in such proceedings?

Mr SKEHILL: I stress I am not an expert litigator. I try to avoid litigation.

CHAIR: For instance, in addition to others, other avenues, such as the Ombudsman.

Mr SKEHILL: Yes. I would think that the options are really either reactive litigation, if you are charged and challenge the admissibility of the document during the course of the prosecution, or proactive litigation where you seek a declaration or other order, such as an injunction, to stop material taken being further used, or to require its return to you. I think litigation would fall into those categories. The other obvious course is to pursue administrative remedies such as the Ombudsman or other oversight body, that is, a body that is charged with overseeing the actions of the investigative authority. In the Commonwealth sphere with the Federal Police, that is the Commonwealth Ombudsman. You can seek to pursue a complaint about a wrongful taking there. I think they are the type of avenues.

Reverend the Hon. FRED NILE: Would there be any difficulty in New South Wales with combined authorities?

CHAIR: We still have an Ombudsman. The Ombudsman still has an oversight role. Can material which has been wrongfully seized under warrant be used in subsequent investigations or legal proceedings, leaving aside the privilege issue?

Mr SKEHILL: I stress that I am not expert in this, but my understanding would be that it cannot be. But I do not say that too categorically.

CHAIR: Okay. I take it on that understanding. In terms of actions taking place in the members offices—and indeed their homes, but I will stick to members offices, such as in the current case—would you think that videotaping would be a wise thing to do during a search and seizure?

Mr SKEHILL: I have not really thought about that but I guess it may well be, for the sake of providing some record of what actually happened on the occasion, and certainly I have had experience where tape-recording—not video recording, but tape-recording meetings—can be very advantageous for later proving or disproving claims about what occurred during the course of a meeting. I do not think evidence of it is foolproof, though.

CHAIR: I just noted that it is mentioned in one of the Senate protocols that, as a matter of course, these matters are videotaped.

Mr SKEHILL: Yes. It may well be very sensible. There is always the possibility of someone claiming that something happened off camera, but, yes.

CHAIR: In terms of another matter, the Parliament of British Columbia has written back to the Committee. We asked various parliaments if they have had similar experiences, just to get their advice. The Parliament of British Columbia has indicated:

> British Columbia has experienced the situation similar to New South Wales on two occasions. The cases clearly demonstrate that the use of electronic surveillance, even though it may be legally sanctioned, is seen to be a grave contempt of the House. The cases differ from the situation in New South Wales in that they do not involve the seizure of print documents but instead relate to the electronic interception of private telephone conversations by members. In both cases the House was not made aware of the search warrant or the resulting processes until after the results of the surveillance had been publicly disclosed.

The Parliament British Columbia indicates that simply having the wire tap, even though it was legally sanctioned, was a grave contempt. They clearly see the situations as similar. I was wondering whether you have any comments on that.

Mr SKEHILL: No. It is not something that I have given any particular thought to, the wire-tapping of members and their offices, so I will pass that opportunity by, thank you.

CHAIR: Thank you. Finally, in relation to the question of whether the relevant documents are immune from seizure or only from use in questioning, et cetera, the Clerk of the Senate, Mr Harry

Evans, referred to two things, (a) testimonial immunity and (b) existing authority prohibiting the compulsory production of privileged documents—for example, for admission into evidence in court proceedings—and the implied immunity of such documents from seizure under a search warrant. Do you have any comments on those arguments?

Mr SKEHILL: I was not here when Harry was speaking to you, so I am not too sure of the context in which he may have made those comments or precisely what he said. I think this is probably largely the issue that we spoke about earlier with the question of whether or not privilege renders the document immune from seizure entirely—

CHAIR: Yes.

Mr SKEHILL:—or whether it only limits subsequent use. That is one of the issues on which I think that there is not clarity.

CHAIR: Are there any other comments?

Reverend the Hon. FRED NILE: Just one, in regard to costs. One of the concerns that members have with these cases is that the Legislative Council has to employ an arbiter. It is the cost, if there are many, many documents, that is of concern. Are the costs from your point of view calculated on the number of pages you had to examine or on an hourly rate? How was that assessed in your own case?

Mr SKEHILL: In my own case, the costs all were billed on an hourly rate, and we also charged for the printing which was quite extensive in the Harris matter, 74,000 pages. We actually installed a separate printer off line and, for security reasons, a separate computer off line, although we charged that not at a standard solicitor's rate but at a far lesser rate. In order to try to contain the costs. I used some more junior solicitors who worked with me in the initial examination, and tried to set up a process whereby I made the final determinations but as little of the proceeding work as possible. But it is certainly an expensive process. To simply examine that sort of volume and particularly if you actually have to form decisions about parliamentary privilege, which can be quite difficult, it is expensive. It is a process that ideally we should avoid wherever possible.

CHAIR: Are there any other questions from any Committee members? Mr Skehill, are there any final comments that you would like to make?

Mr SKEHILL: I think, Mr Chairman, I would like to say and stress that I do not know much at all about the circumstances of the particular execution of the warrant by ICAC and I want to stress that nothing I have said should be viewed as an attempt to be determinative or authoritative in that regard. Quite apart from individual cases in terms of striking an appropriate balance, there are a lot of competing and conflicting issues. I think it is something that warrants—perhaps that is a bad choice of words in the circumstances—or deserves careful consideration. I tend to think that the best outcome would be a well thought out, clear statutory process and a process that deals with two issues. Firstly, the rights of investigating authorities to examine and take, and the method of taking, electronic material, and secondly the more specific issues of parliamentary privilege in relation to warrants generally. I have not comprehensively thought through all the issues but certainly the exercises that I have had to do in the two cases that I have been involved in for the Commonwealth have led me to think more about it, and perhaps that is where what I have said today might be of more assistance.

CHAIR: Thank you very much, Mr Skehill. We appreciate your attendance here today. It has been very interesting.

Mr SKEHILL: My pleasure.

(The witness withdrew)

(Luncheon adjournment)

KEIRAN TIBOR PEHM, Deputy Commissioner, Independent Commission Against Corruption, sworn and examined:

JOHN WILLIAM PRITCHARD, Solicitor, Independent Commission Against Corruption, affirmed and examined:

CHAIR: In what official capacity are you appearing before the Committee—as a private individual or as a representative of the Independent Commission Against Corruption [ICAC]?

Mr PEHM: I appear as the Deputy Commissioner of the ICAC.

Mr PRITCHARD: In the capacity of solicitor to the commission.

CHAIR: I advise you that if you should consider at any stage during your evidence that certain evidence or documents you may wish to present should be heard or seen in private by the Committee, the Committee will consider your request. However, the Committee or the Legislative Council may subsequently publish the evidence if they decide it is in the public interest to do so. Do either of you have an opening statement?

Mr PEHM: We have not prepared an opening statement. We have put in a written submission that states our position. We are happy to take questions.

CHAIR: Would you explain to the Committee the key features of and differences between the ICAC's investigative powers provided for in sections 21, 22 and 23 of the Independent Commission Against Corruption Act 1988?

Mr PEHM: Section 21 is a power in the commission to require a statement of information by notice in writing served on a public authority, and the notice must specify some time in the future for the information to be provided. Section 22 is a similar provision, although it applies to the production of documents. Under section 23 the Commissioner or an officer of the commission is authorised in writing to enter and inspect public premises, to inspect any document or other thing on the premises and to take copies of the documents on the premises. The powers set out in those three sections are all circumscribed by section 24, which applies to both sections 21 and 22 and section 25. The effect of sections 24 and 25 is to preserve certain privileges in the person called upon to provide the information. It does not deal with parliamentary privilege at all. In a nutshell, those sections provide that the person required to produce the documents or information cannot rely on any of the public interest privileges. They are not so common anymore, but they are the sorts of privileges in law that apply to public authorities. An important privilege and perhaps limitation on the powers in those sections is the privilege against self-incrimination.

What happens under those sections and, in particular, under section 23? If the commission or officer of the commission is inspecting documents in an office, a combination of sections 23 and 25 seem to imply that if it appears to the commission officer that a person in whose possession the document is has a privilege which could be relied upon in a court of law—and that would include the privilege against self-incrimination—and they object to the production of that document, then the commission officer is unable to take it. That is the key distinction between section 23, inspection of public premises, and the search warrant power. Under a search warrant there is no provision for the occupier of the office to object to the production of documents on the ground that production might incriminate them or under any of the other privileges set out in section 25.

The Hon. PATRICIA FORSYTHE: In relation to section 23, the power to enter public premises, and division 4, search warrants, would you explain the key differences between the powers available to the ICAC under these provisions?

Mr PEHM: To begin with, there are differences in how they are issued. The power to enter under section 23 can be exercised by the Commissioner or a person authorised by the Commissioner. A search warrant has to be issued by an authorised justice, so it is an application external to the commission. In terms of the rights of the occupier of the office, in any inspection under section 23 the occupier may object to commission officers taking documents if he or she has a ground of privilege

which might be relied on in a court of law. If the commission agrees that is a reasonable objection, and it appears to the commission that privilege could be raised, the commission cannot take the documents. Under a search warrant that option is not available to the occupier.

The Hon. PATRICIA FORSYTHE: Would you outline the protocols or procedures in place within the ICAC that the head of a particular investigation needs to go through? What criteria need to be satisfied in order to obtain a section 23 order from the Commissioner?

Mr PEHM: We could probably give you a more detailed answer on this. We have procedures as to the sorts of things investigation officers must satisfy themselves about. In terms of authority or approval to exercise the power, a section 23 order obviously has to be signed by the Commissioner, or myself as assistant commissioner, as statutory officer. Investigations are done in teams. The team leader or investigator will discuss with the team lawyer if there may be grounds for the exercise of power. They will put together documentation which then has to be approved by the solicitor to the commission. In the case of the exercise of power under section 23, that would then be submitted to the statutory officer. In the case of a search warrant, the officer laying the information for the warrant would go to an authorised justice to seek the warrant.

The Hon. PATRICIA FORSYTHE: Would you outline the type of information that is required by the courts before a search warrant is issued under section 40 of the Act?

Mr PEHM: I will hand the question over to Mr Prichard. He is more familiar with search warrants than I am.

Mr PRITCHARD: It is difficult to say in relation to any sort of general policy. Essentially it can only be guided by the section, which requires that there be reasonable grounds for so doing. What are considered reasonable grounds would depend on the circumstances of each matter. Bearing in mind, it is not only the justice who has to be satisfied that there are reasonable grounds for so doing under section 40 (1). Under section 40 (4) the ICAC officer must also have reasonable grounds for believing there may be found on the premises items in relation to the investigation. There is settled law about what is relevant to determining "reasonable grounds". It can be based on hearsay. It has to be a little bit more than speculation or fishing or some hope that you will find something. You have to demonstrate some evidentiary threshold that satisfies the justice that you have some reason to believe that you are going to find something on the premises that is relevant to your investigation. That is a major distinction because section 23 requires no evidentiary threshold. It is just an authority granted by the commission subject to internal considerations that it is relevant, necessary and appropriate.

Reverend the Hon. FRED NILE: It seems as if the ICAC is shifting from the use of a section 23 order to search warrants. Without referring to a specific investigation, what factors would lead to the ICAC applying for a search warrant under division 4 of the Act rather than acting under section 23?

Mr PRITCHARD: The Deputy Commissioner spoke about some of the limitations in section 23. The major limitation is in section 25, if you issue a section 23 notice on a public official or public authority with a view to finding incriminating material that is relevant to your investigation. That is generally why search warrants are issued if there is an expectation that material relevant to your inquiry will be found. A search warrant does not have the same problems regarding, say, self-incrimination, if you find incriminating material during the execution of a section 23 warrant. On a reading of section 25, there is an argument that the person who is incriminated must be advised of that and given an opportunity to say whether they consent or agree to the notice continuing to be executed. If they do not, there is an argument that you have to stop. It does tend to defeat sometimes the very purpose for which you may be going in.

A section 23 notice can also allow you to go to the public authority office to obtain records in situations where that public authority may not be the organisation or person you are interested in, but it has the records you want and need quickly. You can go in, inspect them and copy them. It can sometimes mean that you just want the records that, via a section 21 notice, you might have to give them some time to prepare. You can go in and copy them yourself, take them and go out. Search warrants can often be executed in situations where you want the material now. You may have some reason to believe that if you do not get it it could be destroyed, eliminated, tampered with, something

of that nature. But generally it is that limitation in relation to section 25 that presents some problems for us using section 23 notices.

Reverend the Hon. FRED NILE: And the way you explain section 23 it sounds as if you would normally have present the person affected by section 23 but with a search warrant you do not have to advise the person?

Mr PRITCHARD: There are still restrictions. You can execute a search warrant covertly, as it is referred to under the Search Warrants Act, but you have to have some approval from a justice in order to do that. It is different with section 23 because you may go in not expecting to find anything but during your search you may find incriminating material that relates to someone that on the section 25 restriction in that situation you may have to stop because to give any meaning to what section 25 is it suggests that you cannot form an opinion that the person who might be able to claim the privilege does not consent to the search if they are not there. It seems somewhat artificial if the only way you can read section 25 is how do you know whether they are not going to consent to the continuation of the notice if they are not there to indicate that? It does tend to suggest that you cannot say, "Well, they are not here, therefore they must consent to it". That is a restriction.

So it may tend operationally to suggest that we do not necessarily need the person we are interested in with a search warrant, there might just have to be someone who occupies the premises at the time that we go in. It may not necessarily be the person we are interested in.

Reverend the Hon. FRED NILE: I think you have just outlined that the commissioner or the deputy commissioner are the ones who authorise the search warrant.

Mr PRITCHARD: Section 23 notices?

Reverend the Hon. FRED NILE: No, the search warrant.

Mr PRITCHARD: Search warrants—I think the deputy commissioner has outlined a process, it is a collaborative effort, the investigator, the lawyer, myself as the director of the legal unit and the commissioner or the deputy commissioner, depending on which one of those is looking after that particular investigation, would be consulted and would be aware and give approval to that application for a search warrant being made.

Reverend the Hon. FRED NILE: So they would definitely give approval?

Mr PRITCHARD: Yes.

Reverend the Hon. FRED NILE: You used the word "aware". It is more than being aware.

Mr PEHM: It is a matter of formal commission procedures. In the operations manual, the procedure is that the approval must be given by the solicitor to the commission but, as a matter of practice, because investigations are done in teams, in most cases the commissioner who is responsible for the investigation will have a say in whether or not they should go ahead with the warrant application.

Reverend the Hon. FRED NILE: I assume you have protocols that are clearly laid down of all the stages that have to be followed by the ICAC staff?

Mr PRITCHARD: Yes. There is an operations manual which has procedures in it, one specifically dealing with search warrants, which sets out relevant law procedures to go through; a checklist of where it is at during various stages.

CHAIR: Is that a public document?

Mr PRITCHARD: The one I have here at the moment is currently being reviewed.

Mr PEHM: It is not a public document but I do not see a problem with providing it to the Committee. It is in general terms. It does not touch on individual matters.

Mr PRITCHARD: It may be provided to the Committee but perhaps no further.

Mr PEHM: Perhaps we can discuss that with the commissioner and provide it to you later perhaps.

Mr PRITCHARD: I am just thinking from a methodology point of view there might be something in it.

CHAIR: Is there a reason? We are talking about procedures, not operational matters.

Mr PRITCHARD: It may just go to a question of methodology, I suppose. Without having intimate detail of every word in it, it might be just something we want to reserve.

CHAIR: If you could take that on notice for us?

Reverend the Hon. FRED NILE: Would that manual lay down clearly what criteria has to be satisfied, that it must be, I imagine, of some serious nature to warrant a search warrant?

Mr PRITCHARD: Yes, in circumstances where there are procedures laid down as to how the issue of the search warrant might first be raised and considered.

Reverend the Hon. FRED NILE: Could you say what some of the criteria would be, just in general terms?

Mr PRITCHARD: The guiding principle we take is the Act. It still requires us to be satisfied on reasonable grounds. Now that means, as I said before, that, all things being equal, a justice will not issue a search warrant to go fishing; there has to be some evidentiary basis to suspect or believe that you will find something when you go into those premises. So you must have some evidence or some material that meets that necessary threshold to believe on reasonable grounds that you will find something. I said that is the difference with the section 23, you do not need that, we can issue the notice and go in and have a bit of a sniff around if we wanted to. I think it is fair to say we do not have that with 23s.

Reverend the Hon. FRED NILE: With the idea of the criteria you mentioned I was just wondering what are some of the more mechanical aspects? Is there some sort of a ratio as to how serious the matter must be to warrant a search warrant? It could be a very minor matter or a serious matter?

Mr PRITCHARD: Yes. Search warrants are not issued lightly. I think that it is reflected in figures in the annual report for the number of search warrants we have executed compared with, say, section 22 notices, which we do issue more regularly. Search warrants are not issued at the drop of a hat, as it were, there is a bit of thought that has to go into them, particularly with a search warrant; it is a very overt act, as it were. If you are conducting a covert investigation up until the time you execute a search warrant then at the time you execute your warrant you are prepared to acknowledge that it will now be known that we are investigating such and such a matter. You get a little bit more control over keeping that sort of thing still covert with section 21s and section 22s, whereas search warrants are sort of a clear indication that if you were being covert up until that stage then that is about to change.

Reverend the Hon. FRED NILE: I was just wondering whether that criteria would include that there is a suspicion that there is fraud involving $20,000, $50,000, $100,000? Does that come into it?

Mr PEHM: No. There are no gradations of seriousness in terms of quantification of amount of theft. Seriousness is an issue that has to be judged on the particular facts of the case. A relatively minor theft in terms of equipment or money can be serious in terms of the position of trust that a person is in. The short answer is there are no clear-cut criteria that set out those sorts of considerations.

Reverend the Hon. FRED NILE: Another general question: how often are orders made out under section 23? Is that listed in your annual report?

Mr PRITCHARD: Yes. According to the annual report that we have just released for 2002-03, it has done a comparison. For the 2002-03 year there were six section 23 notices issued for that year; there were seven for the 2001-02 year; and there were nine for the 2000-01 year. I do not want to pre-empt but in relation to search warrants there were 11 search warrants issued for the 2002-03 year, 51 in the 2001-02 year, and 11 in the 2000-01 year—the 51 for the 2001-02 year, to the extent that it can be explained by the Rockdale matter, for which there were quite a lot of search warrants executed.

CHAIR: I have got one other matter relating to the number of times applications are made. How often are applications made for search warrants under section 40 of the Act?

Mr PRITCHARD: I suppose there might be a couple of parts to that question. Do you mean internally or to the justice?

CHAIR: We are interested at this stage in to the justice.

Mr PRITCHARD: I understand from the figures for the last three financial years that I just referred to that none of our applications to justices were refused. Talking to those in the commission who have been there longer than I have, lawyers in the legal division who have been involved in it, they are not aware that any of our search warrants have been knocked back at that application stage.

CHAIR: I cannot recall the figure—I read the report last week—but how many were actually made last financial year?

Mr PRITCHARD: Last financial year there were 11 applications.

CHAIR: None have been refused?

Mr PRITCHARD: No, certainly not in the last financial year.

CHAIR: Have there been any instances where legal proceedings have resulted in search warrants being set aside or rescinded by the court?

Mr PRITCHARD: I have been with the commission for just over two years and certainly not in my experience during that time have any challenges been made to our search warrants. Having said that, it may be that later on down the track in prosecutions there could be a challenge to admissibility of some material that has been said to have been obtained under our search warrant but I have had no advice from the Director of Public Prosecutions that any material that was seized under our search warrant was rejected for being obtained unlawfully or in breach of the search warrant order, or the search warrant was invalid.

CHAIR: Before I ask the Hon. Jenny Gardener to talk about execution of search warrants, if I can just ask two other questions relating to section 23. My understanding is that section 23 and section 41 do not specify electronic documents. Can you please advise the Committee where does the authority come from for imaging computer hard drives as a consequence?

Mr PRITCHARD: I would probably disagree with you on section 23 because section 23 refers to "inspect any document or other things that are on the premises". I tend to think there is probably an argument that a hard drive would be "a thing on the premises" for the purposes of section 23. Section 23(1)(c)says, "take copies of any documents". You may inspect the thing, being the hard drive. Whether you can then take a copy of the document that you may obtain as a result of printing out and so on there is not clear. In relation to copying or imaging, I concede that is a vexed issue. It is an issue upon which you may have to fall back on general principles in relation to execution of search warrants; that you should not retain something that you obtained under a search warrant any longer than is necessary for the purposes of an investigation.

There may be an argument that in copying or imaging a hard drive on premises, that you are averting a situation where you have to take something away, such as a hard drive or computer, being

another thing that you may be able to seize under the warrant, and then keep for some time in order to access and copy an image. To the extent that there is any authority on that, then I cannot point you to any specific authority that deals specifically with computer images or hard drives and so on, it would fall back on general principles in relation to what an officer must do when executing a search warrant and acting reasonably, and that would include hanging onto something that you had seized for any length of time beyond which it starts to become holding onto it unreasonably.

CHAIR: Where would you reference the issue of general principles?

Mr PRITCHARD: There are some general case law principles that deal with execution of search warrants and there is also a recent decision in the Supreme Court of Greer v The Commissioner of New South Wales Police and another of 26 April 2002. That did not deal with computer equipment or specifically hard drives or imaging, but it dealt with an application by a person to have returned to them a photocopy of a diary that was seized under a search warrant, the original diary having been returned to the person. The person then made an application for copies of the diary pages that had been made by the police to be returned. The police justified the continued retention of the copies on the basis that they were relevant to an investigation that they were conducting with the Crime Commission, albeit there were no proceedings on foot and in fact no one had been charged.

Judge Bell referred to some of the more general principles that apply to the common law power of police to seize articles in connection with an investigation, and cited one of the principles as follows, "The police must not keep the article nor prevent its removal for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice it should be made and the original returned. As soon as the case is over or if it is decided not to go on with it the article should be returned." Arguing from general principles similar to those adopted in that case, there could be a strong argument regarding compliance with the principle that you can make a copy, return the original and keep the copy. It may be argued that in copying a computer hard drive you are complying with that principle of taking a copy and returning the original, or not even taking the original in the first place.

CHAIR: Would that same general principle apply to section 41? I note that it allows for search and seize but does it also authorise ICAC officers to copy records from an office such as happened with the records from Mr Breen's office, which were held on the Parliament's computer servers?

Mr PRITCHARD: It may, yes. If you wanted to comply with the common law principles of retaining it you would retain what you had copied from the original without having to take the original, such as the server itself.

CHAIR: In relation to the authority to copy records under section 41, such as in Mr Breen's case, would you rely on common law principles?

Mr PRITCHARD: Yes.

CHAIR: Rather than the section itself?

Mr PRITCHARD: No. The common law principles help you interpret section 41. Section 41 gives you the general power to do it but the common law principles—one of which I have just read—are the principles you would apply in approaching section 41. I am not suggesting for a moment that it is beyond doubt when it comes to computer equipment. The Commonwealth Crimes Act has a specific provision dealing with search warrants that caters specifically to computers and imaging and allows it to be taken off the premises for, I think, up to 72 hours and to be copied or imaged, as it were. But we do not have anything like that either in our ICAC Act with regard to search warrant powers or in the Search Warrants Act, so you have to fall back on general principles.

The Hon. JENNIFER GARDINER: Mr Pritchard, can you spell out your understanding of the requirements of the Search Warrants Act 1985 and the law in relation to search warrants generally concerning the need for documents or things to be searched before being seized?

Mr PRITCHARD: There may appear to be an argument that without more it would be difficult for an inspector or person executing a search warrant to come to the view that a document must be searched before it can be seized. You will note from section 47 of the Act, which applies to warrants executed by the ICAC, that you may have an authority to be on the premises to search for particular things and to look at particular things. But there is also a special provision in relation to that warrant, which also applied in relation to the Breen warrant, that if you are on the premises and find other things that you believe on reasonable grounds to be evidence and you have information as a result of your executing the warrant that suggests to you that you will find, or that there is, material on the server, I think it is conceded even in Mr Walker's advice that it cannot be said that in all cases it is impossible that the officer cannot have that view without seeing the document first—without seeing a copy of the electronic document. He may be told—or he may be aware from other information—that on that server or that hard drive is material relating to the investigation. It does not always follow that it is necessary that he access that server or that hard drive in order to look at the material to satisfy himself that it comes within the scope of his warrant. There can be other material or other information that suggests to him that it is not necessary that it be accessed.

The Hon. AMANDA FAZIO: Can you give an example of the other information that an officer might come across?

Mr PRITCHARD: The officer may have received information from other sources before or at the time of applying for the warrant that suggests to him either directly or indirectly that there is material or that the computer has been used in such a way as to have stored on it material that is relevant to the investigation.

The Hon. AMANDA FAZIO: If the officers knew that before they applied for the warrant why did they not specify that as part of the original warrant application?

Mr PRITCHARD: They do that with the warrant because it talks about material being held in electronic form, on computer, tapes or things of that nature. Do you mean spelling out the particular documents they are interested in?

The Hon. AMANDA FAZIO: We seem to be going around in circles a little. You are saying that once they have a warrant, they go in and look at something. If, as a result of other information, they believe there could be something on the computer hard drive that they would be interested in, they can take it. However, the argument seems to go round and round: If the officers have the information beforehand why not act specifically on that information as well as on the other information that required their applying for a warrant in the first place?

Mr PRITCHARD: They may not get the additional information until they are on the premises.

The Hon. JENNIFER GARDINER: Mr Pritchard, I think you agreed that the situation in relation to the law and the imaging of the entire contents of the computer hard disk drive is not beyond doubt. Is it fair to say that taking such images potentially puts at risk the successful prosecution of otherwise provable offences or could put it at risk?

Mr PRITCHARD: It certainly raises the issue. There is no doubt that anything done under the search warrant if it is done without authority can be challenged down the track in the prosecution if it is held that the evidence has been obtained unlawfully or without authority of the warrant. It depends what you intend to use later that you have obtained under the warrant. Some seizures or acts of seizure may be valid but others may not. Something may be within the scope of the authority of the warrant and something may not. If the warrant is bad on the face of it because it is a general warrant—that is how they are referred to—and does not specify a connection to the investigation, that will affect the whole warrant and everything that is done under it. There is certainly an argument that, if something is taken in circumstances where it has not been taken properly under the authority of the warrant and an attempt is made to rely on it down the track in a prosecution, it could threaten the admissibility of that material. However, bear in mind that you are then subject to the provisions of the Evidence Act, which does not rule it out automatically. You are then in the realms of unlawfully and improperly obtained evidence, and you would be subject to the provisions of the Evidence Act that deal with, "Yes, maybe, but that does not mean that it is not admissible for all purposes."

The Hon. JENNIFER GARDINER: When executing a search warrant in relation to the Parliament of New South Wales would it be possible for a search warrant to be issued covertly such that the Presiding Officers did not know that it had been issued?

Mr PRITCHARD: It is technically possible under the Search Warrants Act. It is possible to delay the service of the occupiers notice under the Search Warrants Act. I find it very difficult to envisage on behalf of the commission that we would ever execute a warrant in those circumstances. As a lawyer, I would like to reserve my position by not saying that we never would. However, I find it difficult to imagine or envisage such a situation. The other point is that we would have to gain access to Parliament, which would require our having to get the co-operation of somebody in order to access—depending where it is in the Parliament—a particular office in a secure premises. I cannot imagine off the top of my head any circumstances in which that would be done, if only because of the Parliamentary privilege issues that are involved. The assistance of officers of the Parliament would be very helpful. Having said that, theoretically, possibly and as a matter of law under the Search Warrants Act warrants can be executed covertly.

Reverend the Hon. FRED NILE: You mentioned the Rockdale case earlier. Do your protocols or procedures lay down any distinction between a search warrant being served on a member of Parliament or a member of the public? Do you have any guidelines that specify what factors should be taken into account when issuing a search warrant for a parliamentary office, for example, because of the privilege issue?

Mr PRITCHARD: At the moment the policies in relation to formal powers are subject to review with a view to updating them and taking into account matters of that kind. Prior to the execution of any search warrant there is what is called a briefing that is conducted by the investigation team at which all sorts of issues are discussed, including the logistics of executing the warrant. In circumstances where the warrant was to be executed in relation to Parliament, the briefing would include some advice regarding parliamentary privilege and would bear in mind matters that could restrict what could and could not be done in relation to the warrant. To that extent, it would be part of the briefing that is conducted. But that issue is being addressed in relation to our formal powers generally with a view to spelling it out in particular detail.

Reverend the Hon. FRED NILE: Do you see parliamentary privilege working in two stages: it does not apply initially when you are seizing material but it might apply later if you plan to use that material in a prosecution?

Mr PRITCHARD: Yes, I think that is the gist of our approach to search warrants and parliamentary privilege. We take the view that the issuing and execution of the warrant and the search per se do not at that point breach parliamentary privilege.

Reverend the Hon. FRED NILE: Would you discuss the parliamentary privilege issue if it were claimed at the point of using that material in a prosecution?

Mr PEHM: Not in a prosecution but in any proceedings of a commission—

Reverend the Hon. FRED NILE: In a tribunal.

Mr PEHM: Yes, in a hearing in the commission. The situation has never risen, but if we felt at that stage that some claim of privilege might attach to a document that it was proposed to use we would notify the Presiding Officer of the relevant House and extend the opportunity to claim privilege. It could of course be the basis for an objection by a person appearing before the commission.

CHAIR: Would you be prepared to give us a copy of the legal advice on which you have based that distinction?

Mr PEHM: We have some advice and we are currently seeking more advice. It is not complete at this stage and we would like to see the further advice before making that decision.

Mr PRITCHARD: We would say that nothing in the *Crane v Gething* judgment suggests that the issue and execution of a search warrant breaches parliamentary privilege.

CHAIR: So you are using the obiter of the judge as the basis of your legal authority?

Mr PRITCHARD: To the extent that there is any pronouncement at a judicial level, yes.

CHAIR: When do you expect to receive your more substantive information?

Mr PEHM: We were hoping to receive it today but we had not received it by the time we left the office.

CHAIR: It is difficult for us, because we would obviously be interested in that legal advice. Under what circumstances would you not be prepared to release that to the Committee?

Mr PRITCHARD: It is legal professional privilege. I cannot speak off the top of my head without—

CHAIR: We are discussing privilege. I cannot understand under what conditions operational matters or other matters may become involved—

Mr PEHM: Operational matters is one possibility—

CHAIR: An operational issue involving the distinction as to what stage privilege operates?

Mr PEHM: No. We have advised on particular facts and circumstances arising out of this investigation, or circumstances that gave rise to this hearing, and communications between the parties that are going to disclose information relating to that investigation. So that is one consideration. But no decision has been made not to provide it to you, so I think we are jumping the gun. We just want to reserve our position at this stage.

Mr PRITCHARD: Particularly as it is advice that we have not seen yet. It is a little difficult, in the abstract.

CHAIR: Perhaps we will need to call you back for the next round of hearings, so we can have further discussion after you have had an opportunity to receive your additional legal advice.

Reverend the Hon. FRED NILE: It seems that the legal advice you are talking about is not just general legal advice for anyone; it relates to the Breen case.

Mr PEHM: Yes.

CHAIR: With due deference, so far you are basing your material on the obiter in one particular case. I think it is appropriate that we seek legal advice. Once again, I am happy for the Committee to deliberate on this point, but it may be appropriate to ask the officers to come back after they have received that advice and we can then have a more detailed discussion.

Mr PEHM: It may be, and if that is your decision we will certainly come back. The other option we can consider is to perhaps provide an excised version of the advice which omits certain operational details but nonetheless provides you with the gist of the legal reasoning and legal arguments behind it. But, as I say, we have not received the advice yet, so—

CHAIR: Has your position changed since the execution of the search warrant on Mr Breen's office?

Mr PRITCHARD: No.

CHAIR: At that time, officers from the ICAC appeared to indicate that the documents that attracted parliamentary privilege were not to be seized. How does that accord with your position now?

Mr PRITCHARD: It is difficult to answer, because I was not involved in the execution of the warrant. I was not a seizing officer, so I do not know what they saw.

CHAIR: Mr Pehm, if it is your position—which you said has not changed—that at the point of seizure parliamentary privilege did not apply at all, and yet advice was being given to the officers of the Parliament that material that attracted parliamentary privilege would not be seized, how do those two statements accord? Were any documents privileged?

Mr PEHM: The documents that were taken from that office?

CHAIR: Yes.

Mr PEHM: We do not know. We have not looked at them. Let me go back—

CHAIR: You have just told the Committee that your position—which has not changed since that point—is that, in terms of seizing this material, it does not attract privilege under Article 9, is that the case?

Mr PRITCHARD: We believe that to be the position, yes.

CHAIR: Therefore, how could you then make the claim that privileged items would not be seized?

Mr PRITCHARD: Because we can agree to that position.

CHAIR: But, surely, none of them were privileged, under your definition?

Mr PRITCHARD: No. It is more—

CHAIR: Please describe how it works.

Mr PRITCHARD: Our view is that it is a question of the use to which the document that is seized is going to be put by us as the tribunal later on. I have not seen the documents. I was not involved in the execution of the search warrant. An officer involved in it may well have taken the view, looking at the document, that a use was going to be made of it that could infringe the privilege—I do not know.

CHAIR: That is an interesting procedure.

Mr PEHM: We provided you with a scope of the investigation, and on the face of that scope there would be no material that we would want to seek to obtain under the warrant that would involve the question of parliamentary privilege, and the officers would have been acting on that basis. Prima facie, none of the material sought under the warrant would appear to attract privilege. It may be that inadvertently—and this is particularly the case with the electronic documentation—there may be documents in our possession, now in the Clerk's possession, that could be privileged.

CHAIR: On the basis of the use to which you may decide to put them?

Mr PEHM: It is cart before the horse. We do not know what is in them, so we cannot decide—

CHAIR: But is that not the basis upon which you are deciding whether they are privileged or not—when you seize them?

Mr PEHM: No. That is a question of the use to which they would be put, not whether privilege attaches to them. The two are separate issues. If privilege does attach, then the issue is how can they be used, and we would not seek to use them in any proceeding in the commission.

The Hon. AMANDA FAZIO: You say you thought that the documents seized in this instance probably would not attract privilege because they related specifically to the nature of an

investigation you were undertaking. On my understanding, there is an argument about whether the use of the logistic support allowance is related to parliamentary duties or other duties. Given that argument, how can you say that the documents you took in relation to that would not attract privilege?

Mr PEHM: We cannot say definitively that the documents would not attract privilege. What we are saying is that there is no intent to take any documents that would attract parliamentary privilege. With respect to travel records, it may be that they are part of parliamentary proceedings, but that would be a very broad definition of parliamentary privilege. If the contention is that all parliamentarians' travel documents are privileged, or that you could use it as a logistic support allowance, it may be that it might attract to some, but it is hard to see how it would attract to the whole use of the allowance.

The Hon. AMANDA FAZIO: If there is an area of dispute between the person whose documents are being searched and seized and the ICAC with regard to whether the documents attract privilege, is it your view that you should simply take the documents and then sort out later whether they attract privilege? At what stage during the search and seizure process do you ever accede to the fact that privilege might attach to a document and you do not take it? It seems that you simply take everything and try to sort it out later.

Mr PEHM: It is a matter of practicality. Someone has to be there to claim the privilege. If there is no member or representative of the House to claim the privilege, it is left to the officers to decide what to take. The protocol we are proposing is that either the member concerned or a representative of the House be present. If the privilege is claimed, and we agree with that claim, we do not take it. If there is a dispute, we are proposing that some sort of independent opinion be given about it.

The Hon. AMANDA FAZIO: I have seen the protocol that you are proposing be used. If the member cannot be present during the search and seizure process, and the member is not happy for it to take place in his or her absence, from your point of view what would be the problem with sealing the member's office and doing the search and seizure when he or she is available? That would mean that nothing would be taken away; the documents would still be there for you to go through later.

Mr PRITCHARD: That is not dissimilar to the protocols in place with the various law societies. If the lawyer is not available, a reasonable period of time is allowed to lapse before I make arrangements for the lawyer, or someone who is familiar with the office filing or management systems, to attend. Without committing to any sort of protocol along those lines, that is not unreasonable. We would not have a problem with that, I would imagine. Certainly it would assist us if someone, particularly the member or an officer, was there when we were executing a warrant. There is no question about that. We would want someone there for that purpose. Certainly in relation to this warrant, we gave notice before we arrived that the warrant was about to be executed. It is certainly to our benefit to have someone there. There is no doubt about that.

Reverend the Hon. FRED NILE: To whom did you give notice—the member or the Clerk?

Mr PRITCHARD: I made contact with Ms Lovelock prior to the execution of the warrant in the afternoon. I understand that when the officers arrived at the office an attempt was made to contact Mr Breen, and that contact was made with him but he declined to attend.

CHAIR: My understanding is that the ICAC executes simultaneous section 23 documents on members' offices and residences. Do you execute simultaneous search warrants?

Mr PRITCHARD: Yes.

CHAIR: How can the member be present at both premises?

Mr PRITCHARD: They are simultaneous in the sense that we do more than one—I am sorry. No—

Mr PEHM: It has never happened with respect to a member, but in other cases people are taken from their office to their home. The general procedure with a search warrant is that the occupier

of the premises should be there and be able to observe what occurs, so as to preclude any later claims of evidence being planted and so on. The officers at whichever site is vacant simply wait until the search is done in one location, and the occupier then goes to the other location with ICAC officers.

CHAIR: What is your understanding of the meaning of "proceedings in Parliament", and in particular in Article 9 the phrase "for the purposes of or incidental to the transaction of parliamentary business"?

Mr PEHM: It is a very difficult question. I have been reading a lot about it recently. I do not think there is any simple answer. There are some things which clearly are: debates in the House and committee proceedings. There are other issues which are a bit further removed from those principal parliamentary proceedings, and there are question marks over issues like correspondence to members which are subsequently used in a debate or proceedings, as to whether that material should attract privilege or not. It is not a simple question, and I cannot give a definitive answer.

CHAIR: You have indicated one or two kinds of documents which in your view could be said to be for the purposes of or incidental to the transaction of such business. Could you define which items are not?

Mr PRITCHARD: When you say "incidental", you are drawing this from—?

CHAIR: Article 9. Let us look at, for example, the Federal Parliamentary Privileges Act.

Mr PRITCHARD: That is section 16?

CHAIR: Yes. Perhaps I should be a little more specific in terms of proceedings in Parliament. What criteria do you believe should be taken into account in determining whether or not a document is relevant for proceedings in Parliament?

Mr PEHM: It is difficult to answer in the abstract in relation to general principles. Obviously, there are some things, like speech notes, the preparation of speeches and material collected for the purpose of making speeches in Parliament. But there are a lot of grey areas and things that parliamentarians do that might relate in a broad way, in the way that all of your work relates, to proceedings in Parliament. It is very difficult to draw a dividing line without having a specific example.

CHAIR: Let me give you a specific example. Let us say that the ICAC instructs officers who are going into a member's office as result of a search warrant not to touch an item or to take or seize an item that is subject to parliamentary privilege. What advice or guidance do you give and what criteria do you use to inform those officers?

Mr PRITCHARD: Our view would be guided by where we regard privilege kicks in, as it were. That is where the difference is. We say it is a question of what use we may make of it later on, or what use we may make of it as part of our investigation. It might be at that point that it becomes relevant; not at the time that the warrant is being executed.

CHAIR: So we are back to where we were previously. When you instruct officers who are going into a member's office or a member's home, do you advise them not to touch anything, not to seize anything and not to take copies of anything that is privileged?

Mr PRITCHARD: I do not think we can. In the abstract, I am not executing the warrant. I am not there and I do not know what it is that they are going to look at or what they are going to find. So I would not tell an officer not to take something or not to seize something. I do not think I can. I am not the officer executing the warrant.

The Hon. PATRICIA FORSYTHE: How would you advise an officer if a member was present and that member said, "I am claiming privilege on these documents"? How would you advise your officer to treat those documents?

Mr PRITCHARD: To treat the document? That is probably a different question.

Mr PEHM: The protocol provides that if the officer agrees with the claim of privilege we do not take it. If they dispute the claim of privilege then it is set side.

CHAIR: What criteria would they use as to whether they agreed or disagreed?

Mr PRITCHARD: At this stage we have not developed a formal set of criteria. It has been a big learning experience for everyone. From the reading I have done, it is a very complex issue as to when parliamentary privilege attaches. There are disagreements between parliaments over whether it attaches, for instance, to correspondence to members. I do not think I could lay down strict criteria here. I think it would take us some time to develop those criteria, in the event that that sort of protocol is agreed to.

The Hon. AMANDA FAZIO: I do not want to go into the specifics of individual cases today, but could you tell me—if it is possible and without breaching any operational guidelines—whether the same investigators were involved in the two recent ICAC investigations into members of the Legislative Council?

Mr PEHM: Yes. The lead investigators were the same. There might have been different members of the team.

The Hon. AMANDA FAZIO: So it did not occur to you that this issue of privilege might come up and that it might be worthwhile to tell those same investigators, "This is an issue that you need to look into"?

Mr PEHM: We did in broad terms. The question I was dealing with required specific guidance and criteria. As I understand it, the officers exercised the warrant, at least with respect to the paper documents or the hard copies, with that in mind. My understanding is that they did not deliberately take anything that they felt privilege attached to. The problem we have is with the electronic documents. They are not in a position to make that examination on the spot. It is a real practical problem. On counsel's advice, we would be entitled to sit in that office for as long as it took and open up every document and look at it. That is not something that we would want to do and everyone knows how disruptive that might be to the House, but that is the legal entitlement.

The Hon. AMANDA FAZIO: Do you not ultimately have to do that back at your premises anyway?

Mr PEHM: Yes, but it is just a matter of practicality. In the Federal case we are looking at, the referee there took something like eight months to go through a computer hard drive. He printed out every document. As a matter of practicality, for the officers to inspect every document in an electronic form is extremely complicated and time-consuming. As I understand it, that is where the real problem is.

The Hon. PATRICIA FORSYTHE: Are we dealing with practicalities or are we dealing with law?

Mr PRITCHARD: They are mutually exclusive to some extent. You would also find that if you do that back at the premises there are search tools that allow you to do things a lot quicker—things that you might not be able to do on site.

Reverend the Hon. FRED NILE: You spoke earlier about someone deciding what documents were privileged and you referred to having an arbiter. You referred to having an arbiter similar to the one who was used in relation to Senator Crane and Senator Harris. You referred also to how long it took and how much it cost. Have you any thoughts on how that could be done? Would the ICAC be prepared to have an arbiter who makes a decision about what is and what is not privileged?

Mr PEHM: We are prepared to agree to an independent person. The arbiter is probably a misnomer because the arbiter makes a binding decision on which both parties agree. I understand that the position of the House is that it could not bind itself in that way. It has to have certain privileges. The other difference that we propose is where only the disputed material would go to the independent person. So, rather than every document on a computer record being given to the arbiter, only the documents in dispute would go to that person. Hopefully, in the real world and being practical about it, that it would not represent too many.

CHAIR: Would you also be advising the arbiter about your ultimate use of those items?

Mr PRITCHARD: Yes.

CHAIR: We have received advice from a number of parliaments that have had similar experiences. The Parliament of British Columbia wrote to us in the following terms:

> British Columbia has experienced situations similar to New South Wales on two occasions. The cases clearly demonstrate that the use of electronic surveillance, even though it may be legally sanctioned, is seen to be a grave contempt of the House. The cases differ from the situation in New South Wales as they do not involve the seizure of print documents but instead relate to the electronic interception of private telephone conversations by members. In both cases the House was not made aware of the search warrant or the resulting processes until after the results of the surveillance had been publicly disclosed.

I ask for your comments on that.

Mr PRITCHARD: In relation to electronic documents?

CHAIR: Yes.

Mr PRITCHARD: I certainly would have some problems with the concept of, say, the Parliament being aware that one of its members was subject to a listening device warrant or a telephone intercept warrant. Mr Knight just reminded me that, under the Listening Devices Act, at least the Attorney General has to be notified of any and all applications under that Act and he must be given an opportunity to be heard about that application. So there may be some question about that.

CHAIR: The point I am making relates to a report to the Legislative Assembly in British Columbia. In this wiretap, the member's communication amounted to a breach of privilege and a contempt of the House. That was its finding. As a result of our earlier conversations I am interested to know whether you see that as being a breach.

Mr PRITCHARD: Without more information, on the face of that, no. Again, we would say that it would be a question of the use that we then proposed to make of any conversation that we might have recorded or intercepted as part of our proceedings.

Mr PEHM: It is very difficult to comment on that without knowing the extent of privilege that applies in that Parliament. It would be pointless to have any telecommunication intercepts that the subject was aware of in the event that it may—and it probably inevitably would—capture some conversations that would relate to proceedings in Parliament. Then, yes, evidence would come into existence to which a privilege would attach. But I think we would then go back to the argument over the use that is made of it. The same thing applies to a telephone intercept on any individual. You will capture all sorts of conversations and information. But if that is not used in any prosecution or proceeding and it is not used for any purpose outside the lawful power, that is why those electronic interceptions are granted. It is inevitable that they will capture other material. Whether the fact that it does capture other material that is not part of the investigation constitutes a contempt or not—

Mr PRITCHARD: On those facts alone it is difficult to say.

Reverend the Hon. FRED NILE: You mentioned earlier that it took eight months to decide what documents were privileged in previous Federal cases. If a claim of privilege was made at the very beginning when search warrants were issued it could prevent an investigation from continuing into that matter. That would be of concern to you if you wanted to progress an investigation.

Mr PRITCHARD: Yes.

Reverend the Hon. FRED NILE: If a claim of privilege was made at the beginning and all documents were privileged, officers would not be able to conduct an investigation.

Mr PRITCHARD: We would be conducting only half an investigation. It could not be done properly without that issue being resolved.

Reverend the Hon. FRED NILE: That is why it would be better if documents were declared privileged when they were being used by the tribunal—if they were relevant to the inquiry.

Mr PEHM: That makes more sense from our point of view.

The Hon. JENNIFER GARDINER: Earlier reference was made to notices under section 23 of the Independent Commission Against Corruption Act, which deals with the power to enter public premises. I think you said that ICAC would not use that power to "sniff around". Can you unequivocally state that those notices are not used to go on fishing expeditions?

Mr PRITCHARD: No, I would not. As a lawyer, I come back to the section. I come back to what the section allows me to do. The section does not say that I can go fishing, but it does not also have an evidentiary threshold that is required to be met before it can be exercised. It might not then be so much a fishing expedition; it might be a use of your resources. If you are going to pour effort into issuing a section 23 notice, I think you would want to do it on the basis that you thought something fruitful was going to come out of it. So, to that extent, I can only come back to what the section allows me to do with it. It is a matter of policy how the commission approaches it. That may be one thing. I think that is all I am prepared to say.

The Hon. AMANDA FAZIO: You just said that you do not want to go on these sorts of fishing expeditions. What is the difference between going on a fishing expedition in somebody's office and going to a justice and getting a warrant under the Search Warrants Act to look for certain things, and yet having one of your officers at the time that the search warrant is being used deciding, "I might have some other information that would enable me to take a lot more material out of that office." To me I do not see that there is much difference. Perhaps you could point out the difference to me.

Mr PEHM: The difference is that the officer has more information, which gives him reasonable grounds to believe that there are other things that might an indictable offence. That is the difference between fishing, which is simply looking through information on the off chance and having reasonable grounds to believe it could disclose an indictable offence.

Mr PRITCHARD: Following on from what Hon. Jennifer Gardiner said, I should stress that it is certainly my experience with the seven or so that we have issued in the past financial year, they have been issued in circumstances where we had some reason to believe that we would find something, or in circumstances where we needed documents quickly that would assist with the investigation, albeit they may not necessarily be directly incriminating against anybody. That is the extended operation, I think, section 23 notices have that you may want to have a look at something from an evidentiary point of view just to see whether something did or did not happen, and you can get the documents quicker under section 23 than you can say, waiting under a section 22 notice and giving someone time to respond, and so on.

Reverend the Hon. FRED NILE: We know that you act on anonymous complaints. Is there any difference in the way that you treat a signed allegation against a member of Parliament and an anonymous complaint against a member of Parliament, bearing in mind the political environment in which we live where people could make anonymous complaints to try to destroy the reputation of a member of Parliament with a malicious intent?

Mr PEHM: Every complaint is judged on the basis of the information put forward, and the grounds it may provide that lead you to believe there may be corrupt conduct involved. No, the Act provides for people to make complaints anonymously. Some complainants are in fear of retribution and so on. The principal practical difference is that you cannot verify the credibility and authenticity

of the complaint by speaking to the complainant. In terms of assessing the credit of the complaint, and whether it provides a reasonable basis to continue, there is that difference.

But as a matter of law, I can see a situation where an anonymous complainant could provide very credible information, yet remain anonymous and you would still have sufficient basis to investigate that.

Mr PEHM: I want to make a final statement. We respect parliamentary privilege. We do not set out to breach it or to contravene it in any way. We have had complaints that directly raise issues of parliamentary privilege. The classic example is the controversy that arose in England over cash for questions. That could not be investigated by the Independent Commission Against Corruption because it clearly relates to the exercise of free speech in Parliament.

Now complaints like that we would not even begin to exercise powers because it would be very clear from the nature of the complaint that questions of parliamentary privilege would be at the core of it. Where we do investigate complaints we are satisfied that there are reasonable grounds independent of parliamentary privilege and that any inadvertent, I suppose, involvement of parliamentary privilege is not our objective or our intention. I thought I would make that clear.

CHAIR: On behalf of all members, we can indicate as well that we, as members of Parliament, are keen to ensure that we assist the Independent Commission Against Corruption to do its legally responsible work. Where, as you have indicated, there are clearly areas in which you have not been able to yet sufficiently develop criteria and other matters, we are keen to assist in any way possible to clear up those areas of confusion and work together.

(The witnesses withdrew)

BRET WILLIAM WALKER, Barrister, 169 Phillip Street, Sydney, affirmed and examined:

CHAIR: In what official capacity are you appearing before the Committee? As a private individual, or as a representative of an organisation or business?

Mr WALKER: I confess I am attending because I was invited to attend. I have, as a Senior Counsel of the New South Wales Bar, given advice on some of the matters which I understand are being examined by the Committee, and I have given advice to the Council, to the President.

CHAIR: I advise you that if you should consider at any stage during your evidence that certain evidence or documents you may wish to present should be heard or seen in private by the Committee, the Committee will consider your request. However, the Committee or the Legislative Council itself may subsequently publish the evidence if it is decided that it is in the public interest to do so.

Mr WALKER: Yes.

CHAIR: Do you wish to make a brief opening statement prior to questioning?

Mr WALKER: No. I am very happy to answer any questions you may have.

CHAIR: Could you please elaborate on your brief summary of the rationale for parliamentary privilege that is set out in your opinion on the search warrant on the offices of the Hon. Peter Breen MLC for the Clerk of the Parliaments dated 9 October 2003, which states:

> ... 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.

Mr WALKER: My understanding, historically and in current functional terms, of the core provision for New South Wales in relation to parliamentary privilege, namely Article 9 of the Bill of Rights, is that it is designed to permit and to enhance the capacity of individual members to contribute to the work of each Chamber, taken as a chamber. It follows that it principally focuses upon contributions to the business of a chamber which involves the transactions conducted by words—some spoken, some written, some collective and some individual—and we have different terms for the different utterances that are in question: We have questions, we have resolutions, we have motions, we have debate, we have explanations, et cetera, et cetera. Because each of the Chambers is deliberative, it is clear that the words ought to be words which are the result of preparation and thought rather than spontaneous ejaculation, as it were. Because of that, there is an integral connection—to the extent no doubt of some members writing out in advance what they intend to say in the Chamber—between what is done in a member's office and what is done in the Chamber by way of utterances to which that member is a party, or at least there is an integral connection with some of the work done in the office or in the home, or indeed anywhere at all outside the Chamber.

The critical aspect, as it seems to me, is that Article 9's reference to the freedom of speech and Article 9's reference to proceedings in Parliament naturally focus attention on utterances actually made in or presented to the Chamber, physically inside the Chamber. No doubt that will remain the mainstream concern of parliamentary privilege, as it should. But it seems to me that if there is to be any functional efficiency to the privilege, then it needs to be ensured that the Executive in particular—not only the Executive, but in particular the Executive—is warded off by an immunity in the name of the Chamber for each individual member in relation to work, statements, dealings, and interactions with people outside the Chamber which are directly or intimately connected with what that member proposes to do in the Chamber. The classic example of course is the receiving of information about which notes are made by the member for the purposes of the speech. But that is only a very easy classic example. It may well also be, I suggest, that dealings with people which influence the way in which one might vote on the question before the House could as well be subject to questions about whether the parliamentary privilege under Article 9 grants an immunity in relation to certain aspects of it.

They are very difficult case-by-case determinations, but my elaboration of the rationale, I hope, has made it clear that it is the work which it is expected that individual members do in the

Chamber, namely participate in deliberation—which means speaking, listening and thinking, making your mind up, changing your mind—which ought to set the framework in which the very difficult borderline questions that arise, I think, in your present concerns need to be addressed.

CHAIR: What is your response to the submission of the Independent Commission Against Corruption that on the basis of judicial authority, documents subject to parliamentary privilege are not immune from seizure but merely from use; that is, that seizure does not amount to being questioned or impeached?

Mr WALKER: I think it is a very interesting point that is being raised and it raises a number of issues transcending simply what I have referred to as the Article 9 question. First of all, of course, it requires attention to the statutory provisions governing the issue and execution of search warrants by the Independent Commission Against Corruption [ICAC]. That in turn most particularly involves consideration of what section 122 of the Independent Commission Against Corruption Act means because section 122, in very round terms, preserves parliamentary privilege. That probably was an unnecessary provision in the light of certain judicial utterances to the effect that unless parliamentary privilege is explicitly or by necessary intention entrenched upon by legislation, it will not be regarded as having been affected. In this case the Parliament of this State, by section 122, has made even clearer what is probably in any event the case; that is, I think, it makes it very difficult to construe the search warrant provisions in the ICAC Act and the relevant provisions in other statutes, the other legislation governing the execution of search warrants, so as to permit the seizure of material which is conceded cannot then be used by ICAC by reason of parliamentary privilege.

A very simple purposive test can be posed. What is the purpose of a provision that would authorise the seizing of material, which cannot be used because of that immunity as a matter of law and, as it happens, statute law—or what is the purpose of its seizure if great care and explicit provisions mean that it cannot be used? I think that there is an unexplored anomaly in the very interesting position put forward by ICAC as to why they say that provisions which they claim authorise seizure ought to be read as seizure without any purpose, seizure without any use because the search warrant form is quite evocative of the setting in which all this operates. If you look at the search warrants, they make it clear, to those who read it in order to see what the limits of unlawful conduct are under it, that things are being searched for and seized to assist in the discharge of statutory functions of investigation and determination by ICAC. True, that is just the form of the warrant, but in my opinion it is highly likely that, were it ever to come to this, a court would determine that the statutory provisions upon which ICAC relies to issue and execute warrants will be construed so as not to authorise what I will call a warrant for seizure but not for use.

Beyond that I should say there is what I will describe as a very interesting view by ICAC. I want to make it quite clear that I do not mean that in the slightest bit sarcastically or facetiously. It is an interesting view and it correctly focuses attention on the need for precision when one talks about privilege or immunity. It is a privilege or immunity against, ultimately—to use the seventeenth century language—proceedings or freedom of speech in the House being impeached or questioned in another place. I am obviously treating ICAC as another place. That is not at all the same as an immunity from having your papers looked through and is not at all the same as immunity from having some of your papers taken away. However they may, practically speaking, converge on the same point so that papers may not be looked at and may not be taken away because that is held in particular circumstances to be part of a process of impeaching or questioning.

The great interest that lies in the way in which ICAC has framed the question is, I think, that it is a very difficult, fuzzy, borderline area where steps preliminary to an adverse adjudication or an adverse determination, such as police investigation, are the subject of claims of privilege. And it has to be said that in none of the jurisprudence of which I am aware and in none of the conduct and practices of other Westminster style parliamentary chambers of which I am aware has this been categorically or definitively settled as an issue. It is not settled. It is unsettled.

The Hon. PATRICIA FORSYTHE: What is your response to the argument that privilege cannot attach to a document?

Mr WALKER: My response is that that is a very neat way, by those making that statement, of pointing up the need for precision of language in order to get precision of concept. So an easy

answer to it would be, well of course in one sense that is obvious. However, I think it by no means concludes the issue. It certainly does not provide a valid motto under which one can seize and take away a parliamentarian's papers. The question always is: Is the search and seizure and taking way of a parliamentarian's papers within zone which is protected by the prohibition on impeachment or questioning in another place? It sometimes may be, as will be obvious to those who have read some of my opinions in this area.

The Hon. PATRICIA FORSYTHE: Would you explain to the Committee the decision of Justice French in *Crane v Gething* to the effect that the immunity of documents from seizure under a warrant by virtue of parliamentary privilege was not a matter to be determined by the courts. The Clerk of the Senate gave evidence before us today. He has been critical of the decision of Justice French in this regard. Is it possible the decision was due, at least in part, to the imprecise nature of the orders then sought by Senator Crane and the absence of any substantive proceedings taken by Senator Crane against the Australian Federal Police in this matter? Might the result have been different if Senator Crane had instead commenced proceedings against the Australian Federal Police to seek the return of the documents?

Mr WALKER: It is a truism, especially applicable here, that every legal decision should be read in the light of its subject matter and the way in which the arguments were mounted. *Crane v Gething* is, to use a cliché, an unfortunate case in the sense that Justice French himself records the difficult and vague way in which the relief was sought with respect to parliamentary privilege. Unlike Mr Evans, I would not associate myself with a criticism of the decision along the lines of saying it was wrong. I would probably criticise commentary upon it that said it stood as authority for the proposition that the court will never determine this question of privilege. Such commentary would, I think, be wrong. It is true there are some dicta in his honour's reasons which, taken in isolation and read not in context, might support such a view. But I do not think his honour was deciding that.

If there is one particular aspect of his honour's reasoning that I would criticise, in the same way as I think Mr Evans has, it is his suggestion that the point of distinction between proceedings in which a court will entertain such a dispute and those like the one before him in which he was not going to entertain them depended upon the identity of the parties. I do not think that is necessarily true. Indeed, it is interesting that mention is made of *Egan v Willis*. It does not seem to me that the fact that the President of the Legislative Council or the Usher of the Black Rod was one of the parties in *Egan v Willis* was why the Court of Appeal and the High Court considered the so-called jurisdictional issue was correctly conceded by the Solicitor General. Courts have to decide issues that are placed before them. I do not want to be disrespectful to counsel—I did not see their briefs—but it sounds to a reader of the report that the parliamentary privilege issue in *Crane v Gething* is half-baked.

I have no doubt that the result would have been at least differently expressed and probably a different outcome if there had been a claim before the court that the court had to entertain, for example, the return of documents. That would not have been straightforward in proceedings that were principally extremely difficult, quixotic even, seeking a declaration of innocence or no wrongdoing in the context of an ongoing criminal investigation. That is enough of a hallmark of the fact that these are very unusual proceedings. The parliamentary privileges aspect of those proceedings is just another oddity. So I do not see *Crane v Gething* as preventing courts from entertaining issues as to the availability of parliamentary privilege where they necessary.

The most obvious way in which it would arise is as follows: A member claims to own a piece of paper. A policeman claims to be entitled to take away that piece of paper and to keep it from the member. If the policeman is justified by a warrant, then there is no doubt that a judge in a case either in detinue or for conversion brought by the member against the policeman will hold for the defendant. But if the plaintiff's case is that the warrant does not justify the seizure and retention of the document because the warrant cannot be construed or cannot be applied in light of article 9, then in my view the court is bound to determine the matter. Just as in *Egan v Willis,* a case brought in tort for trespass to the person required the very important issue of the Legislative Council's power to require the production of State papers to be determined, because that was the justification for the Usher of the Black Rod touching Mr Egan.

Reverend the Hon. FRED NILE: If it were felt that it was appropriate to have this question reconsidered in the New South Wales context by the Supreme Court of New South Wales, how would

it be effected? For example, what proceedings would need to be commenced, by whom, and for what orders or relief, et cetera?

Mr WALKER: The first proceedings are the ones I have just referred to. So that a document or item of a private member—and, of course, nowadays it would involve disks, hard drives and the like—had been taken away by the police without authority, a simple civil action in detinue or conversion or perhaps for specific restitution—and the differences between those three do not matter for present purposes—would raise the issue for the defence of the authorisation of the removal and retention of someone else's property. In turn, that would necessarily raise the question whether the warrant that appears on its face to authorise the defendant's action had, in fact, to be read down in its application to the particular circumstances by reason of parliamentary privilege.

That can be contrasted with what is sometimes talked about in this area, namely, declaratory proceedings brought either by the member in question or perhaps by the presiding officer seeking an order in the form of a declaration or statement by the Supreme Court to the effect that, for example, certain conduct by an ICAC officer or certain property taken by an ICAC officer was in one case in breach of parliamentary privilege or in the other case improperly seized by reason of parliamentary privilege. I personally think that the disadvantage of declaratory proceedings of that kind is that courts are not bound to issue declarations. In particular, there is a well-established reticence to decide questions that may be hypothetical, that is, which may not actually be affecting any real rights. In particular, historically, and for good reason, there is a reticence to determine the content of the powers, immunities and privileges of a House of Parliament and its members unless it is necessary in the course of the court's ordinary work. That is, of course, where Justice French's reasoning in *Crane v Gething* does have real merit.

It is just a late example of the type of appropriate judicial reluctance to determine questions of privilege, one, in the abstract and, two, unless they are really necessary to determine an issue before the court, which is an ordinary issue before the court—for example, should someone pay damages for trespass to the person; should a document be ordered to be returned; should a subpoena be enforced. Those are the two obvious models in which it could come to court. The former is the elegant solution; the latter is a somewhat risky solution. I am aware that some people think that the former model is somewhat laughable. However, it seems to me it has the virtue of ensuring that courts do not become more involved than they need to be in an area that is ultimately for the parliament to determine.

Reverend the Hon. FRED NILE: If it did go along the lines you have just asserted, in a straight court case before a judge could issue those orders would he have to make a decision about privilege?

Mr WALKER: Yes.

Reverend the Hon. FRED NILE: How would the judge go about that?

Mr WALKER: That would be, in this case, a difficult call. The most interesting aspect of the last question, if I may say so, is that the body of law to which a court naturally turns is other court decisions. When it comes to the law of parliament, I personally have a view that we litigation lawyers may have been a little unimaginative in the way in which those authorities are argued. In particular, it seems to me the practice of the Houses is a primary source of knowledge and understanding of the privileges of the Houses. Having argued such cases, it is not a straightforward matter put in practice before a court and asking a court to treat that as authoritative material.

That is by way of preface to my answer to your question how would a court go about doing it. I fear the court would set about doing it by mainly looking for analogies and guidance in how other judges in courts of law have dealt with analogous matters. As we all know, there are not many judgements of that kind at all. I fear in this area the outcome of any litigation in a court of law runs the risk of a result which is the outcome of rather thin data, research material and previous court decisions, rather than the much richer material which would be provided by knowing how the House in question deals with such matters or has dealt with such matters since 1855 relevantly for the State.

Reverend the Hon. FRED NILE: Could the court's decision could, in fact, weaken the parliament's understanding of parliamentary privilege?

Mr WALKER: Yes. As everyone is aware, it is not only the Executive, as one of the other arms of government, that has to be held at bay from time to time by the Houses. In particular, the nineteenth century in England shows some other important precedents where there was conflict between the courts of law and the Houses of Parliament that was most heated. That happily is not the case in this State. We do not have a history of real conflict between the courts and the Houses of Parliament. But historically it appears to be a mutually deferential position that is quite productive, I would have thought. On the other hand, I entirely agree with your suggestion that there is more than a theoretical risk of privileges being narrowed by a court decision. As a court lawyer, I would start with a sympathetic view to the interpretation of a statute regulating the investigation of allegedly corrupt activities, which would give a broad rather than narrow operation to the execution of search warrants.

The Hon. JENNIFER GARDINER: Alternatively, if an investigating agency, such as the ICAC, did not accept the determination by the Clerk, a committee or the House that a particular document was privileged and determined that access to the document was essential for the purposes of the investigation, how could such a dispute come before the courts? What type of proceedings would need to be commenced, by whom and what orders and relief would be sought?

The third kind of proceeding which would have to be thought about in such a circumstance would be urgent injunctive proceedings brought by either or both of the members in question and the presiding officer to restrain the persons apparently authorised by the ICAC warrants from continuing in what they are doing. Injunctions against the execution of a search warrant are relatively rare because in practice the execution occurs more quickly than an injunction can be got. There is also another aspect: in this country, happily, we do not have any history to speak of of what I will call fake or phoney warrants, so that courts correctly proceed on the basis that if somebody produces a warrant it is not going to be a straightforward matter to show that it is not authorised.

So for those reasons, the third kind of proceeding would be injunctive proceedings but they are probably of more theoretical than practical importance, which is one of the reasons I have no doubt that here and in other places there has been a lot of consideration to what are called protocols. I am reminded of the protocol that the Law Council of Australia and the Australian Federal Police devised for the equally impractical position which obtained with legal professional privilege and the like and search warrants in solicitors' offices where, in theory, it could all be done by seeking injunctions or, worse still, by somebody gathering all their courage and refusing to hand something over and just hoping that they had not committed an offence of impeding an officer in the execution of a search warrant. They are theoretically available legal stratagems which will be most invidious, particularly for officers of the court, and it would be even more invidious for members of a parliamentary chamber. For all those reasons, if there are practical ways around it which do not involve litigation, then I can understand why people are looking at it.

The Hon. AMANDA FAZIO: If I can just follow on from that. In this earlier session with the ICAC we were trying to get to the basis of what they thought parliamentary privilege was and we got to one point where they said we would plead legal privilege. How do you see a comparison between parliamentary privilege and legal privilege?

Mr WALKER: I see them as with very few similarities but with much more important dissimilarities. I suppose the most obvious one is that parliamentary privilege, and concentrating on the Article 9 privilege aspect only, is a matter of statute and it could be called in this State a matter of constitutional statute. I do not mean it is entrenched, I mean it is about the basic framework of government; it is constitutional in that sense. That is why as a matter of shorthand one talks about it not being possible to waive privilege, and obviously it is not a privilege for the benefit of the person who owns or holds the documents in question however convenient it may be, meritoriously or otherwise, for individual members to claim its protection.

Legal professional privilege, on the other hand, is utterly different in those respects. It is for a public interest, namely, to foster the sufficient trust between lawyer and client to permit full and frank exchanges so that, for example, advice is not sought on fictitious bases. But at the end of the day it is for the benefit of the client. Lawyers cannot waive it, but clients do, and frequently do. In my view, however self-important my profession is—as it no doubt is—there is no resemblance between the constitutional importance of parliamentary privilege under Article 9 and the privilege of lawyers'

clients to keep confidential material passing between them and their lawyers as legal professional privilege. I think analogies with legal professional privilege are quite dangerous in this area of parliamentary privilege. It is a great pity that the word "privilege" is used at all, but it is established in the language and so we have to use it. It is apt to mislead, not least because it sounds as if, with great respect, you are all looking after yourselves, you are thinking about a privilege of your own as if it was some personal perquisite. That is, in fact, true with legal professional privilege, it is something quite personal for reasons which can be waived in an instant and, as I say, very often is waived.

It is utterly different here and in my view because legal professional privilege attaches to communications and documents are often communications, the legal shorthand by which we talk about a document being privileged in legal professional privilege is not really misleading. However, as I have already said, the legal shorthand by which we talk in relation to parliamentary privilege, about a computer or a hard drive or a document being subject to parliamentary privilege, it is convenient shorthand because one does not like to be long-winded all the time, but it is apt to mislead in fact. What is privileged is the freedom of speech in debates and proceedings and the privilege is simply an immunity from being impeached or questioned in another place. That will not always involve the owner of a piece of paper being immune from having it taken away. Sometimes it will, sometimes it will not.

The Hon. AMANDA FAZIO: In the submission that has been given to us by the Clerk, the Clerk of Parliaments makes reference to the matter in which the Police Integrity Commission [PIC] sought to question a member of the Legislative Council, Mr Lynn, earlier this year concerning material he provided to the Police Integrity Commission having made a statement to the House. The submission refers to advice he provided in that matter. Included in the advice was a statement that provided the member was not questioned under compulsion and the nature of his answers was not the subject of unfavourable comments by the Police Integrity Commission, there was no reason why the member could not cooperate with the PIC and be questioned.

Could you explain to the Committee how this sort of voluntary co-operation and questioning can be distinguished from a member purporting to waive privilege, which you have already advised is not possible and would require legislative change?

Mr WALKER: Mr Chairman, I gather from the nature of that question that I do not have to worry about the confidentiality of that opinion that was applied for the purposes of PIC?

CHAIR: We are happy for the question to proceed. I am advised that a copy of the advice will be made available to the Committee.

Mr WALKER: I think the best way to illustrate my point is to give an example of something that I presume all of you have done and intend to keep doing whilst you are members, that is to raise in the House something in relation to government, something done or not done by government, which you would like to see done differently, a core function of each of the Houses. If the thing in question is the kind of activity that is in fact being looked at by an agency outside the House—and it does not matter what agency it is: the police, the local council, the headmaster of the local school, but it is something that is within the competence of a body outside the House of Parliament—it would, to my mind, be absurd and unthinkable that the price of you as a citizen—forget being a parliamentarian—of raising it with your local police sergeant, headmaster of local council, is that you as a parliamentarian cannot do anything about it in the Chamber. So that if there is something that you regard as a shortcoming that you exposed in the House, it seems to me there is absolutely nothing about parliamentary privilege which prevents you from doing the same thing outside the House. So far so good. I think everybody agrees with that.

In the case of Mr Lynn, the kind of allegations which had been raised were the kind of allegations which bodies outside the House also had competence in: to name two only—PIC and the police. There may have been a third, obviously, the ICAC, depending upon jurisdictional matters, and I do not know enough about the detail to comment. I do not believe that parliamentary privilege prevented Mr Lynn from going to any of those agencies insofar as they are agencies to which members of the public can go, and each of them is. The line I tried to draw in that union was between Mr Lynn co-operating to the extent of saying what he wanted to say about his matter of concern to PIC, if he wished to say anything about it, and, on the other hand, PIC interrogating him as to the

source of the information which he had relayed to the House, and the cogency of the material upon the basis of which he had raised things in the House. To my mind it does not matter that neither PIC nor the ICAC are agencies with what I will call ultimate adjudicative roles: they cannot throw a member of parliament into prison—which is the 17th century fear obviously—they cannot fine them, they cannot order damages against them, but what they can do is to make fairly serious reports, particularly the ICAC.

It seems to me that although this was no doubt never envisaged by the people who settled the wording of Article 9, as James II scuttled away, nonetheless, these are agencies which I think classically do impeach or question the transactions that they look at. You have only got to go to any ICAC to see that that is in fact what is going on, and a good thing too. That is why we have it. They impeach or question corrupt activities. For those reasons, any dealing by PIC with Mr Lynn which used their compulsory powers would be, in my view, either a step towards or, probably better, it would in fact already constitute impeaching or questioning his freedom of speech and thus the proceedings in the House.

I am one of those who read "impeach or question" in a rather wide way. It obviously mostly includes critical comments, including critical suggestion. The sceptical question is a good example, but it need not be that critical, it may simply be of a kind that I do not think was relevant in the case of PIC' s inquiry, but it could simply be finding out the reliability of material without intending to convey any criticism. But that is precisely what, in my view, PIC was not allowed to do because of the privilege. However, nothing would be waived by Mr Lynn going along to PIC and, in effect, because he chose to do so hence the voluntariness, saying, "I would like you to know the same thing I wanted the upper House to know and through the upper House people to know". There is no waiver of privilege there. I come back to where I started: otherwise we would be in the absurd and self-defeating position where you would be prevented from saying things outside the House, in useful forums like police stations or parents and citizens meetings, that you had already said in the House, and that would be totally self-defeating.

CHAIR: I have used this example on a couple of occasions today with other witnesses. We have received advice from the Parliament of British Columbia, which states, "British Columbia has experienced situations similar to New South Wales on two occasions. The cases clearly demonstrate that the use of electronic surveillance, even though it may be legally sanctioned, is seen to be a grave contempt of the House. The cases differ from the situation in New South Wales as they do not involve the seizure of print documents but instead relate to the electronic interception of private telephone conversations by members. In both cases the House was not made aware of the search warrant or the resulting processes until after the results of the surveillance had been publicly disclosed." Effectively, the relevant committee in that case concluded that a wiretap of a member's communications amounted to a breach of privilege and contempt of the House—even though they had been technically legally obtained, as they describe it, through the relevant warrant process. Do you agree that that would amount to a contempt?

Mr WALKER: In principle, in my opinion nothing that is lawful can be a contempt if it is done by an officer of the State under a statute. I distinguish obviously between things done lawfully by a private individual, such as making a statement that could also be a contempt—that is, be unlawful by being a contempt of Parliament only. But if an officer of the State was using powers granted by, or quite often conferred by discharging a duty imposed by, a statute made by Parliament, in my view that would not be a contempt of Parliament and by definition. That may be a controversial view. We are very lucky to live in a society where that has, to my mind, never even come close to being tested—I do not find it easy to imagine situations in which it would be tested. However, the example that you have raised is one that I hope this Committee and the House, with respect, will think about for the following reason. It must come down to a question of what do the statutes authorising the telephone intercepts say about parliamentary privilege? If the words are sufficiently plain, either expressly by referring to parliamentary privilege or by what I will call an inevitable implication, it is quite simple: Parliament, which includes the two Houses here, has given up any claim of privilege to the extent of such interception being authorised, regardless of privilege.

In a sense that is a truism: if you have given it up, you have given it up. But I want to focus on this point: It is essentially a question of statutory interpretation. Yes, one of the statutes is tremendously important—article 9 as re-enacted in the 1969 Imperial Acts Application Act—and yes

it has to do with two Chambers whose functions are laid down in the most important statute in the State, namely the 1902 Constitution Act. But at the end of the day the three or four statutes in question are just that: statutes—the Constitution Act; the Imperial Acts Application Act, that is the bill of rights, article 9; and whatever statute or statutes govern the telephone intercept, if that is the issue we are talking about. While soever it remains just a State question—that is, we are talking only about State legislation—it is only a matter of a court, and it will be a court of law, simply determining what these statutes mean. It will then be black and white; there will be no grey. The telephone intercept statute either authorises the telephone intercept of members' telephone conversations or it does not. There will be no grey zone.

There may be a grey zone—I have already provided advice about this—about whether it would be a breach of article 9 for them to have done that without authority, but that is a different thing altogether. The question of whether a warrant could be got for a telephone intercept regardless of the telephone calls being so closely related to proceedings of the House as to be an impeaching or questioning et cetera will be a matter of statutory interpretation. That is where the argument that ICAC has raised about the difference between seizure on the one hand and use on the other will get play again. It is a very important argument and I do not want to give the impression that I think it is easily determined. It is the kind of argument that I earnestly suggest Parliament considers legislating to avoid. There ought to be legislation to make it clear what is the immunity available to members of Parliament from what are otherwise ordinary criminal investigatory techniques.

Obviously quite different issues arise if Commonwealth legislation is being invoked to justify the telephone intercept. There is a number of difficulties there constitutionally. First, section 109 of the Commonwealth Constitution means that the Commonwealth legislation will prevail to the extent of any inconsistency but section 106 of the Constitution and the general Federal structure mean that there will be a question as to whether the Commonwealth Parliament has power to impinge upon the peculiarly governmental functions of a State in such a way as to endanger the continuation of the Constitution of the State—section 106—or of the States as polities with their own parliamentary government, the general Federal structure. That is a very grand and difficult matter of constitutional law that will probably involve questions as to whether the Commonwealth statute was of general application. It is probable that that would be an issue by dint of turning around the reasoning that applies to the Commonwealth when the State legislates that was established in Henderson's case—the Defence Housing Authority case. Suffice it to say, we are lucky that we live in a society that I suspect is unlikely to throw up that issue. I doubt that a Commonwealth law will ever be passed that can be seen to single out members of a State Parliament for electronic surveillance.

CHAIR: Given the various interpretations of when privilege applies, particularly given the ICAC proposal today—and I ask this question in light of ICAC suggestion—to what extent or in what circumstances could a Presiding Officer assert privilege and refuse to admit an executive agency from executing a search warrant on the Parliament?

Mr WALKER: That is a very hard question. With confidence, one could not do that at the moment. The House would be asking a lot of one of its officers to put himself or herself in the way of the criminal sanctions that attend impeding or obstructing the execution of a search warrant in the state of the law and parliamentary practice as it presently stands. Having said that, yes, in theory if the House took the view that ICAC was wrong in saying that it could seize material the use of which was prevented by reason of article 9 and it felt like making the Clerk's or the Deputy Clerk's life sufficiently difficult, it could certainly direct that the officers of ICAC were to be physically barred from entering.

CHAIR: A tempting proposition.

Mr WALKER: That is a particularly good example of what I was talking about earlier regarding the way that one can construct theoretical conflicts and how they would need to be determined. You usually end up talking about getting an urgent injunction. Having got lots of urgent injunctions in my life, I can tell you it is not that straightforward. Practical timing is terribly important. It would seem to me that is why, whatever else is done, there need to be protocols and memoranda of understanding between people whose job it is to execute such warrants on the one hand and people whose job it is to be the guardians of parliamentary privilege on the other hand. That is not unique to this area of conflict; there is always going to be a bit of friction and rubbing up and down among

different agencies of the State, particularly when everyone is acting in good faith. It means that people are trying to do their job rather than backing off from doing their job. I must say that the spectre of a policeman forcing himself or herself past an officer of the House is very distressing to a citizen and a lawyer. However, that is the picture that your question evokes. They are entitled to use reasonable force.

CHAIR: Given those same considerations, how does a Presiding Officer or Clerk determine whether a warrant is lawful on its face as to its form and content?

Mr WALKER: That is a bit more straightforward. The Clerk will of course be aware of the statutory provisions under which such a warrant is issued and there are certain formal requirements that must be apparent on the face of the warrant. You never know whether something is a forgery or whether the people before you are robbers posing as policemen—we are lucky in our society that that does not happen. The on-the-face question is pretty clear: there appears to be a signature by somebody who needed to sign it, it appears to invoke the right provisions, it appears, for example, to be filled out in the relevant blank spots—warrants sometimes have accidental gaps. If the form appears to be correct, you will have your ex facie validity.

The really difficult question that I have been thinking about since I was first asked it a while ago and which I do not have an answer to is: How, without knowing in quite a bit of detail the concern that ICAC has, can you determine whether the proposed use of material would amount to an impeaching or questioning of proceedings in Parliament or amount to an infringement of the freedom of speech of Parliament? I do not know whether you can know that without knowing something about the investigation. You will gather, therefore, that I am not saying that there is material that is of its nature always immune from production. I think it is contextual: it depends upon what is proposed—what is intended—for its use. In giving advice on this matter before, I have used a trivial example that I hope points it up. Take for example notes for a speech, the production of which one would ordinarily assume could clearly not be compelled because of parliamentary privilege. However, what if it was a statute for the archiving of historical documents and for some reason the State decided it was compulsory to acquire parliamentary speech notes as an archive? Far from impeaching or questioning anything, that would be enshrining something.

You could not possibly say that the taking of that document for that purpose was a breach of parliamentary privilege—or at least I do not think so. That is a very extreme example, which we do not have to worry about. But if you go to the ICAC, it is possible—though I find it hard to imagine—that in some cases something within a warrant might be for a use which would not amount to impeaching or questioning proceedings, all of which would not amount to an infringement of the freedom of speech.

One of the reasons why I think it is a good idea that you are thinking about protocols and considering where the Senate is up to in relation to this difficult area is that there are very legitimate concerns, in both the general community and the legal community, that there be no more immunity for members of Parliament from investigation of wrongdoing, particularly official wrongdoing, and it is absolutely necessary for the discharge of parliamentary business.

In other words, I suspect that there is no support in the relevant sections of New South Wales or Australian population for a more widespread parliamentary immunity of the kind that other countries have, and in my view it is good that we have that approach. But it means that we have this need in particular circumstances according to particular contexts and, according to the narrowed function I talked about earlier, to determine whether somebody can be questioned, whether their documents can be taken, and whether their words can be quoted, for example. I think that is an extremely difficult thing to address in the abstract, it requires ad hoc dealings when occasions arise, and it is very unsatisfactory at the moment that no-one can lay down the right advice.

It may be that what the ICAC says is the law should be the law. There is some virtue in it, in terms of simplicity—that is, there would be no parliamentary privilege problem at the stage of seizure; that if you do have a parliamentary privilege claim, it cannot be used, it has to be returned. But it may be that there is no mechanism for that being determined. It seems to me that whatever mechanism is involved should ultimately include the House.

CHAIR: Article 9 specifically refers to courts and other tribunals. As you say, unlike what occurred in the seventeenth century, in recognising the roles of particular bodies, to have information, to have it forcibly acquired, not to be questioned in a court but then to be made public by a body—some would suggest that that is use of that material which has a direct consequence.

Mr WALKER: An ICAC report may say: So-and-so has been guilty of corrupt conduct. I find the facts to be as follows, contrary to what he or she said in the House, for example. Or statements might be used in the House to show prejudice in favour of a particular cause, which has led to, say, an allegation of ministerial favouritism which might be corrupt. In my view, that seems to be a shocking sort of possibility, and very clearly impeaching or questioning those proceedings, that member's statements in the House.

I agree with you: It would be quite wrong to restrict the seventeenth century language to courts and tribunals which have an adjudicative role. There is also the modern phenomenon of agencies which have a reporting role, instead of reporting into the ether like the ICAC, so that there is a published finding that X has engaged in corrupt conduct. In fact, that does not change X's legal status at all. I do not see how anyone could sensibly say that that is not impeaching or questioning their conduct, because it certainly is. For example, there may be a statement in a report about somebody who may not be the main target of the report, yet their words to Parliament are to be believed. I think that is impeaching or questioning.

The Hon. AMANDA FAZIO: Earlier you outlined what one of the Clerks or Presiding Officers could do in terms of checking the legality of a warrant that is given to them. I did not understand what happens once the warrant has been served on the person, regarding the conduct of the search and seizure process, and whether there would be any way of knowing that that was being done in accordance with the terms of the warrant. We were told that the ICAC would go to a justice and have a warrant approved, that when the investigators went to the office of a member of Parliament they will not only look for things that were outlined in the warrant but they could also take anything else that they thought might assist them in their investigation.

In those circumstances, how would it be possible to determine whether the conduct of the search and seizure was being done in accordance with the warrant, if investigators have the idea that once they are in the door everything is fair game?

Mr WALKER: You are quite right: Some warrants do have the possibility of an expanded scope of seizure upon them seeing material which answers a more general description than what the interesting part of the warrant says—for example, bus tickets and dance programs between such and such a date casting light upon such and such a possibility in terms of an offence. Then there often will be another part of the warrant which is in more general terms but nonetheless describes a category of thing or document, quite often in relation to the commission of other kinds of offences perhaps.

The Parliament, in the statute in relation to warrants, and the courts in their interpretation of warrants and such legislation, obviously have taken the view over the years that in the balance between privacy on the one hand and the rooting out of wrongdoing on the other, that kind of warrant can be proper. Your question is a difficult one: How do you know that there is a conscientious good faith observance of the limits imposed by that warrant, bearing in mind that the wording you are talking about is so very general? The short answer is: You cannot know that as it is happening, because you cannot see the thought processes of the officers who are executing the warrant. So there is a degree or trust involved.

Mind you, if something is seized without justification by a warrant, it can assume the status of illegally obtained evidence, and although it is a discretionary matter, that can prove to be extremely difficult for any prosecution. So there is a trade-off, but I could not possibly say that there is any comfort or assurance I could give you that while it is going on you can know that the proper limits of a warrant's general provisions are being observed. I think it is a matter of trust and hope.

Reverend the Hon. FRED NILE: I suppose the only argument the ICAC officers could put up is a practical one: We need to seize all the documents because we want to decide what is privileged at that point. The case of Senator Harris in the Federal Parliament has been quoted. I suppose that as the Parliament set up the ICAC, it also wanted the ICAC to conduct investigations and conclude them,

therefore there may be some argument to allow that procedure so that there can be finality to that inquiry.

Mr WALKER: I agree. If they can seize a whole lot of material, and someone has to look at it in order to work out whether it can be used bearing in mind Article 9, the invidious question then is: How does that information get hoovered out of the minds of the people who looked at it? We have come across that kind of problem in litigation a fair bit. Quite often it means that particular lawyers can take no more part in litigation. That strikes me as being an extremely unfortunate matter. The ICAC is scarcely overresourced, and investigative experts are scarcely thick on the ground. It would be terrible if your A team, as it were, suddenly finds itself stopped in its tracks because they have seen something they should not have seen. Yet, I think it is a bit of a joke to say, "They promised not to think about those matters." I do not mean that unkindly at all; I just do not think that any of us are capable of doing that.

There are no easy solutions at all, which is why, I have no doubt, so many people of goodwill have come up with this idea of so-called independent arbiters. My main concern there is that the parliamentary House not, in effect, surrender its prerogative to somebody who is not elected and has none of the status and duties of a parliamentarian.

Reverend the Hon. FRED NILE: But it would save time if the independent arbiter were only involved if the documents are challenged by the member at the tribunal point?

Mr WALKER: Quite so. It may be that the constitutional propriety would be preserved, or even enhanced, if the arbiter is not an arbiter but is really an independent adviser, where it may confidently be expected that the majority of the House will always vote to accept his or her advice but preserves—not just as a matter of form, but for extreme cases—the power to say, "Thank you for your advice, but we disagree."

I would strongly advise that the notion of actually handing over adjudication to another person is just wrong in principle. The Chamber that ultimately gives a hands-on, detailed, fine-grained appreciation and enforcement of its own privileges will eventually lose them—and perhaps should lose them if it does not look after them. We have to be kept modern, for a start. We already have a problem by reason of the fact that on an object about that be could we can have millions of words of information.

Reverend the Hon. FRED NILE: I wondered about the possibility of ICAC officers involved in investigating a member of Parliament including in the search warrant words along the lines of, "Nothing in this search warrant will impede the freedom of speech, to enable proceedings in Parliament".

Mr WALKER: It would not be a bad thing for them to have to the forefront of their mind, I agree, particularly as section 122 of their Act, I believe, means that in any event. That might be a matter of legal controversy, although I do not think so. I do not know that the ICAC argues that section 122 does not apply to the things for which a warrant can be issued, although I may be wrong.

CHAIR: Would you like to add anything further?

Mr WALKER: No. I would just like to say good luck with this; it is a very important but difficult matter.

(The witness withdrew.)

(The Committee adjourned at 4.39 p.m.)