

Privileges Committee

Protocol for execution of search warrants on members' offices

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Terms of Reference

That the Privileges Committee inquire into and report on appropriate protocols to be adopted for the execution of search warrants on members' offices by law enforcement agencies and investigative bodies, and in particular the procedures to be followed:

- (a) in obtaining a search warrant,
- (b) prior to executing a search warrant,
- (c) in executing a search warrant,
- (d) if privilege or immunity is claimed, and
- (e) for the resolution of disputed claims of privilege.

These terms of reference were referred to the Committee by resolution of the House on 6 April 2005 (*Minutes of Proceedings of the Legislative Council*, No. 98, Wednesday 6 April 2005, entry 3).

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Chair's Foreword

This report recommends the adoption by the House of a protocol for the execution of search warrants on members' offices by law enforcement and investigatory agencies. The need for such a protocol was brought into stark relief in a matter which arose in 2003, in which a search warrant was executed on the office of a member of the House by the Independent Commission Against Corruption. That matter led to two inquiries by this Committee, in which the Committee found that the seizure under warrant of documents which fall within the scope of proceedings constitutes a breach of the immunities of the House. The problems which were encountered in that case provided the stimulus for the referral of the further inquiry which has resulted in this report.

In developing an appropriate protocol, one of the main issues to be addressed is that, in the execution of a search warrant there is no opportunity for claims of parliamentary privilege to be made or determined; provided material is otherwise within the terms of the warrant, it falls into the hands of the investigators. The problems which this presents are not so much the consequences for the individual member concerned, but the possible undermining of the immunity acknowledged in article 9 of the Bill of Rights 1689, which is intended to protect parliamentary conduct from external interference. On the other hand, there is an important public interest in investigative agencies being able to carry out their statutory functions without undue interference, including where members of Parliament are concerned.

In developing the protocol recommended in the report, the Committee has drawn on the experience of a number of other Parliaments, as well as the experience of the Legislative Council in the matter referred to above. It has also consulted widely with investigative agencies and law enforcement bodies. On behalf of the Committee I thank all those agencies which contributed to the Committee's inquiry. I also thank the Deputy Clerk of the Legislative Council, Ms Lynn Lovelock, and the other members of the Committee secretariat, for their efforts.



Hon Peter Primrose MLC
Chair

Chapter 1 Introduction

Background - the Breen matter

- 1.1 The origin of the current inquiry lies in a case which arose in 2003, in which a search warrant was executed in the office of the Hon Peter Breen MLC by officers from the Independent Commission Against Corruption (ICAC). In that case, following execution of the warrant, concerns arose that some of the items seized under the warrant may have been subject to parliamentary privilege, or otherwise unlawfully seized. Such concerns raised questions concerning the nature of the relationship between statutory powers of search and seizure and the rights and immunities of Parliament, which had never previously arisen for consideration by the House. In response to those concerns, certain interim measures were implemented for the storage of the seized material pending resolution of the issues raised. The House then referred an inquiry to this Committee in relation to the matter.
- 1.2 In its report on the inquiry,¹ the Committee noted that the particular aspect of parliamentary privilege which is relevant in such cases is the immunity of proceedings in Parliament from impeachment or question in any place out of Parliament, which is enshrined in article 9 of the Bill of Rights². The most common context in which that immunity is invoked is to restrict the uses to which evidence of parliamentary proceedings or related information may be put in courts or tribunals. However, in its report on the inquiry, the Committee accepted that, in the context of the execution of a search warrant, a further effect of the immunity is to prevent the seizure of such evidence or information, where an impeaching or questioning of proceedings in Parliament necessarily results. In adopting that interpretation, the Committee rejected an argument which had been advanced by the ICAC during the inquiry - that it is only the subsequent use of seized material which may amount to an impeaching or questioning, and not seizure itself. However, it relied on evidence provided by authorities in parliamentary and constitutional law.³
- 1.3 In light of that analysis, the Committee concluded that, in the case involving Mr Breen, at least one of the documents seized under the warrant fell within the scope of “proceedings in Parliament”, and that the seizure of that document constituted a breach of article 9. The Committee then recommended the adoption of a particular procedure by which the House could determine whether any of the other items seized under the warrant were also within the scope of “proceedings in Parliament”, and thus immune from seizure, including a method for resolving any disputes which might arise as to the status of particular items. The Committee specified that the procedure was not intended to be seen as a precedent to be followed in future cases, but was designed to provide a workable solution to the issues arising in that case, without compromising either of the public interests at stake.⁴ Nevertheless, the Committee

¹ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No. 25, December 2003

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

³ For details of that evidence see chapter 3 of the Committee’s report

⁴ Ie the ICAC’s right to investigate members’ conduct in accordance with its statutory functions, and the need to uphold the established rights and immunities of Parliament

acknowledged the need to address the issues raised by the case for the purposes of any similar instances in future and on that basis made a further recommendation to the House - that the development of protocols for the execution of search warrants in members' offices be referred to the Committee for inquiry and report. The Committee envisaged that such protocols would apply to all investigatory and law enforcement agencies which have power to seek and execute search warrants.

- 1.4 Following the tabling of the Committee's report, the procedure recommended for resolution of that case was adopted by the House, with some modification. The various stages of the procedure were then implemented (including by the return of the seized material to the Clerk of the House pending resolution of the issues). Finally, in 2004, following a further inquiry by this Committee (concerning the status of certain documents which had become the subject of dispute),⁵ the House upheld a claim of privilege by Mr Breen in relation to a number of the items which had been seized under the warrant, which were later returned to Mr Breen by order of the House.

Establishment of current inquiry

- 1.5 Although the case involving Mr Breen concluded in 2004, when the claim of privilege was upheld by the House, the recommendation made in that case for an inquiry on the development of protocols was not implemented until the following year.
- 1.6 The catalyst for action on the issue was the receipt by the President of the Legislative Council of correspondence from the ICAC Commissioner (and the receipt by the Speaker of the Legislative Assembly of similar correspondence) proposing that a protocol be developed for the exercise of the ICAC's powers with respect to members of Parliament.⁶ The correspondence was forwarded by the President to this Committee. The Committee then resolved to seek an appropriate reference from the House on the issue.⁷
- 1.7 In line with that resolution, on 6 April 2005, the Chair of the Committee moved a motion in the House to establish the current inquiry. The motion was agreed to by the House.⁸ The resulting terms of reference are set out at p. x of this report.
- 1.8 Subsequently, the Legislative Council received a message from the Legislative Assembly advising that an inquiry in similar terms had been referred to the Standing Committee on Parliamentary Privilege and Ethics of that House, and requesting that leave be granted to this Committee to confer with the Assembly Committee.⁹ The Council responded by message of 22 June 2005, advising that under the Council's standing orders, this Committee has power to

⁵ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC, No. 2*, Report No. 28, March 2004

⁶ Privileges Committee, Minutes no. 17, 30 March 2005

⁷ Ibid

⁸ Legislative Council, Minutes of Proceedings, No. 98, 6 April 2005, entry no. 3

⁹ Ibid, part (3)

join together with any committee of the Assembly to take evidence, deliberate and make joint reports on matters of mutual concern.¹⁰

Conduct of inquiry

- 1.9** In June 2005 the Committee adopted an Issues Paper in relation to the inquiry which included a draft protocol for the execution of search warrants in members' offices. The draft protocol drew on aspects of protocols and procedures in other jurisdictions which had been noted by the Committee in its first report on the Breen matter. It also incorporated features from the procedures which were followed in that case.
- 1.10** The Issues paper was sent to 11 agencies for comment. A range of responses were received (see Appendix 1). Following receipt of those responses, the Committee agreed to a number of changes to the draft protocol. It also sought certain further information from a number of the agencies concerning an issue which had been raised in their responses (the procedures followed for securing and preserving evidence seized under a warrant). Finally, after further deliberation, the Committee agreed to the terms of the protocol which it recommends for adoption by the House.

Structure of this report

- 1.11** The report consists of 5 chapters.
- 1.12** Chapter 2 provides an overview of protocols, procedures, and precedents from a number of jurisdictions relevant to the subject of the inquiry.
- 1.13** Chapter 3 outlines the proposed draft protocol which the Committee included in its Issues Paper, while Chapter 4 discusses the various submissions received in response to the draft protocol, the Committee's response to these submissions. Chapter 5 recommends a protocol for adoption by the House.

¹⁰ Legislative Council, Minutes of Proceedings, No. 111, 22 June 2005, entry no. 27

Chapter 2 Other jurisdictions

Execution of Search Warrants

- 2.1** In drafting a protocol for the execution of search warrants on the offices of members of Parliament, the Committee considered both the experiences of search warrants being executed as well as existing guidelines and protocols in Australian jurisdictions. In the Senate search warrants have been executed on the electorate offices of Senators Crane and Harris. In the House of Representatives the Privileges Committee conducted an inquiry in 1995, in relation to the execution of a search warrant on the office of Mr E. Cameron,¹¹ while more recently a search warrant was executed on a member's Parliament House office.¹² These cases, which were examined in the Committee's report into the execution of a search warrant on the office of Mr Breen, MLC, are summarised below. The ACT also has recently had a case of a member's documents being seized from their office under search warrant.
- 2.2** The Committee also examined protocols and procedures for the execution of search warrants on members' offices in several parliaments in Canada, where the issue of search warrants has been examined in some detail. This included the Canadian House of Commons, the Quebec National Assembly and the Alberta Legislative Assembly.

Australian Senate

Senator Crane

- 2.3** In December 1998 search warrants were executed by the Australian Federal Police on the Parliament House and electorate offices, and the home, of Senator Crane. Senator Crane sought a declaration from the Federal Court that some of the documents seized were immune from seizure on the grounds of parliamentary privilege. French J declined to make such a declaration indicating 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."¹³
- 2.4** The court ordered the documents be returned to the Senate, which subsequently appointed an independent legal arbiter, Mr Stephen Skehill SC, to examine the documents and determine which were protected by parliamentary privilege. Mr Skehill was required to give the ones that were not protected to the police, and to return the ones that were protected to the Senator. However, in the course of his examination of the documents, Mr Skehill concluded that it appeared that many of the documents seized were actually

¹¹ House of Representatives Standing Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, 1995.

¹² Correspondence from Mr Ian Harris, Clerk of the House of Representatives, 4 November 2004.

¹³ This matter was examined during the Committee's inquiry into the Breen matter. For an explanation of the judgment of French J in *Crane v Gething* [2000] FCA 45, including the unusual nature of the proceedings and the circumstances in which the issue of parliamentary privilege was raised, see the evidence of Mr Bret Walker SC: Transcript, 10/11/03, p. 43.

beyond the authorisation of the warrant and that it would be anomalous for those documents to be returned to the police. He therefore proposed that he should also determine the documents that were not covered by the warrant. The Senate agreed to have Mr Skehill also make that determination.

- 2.5** At the end of Mr Skehill's examination of the documents one bundle was returned to Senator Crane. Of the 25,000 pages of documents examined, about 1,400 pages of documents were found to be within the scope of the warrant and not privileged. These were returned to the police. After examining those documents the police announced that no prosecution would be instituted against Senator Crane. In evidence before this Committee in 2003 during its inquiry on the Breen matter, the Clerk of the Senate, Mr Harry Evans, noted that the fact that the Senate had custody of the documents, following the decision of French J, meant that the Senate was able to "impose its own solution on the whole matter" and that the police basically had no choice but to accept the arrangement.¹⁴

Senator Harris

- 2.6** In November 2001 a search warrant was executed by the Queensland Police Service on the electorate office of Senator Harris. In this case the Clerk of the Senate immediately wrote to the Queensland Police saying that some of the material may be protected by parliamentary privilege, and recommending that the material be sealed until the question was determined. The Queensland Police agreed and the material was sealed and held by the Queensland Police solicitor.
- 2.7** The Senate referred to the Senate Privileges Committee the question of whether there was any contempt involved in the issuing and execution of the search warrant. The Committee found that at that stage the Queensland Police had behaved appropriately, sealing the documents and allowing the question of privilege to be determined before seeking to examine the documents. However, as Senator Harris and the Queensland Police could not agree on the scope of the documents in dispute (Senator Harris insisting on claiming privilege in relation to all the documents seized), the matter came back to the Senate for resolution. As the Privileges Committee had a reference about Senator Harris's case, the Privileges Committee was able to commission Mr Skehill to undertake examination of the documents. Of the 74,000 pages of documents examined, Mr Skehill found that all were outside the authorisation of the warrant.
- 2.8** In evidence before this Committee during its inquiry in 2003, Mr Skehill outlined a number of concerns about the process that he was required to undertake in the Crane and Harris matters, particularly in relation to the lack of opportunity for either party to challenge his findings and the lack of protocols concerning consultation and contact with the parties during the process.¹⁵

¹⁴ NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Evidence*, 10/11/2003, pp 4-5.

¹⁵ *Ibid*, p. 21.

The House of Representatives

Mr E. Cameron, MP

- 2.9** On 22 August 1995 Mr E. Cameron, the member for Stirling (WA) raised in the House of Representatives as a matter of privilege the actions of the Australian Federal Police in searching his electorate office on 26 July 1995.¹⁶ The matter was referred by the Speaker to the House of Representatives Committee on Privileges.
- 2.10** The Committee, in the course of its inquiry, found that the execution of the warrant on the member's electorate office caused disruption to the work of the electorate office; that it impeded the ability of the constituents to communicate with the member and apparently had a prejudicial effect on the willingness of some persons to do so; and that the disruption caused to the work of the member's office amounted to interference with the free performance by the member of his duties as a member. However the Committee found that there was no evidence that the actions of the AFP officers involved were taken with any intention to infringe against the law concerning the protection of the Parliament, nor that the interference caused to the work of the office should be regarded as improper.¹⁷
- 2.11** The Committee concluded that although the work of the member's electorate office was undoubtedly disrupted by the actions of the AFP, and although these actions amounted to interference in the free performance by the member of his duties as a member, this interference should not be regarded as improper interference for the purpose of s. 4 of the Parliamentary Privileges Act 1987. However, while concluding that no contempt was committed by the AFP officers involved, the Committee did recommend that the House request the Speaker to initiate discussions with the Minister for Justice with the object of reaching an understanding in respect of search warrants.¹⁸

Mr L Brereton, MP

- 2.12** In October 2000, another member, Mr L Brereton, the member for Kingsford-Smith (NSW), and Shadow Minister for Foreign Affairs, raised as a matter of privilege the actions of AFP officers in executing a search warrant at the home of his advisor.¹⁹ However in this case, although the member was concerned that the execution of the warrant had meant that the officers involved had seen confidential material relating to the member's parliamentary duties, the Speaker stated he had seen no evidence that improper interference, as required by s. 4 of the Parliamentary Privileges Act 1987 had occurred. Consequently the matter was not referred to the Privileges Committee.²⁰

Parliament House office

- 2.13** More recently procedures drawn from the findings of the House of Representatives Standing Committee of Privileges in relation to the Cameron inquiry were put in place

¹⁶ *Australian House of Representatives*, VP 1993-95/2303-4

¹⁷ House of Representatives Standing Committee of Privileges, *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, 1995

¹⁸ *Australian House of Representatives*, PP 376 (1995)

¹⁹ *Australian House of Representatives*, VP 1998-2001/1750

²⁰ *Australian House of Representatives*, VP 1998-2001/1772

during the execution of a search warrant on a member's Parliament House office.²¹ In this case the matter involved a criminal investigation. Although the Speaker was given prior notice of the intention to exercise the search warrant it was decided that it was not necessary to know the identity of the member or specific alleged offence. The Speaker's consideration of the warrant was limited to ascertaining whether the warrant had been duly approved and ensuring that the officers seeking to execute it could demonstrate their identity. The warrant was served on the Serjeant-at-Arms who, following an indication from the Speaker, accorded access to the member's office.

- 2.14** The execution of the warrant was video-taped. The investigators were made aware of issues of parliamentary privilege and the need for confidentiality in relation to members' documents and provided with a copy of the draft AFP guidelines. The Serjeant-at-Arms or a representative remained present with the investigators at all times while they were in the building. The Serjeant-at-Arms attempted to ensure that no unauthorised person became aware that the search had taken place, that there was minimal evidence of activity in the area near the member's suite at the time, that there was minimum disruption to the office and that everything was replaced where found. The Serjeant-at-Arms asserted the right, in the absence of the member or an employee on that member's personal staff, for the member to be provided with a copy of any documentation proposed to be removed. The investigators furnished a duly completed Property Seized Record.

Australian Capital Territory

- 2.15** In March 2002 a small number of documents was seized following the execution of a search warrant on a member's parliamentary office in the ACT Legislative Assembly. The documents were all stored in the Clerk's office pending resolution of any issues concerning parliamentary privilege. In accordance with a resolution passed by the Assembly, and following agreement by the party leaders, the Deputy Clerk was appointed to examine the documents and provide a report to the Speaker for tabling on that examination. Of the 27 documents examined, one was considered immune from seizure and returned to the member. The remainder of the documents were given to the police.

South Australia

- 2.16** In South Australia in early 2002 police executed a search warrant on the electorate office and the office of the accountant of the then newly appointed Speaker of the Assembly. The Speaker sought to claim privilege over all documents, however following discussions between the Clerk of the Assembly, the Speaker's legal adviser and the police a large quantity of documents were seized in accordance with the warrant. These were later returned some two years later with no apparent action pursued as a result of the material obtained.

²¹ Correspondence to this Committee from Mr Ian Harris dated 4 November 2004.

- 2.17 At present the Assembly does not have a protocol for the search of members' offices, but the Clerk has indicated if a similar situation arose the Assembly would follow the guidelines used for the Federal Parliament as closely as possible.²²

Protocols from other jurisdictions

Australian Federal Parliament

- 2.18 In early 2005, the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate signed a *Memorandum of Understanding on the execution of search warrants in the premises of members of Parliament*. The Memorandum records the understanding of the office holders concerned on the process to be followed where the Australian Federal Police propose to execute a search warrant on the premises occupied or used by a member of Federal Parliament. Office includes the Parliament House office, the electorate office and the residence of the member. The agreed process is spelled out in the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*.
- 2.19 The *Memorandum of Understanding on the execution of search warrants in the premises of members of Parliament* and the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* were tabled in both the Senate and the House of Representatives on 9 March 2005.

Australian Federal Police National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved

- 2.20 The AFP National Guideline is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that members and their staff are given a proper opportunity to raise claims for parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.²³
- 2.21 The Guideline provides the legal background regarding the principles of parliamentary privilege, as set out in the Parliamentary Privileges Act 1987, and explicitly states that any documents and other things which attract parliamentary privilege cannot be seized under a search warrant. Furthermore it acknowledges that a document held by a member may attract public interest immunity even if it is not covered by parliamentary privilege, and that the High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant.
- 2.22 The Guideline is divided into 5 sections: Procedure prior to obtaining a search warrant; Procedure prior to executing a search warrant; Executing the search warrant; Procedure to be followed if privileges or immunity is claimed; and Obligations at the conclusion of a

²² Conversation between Mr David Bridges, Clerk of the Assembly, South Australia and Director Procedure, NSW Legislative Council, 30 January 2006.

²³ AFP *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*, Preamble, p.1.

search. In summary, before applying for a search warrant in respect to premises used or occupied by a member of Parliament, an AFP officer must seek approval at a senior level within the AFP, and if given approval must consult the appropriate DPP. Before executing the warrant on a Parliamentary office the AFP officer is to contact the relevant Presiding Officer and notify them of the search. If the Presiding Officer is not available the executing officer is to contact the Clerk or Deputy Clerk, or in the case of committee documents, the Chair of that committee. Under the Guideline the executing officer is also to consider the feasibility of contacting the member or a senior staffer to arrange on a suitable time for the execution of the warrant.

- 2.23** Unless it would affect the integrity of the investigation, executing officers are to avoid execution of a warrant on premises in Parliament on a parliamentary sitting day; to ensure the member or a senior staff member are present; and to give the member or their staffer reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed. They are also to ensure that reasonable opportunity is given to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises, and take all reasonable steps to limit the amount of material that is examined in the course of the search.
- 2.24** If privilege or immunity is claimed, the relevant documents are to be placed in audit bags in accordance with the AFP national guidelines on exhibits, and a list of the documents prepared. The member is to be given an opportunity to copy the documents, before the documents are delivered to a neutral third party for safekeeping. The neutral third party can be the warrant issuing authority or an agreed third party. The member has five working days to notify the executing officer that the claim for privilege or immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. Depending on the preference of the member, the ruling can be sought from a court or the relevant House. The items remain with the neutral third party until the claim is determined. If the member or their staff do not contact the executing officer within five working days, the claim for privilege or immunity will be assumed to have been abandoned.
- 2.25** If the member or their staff refuses to cooperate with the procedure outlined above, the executing officer may execute the warrant anyway, although they are advised to minimise the extent to which documents which may attract privilege or public interest immunity are seized. If a claim for privilege or immunity appears arbitrary, vexatious or frivolous,²⁴ unless the executing officer considers that there is a reasonable basis for the claim, they are to inform the member of their intention to execute the warrant, having first given the member an opportunity to specify the particular documents which attract privilege. If the executing officer considers that there is a reasonable basis for such a claim, it may be necessary for a large number of documents to be placed in audit bags.
- 2.26** The AFP has to notify the Attorney-General, in their capacity as First Law Officer, and the Minister responsible for the AFP in any case where a claim of parliamentary privilege has been made by or on behalf of a member of Parliament.
- 2.27** At the conclusion of the search the executing officer has to provide a receipt recording things seized under the warrant, which unless the member has taken copies, must be

²⁴ The cited example is claiming privilege for all documents located on a particular premise.

sufficiently detailed to allow the member to recall details of the things seized and obtain further advice. If it is necessary for the performance of the member's duties to access the seized material, the AFP is to facilitate access on those terms. They will also facilitate access on any other grounds permitted under applicable laws and guidelines.

Canadian House of Commons

- 2.28** In the Canadian Parliament the parliamentary precinct is controlled by the House, which has complete and sole authority to regulate and administer the precinct, without outside interference. The right to control the precinct extends to considerations of security and policing. Beyond the precinct, the RCMP is responsible for security on the grounds of Parliament Hill. The Speaker has the authority, on behalf of the House, to grant or deny police forces permission to enter the precinct. Police wishing to execute a search warrant may only enter with permission of the Speaker, and are required to present themselves to the Speaker before entering a member's office within the parliamentary precincts. The Speaker personally examines every warrant to ensure it is lawful on its face.²⁵
- 2.29** Where a member claims that certain documents attract privilege, the claim is reviewed by the Speaker. If satisfied that the claim is valid, the Speaker can assert privilege and instruct Police not to remove the documents in question. If the Police wish to dispute the claim of privilege, the Police can commence proceedings to have a court order the production the documents. The Speaker can participate in any such proceedings.
- 2.30** If the matter is still not resolved, the Speaker can continue to assert privilege in the face of a court order for the production of the documents. In all cases, the final authority for the assertion of privilege rests with the House.²⁶

Quebec National Assembly

- 2.31** Police do not have lawful access to execute a search warrant within the parliamentary precincts without the President's consent. The President obtains written advice from a specialist in criminal law as to whether the warrant is lawful then personally reviews the warrant according to criteria.²⁷ The criteria to be considered before consenting to the execution of a search warrant in relation to a Member's office in the parliamentary precincts includes:
- Is the description of the document referred to in the warrant precise and accurate?
 - Does the warrant allow the police officer discretion?
 - Is the document referred to in the warrant directly connected with the alleged offence?

²⁵ The Speaker considers the "procedural sufficiency" of the warrant and the "precise description of the documents sought."

²⁶ As described in an e-mail message from Steve Chaplin, Legal Counsel, Legal Service, House of Commons, dated 29 October 2003, and Marleau & Monpetit, *House of Commons Procedure and Practice*, 2000, pp 115-121.

²⁷ As described in an e-mail message attaching a briefing note from Hubert Cauchon & Rene Chretien, legal advisers, 22 October 2003, and P Duchesne, "Execution of Search Warrants in the National Assembly", *The Table*, volume 63 [1995], pp 23-27.

- Is it possible to obtain from another source the document referred to in the warrant?
- If the warrant refers to an original document, should we rather provide a certified copy of the document?
- Is the nature of the document referred to in the warrant related to any privileges, immunities and collective and individual rights of the House and its members?
- Are there any aspects of the document referred to in the warrant that raise the slightest doubt? If need be, can the police officer offer any explanation?
- Does the document referred to in the warrant reveal information protected by the professional secrecy which must be respected by the deputy?

Alberta Legislative Assembly

- 2.32** Before executing a search warrant, every attempt is made by the executing officer to contact the Sergeant-at-Arms, who advises the Speaker, Clerk and Parliamentary Counsel. The Speaker makes any determination as regards the validity and contents of the warrant, and the Sergeant-at-Arms arranges for the documents named in the warrant to be brought to an agreed place within the precincts.²⁸

²⁸ Forwarded by e-mail message from Robert Reynolds, Senior Parliamentary Counsel, 5 November 2003.

Chapter 3 Draft protocol forwarded to agencies for comment

- 3.1** As indicated earlier, this inquiry originated from a case which arose in October 2003 when officers of the NSW Independent Commission Against Corruption executed a search warrant in the parliamentary office of a member of the NSW Legislative Council, and seized documents and various items of computer equipment. The case led to a finding by this Committee that a breach of the immunity of the House under Article 9 of the *Bill of Rights 1689* had occurred.²⁹
- 3.2** It also led to the adoption by the Legislative Council of a procedure which would allow for the issues of privilege arising in relation to the seized material to be assessed and determined, without compromising the integrity of the ongoing external investigation. In accordance with that procedure, the seized material was returned to the Clerk, and was examined by the member, together with the Clerk, and a representative of the independent body. Subsequently, the member made a claim of privilege over some of the seized items. Following a further inquiry by the Privileges Committee, that claim was upheld by the House.³⁰
- 3.3** In the present inquiry, from the experience of both the Council and other jurisdictions in relation to the execution of search warrants on the offices of members, as well as consideration of the various methods developed in dealing with material which attracts parliamentary privilege or public interest immunity, the Committee developed a draft protocol for the execution of search warrants on members' offices by law enforcement agencies and investigative bodies. The draft protocol draws together procedures from three sources:
- the protocols adopted by the Australian Federal Police for the execution of search warrants in the offices of a member of the House of Representatives or a Senator
 - the procedure adopted by the Legislative Council for the determination of a claim of privilege raised by a member
 - the three step test adopted by the Privileges Committee for determining whether or not a member's documents fall within the scope of proceedings in parliament and are therefore protected by parliamentary privilege.
- 3.4** The terms of the draft protocol are set out below.

²⁹ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, December 2003, p 37.

³⁰ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, March 2004, pp 10-11.

Draft protocol

Procedure prior to obtaining a search warrant

- 3.5** An officer who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval at a senior level within the agency/body before applying for the warrant.
- 3.6** If approval is given, the officer should consult the office of the DPP before applying for a search warrant. The DPP can provide assistance to draft the affidavit and warrant, and can provide any legal advice required in relation to the execution of the warrant.
- 3.7** Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation.

Procedure prior to executing a search warrant

- 3.8** If the premises to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If the Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the Chair of that committee.
- 3.9** To minimise the potential interference with the performance of the member's duties, the executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant, with a view to agreeing on a time for execution of the search warrant.

Executing the search warrant

- 3.10** If possible, unless compliance would affect the integrity of the investigation, the executing officer should comply with the following procedures:
- (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day;
 - (b) a search warrant should be executed at a time when the member, or a senior member of his/her staff, will be present; and
 - (c) the member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed.
- 3.11** If the member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the member, or member's staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.
- 3.12** There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege or

immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

- 3.13** As part of that process, the executing officer should consider inviting the member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

Procedure to be followed if privilege or immunity is claimed

- 3.14** If the member, or member's staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the member, or member of staff, to identify the basis for the claim. The executing officer should then follow Procedure A, unless the executing officer considers a claim to be arbitrary, vexatious or frivolous, in which case Procedure B should be followed.

Procedure A

- 3.15** The executing officer should ask the member, or member's staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in audit bags in accordance with the AFP national guideline on exhibits. A list of the documents should be prepared by the executing officer with assistance from the member or member of staff
- The member, or member's staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer
- The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party
- The member has five working days (or other agreed period) from the delivery of the items to the third party to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained.
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling; and
- If the member has not contacted the executing officer within five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.

- 3.16** If the member, or member's staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the

circumstances of the case to minimise the extent to which the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

Procedure B

- 3.17** In some cases a member, or member's staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and that, therefore, the proposed search should not proceed in any form. If that occurs, the executing officer should consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the member, or member's staff, that he/she intends to proceed to execute the search warrant unless the member, or member's staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.
- 3.18** The agency/body will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister responsible for the agency/body (if different) in any case where a claim of parliamentary privilege has been made by or on behalf of a member.

Obligations at the conclusion of a search

- 3.19** The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.
- 3.20** The executing officer should inform the member that the agency/body will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties. The agency/body should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.
- 3.21** The agency/body will comply with any law including the requirements set out in the legislation under which the relevant search warrant was issued.

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

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

All words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, including:

- (a) the giving of evidence before a House or a committee and evidence so given,

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

3.23 In determining whether or not documents are privileged, the Clerk and the member will apply the following tests:

- (1) Were the documents **brought into existence** for the purposes of³¹ or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.³²
 - NO → move to question 2.
- (2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.³³
 - NO → move to question 3.
- (3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.
 - NO → does not fall within ‘proceedings in Parliament’.

3.24 A list of material considered to be within the scope of proceedings in Parliament (referred to as “privileged material”) will then be prepared by the Clerk and provided to the member and the agency/body.

3.25 Any material not listed as falling within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.

3.26 The agency/body may, within a reasonable time, in writing to the President of the Legislative Council, dispute any material considered to be privileged material, and may provide written reasons for the dispute.

3.27 Any privileged material not identified by the agency/body as being in dispute will be returned to the member.

³¹ In this test the expression ‘for the purposes of’ includes ‘or predominantly for the purposes of’.

³² Because the *creation* of the document was ‘an act done ... for the purposes of or incidental to the transacting of the business of the House or of a committee’.

³³ Because the *use* of the document was ‘an act done in the course of, or for the purposes of or incidental to the transacting of the business of the House or of a committee’.

- 3.28** The President will immediately inform the member of any dispute, at which time the member may provide written reasons in support of the member's claim.
- 3.29** The President will inform the House at its next sitting of any disputed claim, and table any documents provided by the agency/body or member relating to the dispute.
- 3.30** The President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.
- 3.31** Any material which the House determines is not within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.
- 3.32** Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides, with a copy to be made available to the member.

Chapter 4 Submissions and responses

4.1 Following the development of the draft protocol the Committee sought comment from relevant investigative agencies. In addition to the resolution of issues concerning parliamentary privilege in relation to seized documents, two further matters which needed to be addressed in any protocols for the execution of search warrants in members' offices included:

- the procedures to be followed in the actual execution of the warrant (including scrutiny of the warrant before access is provided), and
- procedures for resolving questions about the immunity of documents from seizure on the grounds that they are beyond the authorisation of the warrant.

4.2 On the basis of the Committee's experience in the Breen matter and the evidence received by the Committee about practices in other jurisdictions, some of the specific issues which the Committee was particularly interested in included:

- The need for additional/external checking before a decision is taken to apply for and execute a search warrant in respect of a member's office.
- Prior notice to the Clerk and Presiding Officer before execution of a warrant.
- Scrutiny of the warrant by the Presiding Officer (for procedural sufficiency and the precise description of the documents covered) before consent is given to execution of the warrant.
- Prior notice to the member.
- Requirements for the member to be present during a search.
- Administrative procedures to be adopted during execution of the warrant.³⁴
- Initial claim of privilege.
- Handling of documents subject to a claim of privilege.
- Custody of documents subject to a claim of privilege.
- Initial review of a privilege claim, and procedures for narrowing down the range of documents potentially in dispute.
- Procedures for the resolution of disputed claims of privilege.³⁵
- Procedures to minimise the risk of documents being seized that are beyond the authorisation of the warrant.
- Procedures for the resolution of disputes about documents which have already been seized and which may be beyond the authorisation of the warrant.

4.3 The Issues Paper was sent to 11 different agencies for comment. It was also forwarded to all members of the Legislative Council and to the Legislative Assembly Standing Committee on

³⁴ For example, Mr Breen suggested that future ICAC search warrants concerning members' offices be executed in the Office of the Clerk. *Submission*, 26/11/2003, pp 7-8.

³⁵ Ibid.

Parliamentary Privilege and Ethics. Responses were requested by 7 November 2005, but the final submission was not received until 23 November 2005.

- 4.4 A range of responses were provided in the submissions. The Audit Office and Australian Taxation Office advised that they do not execute search warrants. The NSW Law Reform Commission and the NSW Crime Commission did not wish to comment on the Draft Protocol. The Australian Crime Commission expressed support for the Protocol with one qualification. The Special Minister of State advised that the Government takes the view that there should be individual arrangements with each particular agency rather than a standard protocol across the board. The ICAC and NSW Police commented on various aspects of the Protocol. The ICAC also provided its own suggested alternative procedure. The Australian Federal Police noted that the draft Protocol reflects AFP policy and the guidelines which apply in the federal Parliament, and expressed strong support for the Protocol, with minor qualifications.
- 4.5 In this Chapter, the comments made in the submissions with regard to each separate section of the protocol are summarised, followed by the Committee's response.

Draft Protocol – consideration of submissions

1. Procedure prior to obtaining a search warrant

- 4.6 The draft protocol provides that, before applying for a warrant, an executing officer must consult the office of the DPP, which can assist in drafting the warrant and affidavit, and provide any legal advice required in relation to the execution of the warrant. However, the DPP advised in its submission that it does not provide the advice and assistance referred to, and requested that the reference to the DPP be deleted from the Protocol. The Australian Crime Commission acknowledged that it is desirable for legal advice to be obtained before applying for a warrant, but advised that it has its own lawyers who provide such advice and that any requirement to consult with the DPP is therefore likely to be unnecessary in its case.
- 4.7 The ICAC objected to any requirement to consult with the DPP and stated that it has its own internal procedure for applying for a search warrant which incorporates quality control mechanisms to ensure there is a well established forensic basis for the application and to ensure the accuracy of information submitted in support of it. The NSW Police advised that they do not seek advice from the DPP prior to executing a warrant, but suggested that the objective of this part of the Protocol could be achieved with more generic wording, such as "...the officer should request legal advice before applying for a search warrant."

Committee's response

- 4.8 In view of these comments the Committee agreed to amend the Draft Protocol by omitting reference to the DPP, and inserting alternative wording along the lines suggested by the Police.

Amended Protocol: Procedure prior to obtaining a search warrant

An officer who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval at a senior level within the agency/body before applying for the warrant.

If approval is given, the officer should obtain legal advice before applying for a search warrant.

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

2. Procedure prior to executing a search warrant***ICAC***

4.9 Under the ICAC's suggested alternative procedure (see Appendix 2), the ICAC is to contact the Clerk of the Council, or the Deputy Clerk if the Clerk is unavailable, prior to executing the warrant (rather than the Presiding Officer/Clerk/Deputy Clerk/Committee Chair, as required by the Committee's draft protocol). The Clerk is to arrange for the premises to be sealed and secured pending execution of the warrant.³⁶

4.10 ICAC officers are then to meet with the Clerk of the House and the member or a senior staffer of the member and outline certain matters, including obligations under the warrant and the nature of the allegations being investigated.³⁷ Based on that information the member has a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.³⁸ There is no requirement for ICAC officers to consider consulting with the member/staff as to the time of executing the warrant.

NSW Police

4.11 In its submission, the NSW Police questioned whether it can be inferred that the procedures provided by the draft protocol also apply to electoral offices, and argued that it is unclear whether they apply to Ministerial Offices or other premises occupied by members.³⁹

4.12 The Committee also noted that the Law Society and Police Memorandum of Understanding in relation to the execution of search warrants on solicitors' premises includes a guideline that a reasonable time should be allowed to the solicitor to enable them to consult with the client/s concerned to enable consultation with the legal representatives of the persons to whose affairs the documents relate and for the solicitor to obtain legal advice.

³⁶ Paragraph 2

³⁷ Paragraph 4

³⁸ Paragraph 5. It is not stated whether the reasonable opportunity is only available prior to executing the warrant or also extends to when the warrant is being executed

³⁹ At p. 3

4.13 Further, under the Memorandum of Understanding between the NSW Police and the Presiding Officers, entered into under the *Parliamentary Precincts Act 1997*, the Police are not to execute any process including a search warrant without the prior authorisation of “the Presiding Officers”, as defined in the MOU.⁴⁰

Committee’s response

4.14 In view of these comments the Committee agreed to amend the Draft Protocol by including the following provisions:

- Clerk to seal the premises
- opportunity to be given to the member and the Clerk to seek legal advice prior to the execution of the search warrant
- meeting to be held with the Clerk and member prior to execution of the warrant
- opportunity to claim privilege based on information provided at the meeting.

4.15 The Committee noted that the immunity against seizure is a content immunity, rather than attaching to the status of a member. It is possible that privilege may attach to particular documents even if the individual concerned ceases to be a member of Parliament.

4.16 The Protocol does not deal with non-parliamentary offices. However the Committee noted that documents which attract privilege are protected from seizure, even if they are held somewhere other than the member’s parliamentary office. It may be necessary for this Committee to consider the implications for members when warrants are executed on other premises, such as electorate offices and members’ homes/home offices where there is a likelihood of privileged material being present. In the case of the Federal Parliament AFP guidelines apply to the electorate office of a member and any other premises used by a member for private or official purposes on which there is reason to suspect that material covered by parliamentary privilege may be located.

Amended Protocol: Procedure prior to executing a search warrant

If the premises to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If the Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee’s documents may be involved, the Chair of that committee.

To minimise the potential interference with the performance of the member’s duties, the executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant, with a view to agreeing on a time for execution of the search warrant.

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

⁴⁰ Clause 2.13(b)

A reasonable time should be allowed to the member and the Clerk to seek legal advice in relation to the search warrant prior to its execution, and for the member to arrange for a legal adviser to be present during the execution of the warrant.⁴¹

Officers from the agency, including the executing officer, will then meet with the Clerk of the House and the member or a senior member of his/her staff or their nominated representative. The officers will outline any obligations under the warrant, the nature of the allegations being investigated, the nature of the material the agency considers is located in the member's office, and the relevance of that material to the investigation.

Based on that information the member will be afforded a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

3. Executing the search warrant

ICAC

- 4.17** Under the ICAC's suggested alternative procedure there is no prohibition against executing the warrant on a sitting day, and no requirement to execute the warrant when the member/staffer is present, or to give the member/staffer reasonable time to consult with another person. There is also no requirement for the executing officer to limit the material examined during the search in view of the public interest in the flow of information.
- 4.18** The ICAC procedure makes no allowance for claims of public interest immunity, and the ICAC objects to the inclusion of such claims on the ground that they are determined by the courts not the House, and would be unlikely to be upheld in relation to other coercive procedures available to the ICAC under the ICAC Act. The executing officer "may invite" the member or staffer to identify the relevant material,⁴² although this is subject to the proviso that the ICAC "reserves the right to search all of the premises as permitted by the warrant".⁴³ If there is no claim for privilege the warrant is executed according to its conditions and any other things located on the premises.⁴⁴

NSW Police

- 4.19** In their submission, the Police "strongly support" the inclusion of the proviso that the Protocol is observed "unless compliance would affect the integrity of the investigation". Further, they note that conditions may be imposed on the execution of a warrant by the issuing authorised justice.
- 4.20** The Police submission identifies that the draft protocols refer variously to documents and items. As searches frequently result in the seizure of material held on computers and other

⁴¹ In the Breen matter it was discovered sometime later that the warrant had not been properly executed, in that the executing officers had not searched and seized but simply seized computer records.

⁴² Paragraph 7

⁴³ Paragraph 7

⁴⁴ Paragraph 6

items, they express concern as to whether the protocols would apply to this material and what processes can be put in place to ensure that there is no accidental loss of evidence, citing as an example a situation where a computer is seized and the member demands access for the purpose of continued performance of parliamentary duties.

Committee's response

- 4.21** The draft protocol currently allowed the executing officer to bypass the procedures if compliance could affect the integrity of the investigation. However, the Committee considers that determining whether compliance with the protocol would affect the integrity of an investigation should be made at the highest possible level. As such the Committee agreed to specify that the decision should be a matter for the relevant Commissioner.
- 4.22** The Committee does not agree with the ICAC's alternative procedure, as it does not recognise the import of parliamentary privilege, especially in relation to a member's role and the sittings of the House. If a warrant is executed without either the member or their staff present, it is unlikely that the investigating officer could reasonably determine what documents fall within the scope of proceedings in Parliament.
- 4.23** The Committee believes that reference to public interest immunity should be retained. Despite the Commission's assertion "that any claim for public interest immunity" is unlikely to be upheld, it should still be recognised that it is a ground of privilege available to members. There is a close relationship between the concept of public interest immunity and parliamentary privilege, in that citizens should feel free to bring matters to the attention of members for the purpose of having them raised in Parliament. Until the member raises them or in some way brings them within the scope of a proceeding in Parliament, they fall within the area of public interest immunity. This is why the draft protocol recognises the public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Until the courts determine otherwise the Committee is of the view that the Parliament should not relinquish the concept. The Committee also notes that the AFP guideline concerning the execution of search warrants which applies in the federal Parliament makes provision for claims of public interest immunity.
- 4.24** However the Committee agreed to amend the draft protocol to include reference to the Clerk or the Deputy Clerk being present during the search, and to allow the member to have a legal adviser present if they so wished.

Amended Protocol: Executing the search warrant

Unless, in the opinion of the relevant Commissioner, compliance would affect the integrity of the investigation, the executing officer must comply with the following procedures:

- (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day, or on a day on which a parliamentary committee, involving the member, is meeting,
- (b) a search warrant should be executed at a time when the member, or a senior member of his/her staff, will be present,

- (c) the member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed,
- (d) the member may have a legal adviser present during the execution of the search warrant, and
- (e) the Clerk of the relevant House, or if the Clerk is not available, the Deputy Clerk, should also be present during the search.

If the member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the member, or member's staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

As part of that process, the executing officer should consider inviting the member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

4. Procedure to be followed if privilege or immunity is claimed

Procedure A

ICAC

- 4.25** Under the ICAC's suggested alternative procedure, if a claim of privilege is made the executing officer will isolate the relevant material, then examine it and consider whether the material is covered by the terms of the warrant or on any other basis, and if it is relevant to the investigation. If not, then the material will not be seized. If the officer considers that the material is relevant it will be placed in secure bags and sealed in accordance with Commission procedures. A detailed list will be prepared by the executing officer, with the assistance of the member or their staff.
- 4.26** Privileged material, once seized, is to be kept in the custody of the Clerk, and the warrant will not be regarded as having as yet been executed over it. The member is given three days to notify the Commission that they intend to pursue the claim of privilege. The material stays with the Clerk during this time. If the member or staffer does not agree with the procedure, then the protocol set out by the Committee in that regard will apply.

NSW Police

- 4.27** NSW Police advise that they have their own stringent standard operating procedures concerning the handling and securing of exhibits. This includes video recording of the search, strict management of exhibits, and having an occupier and independent officer present. Further, they consider five days is too long a period for the member to decide whether to pursue a claim of privilege.

Australian Federal Police

- 4.28 The AFP submitted that it may be prudent for the reference to AFP guidelines in the draft protocol to be amended to refer to the relevant State agencies guidelines on exhibit handling.

Committee's response

- 4.29 In view of these comments the Committee agreed to amend the Draft Protocol by omitting reference to AFP guidelines and specifying that the agency's procedures for maintaining evidential continuity and integrity are to be followed. Documents subject to a claim of privilege are to be held by the Clerk, and the period of time for the member to notify that they are pursuing the claim of privilege has been reduced from five days to three days.

Amended Protocol: Procedure to be followed if privilege or immunity is claimed

If the member, or member's staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the member, or member of staff, to identify the basis for the claim. The executing officer should then follow Procedure A, unless the executing officer considers the claim to be arbitrary, vexatious or frivolous, in which case Procedure B should be followed.

Procedure A

The executing officer should ask the member, or member's staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in secure bags and sealed in accordance with the agency's procedures for maintaining evidential continuity and integrity. A list of the documents should be prepared by the executing officer with assistance from the member or member of staff;
- The member, or member's staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;
- The items so secured should be delivered into the safekeeping of the Clerk;
- The member has three working days (or other agreed period) from the delivery of the items to the Clerk to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the Clerk until the disposition of the items is determined in accordance with the ruling; and
- If the member has not contacted the executing officer within three working days (or other agreed period), the executing officer and the Clerk will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the Clerk will be entitled to deliver the items to the executing officer.

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

Procedure B

- 4.30** The appears to be general agreement with the terms of Procedure B as set out in the Draft Protocols. Procedure B covers situations where the executing officer considers the claim of privilege to be arbitrary, vexatious or frivolous.
- 4.31** The ICAC has suggested that the Clerk or other representative of the House should be present.
- 4.32** The NSW Police have expressed concern over the responsibility placed on police officers seeking to execute a warrant to determine whether a claim for privilege is vexatious, frivolous or arbitrary. In particular they are concerned at the lack of guidance for officers in this decision making process, and the lack of clarity over the consequences which may flow from a decision to proceed with the search.

Committee's response

- 4.33** In view of these comments the Committee agreed to amend the Draft Protocol by providing that the Clerk or other representative of the House should be present during the execution of the search warrant; and having the executing officer consult with the Clerk in determining whether a claim of privilege is arbitrary, vexatious or frivolous.

Amended Protocol: Procedure B

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

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

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

5. Obligations at the conclusion of a search

- 4.34 None of the Agencies have commented on this section. The Committee assumes that there is general consensus in relation to this part of the draft protocol.

Draft Protocol: Obligations at the conclusion of a search

The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.

The executing officer should inform the member that the agency/body will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties. The agency/body should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

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

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

- 4.35 This issue appears to be the most problematic. The Committee's draft protocol follows the procedure adopted in determining disputed claims of privilege in relation to the execution of the search warrant on Mr Breen's office. The definition of a privileged document is based on section 16(2) of the Parliamentary Privileges Act 1987 (Cth), the text of which is quoted in the draft protocol. It also includes the three-step test developed by this committee during the inquiry into the seizure of documents from Mr Breen's office, and sets out the mechanism by which disputes can be resolved. As is appropriate in relation to determining matters of privilege, it is ultimately the House which will either uphold or deny the member's claim in relation to the privilege of any particular document or other thing.

ICAC

- 4.36 The Commission agrees with several of the procedures set out in the draft protocol, including the presence of the member, the Clerk and a Commission officer when the material is examined, and the proposed definition which is used to determine whether material falls within the scope of "proceedings in Parliament".
- 4.37 However, the Commission rejects the three-step test, suggesting instead that an independent arbiter (such as a Senior Counsel or retired Supreme Court judge) should be used to resolve any dispute over contested documents. This independent person is to provide a recommendation to the House in relation to each disputed document, which is also to be made available to the member and the Commission. Ultimately the House is to determine whether or not to uphold the claim, but must table its reasons for the decision.

NSW Police

- 4.38 The NSW Police have expressed a preference for items in dispute to be held by the nearest or issuing court, rather than with the Clerk, while the issue of privilege is being determined. It is their position that documents may be withheld from production only when in the public interest, and that the protection of confidentiality (as opposed to privilege) of documents must be balanced against the interests of justice, including the impact on law enforcement agencies investigations of serious criminal offences.
- 4.39 They have suggested that the protocol which has been in place between the Police and the NSW Law Society since 1995 provides an effective mechanism for dealing with claims of privilege.⁴⁵

Committee's response

- 4.40 The Committee believes that neither the ICAC nor the NSW Police has demonstrated an adequate understanding of the import of parliamentary privilege in relation to seizure of documents. The draft protocol has been developed to protect the important democratic and constitutional rights of members guaranteed under article 9 of the Bill of Rights. It is not an attempt to protect the privacy of members, nor to put them above the law. As such, the Committee is not willing to compromise on the important protection provided by the procedures in the draft protocol.
- 4.41 The Parliament alone is the proper authority to determine whether or not documents are privileged. If this becomes a point on which agreement cannot be reached with the respective Agencies, the House could resolve the issue by passing a resolution giving authority to the procedures to be followed.
- 4.42 However, the Committee is aware of the need to ensure that claims of privilege can be dealt with expeditiously during an extended recess of the House, or when the House has been prorogued for a general election and Council periodic election. In such cases alone the Committee agrees that an independent opinion should be obtained from a suitably qualified person, such as a Senior Counsel or retired Supreme Court judge, as agreed by the parties, as to whether there is a claim of privilege. The opinion would be made available to both parties, and tabled in the House at its next sitting.
- 4.43 The Committee has therefore agreed to amend the Draft Protocol by providing that in cases where the House has been prorogued, or when the House is in recess and the integrity of the investigation is likely to be compromised, an independent arbiter should be appointed to verify any claim of privilege.

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

When a member seeks a ruling as to whether documents are protected by parliamentary privilege, the member, the Clerk, and a representative of the agency/body will jointly be present at the examination of the material. The member

⁴⁵ Statement of General Guidelines as to the Execution of Search Warrants on the Premises of Solicitors or the Law Society Made by the Commissioner of Police for New South Wales and the Law Society of New South Wales, dated 3 May 1995, paras 8 to 14

and the Clerk will identify material which falls within the scope of proceedings in Parliament, that is:

All words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, including:

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

In determining whether or not documents are privileged, the Clerk and the member will apply the following tests:

- (1) Were the documents **brought into existence** for the purposes of⁴⁶ or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.⁴⁷
 - NO → move to question 2.
- (2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.⁴⁸
 - NO → move to question 3.
- (3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?
 - YES → falls within ‘proceedings in Parliament’.

⁴⁶ In this test the expression ‘for the purposes of’ includes ‘or predominantly for the purposes of’.

⁴⁷ Because the *creation* of the document was ‘an act done ... for the purposes of or incidental to the transacting of the business of the House or of a committee’.

⁴⁸ Because the *use* of the document was ‘an act done in the course of, or for the purposes of or incidental to the transacting of the business of the House or of a committee’.

NO → does not fall within ‘proceedings in Parliament’.

A list of material considered to be within the scope of proceedings in Parliament (referred to as “privileged material”) will then be prepared by the Clerk and provided to the member and the agency/body.

Any material not listed as falling within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.

The agency/body may, within a reasonable time, in writing to the President of the Legislative Council, dispute any material considered to be privileged material, and may provide written reasons for the dispute.

Any privileged material not identified by the agency/body as being in dispute will be returned to the member.

The President will immediately inform the member of any dispute, at which time the member may provide written reasons in support of the member’s claim.

The President will inform the House at its next sitting of any disputed claim, and table any documents provided by the agency/body or member relating to the dispute.

The President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.

Any material which the House determines is not within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.

Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides, with a copy to be made available to the member.

If a dispute concerning a claim of privilege occurs when the House is in an extended recess, or has been prorogued for a general election and Council periodic election, an independent legal opinion may be obtained by the Clerk from a suitably qualified person, such as a Senior Counsel or retired Supreme Court judge, to determine whether there is a claim of privilege.

The legal opinion is to be made available to both parties, and tabled in the relevant House at its next sitting.

Chapter 5 Recommended protocol

5.1 In view of the submissions from agencies and the Committee's responses outlined above, the Committee recommends that the following protocol be adopted for the execution of search warrants on the parliamentary offices of members of the New South Wales Parliament:

Procedure prior to obtaining a search warrant

An officer who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval at a senior level within the agency/body before applying for the warrant.

If approval is given, the officer should obtain legal advice before applying for a search warrant.

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

Procedure prior to executing a search warrant

If the premises to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If the Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a committee's documents may be involved, the Chair of that committee.

To minimise the potential interference with the performance of the member's duties, the executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant, with a view to agreeing on a time for execution of the search warrant.

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

A reasonable time should be allowed to the member and the Clerk to seek legal advice in relation to the search warrant prior to its execution, and for the member to arrange for a legal adviser to be present during the execution of the warrant.⁴⁹

Officers from the agency, including the executing officer, will then meet with the Clerk of the House and the member or a senior member of his/her staff or their nominated representative. The officers will outline any obligations under the warrant, the nature of the allegations being investigated, the nature of the material the agency considers is located in the member's office, and the relevance of that material to the investigation.

Based on that information the member will be afforded a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

⁴⁹ In the Breen matter it was discovered sometime later that the warrant had not been properly executed, in that the executing officers had not searched and seized but simply seized computer records.

Executing the search warrant

Unless, in the opinion of the relevant Commissioner, compliance would affect the integrity of the investigation, the executing officer must comply with the following procedures:

- (b) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day, or on a day on which a parliamentary committee, involving the member, is meeting,
- (b) a search warrant should be executed at a time when the member, or a senior member of his/her staff, will be present,
- (c) the member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed,
- (e) the member may have a legal adviser present during the execution of the search warrant, and
- (e) the Clerk of the relevant House, or if the Clerk is not available, the Deputy Clerk, should also be present during the search.

If the member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the member, or member's staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

There is a public interest in maintaining the free flow of information between constituents and their parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

As part of that process, the executing officer should consider inviting the member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

Procedure to be followed if privilege or immunity is claimed

If the member, or member's staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the member, or member of staff, to identify the basis for the claim. The executing officer should then follow Procedure A, unless the executing officer considers the claim to be arbitrary, vexatious or frivolous, in which case Procedure B should be followed.

Procedure A

The executing officer should ask the member, or member's staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in audit bags in accordance with the ICAC guidelines or NSW Police Standard Operating Procedures on exhibits. A list of

the documents should be prepared by the executing officer with assistance from the member or member of staff;

- The member, or member's staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;
- The items so secured should be delivered into the safekeeping of the Clerk;
- The member has three working days (or other agreed period) from the delivery of the items to the Clerk to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the Clerk until the disposition of the items is determined in accordance with the ruling; and
- If the member has not contacted the executing officer within three working days (or other agreed period), the executing officer and the Clerk will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the Clerk will be entitled to deliver the items to the executing officer.

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

Procedure B

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

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

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

Obligations at the conclusion of a search

The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.

The executing officer should inform the member that the agency/body will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties. The agency/body should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

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

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

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

All words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, including:

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

In determining whether or not documents are privileged, the Clerk and the member will apply the following tests:

- (1) Were the documents **brought into existence** for the purposes of⁵⁰ or incidental to the transacting of business in a House or a committee?

YES → falls within 'proceedings in Parliament'.⁵¹

⁵⁰ In this test the expression 'for the purposes of' includes 'or predominantly for the purposes of'.

NO → move to question 2.

(2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?

YES → falls within ‘proceedings in Parliament’.⁵²

NO → move to question 3.

(3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?

YES → falls within ‘proceedings in Parliament’.

NO → does not fall within ‘proceedings in Parliament’.

A list of material considered to be within the scope of proceedings in Parliament (referred to as “privileged material”) will then be prepared by the Clerk and provided to the member and the agency/body.

Any material not listed as falling within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.

The agency/body may, within a reasonable time, in writing to the President of the Legislative Council, dispute any material considered to be privileged material, and may provide written reasons for the dispute.

Any privileged material not identified by the agency/body as being in dispute will be returned to the member.

The President will immediately inform the member of any dispute, at which time the member may provide written reasons in support of the member’s claim.

The President will inform the House at its next sitting of any disputed claim, and table any documents provided by the agency/body or member relating to the dispute.

The President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.

Any material which the House determines is not within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.

⁵¹ Because the *creation* of the document was ‘an act done ... for the purposes of or incidental to the transacting of the business of the House or of a committee’.

⁵² Because the *use* of the document was ‘an act done in the course of, or for the purposes of or incidental to the transacting of the business of the House or of a committee’.

Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides, with a copy to be made available to the member.

If a dispute concerning a claim of privilege occurs when the House is in an extended recess, or has been prorogued for a general election and Council periodic election, an independent legal opinion may be obtained by the Clerk from a suitably qualified person, such as a Senior Counsel or retired Supreme Court judge, to determine whether there is a claim of privilege.

The legal opinion is to be made available to both parties, and tabled in the relevant House at its next sitting.

Appendix 1 List of submissions received

No.	Date received	Author
1	13 July 2005	Mr N R Cowdery AM QC Director of Public Prosecutions
2	20 July 2005	Mr R J Sendt, Auditor-General Audit Office of New South Wales
3	27 July 2005	Mr Michael Monaghan, Deputy Commissioner of Taxation Australian Taxation Office
4	24 August 2005	Mr Alastair Milroy, Chief Executive Officer Australian Crime Commission
5	12 September 2005	Mr Peter Hennessy, Executive Director New South Wales Law Reform Commission
6	23 September 2005	Hon John Hannaford, Examiner Australian Crime Commission
7	5 October 2005	Mr Phillip Bradley, Commissioner New South Wales Crime Commission
8*	18 October 2005	Hon Jerrold Cripps QC, Commissioner Independent Commission Against Corruption
9	24 October 2005	Hon John Della Bosca MLC, Special Minister for State
10	23 November 2005	Mr K E Moroney, Commissioner for Police NSW Police
11	30 November 2005	Mr Peter Drennan, National Manager, Economic and Special Operations Australian Federal Police

* See Appendix 2

(Note: Copies of all other submissions are available from the Committee Secretariat)

Appendix 2 Submission from ICAC, dated 11 October 2005



INDEPENDENT COMMISSION AGAINST CORRUPTION

// October 2005

Our ref: Z05/0037

The Hon Peter Primrose, MLC
 Chair
 Privileges Committee
 Legislative Council
 Parliament House
 Macquarie Street
 SYDNEY NSW 2000

Dear Mr Primrose

Re: Protocols for the execution of search warrants on Members' offices

Thank you for the opportunity to comment on the Committee's proposed draft protocol for the execution of search warrants on Members' offices.

The Commission welcomes the efforts of the Committee to resolve this issue and approaches the task with a genuine desire to reach agreement on a procedure.

By way of prefacing remarks, it should be noted that while the impetus for the Committee's work on this subject arises primarily from the circumstances surrounding the execution of a search warrant over the Parliament House office of the Hon Peter Breen MLC that matter marked the first occasion that the Commission had sought to exercise its search warrant powers over a Member of Parliament since its establishment in March 1989. This is so notwithstanding that during this time the Commission had had occasion to investigate allegations involving a different number of Members.

It has not been the Commission's experience that its investigation of those allegations has been hampered or unduly restricted by claims of parliamentary privilege, even where other formal coercive powers under the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") have been utilised.

In this respect it is noted that the draft protocol is limited to search warrants only and does not purport to cover the situation of other coercive powers that the Commission at least has available to it.

In relation to the draft protocol the Commission makes the following comments.

First, it is noted that the draft protocol purports to deal also with any claims of public interest immunity that presumably either an individual Member or the House itself may make over material that may come within the terms of material authorized to be seized under the search warrant. This application seems to be drawn from similar

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provisions in the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.

The Commission is opposed to any proposed protocol applying to claims of this kind.

A well established body of principles and law has developed in relation to claims for public interest immunity and unlike claims for parliamentary privilege the Courts' role in adjudicating upon such claims is well settled.

In any event, under section 23 of the ICAC Act the Commission has the power to enter and inspect any premises occupied or used by a public authority and inspect any document or other thing in or on the premises and take copies of any document in or on the premises. This is similar to the powers authorised under a search warrant although it does not permit the taking of original documents or other things.

Section 25 applies to the power under section 23 and in particular sub section 3 provides as follows:

3) *The powers may however be exercised despite:*

- (a) any rule of law which, in proceedings in a court of law, might justify an objection to an inspection of the premises or to production of the document or other thing on grounds of public interest, or*
- (b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or*
- (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official.*

It is therefore unlikely that any claim for public interest immunity could be upheld if the Commission were to seek to use the power under section 23 to enter a Member's office and inspect and copy documents and other material in or on those premises albeit that this would not apply in the case of a search warrant. Search warrants obtained by the Commission are subject to the provisions of the *Search Warrants Act 1985*

Second, the Commission also has its own internal procedure for applying for a search warrant which incorporates quality control mechanisms to ensure there is a well established forensic basis for the application and to ensure the accuracy of information submitted in support of it.

The Commission would also object to any protocol that mandated prior consultation with the Office of the Director of Public Prosecutions (DPP) before applying for a search warrant. It is also unlikely that the DPP itself would provide this advice at such an early stage of the investigative process.

Third, the occasions on which the Commission considers it necessary to execute a search warrant on the office of a Member of Parliament has proven to be rare. It is also not anticipated that any protocol that may be agreed upon would need to be called on frequently.

Fourth, there are a number of issues that the Commission has with the substantive terms of the draft protocol particularly in relation to the matters set out under the heading "Procedure to be followed if privilege or immunity is claimed". Most notably the Commission takes issue with the test for determining whether or not documents are privileged as referred to in pages 5-6 of the draft.

In response the Commission submits an alternative process that takes into account the following matters;

- That the Commission acknowledges the importance of parliamentary privilege as provided for in section 122 of the ICAC Act and in the conduct of its investigations does not wish or seek to infringe any privilege that the House may have.
- That the majority of documents and other material in a Member's office will not ordinarily be covered by parliamentary privilege; this was noted by French J in *Crane v Gething* and was also observed by Bret Walker, SC in his initial advice to the Legislative Council of 9 October 2003 in relation to the search warrant executed on Mr Breen's office (at para 7).
- That, subject to the nature of the allegations that the Commission is investigating, experience suggests that the Commission's interest in the contents of a Member's office will also ordinarily be very limited;
- That in making the decision to seek a search warrant, the Commission acknowledges that what otherwise may have been a covert investigation up to that point will now likely move to a more overt phase;
- That potential areas of difference can be further reduced, subject to any overriding operational requirements, by the Commission providing as much information as possible about the nature of its interest in material that it believes is located in a Member's office and in return the Member and/or the House providing information in support of a claim for parliamentary privilege.

With these matters in mind, the Commission proposes the following procedure. In doing so, the Commission has had particular regard to the procedure agreed upon between the Commission and the House in relation to Mr Breen's matter and as resolved by the Council on 4 December 2003 and amended on 5 December 2003.

1. Upon authorisation being given for the search warrant, Commission officers will contact the Clerk of the Council before executing the warrant and notify the Officer of the proposed search. If the Clerk is not available, the officer will notify the Deputy Clerk.
2. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. Subject to the conditions of the warrant and the operational integrity of the investigation, the Commission will then contact the Member or a

senior member of his/her staff to advise of the warrant and its proposed execution;

4. Commission officers including the executing officer will then meet with the Clerk of the House and the Member or a senior member of his/her staff of their nominated representative where, together with any obligations provided for by the warrant, the Commission will outline the nature of the allegations it is investigating and the material it considers is located in the Member's office and the relevance of that material to the investigation.
5. Based on that information the Member will be afforded a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
6. If there is no claim for privilege, the warrant will then be executed according to its conditions and any other relevant matters relating generally to the execution of search warrants.
7. As part of this process the executing officer may invite the Member or a member of his/her staff to be present during the search and to identify where in the premises those document and other material that are covered by the warrant are located. The Commission however reserves the right to search all of the premises as permitted by the warrant.
8. The Clerk or the Deputy Clerk should also be present during the search.
9. If the Member, or their staff officer or nominated representative claims parliamentary privilege in respect of any documents or other things on the premises, the executing officer should inquire as to the basis for the claim.
10. The relevant material will be isolated and after examining the material, the executing officer will give consideration to whether the material is covered by the terms of the warrant or on any other basis and if it is relevant to the investigation. If not then it will not be seized.
11. If parliamentary privilege is claimed over the material and the executing officer considers it relevant to the investigation the relevant material will be placed in secure bags and sealed in accordance with Commission procedures in maintaining evidential continuity and integrity. A detailed list of the documents will then be prepared by the executing officer with assistance from the Member or their staff member.
12. The documents or other material once secured and itemised should then be kept in the custody of the Clerk and a copy of the list provided to the executing officer and the Member or their staff member.

13. The warrant will not be regarded as having as yet been executed over any material secured in accordance with para 12.
14. The Member has three working days (or other agreed period) from the date of the execution of the warrant to notify the Commission either that the claim for parliamentary privilege has been abandoned or that the claim is maintained.
15. Where the Member advises that the claim of parliamentary privilege is maintained the documents and other material will remain in the possession of the Clerk until the claim is determined.
16. If the Member has not contacted the Commission within three working days (or other agreed period) the Commission and the Clerk will be entitled to assume that the claim for parliamentary privilege has been abandoned and the Clerk will deliver the documents and other material to the Commission.

If the Member or his/her staff member is not prepared to agree to this procedure or no other suitable mutual arrangement is reached with the executing officer, the executing officer will proceed to execute the warrant in accordance with its terms and conditions and ensure that the search team does not seize material which they consider may attract parliamentary privilege.

If the executing officer considers that the Member's or their staff member's claim for parliamentary privilege is arbitrary, vexatious or frivolous then the executing officer should proceed in accordance with **Procedure B** of the draft Protocol with the proviso that the Clerk or other representative of the House should be present.

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

The Commission agrees with the proposal that where a Member seeks a ruling as to whether documents are protected by parliamentary privilege, the Member, the Clerk and a Commission officer will be jointly present at the examination of the material.

It is noted that this was part of the agreed procedure adopted in Mr Breen's matter as per para 10(3) of the Council's resolution of 4 December 2003.

The Commission also agrees that part of the process of determining whether material is covered by parliamentary privilege is determining whether material falls within the scope of "proceedings in Parliament" and for that purpose the Commission accepts the proposed definition as drawn from section 16(2) of the *Parliamentary Privileges Act 1987 (Cth)*.

Commission does not accept the test to be applied is as set out in the draft protocol.

It is noted that the draft protocol appears to suggest that the same test would be applied by both the Clerk and the Member in assessing material over which a claim is asserted and by the House itself in determining that claim if the Commission were to dispute this assessment.

In the alternative, the Commission proposes that;

- if the Clerk and the Member assess that material is covered by parliamentary privilege and;
- the Commission continues to dispute that assessment and;
- it considers that the material is relevant to its investigation;

in the interest of discharging its obligations under the ICAC Act and from a public perception point of view, an independent opinion from a suitably qualified person (eg a Senior counsel or retired Supreme Court Judge) as agreed by the parties be obtained on each contested document as to whether there is an applicable claim of privilege.

The independent person would provide a recommendation to the House – in recognition that a third party decision cannot bind the House on the question of privilege – which may then assert the privilege having considered the recommendation.

The independent person's opinion would be made available to both the Commission and the House.

In the event that the House did not accept this opinion, it should table reasons in the House for its decision.

The Commission confirms its willingness to work with the Committee and the Parliament generally in seeking to agree on a procedure for what is an important and complex issue and looks forward to hearing from you further on the matter.

Yours faithfully



The Hon Jerrold Cripps QC
Commissioner

Appendix 3 Minutes of Proceedings

Minutes of the Committee's proceedings

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

Minutes No. 17

Wednesday 30 March 2005, Parliament House, 10.00 am.

1. Members present

Mr Primrose (in the Chair)
Mr Catanzariti
Ms Forsythe
Ms Griffin

Apologies were received from Revd Dr Moyes, Miss Gardiner and Ms Fazio.

In attendance: Lynn Lovelock, David Blunt, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 16 were confirmed on motion of Ms Forsythe.

3. Correspondence

The Chair tabled the following correspondence:

Correspondence received:

Letter dated 10 March 2005 to the Chair from the President, forwarding a letter from the Hon Jerrold Cripps QC, Commissioner to the Independent Commission Against Corruption (ICAC) related to the development of a protocol between ICAC and the Presiding Officers on the exercise of functions and powers by the ICAC in respect of members of parliament.

4. Protocols for search warrants.

The committee continued to deliberate.

Resolved, on the motion of Ms Forsythe:

1. That the committee seek a reference from the House to inquire into and report on appropriate protocols to be adopted for the execution of search warrants on members' offices by law enforcement agencies and investigative bodies.
2. That the secretariat draft a position paper for consideration by the committee.
3. That after consideration the final position paper be circulated to agencies for comment.
4. That the committee consider responses from the various members and agencies before reporting to the House.

9. Adjournment

The committee adjourned at 11.35 am until Wednesday 6 April at 1.00 pm.

Minutes No. 19

Thursday 23 June 2005, Parliament House, 1.00 pm.

1. Members present

Mr Primrose (in the Chair)
 Mr Catanzariti
 Ms Fazio
 Ms Forsythe
 Miss Gardiner
 Ms Griffin
 Revd Nile

In attendance: Lynn Lovelock, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 18 were confirmed on motion of Ms Forsythe.

4. Draft paper “Protocols for the Execution of search warrants on members’ offices”

The Committee considered the draft report.

Resolved on the motion of Ms Forsythe: That the draft issues paper be adopted.

The committee continued to deliberate.

Resolved on the motion of Ms Fazio: That the issues paper be circulated to members of the Legislative Council, the Legislative Assembly Standing Committee on Parliamentary Privileges and Ethics, the Independent Commission Against Corruption, the Police Integrity Commission, the NSW Police Service, the Director of Public Prosecutions, the Australian Federal Police, and other relevant agencies or organisations.

5. Adjournment

The committee adjourned at 1.18 pm sine die.

Minutes No. 20

Wednesday 20 September 2005, Parliament House, 2.00 pm.

1. **Members present**

Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin

An apology was received from Revd Nile

In attendance: Lynn Lovelock, Steven Reynolds, Velia Mignacca, Janet Williams.

2. **Confirmation of minutes**

Minutes no. 19 were confirmed on motion of Ms Griffin.

3. **Correspondence**

The Chair tabled the following correspondence:

Correspondence received:

Letter dated 8 July 2005 to the Chair from Siwan Davies, Research Director for the Queensland Members' Ethics and Parliamentary Privileges Committee, acknowledging receipt of the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 11 July 2005 to the Chair from Mr N R Cowdrey AM QC, Director of Public Prosecutions, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 15 July 2005 to the Chair from Mr R J Sendt, Auditor General, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 22 July 2005 to the Chair from Mr M Monaghan, Deputy Commissioner of Taxation, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 18 August 2005 to the Chair from Mr Alistair Milroy, Chief Executive Officer, Australian Crime Commission, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 5 September 2005 to the Chair from Mr Peter Hennessy, Executive Director, New South Law Reform Commission, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Correspondence sent:

Letter dated 6 July 2005 to the following people and organisations inviting comments on the draft protocol for the execution of search warrants on members' offices.

Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics
 Council for Civil Liberties
 Australian Crimes Commission
 Australian Federal Police
 Auditor-General
 Australian Taxation Office
 Director of Public Prosecutions
 Independent Commission Against Corruption
 NSW Crimes Commission
 New South Wales Law Reform Commission
 NSW Police Service
 Police Integrity Commission
 Members of the Legislative Council
 The Hon John Hanaford

7. Adjournment

The committee adjourned at 2.35 pm sine die.

Minutes No. 21

Wednesday 19 October 2005, Parliament House, 1.00 pm.

1. Members present

Mr Primrose (in the Chair)
 Mr Catanzariti
 Ms Fazio
 Ms Forsythe
 Miss Gardiner
 Ms Griffin
 Revd Nile

In attendance: Lynn Lovelock, Steven Reynolds, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 20 were confirmed on motion of Ms Fazio.

3. Correspondence

The Chair tabled the following correspondence:

Correspondence received:

Letter dated 21 September 2005 to the Chair from the Hon John Hannaford, Examiner, Australian Crime Commission, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Letter dated 23 September 2005 to the Chair from Mr Phillip Bradley, New South Wales Crime Commission, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Facsimile dated 27 September 2005 to the Chair from the Mr Ashley Holmes, Senior Sergeant, NSW Police in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices and requesting an extension for response.

Letter dated 11 October 2005 to the Chair from the Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

4. Protocols for search warrants

The Committee deliberated.

Resolved on the motion of Revd Nile: That at a meeting to be scheduled next month, the committee consider a summary of submissions received in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices, together with proposed recommendations for such protocols.

6. Adjournment

The committee adjourned at 1.20 pm sine die.

Minutes No. 22

Wednesday 9 November 2005, Parliament House, 1.00 pm.

1. Members present

Mr Primrose (in the Chair)
Mr Catanzariti
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Revd Nile

In attendance: Lynn Lovelock, Velia Mignacca, Janet Williams.

2. Confirmation of minutes

Minutes no. 21 were confirmed on motion of Ms Fazio.

3. Correspondence

The Chair tabled the following correspondence:

Correspondence received:

Letter dated 20 October 2005 to the Chair from the Hon John Della Bosca, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

5. Protocols for search warrants

The Committee deliberated.

Resolved on the motion of Revd Nile: That proposed recommendations for draft protocols for the execution of search warrants on members' offices be prepared for the next meeting.

6. Adjournment

The committee adjourned at 1.15 pm until Monday 28 November at 10.00 am.

Minutes No. 23

Monday 28 November 2005, Parliament House, 10.00 am.

1. **Members present**

Mr Primrose (in the Chair)
Ms Fazio
Ms Forsythe
Miss Gardiner
Ms Griffin
Ms Sharpe

An apology was received from Revd Mr Nile.

In attendance: Lynn Lovelock, Steven Reynolds, Velia Mignacca, Janet Williams.

2. **Confirmation of minutes**

Minutes no. 22 were confirmed on motion of Ms Fazio.

3. **Correspondence**

The Chair tabled the following correspondence:

Correspondence received:

Letter dated 23 November 2005 to the Chair from KE Moroney, Commissioner for Police, NSW Police, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

6. **Protocols for search warrants**

A briefing paper entitled "Search Warrant Protocols" was distributed to members.

The Committee deliberated and agreed to consider an amended version of the paper at the next meeting of the committee.

7. **Adjournment**

The committee adjourned at 11.40 am sine die.

Minutes No. 24

Tuesday 7 February 2006, Parliament House, 10.01 am.

1. **Members present**

Mr Primrose (in the Chair)
 Ms Forsythe
 Miss Gardiner
 Ms Griffin
 Revd Mr Nile
 Ms Sharpe

An apology was received from Ms Fazio.

In attendance: Lynn Lovelock, Steven Reynolds, Velia Mignacca, Janet Williams, Jenelle Moore.

2. **Confirmation of minutes**

Minutes no. 23 were confirmed on motion of Mrs Forsythe.

3. **Correspondence**

The Chair tabled the following correspondence:

Correspondence received:

Facsimile received on 30 November 2005 by the Clerk from Mr Peter Drennan, in response to the letter from the committee inviting comments on the draft protocol for the execution of search warrants on members' offices.

Confidential email received 6 December 2005 to the Clerk from Mr John Pritchard, ICAC, with an extract from the ICAC procedure for registration, control and disposal of property obtained under a search warrant, attached.

Confidential letter dated 9 December 2005 to the Chair from Ms Jenny Scholz, NSW Police, attaching documents relating to NSW Police responsibilities while executing search warrants.

Confidential email received on 12 December 2005 to the Clerk from Ms Victoria Prescott, Australian Federal Police, with the AFP National Guidelines on Property and Exhibits, attached.

4. **Consideration of draft paper on protocols for search warrants for members' offices**

The Committee considered a draft paper entitled "Protocols for search warrants for members' offices", dated February 2006, previously circulated to members of the committee.

Resolved, on motion of Revd Mr Nile: That a draft report be prepared for the Committee to consider.

The Chair indicated the draft paper should be considered as the Chair's draft report.

The Committee considered the Chair's draft report.

The Committee considered Chapter 1.

Resolved, on the motion of Revd Mr Nile: That Chapter 1 be adopted.

The Committee considered Chapter 2.

Resolved, on the motion of Ms Griffin: That Chapter 2 be adopted.

The Committee considered Chapter 3.

Resolved, on the motion of Revd Mr Nile: That Chapter 3 be adopted.

The Committee considered Chapter 4.

Resolved, on the motion of Revd Mr Nile:

That the information contained in Chapter 4 be presented as two separate chapters:
Chapter 4 entitled "Submissions"
Chapter 5 to contain the protocol.

Resolved, on the motion of Ms Sharpe: That the Clerk draft a form of words to ensure that it is understood that while the protocol only applies to Parliament House, the issue of privileged documents arises regardless of the location of the premises searched.

Resolved, on the motion of Revd Mr Nile: That the Clerk draft a form of words to ensure that it is understood that the privileged status applies to the material and documents rather than the member or ex-member in whose custody they reside.

Resolved, on the motion of Revd Mr Nile: That the second last paragraph of section 4.42 on page 13 be amended by:

1. Omitting "may" and inserting "will";
2. Inserting "by the Clerk" after "obtained";
3. Omitting "by the parties".

Resolved, on the motion Revd Mr Nile: That Chapters 4 and 5, as amended, be adopted.

Resolved, on the motion of Mrs Forsythe: That the report, as amended, be adopted.

Resolved, on the motion of Mrs Forsythe: That the report be signed by the Chair and presented to the House.

Resolved, on the motion of Mrs Forsythe: That the submissions, correspondence and other documentation received by the Committee (excepting those documents for which confidentiality has been requested) be tabled with the report and made public.

The committee continued to deliberate.

Resolved, on the motion of Mrs Forsythe: That, upon tabling, the report paper be circulated to all members of the Legislative Council and the Legislative Assembly, and all those who contributed submissions and information.

8. Adjournment

The committee adjourned at 10.55 am sine die.
