The Senate

Committee of Privileges

Parliamentary privilege and the use of intrusive powers

Volume of submissions to the inquiry

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Volume of submissions to inquiry

LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Clerk and Chief Executive

Ref: 10/48.76

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Dear Mr Clerk

I thank the Standing Committee of Privileges of the Australian Senate for the opportunity to make a short submission on the matter of whether existing protocols for the execution of search warrants in the premises of Members of Parliament, or where parliamentary privilege may be raised, sufficiently protect the ability of Members to undertake their functions without improper interference.

In the Northern Territory sufficient protections are not yet in place. There are no Memoranda of Understanding (MOU) in existence with investigatory and law enforcement bodies about the execution of search warrants on Members and the handling of material which is privileged.

However, the matters the Senate Committee is considering are of contemporary interest in the Northern Territory because development of MOU between the Legislative Assembly and the Northern Territory Police and a soon to be created Independent Commission Against Corruption (ICAC) has commenced.

The *Anti-Corruption Integrity and Misconduct Commission Inquiry Final Report* published in May 2016 specifically recommended retention of parliamentary privilege and cites a submission I made to that inquiry (at page 203) recommending that the boundaries concerning the tensions between the proposed investigatory body and the Assembly vis a vis parliamentary privilege be well defined. The Inquiry (Hon Brian Martin AO QC), recommended *an appropriate Memorandum of Understanding be put in place between the Police and the Assembly which could, in due course, also apply to the new NT Anti-Corruption Commission* (Paragraph 427).

I am advised that the proposed ICAC legislation remains in the drafting stages, however the Northern Territory Assembly, with the powers and privileges available to it under the *Legislative Assembly (Powers and Privileges) Act,* will have a specific interest in relation to how it retains and manages the protection of privilege and the handling of privileged material. (Note: s.6 (2) (c) of the Northern Territory Act is identical to s.16 (2) (c) of the Commonwealth Act (*Parliamentary Privileges Act 1987*)

and the entirety of s.6 of the Northern Territory Act is almost identical to the Commonwealth Act except for the headings and the references to the Australian Constitution in the Commonwealth Act.) Section 8 of the *Northern Territory Act* prohibits the execution of search warrants within the precinct of the Assembly without the approval of the Speaker.

One important question to be considered is what will the legislated 'intention' of the ICAC be when considering seizure of potentially privileged material, and who will determine a contested question of parliamentary privilege. Getting the drafting right for the proposed legislation as well as the proposed MOU will be critical for upholding and preserving the privileges of the Assembly as they exist and are expected to exist so that they serve the function of the Assembly itself.

A perceived community disregard and distrust of politicians should not be permitted to cloud the principles underpinning the independence and integrity of the Assembly.

The opportunity presents to avoid a situation where a law enforcement body is permitted to indiscriminately vacuum up material for later sorting as opposed to consciously proceeding on the basis of not intending to gather up privileged material. This is very pertinent to modern evidence gathering techniques such as seizing data in covert operations where a Member is not in a position to assert privilege because they have no knowledge the material has been gathered.

Once the material in contention is seized or about to be seized then how it is treated is very significant.

The then President of the New South Wales Legislative Council stated in October 2003 in relation to seizure of documents by the NSW ICAC in possession of a Member of the Legislative Council: *..only the House can resolve the question of parliamentary privilege arising from an execution of a search warrant to seize documents and things in the possession of a member. I regard the seizure of material protected by parliamentary privilege seriously and am concerned to ensure that proper procedures are put in place to determine questions of parliamentary privilege arising from an execution of search warrants to seize documents and things in possession of members. In this regard I note the work of the Senate committee of privileges in its reports numbers 75, 105 and 114 concerning the execution of search warrants in senators' officers.*

In his submission to the subsequent NSW Inquiry, the then Clerk of the Senate submitted that Article 9 of the Bill of Rights confers an immunity from the compulsory production of documents, including by means of the execution of a search warrant, where documents are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings.

While Article 9 does not prevent the seizure of documents per se, it arguably does operate to prevent the seizure of documents when the use would amount to impeaching or questioning parliamentary proceedings. Perhaps s.16 of the Commonwealth Act and s.6 of the Northern Territory Act should be amended to make this abundantly clear. As drafted, the 'avoidance of doubt' that Article 9 applies as stated in the legislation, could be made even clearer to interpret Article 9 to ensure prevention of seizure when the use of the seized documents amounts to a covert or overt impeaching or questioning of the motives of a Member or the proceedings of a parliament.

The idea that privileged documents may be seized but not used requires an active seizure to be contemplated in isolation from the purpose of which the seizure was effected. Surely there is little point in seizing documents in the first place if it is clear that privilege will apply.

There is also the concern that an 'authorised officer' sees documents and they should then be erasing from their minds any material they have knowledge of in the process of seizure which is subsequently determined to be privileged.

In the Northern Territory, as negotiations commence about the drafting of a relevant MOU, we are paying attention to the NSW Memorandum of Understanding where Procedure 9 of the ICAC's Operations Manual is adopted as the procedure for obtaining and executing search warrants, clause 10 of which states:

> *In executing a warrant on the office of a Member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any document which falls within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee*
>
> *Parliamentary privilege belongs to the Parliament as a whole, not individual members.*
>
> *This procedure is based on the protocol recommended by the Legislative Council Privileges Committee in February 2006 (Report 33).*

The protocol allows for contacting the Member as well as the Clerk and the attendance of an ICAC lawyer to attend a search with the Search Team to provide legal advice on the matter of parliamentary privilege. Specifically clause 10 subclause 8 states: *The Search Team Leader should not seek to access, read or seize any document over which a claim for parliamentary privilege is made.*

When a ruling is sought as to whether documents are protected by parliamentary privilege, the Member, the Clerk and a representative of the ICAC will jointly be present at the examination of the material. The Member and the Clerk identify the material which they claim falls within the scope of parliamentary proceedings. A list will then be compiled by the Clerk and provided to the Member and the Commission's representative.

In the event the ICAC disputes the claim of privilege they write to either the President of the Legislative Council or the Speaker of the Legislative Assembly (as the case may be) and the issue is determined by the relevant House of Parliament.

It remains to be seen how the draft legislation proposed for the Northern Territory will deal with this matter. The South Australian model raises some concerns where the legislated arbiter takes the form of the Supreme Court with an officer of the ICAC as an intermediary.

The *Independent Commissioner Against Corruption Miscellaneous Amendment Bill 2016* (now in schedule 3 of the principal Act) provides a procedure without explanation as to why it was considered the best approach. The South Australia Attorney General's second reading speech introducing the bill does not explain the policy rationale. He said: *the bill will also make clear what I understand is already the practice of the ICAC investigators when undertaking a search to secure documents*

over which the claim of privilege is made. It also provides clarity around the use of information obtained during an investigation under the ICAC act.

While there is no question courts may determine from time to time whether parliamentary privilege arises in the context of proceedings brought before the courts, giving a court a specific and permanent function to determine parliamentary privilege is an interesting policy development which appears not only unnecessary but furthers a perception that parliamentarians cannot be relied upon to understand and resolve matters relating to a core principle of a Westminster parliament. A better approach might be for the Presiding Officer in consultation with Members to source expert opinion, thus keeping the decision with the Parliament rather than outsourcing it permanently.

While this submission provides no concrete examples from this jurisdiction relevant to the Senate Committee's inquiry of the matters under investigation, the matters are very pertinent to contemporary policy development in the Northern Territory and the Senate Committee's final report will no doubt be instructive for policy makers in this jurisdiction. Thank you for the opportunity to make this submission

Yours sincerely

Michael Tatham
Clerk

10 April 2017

IGIS
Inspector-General of
Intelligence and Security

Submission to Senate Standing Committee of Privileges

The Hon. Margaret Stone
Inspector-General of Intelligence and Security

11 April 2017

Contents

SUMMARY

This submission provides background information about the role of the Inspector-General of Intelligence and Security (IGIS) and the operations of the Australian intelligence agencies. It does not contain any recommendations nor does it comment on the ambit of parliamentary privilege.

The key points of the submission are:

- The Inspector-General is a statutory officer supported by a small agency which oversees the operational activities of the Australian intelligence agencies. The IGIS conducts regular inspections and undertakes inquiries to provide assurance that the intelligence agencies operate legally, with propriety and consistently with human rights.
- The IGIS conducts regular inspections of intelligence agency activities. Parliamentary privilege potentially raises issues of legality and propriety meaning it is within the jurisdiction of the IGIS to consider these matters as part of the review of intelligence agency operations.
- Of the six Australian intelligence agencies only the Australian Security Intelligence Organisation (ASIO) can obtain warrants to use intrusive powers such as authorised by search warrants inside Australia.
- In addition to regular inspections of intelligence operations the IGIS conducts inspection projects and inquiries. There are two projects relating to ASIO that may be of interest to the Committee, one concerning the retention of intelligence about currently serving parliamentarians and one concerning the retention and destruction of records.
- It is unlikely that ASIO would seek a warrant from the Attorney-General to search premises occupied by a member of parliament, however, if that should occur the normal practice would be for planning and execution of the search to be undertaken in conjunction with the AFP. The *AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved* would then be relevant.

1. ROLE OF THE INSPECTOR-GENERAL

1.1 The Inspector-General of Intelligence and Security (IGIS) is an independent statutory office holder appointed by the Governor-General under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).

1.2 The Office of the IGIS is within the Prime Minister's portfolio but is not part of the Department of the Prime Minister and Cabinet. As an independent statutory office holder, the IGIS is not subject to general direction from the Prime Minister, or other ministers, on how responsibilities under the IGIS Act should be discharged.

1.3 The Office of the Inspector-General currently has 16 staff (plus the Inspector-General) and receives an annual appropriation of $3m.

1.4 Under the IGIS Act the role of the Inspector-General is to assist Ministers in overseeing and reviewing the activities of the six Australian intelligence agencies, namely:

- Australian Security Intelligence Organisation ASIO)
- Australian Secret Intelligence Organisation (ASIS)
- Office of National Assessments (ONA)
- Defence Intelligence Organisation (DIO)
- Australian Geospatial-Intelligence Organisation (AGO)
- Australian Signals Directorate (ASD).

1.5 The IGIS reviews activities of these agencies for legality, and propriety and for consistency with human rights. The Inspector-General also assists the Government in assuring the Parliament and the public that intelligence and security matters relating to Commonwealth agencies are open to scrutiny.

1.6 The office of the Inspector-General carries out regular inspections of the intelligence agencies which are designed to identify issues of concern, including in the agencies' governance and control frameworks. Early identification of such issues may avoid the need for major remedial action.

1.7 The inspection role is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, akin to those of a royal commission, including the power to compel persons to answer questions and produce records and documents, to take sworn evidence, and to enter agency premises.

1.8 The IGIS can investigate complaints, including complaints by members of the public or staff of an intelligence agency, about the activities of an intelligence agency.

1.9 The role and functions of the IGIS are important elements of the overall accountability framework imposed on the intelligence agencies. The focus of the IGIS on the operational activities of the intelligence agencies complements oversight of other aspects of governance in those agencies by the Parliamentary Joint Committee on Intelligence and Security and the Australian National Audit Office.

2. THE AUSTRALIAN INTELLIGENCE AGENCIES

Australian Security Intelligence Organisation (ASIO)

2.1 ASIO's main role is to gather information and produce intelligence that will enable it to warn the government about activities that might endanger Australia's national security.

2.2 The Organisation's functions are set out in the Australian Security Intelligence Organisation Act 1979 (ASIO Act). ASIO is also subject to guidelines issued by the Attorney-General under the ASIO Act.

2.3 Security is defined in the ASIO Act as the protection of the people of the Commonwealth and the States and Territories from:

- espionage
- sabotage
- politically motivated violence
- the promotion of communal violence
- attacks on Australia's defence system
- acts of foreign interference

2.4 Security under the ASIO Act also includes the protection of Australia's territorial and border integrity from serious threats as well as discharging Australia's responsibilities to any foreign country in relation to this and in relation to any of the above matters.

2.5 ASIO collects information using a variety of intelligence methods including the use of human sources, special powers authorised by warrant, authorised liaison relationships, and open sources. It is difficult to imagine a circumstances in which ASIO could obtain a warrant to search premises occupied by a member of parliament. Were such an unlikely circumstance to arise it would be my expectation that ASIO would undertake the planning and execution of the search with AFP in accordance with normal practice for search warrants. The *AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved* would then be relevant.

Australian Secret Intelligence Service (ASIS)

2.6 ASIS's primary function is to obtain and communicate intelligence not readily available by other means, about the capabilities, intentions and activities of individuals or organisations outside Australia. Additional functions set out in the *Intelligence Services Act 2001* (ISA) include communicating secret intelligence in accordance with government requirements, conducting counter-intelligence activities and liaising with foreign intelligence or security services.

2.7 ASIS's collection of relevant foreign intelligence generally relies on human sources. This intelligence information is transformed into intelligence reports and related products which are made available to key policy makers and select government agencies with a clear and established need to know.

2.8 Under the ISA, ASIS's activities are regulated by a series of ministerial directions, ministerial authorisations and privacy rules.

Office of National Assessments (ONA)

2.9 ONA is established by the *Office of National Assessments Act 1977* and provides 'all source' assessments on international political, strategic and economic developments to the Prime Minister and the Government. ONA uses information collected by other intelligence and government agencies, diplomatic reporting and open sources, including the media, to support its analysis.

2.10 Under its Act, ONA is responsible for coordinating and reviewing Australia's foreign intelligence activities and issues of common interest in Australia's foreign intelligence community, as well as the adequacy of resourcing provided to Australia's foreign intelligence effort.

Defence intelligence agencies

2.11 Three of the six intelligence agencies are within the Department of Defence (Defence). They are the Defence Intelligence Organisation (DIO), the Australian Geospatial-Intelligence Organisation (AGO), and the Australian Signals Directorate (ASD). The functions of ASD and AGO are set out in the ISA and their activities are regulated by a series of ministerial directions, ministerial authorisations and privacy rules.

Defence Intelligence Organisation (DIO)

2.12 DIO is Defence's all-source intelligence assessment agency. Its role is to provide independent intelligence assessment and advice and services in support of:

- the planning and conduct of Australian Defence Force operations;
- Defence strategic policy and wider government planning and decision making on defence and national security issues; and
- the development and sustainment of Defence capability.

Australian Geospatial-Intelligence Organisation (AGO)

2.13 AGO is Australia's national geospatial intelligence agency. AGO's geospatial intelligence, derived from the fusion of analysis of imagery and geospatial data, supports Australian Government decision making and assists with the planning and conduct of Australian Defence Force operations. AGO also directly assists Commonwealth and state bodies responding to security threats and natural disasters.

Australian Signals Directorate (ASD)

2.14 ASD is Australia's national authority on signals intelligence and information security. ASD collects foreign signals intelligence, and its reports on this intelligence are provided to key policy makers and select government agencies with a clear and established need to know the information.

2.15 ASD provides information security advice and assistance to Government agencies. Where ASD is involved in monitoring government IT systems it does so with the agreement of the Australian government agencies involved. ASD activity in this regard is directed at detecting and preventing cyber intrusions by foreign actors.

3 ASIO

The definition of security

3.1 ASIO's functions are set out in s 17 of the AISO Act. Most of those functions relate to 'security' which is defined in s 4 of the ASIO Act; see 2.3 above. The definition is complex as many of the terms used in the definition are themselves defined in s 4. For present purposes it is sufficient to note that in the proper performance of its functions relating to security it is theoretically possible that ASIO could collect information which is at least potentially the subject of parliamentary privilege.

3.2 A hypothetical example would be where a person who is the subject of an ASIO investigation exchanges a series of emails with their local MP. Those emails might or might not be directly related to the matter ASIO is interested in (and may or may not attract privilege) however if ASIO had a telecommunication interception warrant on the person of security interest then it is likely that the emails would be intercepted and retained by ASIO.

3.3 It is worth noting that the investigation of 'leaks' would not normally fall within ASIO's functions unless there was a link to security as defined (for example if the matter related to suspected espionage). The investigation and prosecution of 'leaks' is a matter for police. It is not common for intelligence obtained by ASIO to be used as evidence in a prosecution – usually police exercise their own warrants to gather admissible evidence.

ASIO processes where members of Parliament or their staff may be involved

3.4 I am aware that ASIO is planning to make a submission to this inquiry. ASIO is in a better position than I to provide evidence to the Committee on its internal policies and procedures and, if applicable, why it may consider some of those matters should not be disclosed publically.

IGIS inspections

3.5 The IGIS office regularly examines selected agency records to ensure that the activities of the intelligence agencies comply with the relevant legislative and policy requirements. These inspections include IGIS staff directly accessing electronic records and reviewing hardcopy documentation. Inspections often concentrate on the potential impact of intelligence collection on the privacy of Australians. Inspections review whether each agency is acting in accordance with its statutory functions, any guidance provided by the responsible minister and the agencies' own internal policies and procedures. The outcomes of the IGIS inspection program are included in each IGIS Annual Report.[1] The requirements of national

[1] See for example pp14-34 of the 2015-16 IGIS Annual Report

security mean that not all details can be included in the public report but the Inspector-General seeks to make as much information public as possible.

3.6 In accordance with the IGIS Act the oversight of the Inspector-General considers issues of propriety as well as matters of legality. Parliamentary privilege potentially raises both legality and propriety. Compliance with the *Parliamentary Privileges Act 1987* and any applicable orders made by Parliament would clearly be a matter of legality. The concept of propriety extends to a broader range of matters such as whether agency policies and procedures pay sufficient regard to sensitive issues such as parliamentary privilege and legal professional privilege. Under the heading of propriety the Inspector-General also has regard to matters such as whether sensitive issues are reserved for consideration by staff of appropriate seniority and whether clear records of the reasons for any decision in regard to a sensitive issue are maintained.

3.7 IGIS inspections also look to see that ASIO does not exceed legislative limitations, including s17A of the ASIO Act which makes clear that engaging in lawful advocacy, protest or dissent is not, by itself, to be regarded as prejudicial to security. This position is reflected in ASIO policies and procedures and reinforced by internal training. I note that I have seen nothing to suggest that ASIO fails to heed s17A.

3.8 In addition to the regular inspection of ASIO investigative cases the IGIS office undertakes inspection projects to enable focus on specific areas and to ensure that there are no gaps in the oversight regime. In recent years the majority of inspection projects have focused on ensuring appropriate oversight of the various new powers provided to ASIO through amendments to the ASIO Act, the *Telecommunications (interception and Access) Act 1979* (the TIA Act) and other legislation. However there are two ASIO projects that may be of interest to the Committee: the IGIS inspection project on the retention of intelligence on currently serving parliamentarians and a series of inspection projects on the retention and destruction of records.

IGIS inspection project on the retention of intelligence on currently serving parliamentarians

3.9 In 2008 the then Inspector-General commenced a project to review the manner in which ASIO handles any intelligence information regarding currently serving parliamentarians. In broad terms the project involved a review of relevant ASIO policies and procedures and then identifying and reviewing a sample of records which might include reference to currently serving parliamentarians. The project was not precipitated by any particular event, nor did it reflect a view that ASIO had acted in ways that could be said to be politically partisan.[2]

3.10 The inspection project identified very little of concern and did not identify any impropriety[3]. However the then Inspector-General did make some suggestions to tighten procedures in relation to the retention of intelligence information on currently serving parliamentarians. In the 2008-09 IGIS annual report the then IGIS noted that he was disappointed that one suggestion he had made had not been

[2] IGIS Annual Report 2007-08 p39

[3] IGIS Annual Report 2007-08 p39 and IGIS Annual report 2008-09 p23

accepted.[4] The recommendation related to possible perceptions in the future that an interest had been taken in parliamentarians, where material incidentally collected or made available is retained. The then Inspector-General suggested that the retention of information of this kind may indicate a deficiency in ASIO policy.[5] The 2009-10 IGIS Annual report noted that ASIO had acknowledged that policy and practice relating to retention or destruction of this type of data should be reviewed.[6]

IGIS inspection projects on the retention and destruction of records

3.11 In 2007 then then Attorney-General issued new Guidelines to ASIO replacing previous Guidelines issued in 1992.[7] The 1992 Guidelines contained an express prohibition on so-called 'speculative data matching' which did not appear in the 2007 Guidelines. Instead the 2007 Guidelines were more permissive as to the data ASIO may collect, including as 'reference data', although this is subject to the general limitation that material be 'relevant to security'.[8] This change led the then Inspector-General to initiate a project on the retention and destruction of data in 2009. The project concluded that ASIO's policies and procedures did not seem to have kept pace with changes to the size of the Organisation, the volume of intelligence collected and changes in technology.[9]

3.12 In 2014 a further project on the retention and destruction of records was initiated. The 2014 project particularly focused on the extent to which s 31 of the ASIO Act and s 14 of the TIA Act were being utilised. Those provisions require that, where a record or copy has been made of material obtained under warrant, and is in the possession of ASIO; and where the Director-General is satisfied that the record or copy is not required for the purposes of performing ASIO's functions, or exercising powers under those Acts '...the Director-General shall cause the record or copy to be destroyed'. The project found that there was no evidence that any warrant-related material had been destroyed in reliance on s 31 of the ASIO Act or s 14 of the TIA Act.

3.13 The 2014-15 IGIS Annual Report noted that ASIO advised that it considers material for disposal or retention in accordance with the relevant National Archives of Australia Records Authority, rather than under those specific legislative provisions. However, while the Archives regime permits destruction in appropriate cases, it does not *require* it, and it also does not address the handling of copies of material residing in other databases. The inspection project also noted that there was no evidence that ASIO had actually destroyed any electronic records that were eligible for destruction.[10]

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[4] IGIS Annual Report 2008-09 p23
[5] IGIS Annual Report 2009-10 p19-20
[6] IGIS Annual Report 2009-10 p20
[7] The Guidelines are made under s8A of the ASIO Act.
[8] IGIS Annual Report 2007-08 p18-19
[9] IGIS Annual Report 2009-10 p19
[10] IGIS Annual Report 2014-15 p29-30. Also see IGIS Annual Report 2015-16 p21

ASIO cooperates with police when exercising search warrants

3.14 ASIO can intercept telecommunications and use other intrusive powers including overt and covert searches, computer access and surveillance devices following the issue of warrants by the Attorney-General.[11]

3.15 In evidence to the Parliamentary Joint Committee on Intelligence and Security ASIO advised that it frequently has the assistance of law enforcement when exercising search warrants and only in exceptional circumstances would ASIO exercise a search warrant alone.[12] The Committee report (in the context of the proposal to give ASIO officers power to use force against a person) noted that it would only be on extremely rare occasions where due to sensitivity or urgency ASIO would not be accompanied by police when exercising a search warrant.[13] This is consistent with my experience in reviewing ASIO search warrant activity, the execution of search warrants is almost always undertaken in conjunction with the Australian Federal Police (AFP).

3.16 It is difficult to imagine a circumstance in which ASIO would obtain a warrant to search premises occupied by a member of parliament. However, were such an unlikely circumstance to arise I would expect that ASIO would undertake the planning and execution of the search in conjunction with AFP in accordance with normal practice for search warrants. The *AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved* would then seem relevant.

ASIO access to metadata

3.17 The Terms of Reference refer to 'metadata domestic preservation orders'. It is not clear whether this is a reference to domestic preservation notices given under s107H of the TIA Act. These orders enable an ASIO delegate to require a carrier to retain the *content* of a stored communication (such as an SMS or a voicemail). The notice does not allow ASIO to access a stored communication but requires the carrier to keep it stored for a period of time (up to 90 days) while ASIO seeks a warrant to access stored communication. These notices would not be used to require retention of metadata as there are other provisions in the TIA Act mandating metadata retention. Domestic preservation notices are very rarely used by ASIO.

3.18 Amendments made to the TIA Act by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* require certain carriers and internet service providers to retain specified information for at least 2 years. The minimum information to be retained is set out in s187AA of the TIA Act, and is commonly called 'metadata'. ASIO can obtain metadata retained by carriers and service providers where a relevant ASIO officer is satisfied that disclosure of the

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[11] Authority for telecommunications interception is provided by the *Telecommunications (Interception and Access) Act 1979.* The ASIO Act provides the authority for other powers.

[12] Mr Irvine, PJCIS Committee Hansard, 15 August 2014 p17-18

[13] Parliamentary Joint Committee on Intelligence and Security *Advisory Report on the National Security Legislation Amendment Bill (No.1) 2014* p44

data 'would be in connection with the performance by the Organisation of its functions'. [14]

3.19 ASIO does not publically disclose the number of data authorisation made by ASIO however the PJCIS has noted that the number is proportionate with other agencies.[15] I note that the Director-General of ASIO recently gave evidence to the Senate Estimates (Legal and Constitutional Affairs) Committee that the number of warrants to access journalist metadata issued 'is small'.[16]

Attorney-General Guidelines

3.20 In accordance with s8A of the ASIO Act the Attorney-General may make written Guidelines to be observed by ASIO in the performance of its functions. The Guidelines must be laid before each House of the Parliament.[17] (They are also available on the ASIO website). IGIS inspections review compliance with the Guidelines. The Guidelines do not contain any express reference to parliamentary privilege but do provide general guidance to ASIO in relation to the conduct of inquiries and investigations including that the means for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence.

3.21 The Parliamentary Joint Committee on Intelligence and Security recommended in its *Advisory Report on the National Security Legislation Amendment Bill (No.1) 2014* that the Guidelines be reviewed:

> **Recommendation 4:** The Committee recommends that the Government initiate a review of the Attorney-General's Guidelines issued under section 8A of the *Australian Security Intelligence Organisation Act 1979*, including examining requirements to govern ASIO's management and destruction of information obtained on persons who are not relevant, or no longer relevant, to security matters.

The Government accepted this recommendation and I understand that a review of the Guidelines is underway.[18]

4. The other Australian Intelligence Agencies

The foreign intelligence agencies: ASIS, ASD and AGO

4.1 Australia's three foreign intelligence agencies (ASIS, AGO and ASD) are all governed by the *Intelligence Services Act 2001* (the ISA). Each is focused on the 'capabilities, intentions or activities of people or organisations outside Australia'.[19] None of these agencies is able to seek a warrant to search premises in Australia

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[14] See ss175 & 176 of the TIA Act. IGIS provided detailed submission to the PJCIS in January 2015 when it was considering the data retention amendments: IGIS submission to the Parliamentary Joint Committee on Intelligence and Security *Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 21 January 2015

[15] Parliamentary Joint Committee on Intelligence and Security Report *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* p41

[16] Hansard, Senate Legal and Constitutional Affairs Committee, Tuesday 28 February 2017, pp76-78

[17] See s8A(3) of the ASIO Act

[18] Media release, Senator the Hon George Brandis QC, Attorney-General, 19 September 2014

[19] See ss6, 6B and 7 of the ISA

or to intercept telecommunications passing over the Australian telecommunications network. Nor can they authorise a carrier to disclose metadata under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

4.2 The ISA agency functions are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.[20] There are strict limits in the ISA about the circumstances under which the agencies can gather intelligence about an Australian person.[21] These include a requirement to obtain ministerial authorisation before undertaking any activity to produce intelligence on any Australians person, in most circumstances.[22]

4.3 It is difficult to envisage a circumstance in which any of these agencies would, in the proper performance of their own functions, be involved in any activity inside Australia that raises the issues referred to in the terms of reference. The three foreign intelligence agencies can cooperate with and assist ASIO in the performance of its functions.[23] However when doing so they must operate in accordance with the request from ASIO and subject to the limits applicable to ASIO. Such cooperation is normally about the collection of foreign intelligence outside Australia that is relevant to security.

4.4 It is possible that in the proper performance of their functions relating to the collection of intelligence about people or organisations outside Australia one of the foreign intelligence agencies might incidentally collect intelligence about an Australian member of parliament. This might hypothetically occur if, for example, the parliamentarian was overseas and was for some reason interacting with an individual or group that was a legitimate target of intelligence activity in accordance with the national intelligence priorities.[24] If this occurred ASIS, ASD or AGO could only disclose any intelligence about the Australian person in accordance with the rules to protect the privacy of Australian's made under s15 of the IS Act.[25]

4.5 The collection of intelligence by ASIS, ASD and AGO is the subject of regular inspections by the IGIS. These inspections pay particular attention to the collection and disclosure of information about Australian persons. It is also the practice of each of these agencies to pro-actively brief the IGIS about particularly sensitive operations.

4.6 There is an express prohibition on the foreign intelligence agencies doing any activity for the purpose of furthering the interests of an Australian political party or other Australian political organisation.[26] The experience of this office is that there is no evidence whatsoever to suggest that the agencies do, or would, act in such a manner.

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[20] See s11(1) of the ISA

[21] See ss8, 9

[22] See s8 of the ISA and the exception in s13B for certain ASIS activities outside Australia.

[23] See section 13A and 13B of the IS Act and s12 of the TIA Act

[24] The national intelligence priorities are set by the National Security Committee of Cabinet and guide all intelligence collection by Australia's intelligence agencies.

[25] Copies of the privacy rules are publically available on each of the agencies websites.

[26] See s11(2A) of the ISA

The assessment agencies: ONA and DIO

4.7 In accordance with their functions DIO and ONA do not have any authority to undertake covert intelligence collection activities, and they have no ability to obtain warrants. These agencies assess intelligence collected by other agencies and from open sources. Accordingly it is difficult to see how their activities may raise the types of issues identified in the terms of reference.

Australian Government

Australian Security Intelligence Organisation

Director-General of Security

12 April 2017
Our Ref. A13596981

Committee Secretary
Senate Committee of Privileges
Parliament House
Canberra ACT 2600

Dear Secretary,

ASIO Submission to Senate Standing Committee of Privileges Inquiry into Parliamentary privilege and the use of intrusive powers

Thank you for the opportunity to provide a submission to the Committee of Privileges inquiry into the adequacy of parliamentary privilege as a protection for parliamentary material against the use of the intrusive powers by law enforcement and intelligence agencies.

This submission provides background information about the role of ASIO, the legal and accountability framework within which ASIO operates and the security threat environment While it does not make any recommendations, the submission does highlight the agnostic nature of both security threats and the individuals that may be targeted and the importance for law enforcement and intelligence agencies to have the necessary tools to perform their statutory functions

ASIO's role

The Australian Security Intelligence Organisation (ASIO) is Australia's national security intelligence service. ASIO's enduring purpose is to contribute to the protection of the nation and its interests from threats to security through intelligence collection, assessment and advice to Government, government agencies and business.

Security intelligence is vital to protecting the nation and its people. ASIO collects intelligence using a range of methods including human intelligence, surveillance, warranted activities and other authorised special powers ASIO relies upon the support of people from all communities, Australian and international intelligence, law enforcement and other government partners, security agencies and business and industry to deliver its mission

ASIO's role as the national security intelligence service is anticipatory and protective in nature· it is expected to identify and act against threats before harm has occurred ASIO's role to obtain,

correlate and evaluate intelligence relevant to security is distinct from law enforcement agencies which are concerned with the investigation of criminal offences and the collection of evidence for use in prosecutions

A critical element of Australia's defence against threats to security is ASIO's security intelligence investigations As the Committee has noted in its Background paper, the 'integrity of investigations by law enforcement and intelligence agencies often depends on a large measure of secrecy in exercising intrusive powers.' ASIO recognises it has been entrusted with significant powers and with that comes significant responsibilities to ensure their use is proportionate and measured in response to the nature of the threat

Legislative Framework

The *Australian Security Intelligence Organisation Act 1979* (*ASIO Act*) defines the Organisation's roles and responsibilities and is the legislative basis for ASIO's purpose, activities and cooperation with partners. ASIO is also subject to ministerial guidelines issued by the Attorney-General under the *ASIO Act* (pursuant to section 8A of the ASIO Act) that must be observed by the Organisation in the performance of its statutory functions and exercise of its powers.

The term 'security' has a specific meaning within the *ASIO Act*, and includes the protection of Australia and Australians from.

- espionage
- sabotage
- politically motivated violence
- the promotion of communal violence
- attacks on Australia's defence systems
- foreign interference.

Security is also defined under the *ASIO Act* to include the protection of Australia's territorial and border integrity from serious threats and the carrying out of Australia's responsibilities to foreign countries in relation to the other heads of security.

ASIO is under the control of the Director-General of Security pursuant to section 8(1) of the *ASIO Act* The Director-General has specific obligations under the *ASIO Act* to:

- ensure the organisation only performs the work that is necessary for the purpose of discharging its functions (section 20(a));
- keep the organisation free from any influences or considerations not relevant to its functions and to ensure nothing is done which could be perceived as suggesting the

organisation is concerned to further or protect the interests of any particular section of the community (section 20(b)), and

- consult regularly with the Leader of the Opposition for the purpose of keeping him or her informed on matters relating to security (section 21).

ASIO's legislative framework recognises that ASIO will routinely be required to investigate and provide advice in relation to Australian citizens and permanent residents Accordingly, ASIO is required to operate under a stringent and comprehensive oversight and accountability framework that provides assurance that the conduct of inquiries and investigations is both lawful and proportionate to the gravity of the potential threat posed and the probability of its occurrence. This includes policies and procedures to ensure effective record keeping and retention and destruction of records in accordance with the *Archives Act 1983* and the Attorney-General's Guidelines

Oversight and accountability

ASIO is ultimately accountable to the parliament and the people through legislation, parliamentary oversight, ministerial accountability and guidelines, and independent oversight by the Inspector-General of Security. These mechanisms provide critical oversight and review and in turn provide legitimacy, support and confidence in ASIO and its activities. This includes:

- **Parliamentary oversight** of ASIO and its activities in particular through the Parliamentary Joint Committee on Intelligence and Security (PJCIS).

- **Ministerial supervision** ensuring clear lines of accountability, including through ministerial guidelines on intelligence agencies and authorisation of warranted activities.

- **Independent oversight** by.

    - Inspector-General of Intelligence and Security
    - Australian National Audit Office
    - Independent Reviewer of Adverse Security Assessments
    - Independent National Security Legislation Monitor (INSLM)
    - Security Appeals Division of the Administrative Appeals Tribunal
    - Judicial review by Australian Courts.

- ASIO also maintains strong internal corporate governance arrangements to assist the Director-General of Security fulfil his responsibilities and ensure the legislation is followed, and record keeping and reporting obligations are met.

The Director-General is subject to direction from the Attorney-General on the performance of his functions with the exceptions that the Attorney-General.

- is not empowered to override the opinion of the Director-General of Security concerning the nature of the advice that should be given by ASIO (section 8(4)), and
- is not empowered to override the opinion of the Director-General of Security
    - on the question of whether the collection of intelligence by ASIO concerning a particular individual would, or would not, be justified by reason of its relevance to security, or
    - on the question of whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security

  except by written direction that sets out the Attorney-General's reasons for overriding the Director-General of Security and with copies of the direction to be provided to the Inspector-General of Intelligence and Security and to the Prime Minister (section 8(5) and (6)).

Many of the elements of the oversight and accountability framework are designed to operate in the public domain. For example, legislation governing the operation of the Australian Intelligence Community agencies and the Attorney-General's Guidelines to ASIO is publicly available Legislative reforms are vigorously debated in the Parliament and tested in public committee hearings ASIO's corporate plan, portfolio budget statement and annual report to Parliament are publicly available.

As the Director-General of Security I also make regular appearances before Senate Estimates and in other Parliamentary committee hearings Further, the independent oversight bodies such as the Inspector-General of Intelligence and Security and the Independent National Security Legislation Monitor also provide publicly available reports to Parliament

The consideration of the adequacy of parliamentary privilege as a protection for parliamentary material in relation to the use of intrusive powers by intelligence agencies requires an understanding of the threats posed to parliamentary privilege and independence by hostile actors, whether by those acting on behalf of foreign governments or those who would undertake acts of politically motivated violence.

Parliamentarians are not immune to the attention of foreign states; from being the target of interest from foreign powers and those who would engage in politically motivated violence. As has been observed overseas, the parliament and parliamentarians can be aspirational targets for those who engage in politically motivated violence.

In addition to the current terrorism threat, there remains a real and enduring threat from espionage and clandestine interference by foreign powers seeking to advance their own

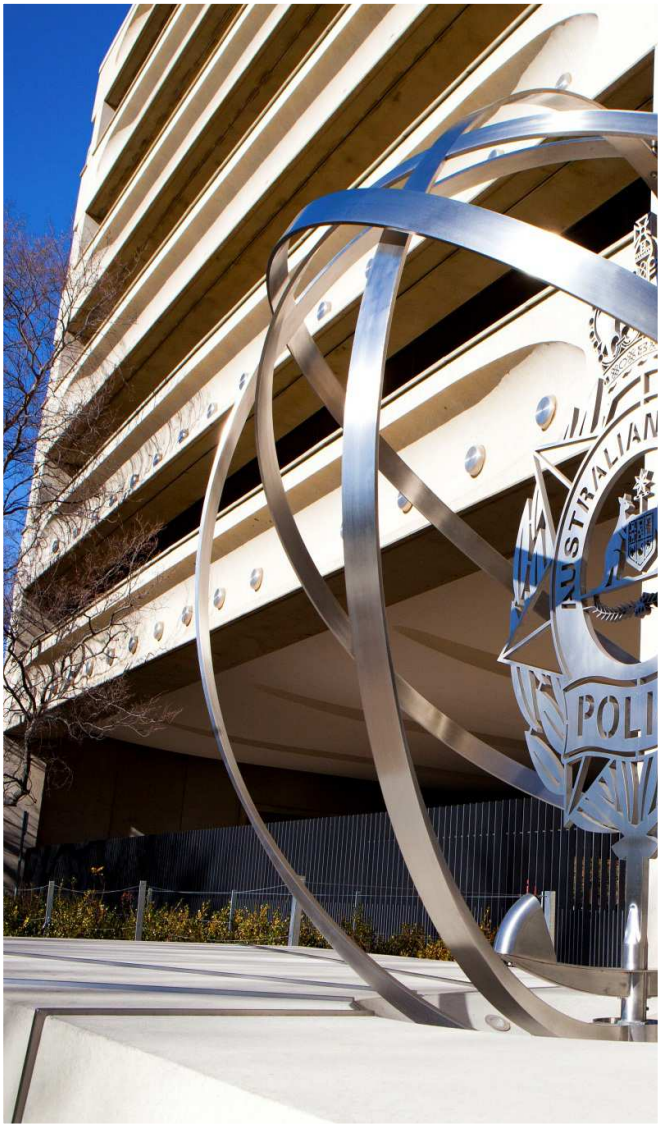
economic and strategic interests at the expense of our own. The harm caused by hostile intelligence activity can undermine Australia's national security and sovereignty. Both espionage and foreign interference can inflict economic damage, degrade or compromise nationally vital assets and critical infrastructure

I once again thank you for the opportunity to contribute to your inquiry, which touches on the very important security role of ASIO

Yours sincerely,

Duncan Lewis

AFP
AUSTRALIAN FEDERAL POLICE



Senate Standing Committee of Privileges inquiry into Parliamentary Privilege and Use of Intrusive Powers

April 2017

Submission by the Australian Federal Police

Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Senate Standing Committee of Privileges inquiry into Parliamentary Privilege and Use of Intrusive Powers.

2. As the Australian Government's law enforcement and policing agency and chief source of advice on policing issues, the AFP is responsible for enforcing the criminal law with an emphasis on combating organised crime, countering terrorism and protecting Commonwealth interests from criminal activity in Australia and overseas.

3. Although the AFP is responsible for a broad range of criminal and national security matters, the particular types of criminal activity that are most relevant to the Committee's current inquiry include the following offences:

    - Offences relating to the proper administration of Government in Chapter 7 of the *Criminal Code* (Cth), including:

        - Bribery and related offences;

        - Causing harm to, and impersonation and obstruction of, Commonwealth Public Officials; and

        - Fraudulent conduct.

    - Offences relating to espionage and similar activities in Division 91 of the *Criminal Code* (Cth);

    - Offences relating to telecommunications and postal services, including using telecommunications and postal services to menace, harass and cause offence in Parts 10.5 and 10.6 of the *Criminal Code* (Cth); and

    - Information disclosure offences in ss. 70 and 79 of the *Crimes Act 1914*.

4. These offences may arise in the context of Parliamentary activities, or attempts to undermine or impeach the lawful operation of government.

5. The AFP also offers a range of investigation services to other Commonwealth departments and agencies, and may be requested to undertake or assist with investigations on their behalf, including:

    - serious and complex matters including fraud, corruption, drug trafficking, organised crime, money laundering and people smuggling;

    - operational assistance in the course of another department or agency's criminal investigation including execution of s.3E *Crimes Act 1914* search warrants;

    - financial investigation services including training, advice and guidance relating to proceeds of crime;

    - computer forensics and other forensic services; and

- electronic evidence services including training, advice and forensic examination of seized computers and electronic items.

6. The AFP's role and services within Government therefore extend beyond its own investigations, and encompasses the protection of other Government departments from criminal behaviour, including fraud and corruption.

The Committee's Inquiry into parliamentary privilege and the use of intrusive powers

7. The AFP has been advised that the following matters were referred to the Standing Committee of Privileges for inquiry and report by 14 August 2017 ('the Terms of Reference'):

a. whether protocols for the execution of search warrants in the premises of members of Parliament, or where parliamentary privilege may be raised, sufficiently protect the capacity of members to carry out their functions without improper interference;

b. the implications of the use of intrusive powers by law enforcement and intelligence agencies, including telecommunications interception, electronic surveillance and metadata domestic preservation notices, on the privileges and immunities of members of Parliament;

c. whether current oversight and reporting regimes on the use of intrusive powers are adequate to protect the capacity of members of Parliament to carry out their functions, including whether the requirements of parliamentary privilege are sufficiently acknowledged;

d. whether specific protocols should be developed on any or all of the following:

   i. access by law enforcement or intelligence agencies to information held by parliamentary departments, departments of state (or portfolio agencies) or private agencies in relation to members of Parliament or their staff;

   ii. access in accordance with the provisions of the *Telecommunications (Interception and Access) Act 1979* by law enforcement or intelligence agencies to metadata or other electronic material in relation to members of Parliament or their staff, held by carriers or carriage service providers; and

   iii. activities of intelligence agencies in relation to members of Parliament or their staff (with reference to the agreement between the Speaker of the New Zealand House of Representatives and the New Zealand Security Intelligence Service); and

e. any related matters, including competing public interest considerations.

The AFP's position

8. For the reasons explained in more detail in the body of this submission, the AFP's position in respect of these issues is as follows:

a. The AFP considers that the agreed protocols for the execution of search warrants do sufficiently protect the capacity of members to carry out their functions without improper interference. However:

- the AFP considers that advancements in electronic capabilities and storage mechanisms mean that some aspects of the agreed protocols are out of date and should be reviewed; and
- the AFP respectfully acknowledges the findings of the Committee in its 164th Report concerning the manner of execution of the 'Melbourne warrants',[1] and agrees these could be taken into account in any such review.

b. The AFP considers that there are no obvious implications for the privileges and immunities of members of Parliament arising from the use of intrusive powers by law enforcement, and respectfully submits that the lawful and appropriate use of such powers is necessary in order for the AFP to effectively and independently carry out its law enforcement responsibilities.

c. Accordingly, the AFP's view is that the current oversight and reporting regimes on the use of intrusive powers are adequate to protect the capacity of members of Parliament to carry out their functions, noting in particular the extra care taken by the AFP with politically sensitive investigations.

The AFP notes that there are costs and risks associated with unnecessarily increasing oversight of its performance.

d. The AFP considers that there is no evidence to support the need for any additional protocols governing law enforcement access to information, including through lawfully issued warrants under the *Telecommunications (Interception and Access) Act 1979*, noting in support of this view:

- parliamentary privileged material is currently subject to sufficient protection, being the protections set out in the Parliamentary Privileges Act 1987 ('the Parliamentary Privileges Act');
- there is an absence of specific examples illustrating that lawful police access to such information has adversely affected the capacity of members of Parliament to carry out their functions; and
- there is a clear need for the AFP to be able to perform its functions with an appropriate degree of independence.

e. In relation to the competing public interest considerations, the AFP stresses the paramount importance of the AFP being able to effectively perform its

[1] 164th Report at 3.37 – 3.40

functions as an independent statutory agency, including the safeguarding of Parliament and its processes against criminal behaviour, and the safeguarding of those same institutions against internal and external threats to Australia's national security.

Concepts and definitions

9. In considering the interaction between parliamentary privilege and police powers, the AFP considers it important to briefly set out relevant concepts and definitions. A more detailed examination of the powers and immunities is at **Appendix 1**.

10. The term 'parliamentary privilege' broadly refers to the powers, privileges and immunities of both Houses of Parliament and their members, which enable the Houses of Parliament to carry out their functions effectively and protect the integrity of their processes. The *powers* of parliament are distinct from the *immunities* of Parliament, the latter of which are commonly referred to as 'privileges'.

Improper interference

11. The principal privilege, or immunity under the Parliamentary Privileges Act is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, the best known effect of which is that a person cannot be sued or prosecuted for anything said or done in parliamentary proceedings. The principal powers are the power to conduct inquiries (including by compelling the attendance of witnesses, the giving of evidence and the production of documents), and to adjudge and punish contempts of the Houses. [2] According to Odgers, the rationale for the power to punish contempts is to enable the Houses of Parliament to '*protect themselves from acts which directly or indirectly impede them in the performance of their functions*.'[3]

12. A matter will not constitute contempt unless it amounts, or is intended or likely to amount, to an *improper interference* with the free exercise by a House or Committee of its authority or functions, or with the free performance by a member of the member's duties as a member –s. 4 of the *Parliamentary Privileges Act*

13. The word 'interference' suggests some sort of intervention, interruption or impediment. In a matter concerning the execution of a search warrant on a parliamentarian's electorate office, the House of Representatives Committee of Privileges has considered that '*clashing with or coming into opposition to the*

[2] *Odgers' Australian Senate Practice* (14th edition), Chapter 2: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02

[3] Ibid

normal or ordinary operation or workings of the office' could constitute interference with the operation of the office.[4]

14. However, in order for contempt to have occurred, any interference must be *improper*. In the same matter, the House Committee stated that in determining whether interference is improper, '*regard should be had to whether there was evidence of unusual or inherently improper, wrongful or deceptive action on the part of those responsible, to their intentions and motives and to whether there were any unusual circumstances in connection with the actions complained of (in terms of what might normally be expected in connection with the execution of a search warrant).*'[5]

15. This Committee (differently constituted) has stated that there must be '*culpable intention involved*' for an act to be an improper interference with the free exercise by a House or Committee of its authority or functions, or with the free performance by a member of the member's duties as a member.[6] The AFP considers that 'improper' therefore indicates some deviation from the standard of conduct of a reasonable person.[7]

16. The Senate's Brief Guides to Procedure No. 20 *Parliamentary Privilege* states:

> '*the Senate has taken a fairly robust view as to whether senators have been improperly obstructed, probably on the basis that senators are capable of looking after themselves'*.[8]

Immunity from suit

17. The relevant immunity is immunity from question and impeachment in the courts of matters falling within the concept of 'proceedings in parliament'; what is generally referred to in relation to parliamentary privilege, or the privilege of freedom of speech– s. 16 of the Parliamentary Privileges Act.

18. This aspect of the privilege operates, in effect, as a rule of evidence, preventing the use of material or information concerning Parliamentary proceedings in a court or tribunal, where that use would impeach parliamentary proceedings.

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[4] House of Representatives Committee of Privileges Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP, October 1995, Parl Paper Number: 376/95 [28]

[5] Ibid

[6] Committee of Privileges, Report 142, [4.57] (citations omitted) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2008-10/report_142/c04

[7] See also the discussion of the word 'improper' in *Carmody v MacKellar & Ors* [1996] FCA 791 (5 September 1996)

[8] http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_20

19. The AFP is not aware of any judicial authority for parliamentary privilege operating so as material or information is immune from the exercise of police functions and powers, and notes that the basis for the prevention of privileged material being seized under a search warrant is through the agreed terms of an MOU.

20. In this respect the AFP respectfully agrees with the points made by the Committee in its 164th Report, including that:

> *'2.1 There is uncertainty at law about the extent to which parliamentary material is protected from seizure under search warrant. In the Commonwealth jurisdiction, the matter is currently governed by a settlement between the Parliament and the Executive Government, embodied in the AFP National Guideline for the execution of search warrants where parliamentary privilege may be involved, which draws upon the traditional scope of parliamentary privilege in the courts.'*

21. Importantly, from an AFP perspective, the mere fact that something is in the possession of an parliamentarian or a member of his or her staff does not engage the privilege. As was noted in the Queensland Supreme Court:

> "*While the phrase* "…for the purposes of or incidental to, the transaction of the business of a House…" *in s 16(2) of the Parliamentary Privileges Act is to be given a generous operation, they do not transform every action of a parliamentarian in the pursuit of his or her vocation into "proceedings in Parliament."*[9]

22. The need for appropriate limits on the powers and privileges of Parliament is recognised in the Parliamentary Privileges Act. These limits are consistent with the need to balance ensuring freedom of speech in Parliament (e.g. without fear of prosecution or suit for what is said in Parliament) with freedom of speech more generally (e.g. by allowing fair criticism by the public and media of parliamentarians) and the broader interests of justice in ensuring courts are able to assess all relevant evidence.[10] Implicit in the latter is that, for criminal matters, police are able to properly exercise their lawful functions without undue interference or constraint.

The interaction between parliamentary privilege and police powers

23. This inquiry is, in relation to the AFP, examining the interaction between police investigations and parliamentary privilege. Three aspects of police investigations are considered as part of this inquiry: the execution of search warrants on the premises of members of Parliament; investigative inquiries; and the use of covert, intrusive powers authorised by the *Telecommunications (Interception and Access) Act 1997* ('the TIA Act') and the *Surveillance Devices Act 2004* ('the SD Act').

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[9] *O'Chee v Rowley* (1997) 150 ALR 199 at 203. See also *Slipper v Magistrates Court of the ACT and Ors* (2014) 179 ACTR at [49]-[50]

[10] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 336

24. The AFP understands that, provided the lawful use of police powers as part of a criminal investigation does not improperly interfere with the operation of Parliament, there is no conflict between the use of such powers and the powers and immunities of Parliament.

25. This view is supported by comments in the House of Representatives Committee of Privileges *Report Concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP* (Parliamentary Paper No. 376/1995) which at paragraph 31, states:

> *'The Committee acknowledges that there is no parliamentary immunity which would exempt electorate offices from the execution of such search warrants. It recognises, however, that Members' electorate offices are vital to the performance of their duties as Members and are important to constituents. Members and their assistants are called upon to help in many matters, and they come into possession of much confidential and sensitive information. As an interim measure, the Committee considers that the proper operation of electorate offices, and the assistance and services provided to constituents, would justify the negotiation of an understanding (which would not impede the operations of the law enforcement authorities) between the Minister responsible for the AFP and the Speaker in respect of search warrants. Such an understanding would not create any immunity for Members, it would not seek to change the statutory provisions, but it would enable some ground-rules to be agreed (at least in so far as the AFP was concerned) so as to recognise the reasonable interests of Members and their constituents, particularly in respect of sensitive or confidential information which was not related to the subject matter of the warrant.'*

26. The significance of these comments, in the context of the current inquiry, is that they were used to support related findings in the Senate Committee of Privileges' 75th, 105th, and 114th Reports and ultimately led to the agreement to establish a Memorandum of Understanding ('MOU') and the AFP National Guideline ('NG') concerning the conduct of search warrants on electorate offices (see **Appendix 2**). The MOU was agreed between the then Attorney-General and Minister for Justice and Customs, and the then Speaker of the House of Representatives and President of the Senate. The MOU requires the agreement of both Houses of Parliament to any changes to the NG.

27. The AFP submits that the comments in paragraph 31 of the Committee's report are an important aid in understanding the scope and purpose of the MOU and the associated NG. In particular, the passage expressly recognises the need not to impede the operations of law enforcement authorities.

28. A fundamental question raised for consideration by the Committee is whether there are sufficient protocols in place to appropriately protect parliamentary privilege, while facilitating the legitimate objectives of the AFP to perform its enforcement responsibilities in respect of the Commonwealth criminal law. It is important to carefully consider the consequences of tightening existing protocols, oversight and accountability mechanisms, or introducing more such mechanisms, on lawful and properly conducted police investigations. The

AFP submits that the current oversight mechanisms have proven to be effective, and notes the lack of evidence to suggest any deficiency in their operation.

29. In making such assessments, it is also important to consider the way in which the AFP's statutory independence and mandate also supports the rule of law, in particular equality before the law (including that the law is enforced in the same way, regardless of a person's social, economic or political status) as well as its role in the protection of other arms of Government against criminal enterprises that may deliberately seek to impair their functions.

30. The AFP submits that, to the extent additional oversight would add time and delay, it may come at some cost, both financially, and in terms of the AFP's efficacy and perceived integrity as an independent agency. The events described in the Senate Committee's 142nd Report (the events sometimes referred to as 'Utegate') provide an example of the important role of an independent police investigation in protecting Parliament against attempts to improperly interfere with its processes.[11] While the need for the AFP to become involved in such matters may only arise infrequently, the importance of efficient investigation by an independent agency should not be underestimated. It is essential for the effective operation of Government that it can rely upon an independent policing agency on the occasions when such assistance is required.

31. While the focus of some recent Parliamentary Committee inquiries has been on the AFP's investigation of allegations of unauthorised disclosure, this is not the only kind of criminal matter which may require the use of police powers in relation to members of Parliament and/or their staff. In recent years members of state/territory Parliament have been investigated and subsequently convicted of serious criminal offences. Examples include:

- Andrew Theophanous (Cth), who was convicted of bribery and defrauding the Commonwealth in 2002 (see *R v Theophanous* [2003] VSCA 78 (20 June 2003);
- Eddie Obeid (NSW), who was convicted of misconduct in public office (*R v Obeid (No 12)* [2016] NSWSC 1815 (15 December 2016));
- Bernard Finnigan (SA), who was convicted with obtaining access to child pornography (*R v Finnigan (No.3)* [2015] SADC 166 (10 November 2015)); and
- Milton Orkopoulos (NSW) was convicted of multiple child sex and drug offences (*Orkopoulos v R* [2009] NSWCCA 213 25 August 2009)); and
- Ian Macdonald (NSW) who was recently convicted of misconduct in public office.

32. It is of obvious importance that parliamentary privilege should not impede the investigation of offences committed by serving members of Parliament. Indeed the public expectations of the AFP will likely demand thorough and impartial investigation of any allegations of criminality conducted by serving members.

[11] Senate Committee of Privileges 142nd Report at para 6.2

33. Further, due to the position they hold, members of Parliament and/or their staff may be high value targets for criminal interference and corruption. They may be targeted using sophisticated techniques which are designed to deceive and obfuscate their interference with the political process.

34. It is in the public interest that the AFP can conduct a robust and independent investigation of serious criminal matters. As such, mechanisms to safeguard parliamentary powers and immunities must be carefully framed so as to avoid unintended adverse impacts on such investigations. The AFP submits that the current protections, as described in this submission, achieve that aim.

Search warrants

35. The Terms of Reference for this inquiry are directed at whether existing protocols for the execution of search warrants '*sufficiently protect the capacity of members to carry out their functions without improper interference'* and whether specific protocols should be developed on "*access by law enforcement or intelligence agencies to information held by parliamentary departments, departments of state (or portfolio agencies) or private agencies in relation to members of Parliament or their staff*".

36. In respect of the second aspect of that Term of Reference, the AFP respectfully submits that information '*in relation to members of Parliament or their staff*' is likely to include material falling outside the concept of 'proceedings in Parliament' and therefore not warranting protection on that basis.[12] Law enforcement access to such material is not likely to amount to any improper interference with the operation of Parliament.

37. The relevant search warrant protocols are those set out in the previously mentioned *Memorandum of Understanding on the Execution of Search Warrants on the Premises of Members of Parliament* and the *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved*. The MOU and the NG are intended to ensure that search warrants are executed without improperly interfering with the functioning of Parliament.[13]

38. The lawful execution of a search warrant in the premises of a member of Parliament is not, of itself, an improper interference with the free performance by the member of their duties.[14] Even if the execution of a warrant might in

[12] Parliamentary Privileges Act, s. 16

[13] 164th Report, para 2.9

[14] For example, see the findings of the House of Representatives Committee of Privileges in relation to the matter raised on 28 July 1995 by Mr E Cameron in relation to a search warrant executed on his electorate office (PP 376/95). In a matter of privilege raised on 3 October 2000 in relation to the execution by the AFP of a search warrant at the home of an adviser to a Shadow minister, the Speaker noted the warrant had been issued under the *Crimes Act 1914* and that while the Speaker understood the member's concerns and his claim that the execution of the warrant had meant that officers involved had seen confidential material relating to his parliamentary duties, he had seen no evidence of improper interference. Accordingly, the Speaker did not allow precedence to the motion as there was no evidence of improper interference (VP 1998/2001/1750). The execution of a search warrant by Queensland Police in 2001 on a Senator's office was found by the Senate Committee of Privileges not to amount to any contempt of the Senate (PP 310/2002). A

some way practically interfere with the functions of a member or the running of their office, the AFP submits that the lawful execution of a search warrant validly issued, and conducted in accordance with the agreed procedures, should not normally give rise to an impropriety. The agreement of both Houses to the MOU covering the NG clearly indicates that the obtaining and execution of a warrant will not, of itself, necessarily be 'improper'. Further, contempt should not generally be found where public officers are fulfilling their lawful public duties in good faith and for a proper purpose (i.e., police executing a validly issued search warrant).

39. In its report titled 'Claim of parliamentary privilege by a Member in relation to material seized under a search warrant,' the House of Representatives Privileges and Members' Interests Committee stated:

> *'It is apparent from the related AFP documents and the Speaker's two statements to the House that the process provided for under the AFP National Guideline has been applied. There has been no complaint in relation to the process itself and it appears to have operated to preserve the records and documents seized from the Member for Blaxland from disclosure to anyone else.'*[15]

40. The Committee also acknowledged:

> *'…the success of the AFP National Guideline in providing members with the opportunity to raise claims of parliamentary privilege in accordance with an agreed formal process when a search warrant is executed in relation to their records, documents and other material. Indeed, to the extent that the seized material has been preserved from disclosure to anyone, without the agreement of the Member for Blaxland, the AFP National Guideline has been a successful safeguard for the member until the matter is finally resolved. The committee notes that this procedure has operated as envisaged and first recommended in October 1995 by its predecessor, the Committee of Privileges.'*[16]

41. The AFP acknowledges the comments made by the Senate Standing Committee of Privileges in paragraph 3.40 of its 164th Report titled *Search Warrants and the Senate*, in relation to whether additional matters should be included in the NG to address the use of constables or third parties assisting in the execution of search warrants ('constables assisting'). The use of persons with particular knowledge or skills to assist police in executing a search warrant is permitted at law where they are a constable or are authorised by the relevant executing officer. The AFP understands that in particular, this Committee is considering whether specific guidance should be provided on the appointment of constables assisting, and to ensure that all persons involved in the execution of

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claim was later made by the Senator of parliamentary privilege over material seized. It was found the material seized fell outside the scope of the warrant, so the question of parliamentary privilege was not ultimately considered (PP 75/2003).

[15] House of Representatives Privileges and Members' Interests Committee, Claim of parliamentary privilege by a Member in relation to material seized under a search warrant, November 2016, para 1.33.

[16] Ibid, para 1.44

search warrants understand and respect the requirements around use and disclosure of information while claims of parliamentary privilege are being determined. The AFP agrees with these suggestions.

42. The AFP notes that the MOU was agreed to in 2005 and this inquiry presents a timely opportunity to review the associated NG and, if necessary, refresh its content. In the last 10 years there have been considerable advances in information communications technology which impact on how search warrants are executed. Records are more prolific, and exist in multiple media and various formats. Investigations are more complex and the AFP's forensic tools more sophisticated. The AFP agrees that there may be benefit in a review of the NG to ensure it continues to provide adequate guidance and appropriate instruction for protecting parliamentary privilege in today's environment.

43. In previous matters, the Senate Committee of Privileges has considered it appropriate to appoint an independent third party to assist it to assess whether parliamentary privilege applies to material seized under a search warrant.[17] The AFP considers that there is merit in this approach, and that in any event, inspection of the content of each document in respect of which privilege is claimed is desirable in order for an accurate and consistent determination to be made.

Managing Politically Sensitive Investigations

44. The AFP has statutory responsibilities for investigating a range of serious crimes that can be committed by, or in relation to, members of Parliament. The AFP also has statutory responsibilities in respect of certain matters concerning the integrity and accountability of the Commonwealth public sector.[18]

45. Examples of serious matters that the AFP may investigate include the offences relating to the proper administration of Government in Chapter 7 of the *Criminal Code*, which includes serious offences such as dishonestly influencing a public official in the performance of the official's duties.[19]

46. Where such offences occur in relation to members of Parliament, they will be treated as politically sensitive investigations. The AFP has additional procedures that are required to be followed for such investigations, both in terms of the actions taken on initial referral, and in the subsequent approvals to take investigative steps.

[17] For example, see the Senate Committee of Privileges 114th Report, and the discussion in paragraph 1.34 of the Committee's 163rd Preliminary Report.

[18] See, for example, s. 56 of the *Public Interest Disclosure Act 2013*, which stipulates that certain matters must be referred to the AFP.

[19] s.135.4(7),which carries a maximum penalty of 10 years' imprisonment

AFP Referral process

47. As set out on the AFP's website,[20] agencies must specifically notify the AFP if a matter they are referring to the AFP is politically sensitive. Where deemed appropriate by the referring agency, matters of a politically sensitive nature may be raised with the Minister responsible for the AFP, by the relevant Minister or Department, at the same time the matter is referred to the AFP. This enables the Government to be informed at the earliest juncture of potentially politically contentious matters.

48. Under present arrangements, the Minister for Justice is responsible for the AFP.

49. As stated on the AFP's website, the Minister does not have the power, or responsibility, to decide what allegations the AFP will, or will not, investigate. The procedure to inform the Minister for Justice is designed to make him aware of significant matters affecting his portfolio. The decision to seek an AFP investigation will, unless the matter also affects other portfolios, remain that of the complainant agency or Minister.

50. The purpose of this procedure is to ensure that there is a coherent, consistent approach by the Government of the day and the AFP. The Minister for Justice will be informed of the investigation's outcome once it has been finalised.

National Guideline on Politically Sensitive Investigations

51. The AFP's *National Guideline on Politically Sensitive Investigations* recognises that politically sensitive investigations require additional care and discretion, and decision-making needs to be made at a higher level than is customary.

52. That National Guideline includes the following requirements:

8. Referral evaluation

All matters which are considered to be politically sensitive must be evaluated in consultation with the relevant manager, who should determine their priority in accordance with the Case Categorisation and Prioritisation Model.

As referral documentation may initially be limited, coordinating further information should be conducted in consultation with the referring body.

9. Parliamentary privilege

When parliamentary privilege issues are likely to be encountered during an investigation, the functional management team should be consulted in the first instance.

The relevant National Manager must be consulted prior to:

- conducting interviews with Members of Parliament (MP)
- executing search warrants upon MP's premises.

[20] www.afp.gov.au

Members undertaking politically sensitive investigations should familiarise themselves with the AFP *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* which outlines procedures members must follow when seizing documents/property related to 'proceedings in parliament'.

When dealing with parliamentary privilege issues, members should also consider consulting with:

- AFP Legal
- the Commonwealth Director of Public Prosecutions
- the Attorney-General's Department
- the Australian Government Solicitor, on referral from AFP Legal.

10. Case security

The case officer should give early consideration to restricting access to any potentially sensitive information by those not required to access it.

53. Further internal procedures regulate the involvement of Ministers and the need to only share information about the investigation on a strict 'need to know' basis.

54. The National Guideline is at **Appendix 3**.

Other relevant governance

55. Stringent internal and external procedures govern the way the AFP manages its investigations. These procedures also govern the way the AFP handles information obtained during the course of an investigation, including requests for information to relating to Government departments and agencies, and private agencies relating to persons of interest.

56. These governance and oversight mechanisms include the following:

- Best-practice guidance documents relating to all aspects of investigations, as developed by AFP Investigations Standards and Practices (ISP).[21] This covers the full spectrum of an investigation, but includes the mandatory AFP Investigation Practice Standard relating to Search Warrants, which outlines the requirements for the use of a search warrant in the context of an investigation, including the specific evaluation and preparation that is required prior to obtaining and executing a warrant.
- A requirement to prepare and submit an AFP Investigation Plan for any matter with an anticipated duration of more than two months, or where an investigator is otherwise directed to do so. The level of detail requested in an Investigation Plan requires a significant amount of forward planning in the initial stages of an investigation, relating to all aspects of an investigation.
- The AFP *National Guideline on Privacy*, which outlines the obligations of AFP personnel arising from the Australian Privacy Principles, the role of the

[21] ISP is an AFP professional practice body promoting consistency, standards and quality in a support of investigations across the organisation through the publication of guidance documents and provision of support and advice to AFP investigators.

Privacy Contact Officer and how the AFP should manage privacy complaints. This includes governance around the way the AFP collects, uses, discloses and stores personal information (which would include information obtained through pre-warrant inquiries).

- The AFP *National Guideline on Information Management*, which outlines the AFP's governance and the obligations for AFP personnel in relation to information management. This includes appropriate classification of documents and correspondence, storage, transportation and appropriate release of information.
- The *Australian Federal Police Act 1979* which outlines the secrecy provisions which AFP appointees must abide by (section 60A), and *Australian Federal Police Regulations 1979* (regulation 13C), which addresses the unauthorised use, access or disclosure of information by an AFP appointee.

Investigative inquiries

57. The Terms of Reference of this Committee Inquiry are directed at whether specific protocols should be created for police enquiries in relation to members of Parliament or their staff. This would include police enquiries to obtain information held by parliamentary departments, departments of State (or portfolio agencies) or private agencies.

58. The AFP understands that in examining the need for new protocols, the Committee is considering both the need to avoid the improper interference with the functioning of Parliament as well as the need to protect parliamentary privilege.

59. During the course of a criminal investigation, it is both commonplace and necessary to make routine police enquiries about a person of interest. This can involve contacting employers to obtain access to information such as employment records; information relating to the location of an individual's work station or office within a building; and swipe card access or ICT records such as use of office scanners, printers or computers to determine when particular information was accessed.

60. Such information is an essential part of an investigation, as it allows the AFP to confirm the identity of individuals who are of interest to the investigation, and eliminate others who are then not subject to any further intrusive powers. Generally speaking, the mere obtaining of information will involve no steps being taken against the individual subject to the investigation, such that it is difficult to see how this could interfere with Parliamentary business, even if the individual subject of the investigation were a member. Rather, it will enable the next steps in the investigation to be assessed on their merits and may lead to no further action being taken.

61. It is important for the integrity of an investigation that the AFP is able to pursue whatever appropriate avenues of inquiry are available, as the failure to do so can compromise the integrity of the investigation. If it were otherwise, criminal elements could exploit their connection to a member of Parliament in order to avoid their activities being investigated.

62. The AFP does not consider there is any need for additional protocols to be developed concerning its access to this information. The following observations are relevant:

- the nature of such routine inquiries does not obviously impact on the proper functioning of Parliament – indeed very often the member is not the target of the investigation;
- the information sought and obtained in such inquiries would not normally fall within the definition of 'proceedings in Parliament'[22] and therefore potentially attract parliamentary privilege;
- the disclosure of information to the AFP does not involve any activity prohibited by the Parliamentary Privileges Act;
- other Government departments and agencies hold and use this information (including privileged information) for other statutory purposes, and there is no apparent basis for introducing a different standard that would require the same information to be withheld from police; and
- police inquiries remain secret unless and until their results are used in evidence in a criminal prosecution. Even then, only the information that is relevant and admissible is publicly revealed. Police inquiries do not have any 'chilling effect' on parliamentary free speech, because members of the public expect that the AFP will properly enforce its statutory obligations in respect of enforcing the criminal law.

63. Even if the Committee were to suggest additional protocols, there is a practical difficulty in determining how material that might be covered by parliamentary privilege could be distinguished and treated in a different way to other material. The Federal Court in *Carmody v MacKellar & Ors* [1996] FCA 791 (5 September 1996) recognised the difficulty in distinguishing legally professionally privileged material from non-privileged material before the relevant communications had been monitored. Practical difficulties may arise if the AFP were subject to any additional procedural obligations in respect of its use of intrusive powers, particularly as the scope of parliamentary privilege is far less readily defined than legal professional privilege. It is foreseeable that any restrictions on evidence gathering would have the detrimental effect of assisting wrongdoers in the concealment of their criminal activity.

64. Finally, if privileged material revealing the existence of a crime was widely reported in the news media, including privileged material available to the public under the *Freedom of Information Act 1982*, but was simultaneously precluded from being used by the AFP to progress an investigation, public confidence in the integrity of law enforcement investigations would be compromised.

[22] s.16(2) Parliamentary Privileges Act

Intrusive powers

65. The Committee is considering the implications of the use of intrusive powers by law enforcement on parliamentary privileges and immunities, including:

- whether existing oversight mechanisms for the use of intrusive powers are adequate; and/or
- whether specific protocols should be developed to safeguard against contempt of Parliament, as well as ensuring that parliamentary privilege may be maintained over material or information which may be obtained as a result of the use of intrusive powers.

66. Intrusive police powers exercised by the AFP include access to the content and data of communications under the TIA Act, and activities authorised under the SD Act.

Thresholds for use of intrusive powers

67. Given the concerns raised by the Committee as to the AFP's potential use of intrusive powers to gather material, and for that to impact on the ability of members of Parliament to carry out their functions, it is important to highlight that these powers are normally reserved for the investigation of serious offences, per the thresholds outlined below.

68. This also means that the AFP is not able to rely on TIA Act and SD Act powers for investigating the following offences in the *Crimes Act 1914*:

- s. 70 Disclosure of information by Commonwealth officers (maximum penalty 2 years' imprisonment); and
- s. 79(2) Official secrets (maximum penalty 2 years' imprisonment).

69. The Committee will be aware of the frequency of 'leak' allegations within Parliament, and in the context of this inquiry, it is relevant to note that the AFP's investigative powers in respect of those matters are limited due to the low penalties involved. This means telecommunications interception warrants are not available to assist in a 'leak' investigation.

Oversight and accountability mechanisms

70. The use of intrusive, covert powers by the AFP is subject to robust oversight and accountability mechanisms. Such mechanisms include:

- internal governance arrangements to ensure the legislation is followed, and record keeping and reporting obligations are met;
- external scrutiny by the Commonwealth Ombudsman; and
- scrutiny by the courts, where material gathered through the use of a power is proposed to be relied upon as evidence in criminal proceedings.

71. The AFP is also subject to the oversight of the:

- Integrity Commissioner (head of the Australian Commission for Law Enforcement Integrity) in relation to allegations of corruption;

- Independent National Security Legislation Monitor (INSLM) in relation counter-terrorism legislation used by the AFP;
- Parliamentary Joint Committee on Law Enforcement (PJCLE) in relation to the performance of the AFP's functions; and
- Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to the performance of the AFP's counter-terrorism functions.

Access to telecommunications data

72. Access to non-content telecommunications data (often referred to as meta-data) is regulated by Chapter 4 of the TIA Act. While telecommunications data has not been defined in the TIA Act, it is taken to mean anything that does not include the content or substance of a telecommunication. Data can include: subscriber information; telephone numbers of the parties involved in a communication; the date, time and duration of a telecommunication; and location-based information.

73. Telecommunications data is a critical component of investigations and has been successfully used to support numerous investigations into serious criminality, including Counter-Terrorism, Cybercrime, Child Protection and Serious Organised Crime investigations. Telecommunications data plays a key role in investigations by supporting warrant applications, identifying criminal networks, establishing evidential trails and developing briefs of evidence.

74. The AFP is permitted to seek access to data held by carriers and carriage service providers (C/CSPs) where statutory threshold tests are met. Disclosure of data by C/CSPs is only permitted where it is determined to be reasonably necessary for agencies' investigations. There are two types of data that can be accessed: historical data and prospective data.

75. Historical data is information which existed before an authorisation for disclosure was received. Its disclosure may be authorised by an enforcement agency (including the AFP) only when it is considered reasonably necessary for the enforcement of: Australian criminal law; a law imposing a pecuniary penalty; or for the protection of the public revenue.

76. Prospective data is data which comes into existence during the period the authorisation is in force. The disclosure must only be authorised when it is considered reasonably necessary for the investigation of an offence with a maximum prison term of at least three years.

77. Data can be accessed on the basis of internal authorisation; in the AFP this is set at the Superintendent level. Consideration must be given to how authorising access to data would affect or interfere with the privacy of any individual, and if any such impacts are justifiable and proportionate to the likely usefulness of the information that would be gained, and the reason the authorisation is being made.

78. A warrant is required where an investigator intends to access data to identify a journalist's source to assist with one of the permitted purposes described above (i.e. the threshold test is met).[23]

Access to the content of communications

79. The provisions of the TIA Act which outline how and when it is lawful to intercept or access content are necessarily rigorous. In addition, the *AFP National Guideline on Telecommunications Interception and Accessing Stored Communications* outlines the policies, procedures and obligations for AFP appointees to obtain, use, record, disclose and report on telecommunications interceptions and stored communications warrants under the TIA Act.

Stored communications

80. Part 3.3 of the TIA Act enables an enforcement agency (which can include regulatory bodies like ATO and ASIC) to apply for a stored communications warrant to assist in the investigation of a serious contravention.

81. Stored communications include communications such as e-mail, SMS or voice messages stored on a carrier's network. The *Cybercrime Legislation Amendment Act 2012* formalised a provision that allows enforcement agencies to request (under notice) that stored communications are preserved until a warrant can be obtained.

82. Stored communications warrants can be obtained for a serious contravention which includes:

- a serious offence for which a telecommunications interception warrant may be obtained;
- an offence punishable by imprisonment for at least three years;[24] or
- an offence punishable by a fine of least 180 penalty units (currently $30,600) for individuals or 900 penalty units (currently $153,000) for non-individuals such as corporations.

83. Applications for a stored communication warrant are considered by an Administrative Appeals Tribunal Member ('AAT Member').

Interception of communications

84. Part 2-5 of the TIA Act provides for the issue of a telecommunications interception warrant (which allows access to the content of a 'live' communication) to designated interception agencies (including the AFP). An interception warrant may only be sought to assist with the investigation of a

[23] The application must be authorised to the level of Superintendent, given to Public Interest Advocate (PIA) for review, and then submitted to an external authorising officer (Administrative Appeals Tribunal member/Judge) for approval.

[24] This does not include the *Crimes Act 1914* offences at s. 70 *Disclosure of information by Commonwealth officers* (maximum penalty 2 years' imprisonment); and s. 79(2) *Official secrets* (maximum penalty 2 years' imprisonment)

'serious offence'. Under the TIA Act a 'serious offence' must generally carry a penalty of at least seven years' imprisonment. The term 'serious offence' is defined in section 5D and generally includes offences punishable by at least 7 years imprisonment that also involves particular types of serious conduct.

85. Applications for an interception warrant are considered by an AAT Member.

Compliance and inspections

86. In accordance with the requirements of the TIA Act, the AFP has a central compliance area dedicated to ensuring that record keeping and reporting obligations are met in relation to accessing telecommunications data and content.

87. The Ombudsman has a statutory obligation under the TIA Act to inspect records relating to access to telecommunications data and stored communications warrants once a year, and assess compliance with relevant provisions of the Act.

88. Under the TIA Act, the Ombudsman is also required to inspect records relating to interception of communications twice per year, and to report any contraventions of the TIA Act identified in the course of the inspections.

89. The INSLM, PJCLE and PJCIS do not have a direct role in oversighting the AFP's interception of communications.[25]

Secrecy obligations under the TIA Act

90. Part 4 of the TIA Act limits what can be done with telecommunications data once it has been lawfully obtained. In essence, secondary disclosure is prohibited unless the disclosure is required for the enforcement of the criminal law; for the enforcement of a law imposing a pecuniary penalty; or for the protection of the public revenue – see sections 181A-182B.

91. Section 133 of the TIA prohibits any disclosure of stored communications or stored communication warrant information. Section 63 of the TIA Act prohibits any disclosure of intercepted information or interception warrant information. For both provisions, this includes disclosing information relating to the existence or non-existence of a warrant outside of the prescribed allowance for use in proceedings, or for a permitted purpose, as defined in section 5 of the TIA Act.

92. The penalty for breaching non-disclosure offences in the TIA Act is two years' imprisonment.

[25] This does not mean that Parliament has not conducted inquiries into the AFP's activities under the TIA Act. See for example, the AFP's access to, and use of, telecommunications data was considered as part of the PJCIS' *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*.

Surveillance Devices Act 2004

93. Surveillance devices are a data surveillance device, a listening device, an optical surveillance device or a tracking device. Surveillance devices are used to gather information for criminal investigations and for the safe recovery of children.

94. Section 14 of the SD Act sets out the circumstances in which a SD warrant may be obtained. A law enforcement officer may apply for the issue of a surveillance device warrant if the law enforcement officer suspects on reasonable grounds that:

- one or more relevant offences have been, are being, are about to be, or are likely to be, committed;
- an investigation into those offences is being, will be, or is likely to be, conducted; and
- the use of a surveillance device is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.

95. Under the SD Act, 'relevant offence' is defined to include:

- an offence against the law of the Commonwealth that is punishable by a maximum term of imprisonment of 3 years or more[26] or for life; or
- an offence against a law of a State that has a federal aspect and that is punishable by a maximum term of imprisonment of 3 years or more or for life.

96. The use of these devices usually requires a warrant, issued by an eligible Judge or nominated Administrative Appeals Tribunal (AAT) member.[27]

97. The SD Act outlines requirements for the secure storage and destruction of records, and restricts the use, communication and publication of information obtained through the use of surveillance devices. It also imposes reporting obligations on law enforcement agencies to ensure an appropriate level of transparency.

98. Under the SD Act, the Ombudsman is required to inspect the records of Commonwealth, State and Territory law enforcement agencies that utilise

[26] This does not include the *Crimes Act 1914* offences of s. 70 Disclosure of information by Commonwealth officers (maximum penalty 2 years' imprisonment); and s. 79(2) Official secrets (maximum penalty 2 years' imprisonment)

[27] There are some exceptions that permit the use of surveillance devices without a warrant , including the use of optical surveillance in circumstances which do not involved a trespass, the use of tracking devices in circumstances that do not involve trespass to private property (which are subject to internal authorisation) or the use of listening devices where a law enforcement officer is included in a class of persons by whom the speaker of the words intends or should expect the words to be heard.

powers under the Act, such as the Australian Federal Police, Australian Criminal Intelligence Commission and State and Territory police forces.

Secrecy obligations under the SD Act

99. Part 6 of the SD Act outlines the restrictions on use, communication and publication of information, including prohibiting the disclosure of any 'protected information' collected under the Act. The penalty for using, recording, communicating or publishing protected information obtained under the Act is imprisonment for 2 years. Where the health or safety of a person is endangered, or the effective conduct of an investigation into a relevant offence is prejudiced, the penalty is imprisonment for 10 years.[28]

100. The SD Act outlines the circumstances in which information obtained under the Act can be used in evidence and the particular circumstances where information can be communicated to another law enforcement or intelligence agency.

Interaction with powers and immunities of Parliament

101. As outlined above, covert police powers (which are, by their nature, exercised without a person of interest's knowledge), are utilised only in restricted circumstances. Accordingly, the AFP invites the Committee to consider whether in fact the lawful exercise of such covert police powers affects the ordinary operation or workings of a parliamentarian's office or impedes the ability of parliamentarians or their staff from continuing to perform their duties freely.

102. Unlike the execution of search warrants, the use of intrusive powers is done covertly. In the search warrant context, there may be concerns of interference with the operation of a member's office such as the presence of officers disrupting the work of the office or impeding the ability of constituents to communicate with a Member. These were the types of interference which gave rise to the concern in the matter of Mr E H Cameron, MP. [29] Such types of interference are unlikely to occur where police powers are being exercised covertly.

103. The AFP also notes its view that parliamentary privilege is more likely to apply to the content of communications than to the meta-data about those communications. The privilege is primarily directed at protecting – from impeachment or questioning (including by way of drawing inferences) in the courts – the content of communications in order to preserve the freedom of speech.

104. The operation of parliamentary privilege as a rule of evidence (to prevent the use of material in a court to impeach or question, including by way of

[28] s. 44 SD Act

[29] House of Representatives Committee of Privileges Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP, October 1995, Parl Paper Number: 376/95 paragraph [8]

drawing inference, Parliamentary proceedings) is not affected. This again reflects the position that there is no judicial authority for parliamentary privilege operating so as material or information is immune from the exercise of police functions and powers.

105. It is difficult to see how notifying the Presiding Offices of the House or Senate could practically improve the operation of parliamentary privilege in relation to the use of covert powers. The Presiding Officers would not have any power to challenge the authorisation of the use of covert powers. Any power of oversight of a police investigation would go beyond the current operation of the privilege under the Parliamentary Privileges Act, and may imperil the political impartiality of police.

106. In the event that a serious criminal investigation was compromised, having more people aware of the investigation broadens the potential scope of inquiry for the source of such compromise. There are sound reasons for the AFP's careful 'need to know' approach, which is taken in respect of politically sensitive matters.

107. It is arguable that there are sufficient distinguishing features, within the SD Act and TIA Act regimes, that limit the potential for these powers to be used in a way that amounts to improper interference with parliamentary privilege, in the same way that search warrants potentially could.

Are additional protocols required?

108. There is no legislative requirement under the TIA Act or SD Act to consider the powers and immunities of Parliament in authorising or executing the use of intrusive powers. However, the TIA Act and SD Act contain significant administrative, reporting and oversight measures designed with the intention of ensuring the use of covert investigative powers is accountable.

109. It is important to carefully consider the consequences of tightening existing mechanisms, or introducing new mechanisms, on lawful and proper police investigations. Where covert powers are involved, relevant considerations could include: the potential prejudice to an investigation; compromising the independence of the AFP; and the privacy and reputation of the person who may be subject of such powers.

110. The current arrangements allow police to conduct covert investigations into serious criminal matters, while maintaining parliamentary privilege over any privileged material so obtained. The AFP considers that existing oversight and accountability mechanisms (as outlined above) are adequate to ensure Parliamentarians can carry out their functions and that the powers and immunities of Parliament are not unduly affected.

Appendix 1

What is parliamentary privilege?

The term 'parliamentary privilege' broadly refers to the powers, privileges and immunities of both Houses of Parliament and their members, which enable the Houses of Parliament to carry out their functions effectively and protect the integrity of their processes.

The *powers* of parliament are distinct from the *immunities* of Parliament. The immunities are commonly referred to as 'privileges'. As *Odgers' Australian Senate Practice* (Odgers' ASP) explains, '*the term "*privilege*", in relation to parliamentary privilege, refers to an immunity from the ordinary law which is recognised by the law as a right of the Houses and their members*.'[30]

This manifests itself as:

- the immunity from question and impeachment in the courts of parliamentary debates and proceedings – or the privilege of freedom of speech – which has the effect that parliamentarians are immune from suit or prosecution for things said in the course of proceedings in Parliament; and
- the immunities of members from arrest and attendance before courts in relation to civil matters and from civil duties.

It is these immunities which are more commonly understood to be referred to by the term 'parliamentary privilege.'

The powers of Parliament, on the other hand, are the power to conduct inquiries and the power to punish contempts – i.e. the ability of the Houses of Parliament to deal with acts which are deemed to be offences against the Houses. The power to punish contempts is distinct from the immunities, and it is not the primary purpose of the power to protect those privileges,[31] as is discussed further below.

Sources of parliamentary privilege

The sources of parliamentary privilege, in the broader sense, in the Commonwealth Parliament are the Constitution, the *Bill of Rights 1688* and the Parliamentary Privileges Act.[32]

The Constitution

Section 49 of the Constitution provides:

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[30] *Odgers' Australian Senate Practice* (14th edition), Chapter 2 - accessed 14 March 2016 online: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02#h02

[31] See Senate Committee of Privileges, *35th report*, PP 467/1991, pp. ix-x, cited in Senate Committee of Privileges, *125th report*, PP 3/2006, at 1.3

[32] *Crane v Gething & Ors* (2000) 169 ALR 727 at [47]

> *The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.*

This section empowers Parliament to declare the powers, privileges and immunities of both Houses of Parliament. Pursuant to this section, the enactment of the Parliamentary Privileges Act preserved the powers, privileges and immunities of Parliament of the United Kingdom House of Commons in 1901.

The Bill of Rights 1688

These included the freedom against the impeachment of proceedings in parliament, contained in article 9 of the *Bill of Rights 1688*, which was enacted as the '*culmination of a long struggle with the executive over the right to freedom of speech in parliament in England*'[33] and from which the immunity from question and impeachment in the courts of parliamentary debates and proceedings originates.

Article 9 of the *Bill of Rights 1688* provides:

> '*That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament*.'[34]

The underlying rationale of article 9 was to '*ensure as far as possible that a member of the legislature and witnesses before Committees of the House can speak freely without fear that what they say will later be held against them in the courts*.'[35]

The Parliamentary Privileges Act

The power under s 49 of the Constitution was exercised by Parliament in 1987, with the enactment of the Parliamentary Privileges Act, which clarified the law of parliamentary privilege in Australia. Section 5 of the Parliamentary Privileges Act provides that the powers, privileges and immunities of the Houses of Parliament and their members as in force under s 49 of the Constitution continue in force, except as expressly provided by the Parliamentary Privileges Act.

Among other things, the Parliamentary Privileges Act:

- sets out the essential element of offences against a House (s 4);
- abolishes contempt by defamation (s 6);

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[33] *O'Chee v Rowley* (1997) 150 ALR 199 at 206

[34] *Laurance v Katter* (1996) 141 ALR 447 at 448

[35] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334

- sets out the penalties which may be imposed for an offence against a House (s 7);
- creates offences in relation to improperly influencing or harming witnesses in respect of evidence given, or to be given before a House or a Committee (s 10);
- creates an offence in relation to the unauthorised disclosure of evidence given *in camera* (s 13); and
- provides limited immunities to members and officers of the Houses from arrest and attendance before courts in relation to civil matters (s 14).

Most significantly, section 16 of the Parliamentary Privileges Act relates to the immunity from question and impeachment in the courts of parliamentary debates and proceedings. The provision sets out prohibited and permitted treatments by courts or tribunals of information concerning proceedings in Parliament.

Section 16 of the Parliamentary Privileges Act – immunity from question and impeachment in the courts

This provision was enacted to '*avoid the consequences of the interpretation of article 9 of the* Bill of Rights 1688 *by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of NSW*'[36] in *R v Murphy* (1986) 64 ALR [498], where it was held that witnesses in a proceeding could be cross-examined on evidence given to a parliamentary committee for the purpose of testing their credibility.

Section 16(1) declares that article 9 of the *Bill of Rights* applies in relation to the Commonwealth Parliament, and the remainder of the provision defines what is covered and protected by article 9.

Section 16(2) of the Parliamentary Privileges Act provides that for the purposes of article 9 of the *Bill of Rights* "proceedings in Parliament" means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee … 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.

[36] *Explanatory Memorandum* to the Parliamentary Privileges Act 1986, page 1

Section 16(2) should be '*regarded as a codification of the pre-existing law, not as an extension of the law'* – opinion of the then Clerk of the Senate, Mr Harry Evans, 30 August 1995, cited in the Senate Privileges Committee in its 67th Report (PP141/1997); see also *Amann Aviation v Commonwealth* (1988) 19 FCR 223.

Section 16(3) prohibits, in proceedings in any court or tribunal, evidence from being tendered or received, questions being asked, or statements, submissions or comments being made, concerning proceedings in Parliament, by way of, or for the purpose of:

- calling into question, or relying on the truth of, anything forming part of parliamentary proceedings;
- otherwise questioning or establishing the credibility, motives, etc or good faith of any person; or
- drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Courts and tribunals are also prohibited, by virtue of s 16(4), from requiring evidence given to a House or Committee *in camera* to be produced or admitted into evidence, unless it has been published or authorised for publication by a House or Committee.

What are 'proceedings in Parliament' for the purpose of s 16?

The courts have considered what activities of a parliamentarian might fall within the term 'proceedings in Parliament' for the purpose of section 16 of the Parliamentary Privileges Act. It is important to note that:

> *'While the phrase "…for the purposes of or incidental to, the transaction of the business of a House…" in sub-s 16(2) of the Parliamentary Privileges Act is to be given a generous operation, they do not transform every action of a parliamentarian in the pursuit of his or her vocation into "proceedings in Parliament."*[37]

In the case of *Slipper v Magistrates Court of the ACT and Ors,* Burns J noted that '*Parliamentarians undoubtedly engage in many activities that have no real connection with "the transacting of the business of a House or of a committee"'* and, emphasising that section 16 of the Parliamentary Privileges Act is primarily directed to protect the freedom of speech in parliament, stated that the provision is '*not intended to apply to all activities engaged by a parliamentarian*.'[38]

Consistent with these principles, a document will not attract parliament privilege merely by virtue of being provided to a parliamentarian. At a minimum, some

[37] *O'Chee v Rowley* (1997) 150 ALR 199 at 203

[38] (2014) 179 ACTR at [49]-[50]

act must be done by the parliamentarian or their agent with respect to the document for the purposes of transacting business in a House of Parliament – for example, retaining them for the purpose of Senate questions or debate on a particular topic.[39]

The power to punish contempt

As noted above, the Parliamentary Privileges Act contains provisions relating to the power of the Houses of Parliament to punish offences against the Houses – i.e., contempts. The rationale underlying the power, which is similar to courts' powers to punish contempt, is to enable the Houses to '*protect themselves from acts which directly or indirectly impede them in the performance of their functions*."[40]

A contempt is not synonymous with a breach of privilege,[41] and a range of matters may be considered to be contempts. However, since the introduction of the Parliamentary Privileges Act, a matter will not constitute a contempt unless it amounts, or is intended or likely to amount, to an *improper interference* with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member – see section 4 of the Parliamentary Privileges Act.

It would be open to a person who is punished for a contempt of Parliament to bring an action in the courts challenging whether the conduct actually meets the requirements of section 4.

The word 'interference' connotes some sort of intervention, interruption or impediment. In a matter concerning the execution of a search warrant on a parliamentarian's electorate office, the House of Representatives Committee of Privileges has considered that '*clashing with or coming into opposition to the normal or ordinary operation or workings of the office'* could constitute interference with the operation of the office.[42] However, in order for a contempt to have occurred, any interference must be *improper*.

In the same matter, the House Committee stated that in determining whether interfere is improper, '*regard should be had to whether there was evidence of unusual or inherently improper, wrongful or deceptive action on the part of those responsible, to their intentions and motives and to whether there were any unusual circumstances in connection with the actions complained of (in terms of what might normally be expected in connection with the execution of a search warrant).'*[43]

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[39] *O'Chee v Rowley* (1997) 150 ALR 199 at 209

[40] *Odgers' Australian Senate Practice* (14th edition), Chapter 2: http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_02

[41] *House of Representatives Practice* (6th Ed.), p. 731

[42] Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP, October 1995, [28]

[43] Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron, MP, October 1995, [28]

This Committee (differently constituted) has stated that there must be 'culpable intention involved' for an act to be an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member. [44]

The Senate's Brief Guides to Procedure No. 20 *Parliamentary Privilege* states:

> *'the Senate has taken a fairly robust view as to whether senators have been improperly obstructed, probably on the basis that senators are capable of looking after themselves.'*[45]

The AFP agrees that 'improper' indicates some deviation from the standard of conduct of a reasonable person. In considering the interaction between police powers in criminal investigations and parliamentary privilege, the AFP submits that any understanding of what might be 'improper' interference must be set against the rule of law, the legislated function of the AFP to enforce Commonwealth laws, and the duties of police to act impartially and without fear or favour.

Taking this into consideration, and based on previous statements of this Committee and the House Committee of Privileges, the lawful and diligent exercise of police powers should not normally constitute improper interference with the free exercise by a House or Committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

[44] Committee of Privileges, Report 142, [4.57] (citations omitted) http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2008-10/report_142/c04

[45] http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_20

MEMORANDUM OF UNDERSTANDING ON THE EXECUTION OF SEARCH WARRANTS IN THE PREMISES OF MEMBERS OF PARLIAMENT

BETWEEN

THE ATTORNEY-GENERAL

THE MINISTER FOR JUSTICE AND CUSTOMS

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, AND

THE PRESIDENT OF THE SENATE

1 Preamble

This Memorandum of Understanding records the understanding of the Attorney-General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate on the process to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'), including the Parliament House office of a Member, the electorate office of a Member and the residence of a Member.

The process is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and so its Members and their staff are given a proper opportunity to raise claims for parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.

2 Execution of search warrants & parliamentary privilege

The agreed process is spelt out in the AFP's *National Guideline for the Execution of Search Warrants where Parliamentary Privilege may be involved* ('National Guideline'). This National Guideline establishes the procedures that AFP officers shall follow when executing search warrants on premises occupied or used by a 'Member'. The National Guideline is set out at Annexure A to this Memorandum of Understanding and covers the:

- Legal background to parliamentary privilege;
- Purpose of the guideline;
- Application of the guideline;
- Procedure prior to obtaining a search warrant;
- Procedure prior to executing a search warrant;
- Execution of the search warrant;
- Procedure to be followed if privilege or immunity is claimed; and
- Obligations at the conclusion of a search.

3 Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the AFP by publishing the Memorandum of Understanding on the AFP Hub, together with an electronic message addressed to all AFP employees or special members affected by the Memorandum of Understanding to bring it to their attention.

This Memorandum of Understanding will be tabled in the House of Representatives and the Senate by the Speaker of the House of Representatives and the President of the Senate respectively.

4 Variation of the National Guideline

Subsection 37(1) of the *Australian Federal Police Act 1979* (AFP Act) provides that the Commissioner of the AFP has the general administration and control of the operations of the AFP. Section 38 of the AFP Act provides that when exercising his powers under section 37, the Commissioner may issue orders about the general administration and control of the operations of the AFP in writing. The Commissioner has delegated this power in relation to the issuing of national guidelines to National Managers.

The AFP will consult with the Speaker of the House of Representatives and the President of the Senate when revising and reissuing the National Guideline.

The most current National Guideline applies to this Memorandum of Understanding. The version attached at Annexure A is current at the time this Memorandum of Understanding is signed.

5 Conflict Resolution

Any issues or difficulties which arise in relation to the interpretation or operation of this Memorandum of Understanding are to be discussed, at first instance, by the parties to the Memorandum of Understanding. If necessary, the Attorney-General or the Minister for Justice and Customs will raise those issues or difficulties with the Commissioner of the AFP.

6 Variation of this Memorandum of Understanding

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

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants in the premises of Members of Parliament is concluded between the parties holding the positions of the Minister for Justice and Customs, the Attorney-General, the Speaker of the House of Representatives and the President of the Senate.

7 Revocation of agreement to this Memorandum of Understanding

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

Signatures

PHILIP RUDDOCK
Attorney-General

/ / 2005

CHRIS ELLISON
Minister for Justice and Customs

9 / 2 / 2005

DAVID HAWKER
Speaker of the House of Representatives

2 / 3 / 2005

PAUL CALVERT
President of the Senate

15 / 2 / 2005

Australian Federal Police

To fight crime together and win

AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved

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AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved

1. Preamble

This guideline sets out procedures to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'). The guideline applies to any premises used or occupied by a Member, including the Parliament House office of a Member, the electorate office of a Member and the residence of a member.

The 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.

2. Legal background

A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member. Evidential material cannot be placed beyond the reach of the AFP simply because it is held by a Member or is on premises used or occupied by a Member.

However, it can be a contempt of Parliament for a person to improperly interfere with the free performance by a Member of the Member's duties as a Member. The Houses of Parliament have the power to imprison or fine people who commit contempt of Parliament.

Some of the principles of parliamentary privilege are set out in the Parliamentary Privileges Act 1987. They are designed to protect proceedings in Parliament from being questioned in the courts but they may also have the effect that documents and other things which attract parliamentary privilege cannot be seized under a search warrant.

Parliamentary privilege applies to any document or other thing which falls within the concept of "proceedings in parliament". That phrase is defined in the Parliamentary Privileges Act to mean words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee. It includes evidence given before a committee, documents presented to a House or a committee, documents prepared for the purposes of the business of a House or committee and documents prepared incidentally to that business. It also includes documents prepared by a House or committee. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.

It is not always easy to determine whether a particular document falls within the concept of "proceedings in parliament". In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.

It is also possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (Jacobsen v Rogers (1995)127ALR159).

Public interest immunity can apply to any document if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Among other things, public interest immunity can apply to documents if disclosure could damage national security, defence, international relations or relations with the States, or if the document contains details of deliberations or decisions of the Cabinet or Executive Council, or if disclosure could prejudice the proper functioning of the government of the Commonwealth or a State.

Public interest immunity can arise in any situation, but it is more likely to arise in relation to documents held by a Minister than by a Member who is not a Minister.

Further information in relation to the legal principles which apply in these cases can be found in the DPP Search Warrants Manual. That document is not a public document but has been provided to the AFP by the DPP and is available to AFP officers on the AFP Intranet.

3. Purpose of the guideline

This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.

4. Application of the guideline

4.1 The guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a Member including:

- the Parliament House office of a Member
- the 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.

4.2 The guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.

4.3 If a Member raises a claim for Legal Professional Privilege (sometimes called client legal privilege) in respect of a document, the executing officer should follow the normal procedure that applies in cases where a claim for Legal Professional Privilege is made in respect of a document that is on premises other than those of a lawyer, law society or like institution. The fact that Legal Professional Privilege has been claimed by a person who is a Member does not alter the normal rules that apply in such cases.

5. The Substantive Guideline

Procedure prior to obtaining a search warrant

5.1 An AFP 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 AFP (the relevant National Manager if available, otherwise a Manager) before applying for the warrant.

5.2 If approval is given, the officer should consult the office of the appropriate DPP before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against ACT law, the appropriate DPP is the ACT DPP. The appropriate 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.

5.3 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

5.4 If the premises that are 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 a 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.

5.5 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 so as to minimise the potential interference with the performance of the Member's duties.

Executing the search warrant

5.6 If possible, the executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:

(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.

5.7 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 of 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.

5.8 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.

5.9 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

5.10 If the Member, or a member of 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 the procedure in paragraph 5.11 unless the executing officer considers a claim to be arbitrary, vexatious or frivolous. In the latter circumstances, the procedure in paragraph 5.13 should be followed.

5.11 The executing officer should ask the Member, or member of 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 of 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. In this respect, it is a matter for the Member to determine whether he/she should seek that ruling from a Court or the relevant House;
- 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.

5.12 If the Member, or member of 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 members of the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

5.13 In some cases a Member, or member of 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 of staff, that he/she intends to proceed to execute the search warrant unless the Member, or member of staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.

5.14 The AFP will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister responsible for the AFP (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

5.15 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.

5.16 The executing officer should inform the Member that the AFP 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 AFP 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.

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

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

OFFICE OF THE CLERK
BUREAU DU GREFFIER

April 12, 2017

Mr. Richard Pye
Clerk of the Senate
Parliament House
Canberra ACT 2600
priv.sen@aph.gov.au

Dear Mr. Pye:

I am writing in response to your letter of March 17, 2017, in which you solicit information about the use of intrusive powers and how it relates specifically to the operation and integrity of parliamentary privilege at the House of Commons of Canada for an inquiry being conducted by the Standing Committee of Privilege of the Australian Senate. While we believe that the Canadian House of Commons may have a broader view of what constitutes parliamentary privilege than its Australian counterparts, I hope that the information we provide will be useful to the Committee.

The privileges of the House of Commons of Canada include "such rights as are necessary for free action within its jurisdiction and the necessary authority to enforce these rights if challenged" (Sir John George Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 4th ed., Toronto: Canada Law Book, 1916, p. 37). It is well established that, by extension, the House has complete and sole authority to regulate and administer its precinct, without outside interference, including controlling physical or electronic access to the buildings.

In the Supreme Court of Canada decision of Canada (House of Commons) v. Vaid, 2005 SCC 30, the Court determined that laws of general application apply in relation to the House of Commons up to the point where parliamentary privilege is engaged. As such, law enforcement and intelligence agencies cannot enter the premises occupied by the House of Commons without the authorization of the Speaker of the House of Commons. In order to preserve its rights, privileges, immunities and powers, the House of Commons has protocols in place with these agencies to execute their intrusive powers while protecting the capacity of Members of Parliament to carry out their parliamentary functions without interference.

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For example, before executing a search of a Member's office within the Parliamentary Precinct, the police must present a search warrant to the Speaker, who will examine the warrant to satisfy himself that the search is lawful. The normal practice in dealing with search warrants in the Parliamentary Precinct is for the police to contact the Corporate Security Officer, who will meet with the Clerk and the Law Clerk to determine whether the search warrant is in order and meets the requirements of the law. Afterwards, a meeting is held with the Speaker, who asks questions to be satisfied that the Member's privileges are not being infringed by the process. If the Speaker allows the execution of the search warrant to proceed, arrangements are made to carry out the search if necessary. In addition, the Law Clerk—or a lawyer from the Law Clerk's office—will be present at the search of the Member's office to ensure that the terms of the warrant are followed precisely and to assert any claim of parliamentary privilege as necessary. A list of the materials seized is then prepared and delivered to the Speaker. If privilege were asserted and the police did not agree with the assertion, the practice would be to seal the materials and deliver them to the Speaker to establish a process for the House to decide the claim of privilege. To date, this has not occurred since the police have accepted all claims relating to particular documents or information.

The courts have affirmed many times that the independence of the House of Commons protected by parliamentary privilege should not be interfered with by the judicial or executive branches. For example, in George v. Canada (Attorney General), 2007 FC 564, the Federal Court mentions that "to allow a court or another entity to inquire into whether a member or a witness had misled the House of Commons could lead to exactly the type of conflict between two spheres of government that the wider principle of parliamentary privilege is designed to avoid. The courts would be trespassing on Parliament's jurisdiction." Canadian law enforcement and intelligence agencies usually have a broad understanding of the application of parliamentary privilege and respect the separation of powers and the fact that the House of Commons is constitutionally and legally independent from the federal government. When using their powers, law enforcement and intelligence agencies have taken into account the unique situation of the legislative branch. Any issues that have arisen out of the use of these powers at the House of Commons have been worked out on an *ad hoc* basis. For example, legal counsel have worked with law enforcement and intelligence agencies in the execution of any process to ensure that parliamentary privilege is protected.

In conclusion, *House of Commons Procedure and Practice*, Second Edition, 2009, reminds us on page 123 that throughout this process, the Speaker "must ensure not only that the corporate privilege of the House to administer its affairs within the precinct is not infringed, but also that the privileges of individual Members to participate freely in the proceedings are not compromised. At the same time, the Speaker must be careful not to be seen as obstructing the administration of justice." The Speaker's powers are limited to ensuring that the search warrant is lawful and that the search adheres to its terms. *House of Commons Procedure and Practice* continues on page 126: "In no sense does the Speaker enjoy the right to review the decision to issue the warrant in the first instance. To do so could amount to an obstruction of justice and would undeniably blur the distinctions between Parliament as a legislative body on the one hand and the judicial and executive functions in respect of the issuance of the search warrant and the administration of justice on the other."

I thank you for your interest in the work of the House of Commons and I wish the Committee good luck with its inquiry.

Yours sincerely,

Marc Bosc
Acting Clerk of the House of Commons

LEGISLATIVE COUNCIL

OFFICE OF THE PRESIDENT

18 April 2017

D17/10893

Senator the Hon Jacinta Collins
Chair
Senate Standing Committee of Privileges
PO Box 6100
Parliament House
Canberra ACT 2600

By email: Priv.Sen@aph.gov.au

Inquiry into parliamentary privilege and the use of intrusive powers

Dear Senator Collins

I refer to correspondence dated 13 April 2017 from the Deputy Clerk of the Senate seeking a submission to the Senate Standing Committee of Privileges' inquiry concerning the adequacy of parliamentary privilege as a protection against the use of intrusive powers by law enforcement and intelligence agencies.

The New South Wales Parliament has adopted protocols with both the New South Wales Independent Commission Against Corruption and the New South Wales Police for the execution of search warrants on members' offices which include procedures designed to prevent the seizure of material protected by parliamentary privilege. These protocols were developed following an incident in 2003 in which documents were seized from a member's office under a warrant. Other protocols, concerning matters such as police access to the precincts, also include limitations on the conduct of external investigations at Parliament House. Outside the realm of these protocols, issues of parliamentary privilege have also arisen in the context of 'notices to produce' issued by the Independent Commission Against Corruption under its governing Act.

A summary of these precedents and protocols is provided below.

Seizure of a member's documents, 2003

In 2003, during the execution of a search warrant on the parliamentary office of the Hon Peter Breen MLC, investigators from the Independent Commission Against Corruption seized a quantity of paper documents, two computer hard drives and Mr Breen's laptop and downloaded information from Mr Breen's personal drive on the Parliament's IT network.

Following correspondence from the President of the Legislative Council raising issues concerning the lawfulness of the search and the application of parliamentary privilege, the Commission returned the laptop and hard drives to the President together with 'imaged' copies of both, and advised that the seized paper documents would be placed in 'quarantine' until the issue of access had been settled.

The Legislative Council then referred an inquiry on the matter to its Privileges Committee, which received conflicting evidence as to nature of the relationship between search warrants and the immunity attaching to parliamentary proceedings under article 9 of the Bill of Rights.[1]

On the one hand, the Independent Commission Against Corruption argued that the seizure of documents pertaining to parliamentary proceedings does not contravene article 9 because the act of seizure does not involve an impeaching or questioning of proceedings. Similarly, the New South Wales Crown Solicitor and Solicitor General advised that it is only if seized material is subsequently used in a way that amounts to impeaching or questioning that any contravention of parliamentary privilege may arise.[2] On the other hand, the Clerk of the Senate, Harry Evans, advised that there is a 'testimonial' element to article 9 which includes an immunity against the compulsory production of documents which are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings and that this immunity extends to the seizure of documents under a search warrant. Similarly, Bret Walker SC advised that it would be very difficult to construe legislation governing the execution of search warrants as permitting the seizure of material which it is conceded cannot then be used by reason of parliamentary privilege.

The Privileges Committee concluded that the execution of the warrant had involved a breach of the immunities of the House as at least one of the documents seized was within the scope of 'proceedings in Parliament' and the seizure of such a document results in the impeaching or questioning of parliamentary proceedings. The Committee also recommended a set of procedures to allow the seized material to be further examined so that all of the issues of parliamentary privilege arising could be explored and resolved.[3]

Based on the committee's recommendations the Legislative Council passed a resolution which provided that:

- the seized material was to be returned to the President and retained in the possession of the Clerk until the issue of parliamentary privilege had been determined
- Mr Breen, the Clerk and a representative of the Commission were to be jointly present at the examination of the material and Mr Breen and the Clerk were to identify any items claimed to be within the scope of 'proceedings in Parliament'
- the Commission had the right to dispute any claim of privilege and any disputed claim was to be determined by the House
- material not subject to a privilege claim or in respect of which such a claim was not upheld by the House was to be released to the Commission.[4]

In accordance with these procedures the Commission disputed a claim of privilege in relation to a small number of the seized documents (concerning a motor vehicle accident which had led to litigation in which Mr Breen had acted as a solicitor). The Legislative Council subsequently referred the disputed documents to the Privileges Committee for inquiry and report as to which particular items covered by the claim fell within the scope of 'proceedings in Parliament'.

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1 The Bill of Rights 1689 applies in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969* (NSW).

2 A similar view was expressed by Professor Anne Twomey the following year: *The Constitution of NSW* Federation Press, 2004, p 502.

3 Legislative Council, Privileges Committee, *Parliamentary privilege and the seizure of documents by ICAC*, Report 25, December 2003.

4 Legislative Council, *Minutes*, 4 December 2003, pp 493-495.

To assist with assessing the documents the Privileges Committee developed a 'three step' test for determining whether records form part of 'proceedings in Parliament', based on approaches which have been adopted in a range of judicial and parliamentary authorities (see Annexure 1). Applying that test the committee concluded that, while none of the documents had been brought into existence for the purpose of transacting business in the House or a committee, the documents *had* been *retained* by Mr Breen for purposes of or incidental to the transacting of such business, and were thus within the scope of proceedings in Parliament.[5] The House subsequently upheld the claim of privilege pertaining to the documents which the Committee had identified as within proceedings in Parliament,[6] and those documents were returned to Mr Breen.

MOU with ICAC, 2009

In 2005, in the wake of the Breen case, the Legislative Council referred to its Privileges Committee an inquiry into the appropriate protocols to be adopted by law enforcement agencies and investigative bodies such as the Independent Commission Against Corruption when executing search warrants on members' offices. The Committee reported in 2006 recommending the adoption of a protocol to be followed in any future instances involving the execution of search warrants by investigatory or law enforcement bodies at Parliament House.[7]

In December 2009, following further reports by the privileges committee of each House,[8] the Presiding Officers and the Commissioner of the Independent Commission Against Corruption entered into a 'Memorandum of Understanding on the execution of search warrants in the Parliament House offices of members of the New South Wales Parliament' (Annexure 2).[9]

The Memorandum of Understanding with the Independent Commission Against Corruption provides that the process to be followed for executing search warrants in members' offices is that spelt out in the relevant part of the Commission's Operations Manual, section 10 of which, entitled 'Execution on parliamentary office', is 'based on the protocol recommended by the Legislative Council Privileges Committee in February 2006'.[10] Section 10 includes procedures for claims of privilege to be made by the member and if necessary disputed by the Commission and for such disputes to be determined by the House.

MOU with NSW Police, 2010

In November 2010, following further reports by the privileges committee of each House,[11] the Presiding Officers and the New South Wales Commissioner of Police entered into a

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5 Legislative Council, Privileges Committee, *Parliamentary privilege and the seizure of documents by ICAC No.2*, Report 28, March 2004.

6 Legislative Council, *Minutes*, 1 April 2004, p 650.

7 Legislative Council, Privileges Committee, *Protocols for execution of search warrants on members' offices*, Report 33, February 2006.

8 Legislative Council, Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report 47, November 2009; Legislative Assembly, Parliamentary Privileges and Ethics Committee, *Memorandum of Understanding – Execution of search warrants by the Independent Commission Against Corruption on members' offices*, November 2009.

9 The Memorandum was tabled in the Legislative Council: *Minutes*, 5 May 2011, p 54.

10 Independent Commission Against Corruption, 'Operations manual, Procedure No. 9, Procedures for obtaining and executing search warrants', approved 22 July 2009, p 16.

11 Legislative Council, Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report No 53, November 2010; Legislative Assembly, Parliamentary Privileges and Ethics Committee, *Report on a Memorandum of Understanding with the NSW Police relating to the execution of search warrants on members' premises*, October 2010.

'Memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament' (Annexure 3).

Unlike the Memorandum with the Independent Commission Against Corruption, the Memorandum with Police covers all premises occupied by members including the Parliament House office of a member, the ministerial office of a member (if applicable), the electorate office of a member and a member's residence.

The Memorandum does not extend to the Federal Police. However, during the inquiry by the Legislative Council Privileges Committee which led to the adoption of the Memorandum, the Australian Federal Police advised that in the unlikely event of the Federal Police seeking to execute a search warrant on the premises of a member of the New South Wales Parliament, the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the Commonwealth Government would provide an appropriate framework for dealing with any privilege claims.[12]

Draft revised MOU with ICAC, 2014

In 2014, following the execution of search warrants by the Independent Commission Against Corruption on the home and electorate offices of a number of former and sitting members of the Legislative Assembly, the Presiding Officers authorised the clerks to enter into discussions with the Independent Commission Against Corruption with a view to developing a revised Memorandum of Understanding with the Commission. A revised MOU would ideally be based on the form of the 2010 Memorandum with the Police covering not only the Parliament House offices of members but also other premises used and occupied by members.

A draft revised Memorandum was subsequently developed which included coverage of all premises occupied by members (Annexure 4). Other innovations of the draft included:

- a procedure allowing a forensic image or report to be made of material on an electronic device
- a procedure enabling a member who was not present at the execution of the warrant and consequently did not have the opportunity to make a claim of parliamentary privilege over items that were seized to make such a claim after the event
- a procedure which applies where officers executing a search warrant decide to remove an item from the premises for examination at another location to determine whether or not it may be seized.

The draft revised Memorandum was referred to the privileges committee of each House for inquiry and report. The Legislative Council's committee recommended that the draft revised Memorandum be amended to extend the specified timeframes for making claims of privilege where a member is not present at the search or items have been removed for examination[13] but was unable to obtain the Commission's agreement to those amendments. The Legislative Assembly's committee recommended that the draft revised Memorandum be adopted as proposed without recommending any amendments but noted in its report that a further review

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12 Legislative Council, Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report No 53, November 2010, Appendix 10.

13 Legislative Council, Privileges Committee, *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises*, Report 71, November 2014.

of the timeframes for making a claim of privilege may be warranted in future.[14] Since then no further action has been taken to implement the draft in the absence of agreement on the times available for making claims of privilege.

Other MOUs with NSW Police

In December 2004 the Presiding Officers and the Commissioner of Police entered into a revised Memorandum of Understanding for police access to the parliamentary precinct which provides that:

> During their attendance within the Parliamentary Precincts or the Parliamentary Zone, the Police will not, without the prior authorisation from the Presiding Officers:
>
> • conduct any investigation,
> • execute any process (eg, search warrants),
> • interview, hold in custody or arrest any Member of Parliament or any Parliamentary employee.
>
> This clause does not prevent Police carrying out an investigation, within the limited confines of the Parliamentary Zone, with respect to any accident or incident which does not involve a Member of Parliament or the Parliamentary buildings or structures.[15]

In October 2009, the Presiding Officers also entered into a further Memorandum of Agreement with the Commissioner of Police for the provision of security services in and around the parliamentary precincts and parliamentary zones. The agreement included a provision to the effect that where the Police, Independent Commission Against Corruption or other investigative agencies seek to access a member's office or seek to serve process on a member, the relevant Presiding Officer and Clerk must be advised to ensure that all relevant protocols put in place by either the agency or the House are followed.[16]

'Notices to produce' to ICAC

More common than search warrants, at least in relation to the Independent Commission Against Corruption, are notices to produce under section 22 of the *Independent Commission Against Corruption Act 1988*. Unlike the execution of search warrants which involves the attendance of Commission officers at Parliament House, a notice to produce requires parliamentary officers to attend upon the Commission to hand over material.

Although notices to produce are not covered by the Memorandum of Understanding on search warrants, equivalent procedures are followed by the relevant parliamentary House department (working in conjunction with DPS) in responding to such notices to ensure that parliamentary privilege is protected. According to long established practice Presiding Officers are not informed

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14 Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, Report 3/55, November 2014.

15 Memorandum of Understanding between the Presiding Officers and the Commissioner of Police, 3 December 2004, para 2.13.

16 Memorandum of Agreement: Security Services for the Parliament of New South Wales, October 2009, para 6b.

when notices to produce are served. This is a consequence of the secrecy provisions applying to these investigative steps and the recognition of previous Presiding Officers that it would not be appropriate to be involved in the processes of an ICAC preliminary investigation of a colleague or political opponent.

Electronic telecommunications interceptions, surveillance and the like

The terms of reference and background paper to your inquiry also make reference to the potential for the use of intrusive powers by law enforcement and intelligence agencies to raise matters of parliamentary privilege, and whether the rights of members to undertake their functions without improper interference are sufficiently safeguarded. The background paper indicates that it is unclear how parliamentary privilege sits within the potential for oversight by intelligence, security and law enforcement agencies.

The Legislative Council does not have any direct experience of this issue, so has limited information to offer. However, the position of the Council in consistently asserting the 'testimonial' aspect of article 9 to protect 'proceedings in Parliament' has been adopted for good reason: failure to uphold the immunity has the potential to lead to a chilling effect on the flow of information to members. To the extent that surveillance, telecommunications interceptions and the like have the potential to curtail the free and ready flow of information to members issues of privilege may arise, albeit that such activities by their very nature would presumably not often enter into the public domain.

In that regard, the approach which has been adopted in the New Zealand Parliament through the development of a protocol for the collection of information on members by the intelligence service seems appropriate.

Conclusion

The Legislative Council has asserted that the 'testimonial' aspect of article 9 operates so as to prevent the compulsory disclosure of records forming part of proceedings in Parliament during the execution of a search warrant. That view has in the past been contested by government law officers in New South Wales, the Independent Commission Against Corruption, and Professor Twomey, but now seems increasingly accepted (at least by the ICAC) and is implicit in the Memorandums of Understanding on search warrants discussed above. Issues of parliamentary privilege have also been addressed in the context of 'notices to produce' from the Independent Commission Against Corruption, where there are set procedures in place, although there are no formal protocols.

In 2016 following recommendations by the privileges committee of each House the New South Wales Premier advised that the Government was open to considering reforms that may assist in improving the integrity, transparency or operation of the Parliament. In reply, the Presiding Officers stated that the opportunity should be taken to address and resolve a number of related areas of uncertainty in respect of parliamentary privilege via the development of privilege legislation. The process of developing that draft legislation may include consideration of the interaction between compulsory disclosure processes such as search warrants and Article 9; the matter is under active review.

The Legislative Council has no direct experience with other intrusive powers such as telecommunications interception and electronic surveillance. However, these powers also have

the potential to come into conflict with members' freedom to carry out their functions as elected representatives and the House's power to control its own proceedings.

Should you require further information on any of the matters raised in this submission please do not hesitate to contact the Clerk of the Parliaments and Clerk of the Legislative Council, or the Clerk Assistant - Procedure,

Yours sincerely

The Honourable John Ajaka MLC
President

Encl.

Annexure 1

Test for whether documents fall within 'proceedings in Parliament'

Test for whether documents fall within 'proceedings in Parliament'

(Source: Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report 28, March 2004, p 8.)

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

□ YES → falls within 'proceedings in Parliament'[2]
□ 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'.[3]
□ 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'.

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

2 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'.

3 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'.

Annexure 2

Memorandum of understanding on the execution of search warrants in the Parliament House offices of members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly, 2009

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

1. Preamble

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

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

2. Execution of Search Warrants

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

The document covers the following issues:

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

3. Promulgation of the Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

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

Signatures

The Hon David Ipp AO QC
Commissioner

11 / 12 / 2009

The Hon Amanda Fazio MLC
President

11 / 12 / 2009

The Hon Richard Torbay
Speaker

16 / 12 / 2009

OPERATIONS MANUAL

PROCEDURE NO 9

PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

APPROVED: 22 JULY 2009

PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

01 GENERAL

1.1 Search warrants issued in New South Wales

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

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

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

1.2 Extra-territorial search warrants

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

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

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

1.3 General warrants are invalid

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

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

02 APPLYING FOR A WARRANT

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

i) a thing is on the premises or will be within 72 hours; and

ii) the thing is connected with a matter that is being investigated under the *ICAC Act.*

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

2.1 Drafting and Approval

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

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.

2. All applications must be approved by the Executive Director, Investigation Division. If approved the Case Officer will arrange for the Executive Director, Investigation Division to sign the Authorisation Checklist (Appendix A).

3. The senior investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In the case of a search warrant to be executed on a parliamentary office approval must be obtained from the Commissioner or Deputy Commissioner.

4. The Case Officer will be responsible for drafting the search warrant application using the legal macro[1]. A separate application must be prepared for each warrant sought. The application must address:

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

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

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

The issuing officer is also required to consider:

- the reliability of the information;
- the nature and source of the information (see informers); and
- whether there is sufficient connection between the thing(s) sought and the matter under investigation.

5. The Case Officer is responsible for ensuring that all information contained in the application is true and correct and all relevant matters are disclosed.

6. The Case Officer will also draft the warrant[4], Occupier's Notice and if needed, the cl.11 Certificate, using the legal macros.

7. The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief

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

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

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

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

[3] The warrant must identify:
(i) the relevant documents or things believed to be on the premises; and
(ii) state that these documents or things are connected with the matter under investigation.

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

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

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

8. The draft documentation and Authorisation Checklist will be referred to the Executive Director, Legal, for approval, both as to the documentation and the making of the application.

9. If the Executive Director, Legal, does not approve the documentation it is to be returned to the Case Lawyer for appropriate amendment. If the Executive Director, Legal, does not approve the making of the application he/she will discuss with the Executive Director, ID, and the Commissioner or Assistant Commissioner responsible for the investigation to resolve the issue.

10. If approved, the documentation is to be returned to the Case Lawyer who will provide it and the Authorisation Checklist to the Case Officer for submission to the Senior Property Officer for numbering. The Senior Property Officer will return the original warrant to the Case Officer and retain a copy. The Authorisation Checklist will be retained with the other records by the Senior Property Officer.

11. The Case Officer will then arrange for swearing and issue. A copy of the original signed application including the authorised officer's record of the application is to be obtained for Commission records.

12. Where the search warrant affects premises occupied by a public authority as defined in the *ICAC Act*, consideration shall be given as to whether any prior liaison should take place with a public official. Prior liaison shall not occur without the express approval of the Executive Director, ID.

03 SEARCH WARRANT APPLICATION BY TELEPHONE

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

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

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

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

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

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

04 DISCLOSING IDENTITY OF INFORMANT

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

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

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

05 PREVENTING INSPECTION OF DOCUMENTS

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

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

(a) such a document or part of such a document contains matter:

  (i) that could disclose a person's identity, and

  (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or

(b) a document or part of a document contains matter that, if disclosed, may seriously compromise the investigation of any matter.

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

06 COVERT SEARCH WARRANT

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

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

07 BRIEFING

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

(a) assess personnel required and allocate tasks, e.g. group leaders, document and property recorder, photographer, video and audio recording operator, etc;

(b) ensure Team members are skilled in the operation of equipment to be used and that such equipment is in working order and ready for immediate use;

(c) assess the need for equipment which will be required to accompany the search team, e.g. camera, video recorder, notebooks, property seizure sheets, containers and seals to secure seized property and documents, and equipment to gain access to the premises if force is likely to be required;

(d) establish the search team/s under his/her personal direction; prepare operational orders, brief the search team/s and Case Lawyer on the proposed execution of the warrant, ensure that each search team member reads and understands the authority of the warrant and is aware of his/her role and any potential risks. The Executive Director, ID shall be advised beforehand of the briefing session and attend if he/she considers it appropriate or necessary;

(e) arrange for the search team/s to physically study the address and precise premises to be searched and be aware of the address and detail, i.e. whether brick or fibro house, office building, etc, and of special landmarks or peculiarities which readily identify them. In short, the search team/s must be fully aware of the exact location and description of the premises to be searched, including entrances and other accesses to ensure that only the premises mentioned in the Warrant are entered.

The Team Property Officer is responsible for:

(a) making themselves aware of the property control procedure as it applies to Team Property Officers as set out in Procedure No. 27 (Registration, Control and Disposal of Property);

(b) the composition, care and control of the search kits - including ensuring that the search kit contains adequate consumables for the search;

(c) maintaining the seizure records in the field including:

(i) Property Seizure Sheets (Appendix 'D');

(ii) General Receipts (Appendix 'C');

(d) control of seized or volunteered property until such time as it is registered with Property.

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

08 EXECUTION OF WARRANT

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

(i) one month after issue (or such earlier time as specified); or

(ii) if it is withdrawn by the person who issued it ; or

(iii) when it is executed

whichever first occurs.

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

(a) enter the premises, and

(b) search the premises for documents or other things connected with any matter that is being investigated under the *ICAC Act*, and

(c) seize any such documents or other things found in or on the premises and deliver them to the Commission.

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

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

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

8.2 Times between which warrant can be executed

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

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

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

8.3 Entry Announcement

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

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

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

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

(i) identify the search team as members of the Independent Commission Against Corruption;

(ii) read and explain the Search Warrant to the occupier and produce it for inspection if requested **(NOTE: The Search Team Leader must retain possession of the Search Warrant);**

(iii) serve the Occupier's Notice. If the occupier is not present, the notice shall be served as soon as practicable after executing the warrant;

(iv) invite the co-operation of the occupier;

(v) execute the warrant,

(vi) advise the Search co-ordinator of time of entry and exit.

8.4 Service of the Occupier's Notice

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

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

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

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

8.5 Execution

In executing the warrant ICAC officers must:

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

(ii) cause the least amount of damage necessary in the course of the search and entry;

(iii) not unduly restrict the movement of occupants of searched premises, unless they are hindering the search;

(iv) wear the approved ICAC identification jacket unless exempted by the Search Team Leader (such exemption only to be given in exceptional circumstances);

(v) if not wearing an ICAC identification jacket, display prominently the ICAC official identification badge during the execution;

(vi) only break open receptacles in the premises if reasonably necessary for the purpose of the search;

(vii) use such assistants as considered necessary.

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

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

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

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

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

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

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

8.6 Operation of Electronic Equipment

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

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

8.7 Removal for Inspection

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

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

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

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

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

8.8 Access to and Downloading of Data

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

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

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

- copy any accessed data to a disk, tape or other data storage device brought to the premises (or, with the consent of the occupier, copy the data onto such a storage device already at the premises) and

- take the storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.

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

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

8.9 When is a Warrant Executed?

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

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

(a) have been located and seized, or

(b) are not on the premises

he/she shall terminate the search.

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

8.10 Rights of Occupier

The occupier of premises has the following rights:

- to see a copy of the warrant;

- to be present during the search and observe, provided they do not impede it. **(NOTE: There is no power for the investigators to require a person to remain on the premises, unless they have been arrested);**

- to be given a receipt for things seized;

- to request a copy of any document seized or any other thing that can be readily copied;

- to receive the occupiers notice.

09 EXECUTION ON LAWYER'S OFFICE

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

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

(a) documents prepared for other purposes, even if they are held for the purposes of legal proceedings or obtaining advice; eg title deeds, trust account records, business records, or photocopies of any unprivileged document,

(b) communications made for a criminal purpose,

(c) documents concerning the identity of a client or the fact of their attendance at their solicitor's office.

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

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

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

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

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

3. The lawyer or Law Society should be provided with a copy of the search warrant in addition to being shown the original warrant, if production thereof is demanded by them.

4. A reasonable time should be allowed to the lawyer to enable him or her to consult with his or her client(s) or to the Law Society to enable it to consult with the legal representatives of the persons to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his or her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.

5. Having informed his or her client(s) of the position or the Law Society having informed the legal representatives of the persons to whose affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his or her client's/clients' instructions or the instructions of the legal representatives of the persons to whose affairs the documents relate, co-operate in locating all documents which may be within the warrant.

6. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:

   (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the Search Team Leader as potentially within the warrant, the Search Team Leader should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents. If the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the Search Team Leader grounds upon which the claim is made and in whose name the claim is made.

   b) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines set out below. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

7. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the Search Team Leader be placed by the lawyer and/or his or her staff, or the Law Society and/or its representatives, in a container which shall then be sealed. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the

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

8. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.

9. That list and the container in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the Search Team Leader, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his or her client(s) or the Law Society on behalf of the persons to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the clerk of the magistrate who issued the warrant or other independent party agreed upon by the lawyer or Law Society and the Search Team Leader (referred to below as the "third party") pending resolution of the disputed claims.

10. The list and the container in which the documents have been sealed shall then be signed by the Search Team Leader and the lawyer or a representative of the Law Society.

11. The Search Team Leader and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.

12. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the Search Team Leader or his agent or the third party or his or her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client or clients on whose behalf the lawyer asserted the privilege, or from the person or persons on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

(i) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or

(ii) proceedings to establish the privilege have failed; or

(iii) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.

13. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third

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

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

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

10 EXECUTION ON PARLIAMENTARY OFFICE

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.

2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The

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

3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.

5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.

7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.

9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.

11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.

13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.

14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.

15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.

16. Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.

17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

11 SEARCH OF PERSONS

11.1 Personal Search Power

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

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

11.2 Guidelines for Personal Searches

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

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

(a) a search of a person conducted by quickly running the hands over the person's outer garments; and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

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

(a) requiring the person to remove their overcoat, coat or jacket and any gloves, shoes and hat; and

(b) an examination of those items.

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

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

(a) requiring the person to remove all of his or her garments for examination; and

(b) an examination of the person's body (but not of the person's body cavities).

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

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

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

(a) Full name of person searched

(b) Date of birth of person searched

(c) Sex of person searched

(d) Date of search

(e) Time of search (Start/Finish)

(f) Place where search was conducted

(g) Category/ies of search conducted

(h) Name of investigator conducting search

(i) Name of witness (contact details if an independent witness)

(j) Reason for search (including reason for change of search category, if required)

(k) Warrant Number

(l) Description of any property located

12 SEIZURE – SPECIAL PROVISIONS

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

13 DAMAGE TO PROPERTY

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

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

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

14 RECEIPT OF PROPERTY AT COMMISSION

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

15 RETURN OF SEIZED DOCUMENTS

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

16 REPORT TO ISSUING OFFICER

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

17 DEBRIEF

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

18 FILING WITH PROPERTY

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

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

APPENDIX 'A'

AUTHORISATION CHECKLIST

THIS FORM MUST ACCOMPANY EACH STAGE OF THE APPLICATION

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

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

APPENDIX 'B'

CASE OFFICER'S CHECKLIST

WARRANT HOLDER

NAME	POSITION

PREMISES SEARCHED

ADDRESS	SUBURB

DESCRIPTION OF PREMISES:

INDEPENDENT OFFICER

NAME	POSITION	LOCATION	CONTACT NUMBER

EXECUTION

TIME OF ENTRY	DATE
TIME OF DEPARTURE	DATE

OCCUPIERS NOTICE: Served Yes/No

NAME	DOB	POSITION

OTHER PERSONS ON THE PREMISES AT TIME OF EXECUTION

NAME	POSITION	ORGANISATION

VEHICLES PRESENT AT LOCATION:

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

MEMBERS OF SEARCH TEAM/PERSONS ASSISTING COMMISSION OFFICERS

NAME		POSITION

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

APPENDIX 'C'

INDEPENDENT COMMISSION AGAINST CORRUPTION

RECEIPT

PROPERTY RECEIVED BY: _____

AN OFFICER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ON _____

ON THIS DATE, PROPERTY AS LISTED HEREUNDER/

DESCRIBED IN ATTACHMENT

WAS RECEIVED FROM _____ OF

_____

SIGNED: _____

TITLE: _____

DATE: _____

APPENDIX 'D'

PROPERTY SEIZURE SHEET

OPERATION: _____

ADDRESS: _____

_____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Name/Signature - Occupier

Name/Signature - Property Officer

Date: _____

Annexure 3

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

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

1. Preamble

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

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

Revocation of agreement to this Memorandum of Understanding

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

Signatures

Mr Andrew P Scipione APM
Commissioner

29 November **2010**

The Hon Amanda Fazio MLC
President

23 November **2010**

The Hon Richard Torbay
Speaker

16. 11. **2010**

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

1. Purpose of these procedures

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

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.

2. The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer shall then inform the Clerk or the Deputy Clerk. If the Presiding Officer is not available the Search Team Leader will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

3. To minimise the potential interference with the performance of the member's duties the Search Team Leader should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

4. The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

5. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.

6. On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.

7. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

8. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 5(9) below, should not seek to access, read or seize the document.

9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.

11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.

12. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.

13. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.

14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.

15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.

16. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.

17. In the event the NSW Police Force dispute the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President

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

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

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

1. A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Commissioner's delegate is satisfied that compliance with this restriction would affect the integrity of the investigation.

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

3. The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the member to arrange for a legal adviser to be present during the execution of the warrant.

4. The Search Team Leader may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege, and a technical information expert to assist with accessing information stored in a computer.

5. On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the member's office and the relevance of that material to the investigation.

6. The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

7. The Search Team Leader, apart from sighting a document over which a claim of parliamentary privilege is made for the purposes of identification and listing as per clause 6(8) below, should not seek to access, read or seize the document.

8. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

9. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the member to recall details of the things seized and obtain further advice.

10. The Search Team Leader should inform the member that the NSW Police Force will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the member's duties.

11. The Search Team Leader should deliver any documents over which parliamentary privilege is claimed to the Clerk of the House.

12. Any claim of parliamentary privilege will be reported by the Search Team Leader to his or her Commander who will consider the matter in conjunction with the Commissioner's delegate for the purpose of determining whether the NSW Police Force will object to such a claim.

13. Where a ruling is sought as to whether documents are protected by parliamentary privilege the member, the Clerk and a representative of the NSW Police Force will jointly be present at the examination of the material. The member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.

14. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the NSW Police Force representative.

15. Any material not listed as falling within the scope of proceedings in Parliament will immediately be made available to the NSW Police Force.

16. In the event the NSW Police Force disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

Annexure 4

Revised draft memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly, 2014

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

1. Preamble

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

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

5. Term of this Memorandum of Understanding

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

6. Revocation of agreement to this Memorandum of Understanding

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

Signatures

The Honourable Megan Latham
Commissioner of the ICAC

2014

The Honourable Don Harwin MLC
President

2014

The Honourable Shelley Hancock MP
Speaker

2014

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

1. Purpose of these procedures

These procedures are designed to ensure that officers of the ICAC execute search warrants on the premises of members of the New South Wales Parliament in a way which does not amount to a contempt of Parliament and which gives a proper opportunity to members to raise claims of parliamentary privilege in relation to documents and things[1], including electronic documents, that may be on the search premises.

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

a) A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Deputy Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.

b) The Executive Director, Legal will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

c) The Presiding Officer, Clerk, Deputy Clerk and Executive Manager, Parliamentary Services (or the Deputy Executive Manager) should not advise the member or the

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

d) To minimise the potential interference with the performance of the member's duties the Search Team Leader should consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

e) The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to parliamentary privilege at the time of execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.

f) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

g) On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the member's office and the relevance of those documents and things to the investigation.

h) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.

i) The Search Team Leader, apart from sighting the items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph j) below, should not seek to access, read or seize the items.

j) Items over which parliamentary privilege is claimed should be placed in a Property container or bag. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.

k) The Search Team Leader should request the Clerk to secure and take custody of any items over which a claim for parliamentary privilege has been made. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.

l) At the conclusion of the search the Search Team Leader should provide a receipt recording the items seized to the member or, in the absence of the member, the most senior staff member present. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.

m) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

n) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.

o) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.

p) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.

q) Any document or thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.

r) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

a) A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Deputy Commissioner or, in their absence, the Executive Director Investigation Division is satisfied that compliance with this restriction would affect the integrity of the investigation.

b) The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is

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

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

d) The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to parliamentary privilege at the time of the execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.

e) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

f) On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the premises and the relevance of those documents and things to the investigation.

g) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.

h) The Search Team Leader, apart from sighting items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph i) below, should not seek to access, read or seize the items.

i) Items over which parliamentary privilege is claimed should be placed in a Property container or bag sealed by the Search Team Leader. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.

j) At the conclusion of the search the Search Team Leader should provide a receipt to the member or, in the absence of the member, the occupier of the premises, recording the items seized. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.

k) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

l) The Search Team Leader should deliver the sealed Property container or bag containing any items over which parliamentary privilege is claimed to the Clerk of the House. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.

m) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.

n) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.

o) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.

p) Any document and thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.

q) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

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

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

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

b) For those items where the ICAC does not object to the claim, the ICAC will return the items in accordance with the return instructions of the occupier.

c) For those items where the ICAC objects to the claim, the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

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

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

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

(i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and

(ii) there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

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

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

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

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

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

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

Member requires time to consider making a claim of parliamentary privilege

a) If the member needs to consider whether to make a claim for parliamentary privilege with respect to the thing or any of the contents of the thing, the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the removal of the thing. The ICAC will not use the document or thing or any of the contents of the document or thing until the expiry of that working day.

b) If the member needs to identify the contents of the thing in order to determine whether to make a claim, the ICAC will provide the member with a list of the contents of the thing or the nature of the contents of the thing.

c) If the ICAC is advised by the member that the member is considering making a claim of parliamentary privilege the ICAC will not use the thing or any of the contents of the thing until after whichever of the following first occurs:

   (i) one working day from the member's advice; or

   (ii) if a list is provided under paragraph b) above, after one working day from the provision of that list; or

   (iii) the member has advised the ICAC Executive Director Legal or other person nominated by the ICAC that no claim of parliamentary privilege is to made.

d) Where the member decides to claim parliamentary privilege the member will provide the ICAC Executive Director Legal or other person nominated by the ICAC with a list of the things or subject matter over which the claim is made. The matter will then be dealt in accordance with paragraphs f) to i) below.

Member makes a claim of parliamentary privilege

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

f) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC does not object to the claim, the ICAC will return the thing in accordance with the return instructions of the occupier.

g) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to z) of section 5 of the procedures will apply.

h) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC does not object to the claim, the ICAC will either return those contents in accordance with the return instructions of the occupier or, if it is not possible to separate the contents from the whole thing, will ensure that those contents the subject to the claim are not used by the ICAC in the event that the thing is seized under the warrant.

i) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to z) of section 5 of the procedures will apply.

ICAC seeks authorisation for additional period

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

ICAC decides to seize the document or thing

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

LEGISLATIVE ASSEMBLY
COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

8 May 2017

Mr Richard Pye
Clerk of the Senate
Parliament House
CANBERRA ACT 2600

D17/11835 (LAC15/059.15)

Dear Mr Pye

Parliamentary privilege and the use of intrusive powers

The NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics welcomes the opportunity to make this submission to the Senate Standing Committee of Privileges' inquiry into the adequacy of parliamentary privilege as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies.

Please find a copy of the submission attached and I also enclose the 2014 report of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics entitled *Inquiry into the Revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*.

I hope this information is of assistance and please do not hesitate to contact the Clerk of the Parliament, or the Acting Deputy Clerk, , should you wish to discuss matters further.

Yours sincerely

Mr Mark Taylor MP
Chair

NSW LEGISLATIVE ASSEMBLY STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS SUBMISSION TO SENATE STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

Introduction and background

The NSW Parliament's powers and privileges derive from:

- The common law, as implied by "reasonable necessity";
- The *Bill of Rights 1689*
- The *Defamation Act 2005 (NSW)*; and
- Other legislation.[1]

Members of Parliament in NSW have no explicit immunity against compulsory processes for the disclosure of information such as subpoenae and orders for the discovery of documents.

For instance, the Independent Commission Against Corruption (ICAC) may investigate Members of Parliament in relation to allegations of corrupt conduct. Such investigatory powers are conferred under legislation and include the power to obtain information, the power to obtain documents and the power to enter public premises.

Section 122 of the Independent Commission Against Corruption Act 1988 confirms that the rights and privileges of Parliament are not affected by the legislation. By virtue of the application of section 122 of the ICAC Act and Article 9 of the Bill of Rights in New South Wales, parliamentary privilege could be claimed for those documents and statements either sought, or in the possession of the ICAC, which are integral to transacting business in the House or the "proceedings in Parliament".

Current Memoranda of Understanding with external investigative agencies

Following recommendations by the respective House privileges committees, Memoranda of Understanding (MOUs) between the Presiding Officers and external investigative agencies regarding the execution of search warrants have been established, so that the potential presence of parliamentary privilege over certain items and documents within the premises or office of a Member of Parliament is acknowledged and dealt with appropriately. Such Memoranda includes recognition of parliamentary privilege and the privileges intertwined with the individual constitutional functions of the Parliament, the executive of the Crown, and the Courts.

The procedures specified in such Memoranda are designed to ensure that officers of external investigative agencies execute search warrants on the premises of Members of Parliament in a way that preserves the privileges of the Parliament, does not amount to a contempt and which provides Members the opportunity to make claims of parliamentary privilege over documents.

They are respectively:

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[1] See for example the *Parliamentary Evidence Act 1901* or the *Parliamentary Papers Act 1975*.

For further information on Parliamentary privilege in NSW see Griffith, G. 'Parliamentary Privilege: Major Developments and Current Issues' NSW Parliamentary Research Service, Background Paper No 1/07 https://www.parliament.nsw.gov.au/researchpapers/Documents/parliamentary-privilege-major-developments-and-c/ParliamentaryPrivelige07.pdf.

- A 2009 MOU with ICAC which records the processes to be followed if ICAC proposes to execute a search warrant on the Parliament House office of a Member; and

- 2009 and 2010 MOUs with the NSW Police which respectively address the provision of security services in the Parliamentary Precincts and Parliamentary Zones and the execution of search warrants in the premises of Members.

Background to the development of MOUs in NSW

On 3 October 2003, officers of the NSW Independent Commission Against Corruption (ICAC) obtained a search warrant to enter and search the Parliament House office of the Hon Peter Breen MLC, for the purposes of an investigation into Mr Breen's use of parliamentary entitlements. A laptop, documents and two computer hard drives were seized. Information from Mr Breen's personal hard drive was also downloaded on the understanding that this and other material would not be accessed and examined by ICAC officers except later with Mr Breen present.

During the search, the Deputy Clerk reminded ICAC officers that parliamentary privilege may attach to the material seized. ICAC officers acknowledged section 122 of the *Independent Commission Against Corruption Act 1988*, which as above preserves parliamentary privilege in relation to freedom of speech, debates, and proceedings in Parliament.

Mr Breen, who was not present at the search, later claimed parliamentary privilege. The following day, the Legislative Council resolved that the Legislative Council Standing Committee on Parliamentary Privilege and Ethics report on whether any breaches of the immunities enjoyed by the Legislative Council, or contempt, had occurred; and what procedure should be adopted to determine whether any of the material seized was subject to parliamentary privilege.

The resulting December 2003 report of the Committee found that a breach of immunity had occurred because 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 of the *Bill of Rights 1689*. The Committee further found no contempt of Parliament had occurred because the ICAC had not acted with improper intent or reckless disregard to the effect of its action. However, any subsequent attempt by the ICAC to 'use documents which fall within the scope of proceedings in Parliament in their investigations would amount to a contempt of Parliament'.[2]

The 2009 Memorandum of Understanding with ICAC

Further Legislative Council Privileges Committee reports followed.[3] This culminated in the Presiding Officers entering into a Memorandum of Understanding (MoU) with the ICAC Commissioner in December 2009 regarding the execution of search warrants. The MoU contains procedures designed to ensure that ICAC officers execute search warrants on the premises of Members of

[2] Griffith, G. 'Parliamentary Privilege: Major Developments and Current Issues' pp36-37.
[3] Griffith, G. 'Parliamentary Privilege: Major Developments and Current Issues' pp36-41.

Parliament in a way that does not amount to a contempt of Parliament and which provides members the opportunity to claim parliamentary privilege over documents.[4]

The perceived limitations of the 2009 MOU with ICAC

In 2013, the Clerks of the Legislative Council and Legislative Assembly and the Executive Manager of the Department of Parliamentary Services raised with the Solicitor to the ICAC the possibility of reviewing the MoU to address limitations. Consequently, the Presiding Officers forwarded a draft MoU to the ICAC, inviting comment on proposed new clauses. In early 2014, the Speaker and the President wrote to the new ICAC Commissioner, raising further issues.

In May 2014, the Commissioner forwarded a draft MoU suggesting additional proposed changes. Further amendments were incorporated following discussions between senior officers of the Parliament and the Solicitor to the ICAC.[5]

On 17 September 2014, the Speaker tabled a draft revised MoU and correspondence between the Presiding Officers and the ICAC Commissioner agreeing that the draft MoU should be referred to the Privileges Committees of both Houses for inquiry and report.[6] The President also tabled the MoU and the correspondence in the Legislative Council on 16 September 2014.[7]

On 17 September 2014, the Legislative Assembly referred the revised MoU to the Committee to inquire into and report on its provisions.[8] On the same day, the Legislative Council referred the revised MoU to its Privileges Committee for inquiry and report.[9]

The revised MoU sought to:

- Address limitations in the 2009 MoU, including that it only covers the Parliament House officers of members and not other offices such as ministerial offices, electorate offices and the residence of a member.
- Clarify how the Parliament and the ICAC will deal with electronic devices, and the contents of electronic devices, providing for a forensic image or forensic report in the event that the contents of an electronic device is listed as falling within the scope of proceedings of Parliament. This new provision aimed to address problems that had been experienced when a member with an impending matter listed for parliamentary debate was not able to access computer files.[10]

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[4] NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report 3/55 Inquiry into the Revised Memorandum of Understanding Between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, November 2014, p5.
[5] NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report 3/55*, pp5-6.
[6] NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report 3/55*, p6.
[7] Legislative Council Minutes No 4, Entry 7, Tuesday 16 September 2014.
[8] *Votes and Proceedings of the Legislative Assembly No 5, Entry 2, Wednesday 17 September 2014.*
[9] *Legislative Council Minutes No 5, Entry 15, Wednesday 17 September 2014.*
[10] NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report 3/55*, p7.

In examining the revised MoU, both committees noted the short timeframe of one working day within which a member can make a claim for parliamentary privilege for an item that is seized.[11] The Legislative Council Committee recommended increases to the timeframes.[12]

Subject to this, both Committees recommended that the Presiding Offices of their respective Houses enter into the revised MoU with the ICAC Commissioner, but to date this matter has not been resolved.

[11] NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Report 3/55*, p7; and NSW Legislative Council Privileges Committee, *Report 71 A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises*, November 2014, pp12-14.
[12] NSW Legislative Council Privileges Committee, *Report 71*, p13.

LEGISLATIVE ASSEMBLY

STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS

INQUIRY INTO THE REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE PRESIDING OFFICERS AND THE COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REPORT 3/55 – NOVEMBER 2014

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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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Terms of Reference

Mr Anthony Roberts moved, That:

(1) This House notes the revised draft Memorandum of Understanding on the execution of search warrants on the premises of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly tabled by the Speaker on Wednesday 17 September 2014.

(2) The Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the provisions of the revised draft Memorandum of Understanding.

(3) A message be sent informing the Legislative Council accordingly.

Question put and passed.

Excerpt from Votes and Proceedings of the Legislative Assembly No 5, Entry 2, Tuesday 17 September 2014.

Chair's Foreword

The relationship between parliaments and investigative agencies has been an issue at both federal and state levels. The important public interest in investigative bodies being able to carry out their statutory functions and obtain information is acknowledged. However, it is equally recognised that parliament must be protected from external interference in the conduct of its business, which includes interference with the members of parliament in the performance of their role.

In recent years court cases have brought into stark relief the difficulty in determining what members' documents constitute 'proceedings in Parliament' where they are subject to seizure under the terms of a search warrant. In New South Wales the Independent Commission Against Corruption exercised a search warrant which resulted in the Legislative Council Privileges Committee reporting that the Independent Commission Against Corruption had unintentionally breached parliamentary privilege in the way they exercised the warrant. Consequently the Committee, and the Commission, both reported on the desirability of a protocol to place such matters on a more formal footing. The Presiding Officers entered into a Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption on 11 December 2009.

The Presiding Officers and the Commissioner have reviewed the Memorandum and proposed amendments to deal with the technicalities involved in copying electronic material, to ensure that the memorandum covers ministerial offices, electorate offices and the residence of a member, and to clarify how claims of privilege will be dealt with.

The Committee thanks officers of the Independent Commission Against Corruption and of the Legislative Council and Legislative Assembly for their assistance in updating the MOU, and assisting the Committee with its review of the draft tabled on 17 September 2014.

This report recommends that the House resolve that the Speaker enter into the Memorandum of Understanding with the Commissioner of the ICAC. I commend the report to the House.

John Sidoti
Chair

List of Recommendations

RECOMMENDATION 1

That the House resolve that the Speaker enter into a Memorandum of Understanding on the execution of search warrants on the premises of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council, and the Speaker of the Legislative Assembly.

RECOMMENDATION 2

That the House send a message to the Legislative Council requesting the Council to authorise the President to join with the Speaker in entering into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 1 to this report.

Chapter One – Introduction

TERMS OF REFERENCE

1.1 On 17 September 2014 the House resolved that the Committee should inquire into and report on the provisions of a revised draft Memorandum of Understanding on the execution of search warrants on the premises of members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council, and the Speaker of the Legislative Assembly.

PREVIOUS MEMORANDA OF UNDERSTANDING REGARDING SEARCH WARRANTS

1.2 Memoranda of Understanding (MOU) between the Presiding Officers and external investigative agencies regarding execution of search warrants exist so that the potential presence of parliamentary privilege over certain items and documents within the premises or office of a member of Parliament is acknowledged and dealt with appropriately. Such Memoranda include recognition of parliamentary privilege and the privileges intertwined with the individual constitutional functions of the Parliament, the executive of the Crown, and the Courts.

1.3 The procedures specified in such Memoranda are designed to ensure that officers of external investigative agencies execute search warrants on the premises of members of Parliament in a way which does not amount to a contempt of Parliament and which provides members the opportunity to claim parliamentary privilege over documents.

1.4 The NSW Parliament has entered into two similar Memoranda in recent years. The Presiding Officers entered into a Memorandum of Understanding with the Commissioner of the NSW Police Force in November 2010. A Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption was also entered into in December 2009.

1.5 In 2013 the Clerks of the Legislative Council and the Legislative Assembly and the Executive Manager of the Department of Parliamentary Services raised with the Solicitor of the Independent Commission Against Corruption the possibility of reviewing the MOU to address limitations in the 2009 MOU, and as a consequence the Presiding Officers forwarded a draft MOU to the Commission, based on the MOU with NSW Police, inviting comment on any aspect of the Memorandum, but particularly on proposed new clauses referring to ministerial offices, electorate offices and the residence of a member. In early 2014, the Speaker and the President wrote to the new Commissioner, raising further issues.

1.6 In May 2014 the Commissioner forwarded a draft MOU, suggesting additional proposed changes to deal with the technicalities involved in copying electronic material. Following discussions between senior officers of the Parliament and the Solicitor to the Commission, further amendments were incorporated to clarify

how claims of privilege would be dealt with, particularly in relation to electronic documents or electronic devices.

1.7 On 17 September 2014 the Speaker tabled a draft Memorandum of Understanding on the execution of search warrants in the premises of the members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly (Appendix 1).

1.8 The Speaker also tabled correspondence from the Presiding Officers to the Commissioner, the Hon. Megan Latham, which proposed that the draft Memorandum be referred to the Privilege Committees of the Legislative Assembly and the Legislative Council. The Speaker then tabled correspondence from the Commissioner to the Presiding Officers which stated:

> I agree with the proposal that the draft memorandum of understanding be tabled in both Houses of the Parliament and be referred to the respective Privileges Committees of both Houses for inquiry and report.[1]

1.9 The table below provides an overview of previous memoranda and relevant reports by the Standing Committee on Parliamentary Privilege and Ethics.

Memoranda of Understanding		
Title	Date	Committee report
Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the New South Wales Parliament	Proposed late 2014 (Draft tabled 17 September 2014)	*This report*
Memorandum of Understanding on the Execution of Search Warrants in the Premises of Members of the NSW Parliament (NSW Police Force)	Signed November 2010 (Tabled 3 May 2011)	*Report on a Memorandum of Understanding with the NSW Police Relating to the Execution of Search Warrants on Members' Premises* (Tabled 27 October 2010)
Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption	Signed December 2009	*Memorandum of Understanding - Execution of Search Warrants by the Independent Commission Against Corruption on Members' Offices* (Tabled 26 November 2009)

[1] Letter from Commissioner Megan Latham to the Presiding Officers of the NSW Parliament, 10 September 2014.

Chapter Two – Review of the Revised Draft Memorandum of Understanding

2.1 The Committee has examined the draft MOU which forms Appendix 1 to this Report.

2.2 The Committee has noted the proposed MOU addresses limitations in the existing memorandum, including notably that it only covers the Parliament House offices of members, and not other offices such as ministerial offices, electorate offices and the residence of a member.

2.3 The Committee further notes that the MOU clarifies how the Parliament and the Commission will deal with electronic devices, and the contents of electronic devices, providing for a forensic image or forensic report in the event that the contents of an electronic device is listed as falling within the scope of proceedings of Parliament. This new provision will address problems that have been experienced when a Member with an impending matter listed for parliamentary debate has not been able to access computer files.

2.4 During consideration of the proposed MOU, the Committee also noted the constrained timeframe (one working day) within which a member can make a claim for parliamentary privilege with respect to an item that is seized. The Committee considers that in the future a further review of the timeframes that apply in making a claim of privilege over a seized item and specified in the MOU may be warranted.

RECOMMENDATIONS:

2.5 Accordingly the Committee recommends:

RECOMMENDATION 1

That the House resolve that the Speaker enter into a Memorandum of Understanding on the execution of search warrants on the premises of Members of the New South Wales Parliament between the Commissioner of the Independent Commission Against Corruption, the President of the Legislative Council, and the Speaker of the Legislative Assembly.

RECOMMENDATION 2

That the House send a message to the Legislative Council requesting the Council to authorise the President to join with the Speaker in entering into the 'Memorandum of understanding on the execution of search warrants in the premises of Members of the New South Wales Parliament between the Commissioner of Independent Commission Against Corruption, the President of the Legislative Council and the Speaker of the Legislative Assembly' set out in Appendix 1 to this report.

Appendix One – Draft Memorandum of Understanding

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

1. Preamble

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

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

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

2. Execution of Search Warrants

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

3. Promulgation of this Memorandum of Understanding

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

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

4. Variation of this Memorandum of Understanding

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

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

5. Term of this Memorandum of Understanding

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

6. Revocation of agreement to this Memorandum of Understanding

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

Signatures

The Honourable Megan Latham
Commissioner of the ICAC

2014

The Honourable Don Harwin MLC
President

2014

The Honourable Shelley Hancock MP
Speaker

2014

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

1. Purpose of these procedures

These procedures are designed to ensure that officers of the ICAC execute search warrants on the premises of members of the New South Wales Parliament in a way which does not amount to a contempt of Parliament and which gives a proper opportunity to members to raise claims of parliamentary privilege in relation to documents and things[1], including electronic documents, that may be on the search premises.

2. Application of these procedures

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

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

3. Parliamentary privilege

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

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

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

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

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

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

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

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

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

4. Procedure prior to obtaining a search warrant

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

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

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

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

a) A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner or the Deputy Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.

b) The Executive Director, Legal will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

c) The Presiding Officer, Clerk, Deputy Clerk and Executive Manager, Parliamentary Services (or the Deputy Executive Manager) should not advise the member or the

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

d) To minimise the potential interference with the performance of the member's duties the Search Team Leader should consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

e) The Search Team Leader will allow the member and the Clerk a reasonable time to seek legal advice in relation to parliamentary privilege at the time of execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.

f) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

g) On arrival at Parliament House the Search Team Leader and assigned lawyer (if present) should meet with the Clerk of the House and member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the member's office and the relevance of those documents and things to the investigation.

h) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.

i) The Search Team Leader, apart from sighting the items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph j) below, should not seek to access, read or seize the items.

j) Items over which parliamentary privilege is claimed should be placed in a Property container or bag. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.

k) The Search Team Leader should request the Clerk to secure and take custody of any items over which a claim for parliamentary privilege has been made. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.

l) At the conclusion of the search the Search Team Leader should provide a receipt recording the items seized to the member or, in the absence of the member, the most senior staff member present. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.

m) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

n) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.

o) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.

p) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.

q) Any document or thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.

r) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

a) A search warrant should be executed on premises used or occupied by a member at a time when the member, or a senior member of his or her staff, will be present, unless the Commissioner or the Deputy Commissioner or, in their absence, the Executive Director Investigation Division is satisfied that compliance with this restriction would affect the integrity of the investigation.

b) The Search Team Leader will contact the relevant Presiding Officer prior to execution of a search warrant and notify that officer of the proposed search. The Presiding Officer will then inform the Clerk (or the Deputy Clerk) and the Executive Manager, Parliamentary Services (or the Deputy Executive Manager). If the Presiding Officer is

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

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

d) The Search Team Leader will allow the member a reasonable time to seek legal advice in relation to parliamentary privilege at the time of the execution of the search warrant and for the member to arrange for a legal adviser to be present during the execution of the warrant.

e) The Executive Director, Legal may assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

f) On arrival at the premises, the Search Team Leader and assigned lawyer (if present) should meet with the member or the member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the documents and things it is believed are located in the premises and the relevance of those documents and things to the investigation.

g) The Search Team Leader is to allow the member a reasonable opportunity to claim parliamentary privilege in respect of any items including documents, electronic devices, or other things located on the premises.

h) The Search Team Leader, apart from sighting items over which a claim of parliamentary privilege is made for the purposes of identification and listing as per paragraph i) below, should not seek to access, read or seize the items.

i) Items over which parliamentary privilege is claimed should be placed in a Property container or bag sealed by the Search Team Leader. A list of the items will be prepared by the Search Team Leader with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take a copy of any document before it is secured.

j) At the conclusion of the search the Search Team Leader should provide a receipt to the member or, in the absence of the member, the occupier of the premises, recording the items seized. If the member does not hold copies of the items that have been seized the receipt should contain sufficient particulars of the items to enable the member to recall details of the items seized and obtain further advice.

k) The Search Team Leader should inform the member that the ICAC will, to the extent possible, provide or facilitate access to the seized items where such access is necessary for the performance of the member's duties.

l) The Search Team Leader should deliver the sealed Property container or bag containing any items over which parliamentary privilege is claimed to the Clerk of the House. The Clerk will ensure the forensic integrity of the items to ensure they are not lost, damaged, altered or destroyed.

m) Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Commissioner and other relevant ICAC officers for the purpose of determining whether the ICAC will object to such a claim.

n) Where a ruling is sought as to whether an item is protected by parliamentary privilege the member, the Clerk and a representative of the ICAC will jointly be present at the examination of the item. If material is contained on an electronic device then a suitably qualified person agreed to by the Clerk and ICAC representative will either create a forensic image of the device or create a forensic report of its contents so that the forensic image or forensic report can be examined rather than the electronic device. The member and the Clerk will identify the documents and things which they claim fall within the scope of parliamentary proceedings.

o) A list of documents and things considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the member and the ICAC representative.

p) Any document and thing not listed as falling within the scope of proceedings in Parliament will immediately be made available to the ICAC. In the event some of the contents of an electronic device are listed as falling within the scope of proceedings in Parliament, then the balance of the contents of that electronic device not listed as falling within the scope of proceedings in Parliament will be copied from the imaged device onto another electronic storage medium in the form of a forensic image by a suitably qualified person agreed to by the Clerk and ICAC representative and provided to the ICAC. In the event the contents have not been imaged but a forensic contents report has been produced, then a copy of the forensic contents report redacting the material falling within the scope of proceedings in Parliament will be provided to the ICAC. The ICAC will provide the Clerk with a receipt for the items it receives.

q) In the event the ICAC disputes the claim for privilege over any document or thing listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any item considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

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

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

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

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

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

b) For those items where the ICAC does not object to the claim, the ICAC will return the items in accordance with the return instructions of the occupier.

c) For those items where the ICAC objects to the claim, the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

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

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

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

(i) it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and

(ii) there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

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

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

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

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

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

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

Member requires time to consider making a claim of parliamentary privilege

a) If the member needs to consider whether to make a claim for parliamentary privilege with respect to the thing or any of the contents of the thing, the member should advise the ICAC officer named in the Occupier's Notice or the ICAC Executive Director Legal within one working day of the removal of the thing. The ICAC will not use the document or thing or any of the contents of the document or thing until the expiry of that working day.

b) If the member needs to identify the contents of the thing in order to determine whether to make a claim, the ICAC will provide the member with a list of the contents of the thing or the nature of the contents of the thing.

c) If the ICAC is advised by the member that the member is considering making a claim of parliamentary privilege the ICAC will not use the thing or any of the contents of the thing until after whichever of the following first occurs:

   (i) one working day from the member's advice; or

   (ii) if a list is provided under paragraph b) above, after one working day from the provision of that list; or

   (iii) the member has advised the ICAC Executive Director Legal or other person nominated by the ICAC that no claim of parliamentary privilege is to made.

d) Where the member decides to claim parliamentary privilege the member will provide the ICAC Executive Director Legal or other person nominated by the ICAC with a list of the things or subject matter over which the claim is made. The matter will then be dealt in accordance with paragraphs f) to i) below.

Member makes a claim of parliamentary privilege

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

f) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC does not object to the claim, the ICAC will return the thing in accordance with the return instructions of the occupier.

g) If the member claims parliamentary privilege with respect to the entirety of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

h) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC does not object to the claim, the ICAC will either return those contents in accordance with the return instructions of the occupier or, if it is not possible to separate the contents from the whole thing, will ensure that those contents the subject to the claim are not used by the ICAC in the event that the thing is seized under the warrant.

i) If the member claims parliamentary privilege with respect to part of the contents of the thing, and the ICAC objects to the claim, then the procedures for determining a claim of parliamentary privilege set out in paragraphs o) to r) of section 5 of the procedures will apply.

ICAC seeks authorisation for additional period

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

ICAC decides to seize the document or thing

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

Appendix Two – Extracts from Minutes

MINUTES OF MEETING NO 20

4:14 pm, Wednesday 17 September 2014
Room 1136, Parliament House

Members present

Mr Anderson, Mr Sidoti (Chair), Mr Zangari

Apologies

Apologies were received from Mr Brookes, Mr Patterson and Mr Rohan.

1. Confirmation of Minutes
   Resolved, on the motion of Mr Anderson, seconded Mr Zangari,
   'That the minutes of the meeting held on 19 June 2014 (No 19) be confirmed'.

2. Business arising from previous meeting
   ***

3. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President
   The Clerk drew attention to the resolution of the House earlier this day that referred the draft MOU to the Committee for inquiry and report. Copies of the draft MOU were circulated, together with the correspondence which had been tabled between the Presiding Officers and the Commissioner, dated 8 September and 10 September respectively.

   The Committee resolved, on the motion of Mr Anderson, seconded Mr Zangari, that the secretariat prepare a briefing note on the development of the updated MOU, together with background information on the circumstances that led to the draft.

4. General Business
   ***

   Meeting adjourned at 4.37 pm, sine die.

MINUTES OF MEETING NO 21

4.11 pm Wednesday 22 October 2014
Room 1043, Parliament House

Members present

Mr Anderson, Mr Brookes, Mr Sidoti (Chair), Mr Rohan and Mr Zangari.

Apologies

Apologies were received from Mr Patterson.

1. Confirmation of Minutes
   Resolved, on the motion of Mr Anderson, seconded Mr Zangari:
   'That the minutes of the meeting held on 17 September 2014 (No 20) be confirmed'.

2. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President
   A briefing note drafted by Committee staff regarding the development of the updated Memorandum of Understanding (MOU), together with background information on the circumstances that led to the draft, was circulated and noted by the Committee.

   Discussion ensued.

   Copies of the Chair's draft report were circulated and noted. The Committee discussed the draft report and draft recommendations regarding the MOU.

   The Committee resolved, on the motion of Mr Anderson, seconded Mr Zangari:

   'That the Committee note the draft report and that the report be circulated to members of the Committee and be subject to feedback and comment from members, to be received by Wednesday 5 November 2014. Any proposed amendments to the report will be circulated to members for comment and if mutually agreed to, the report will be tabled in the House.'

3. General Business
   ***

   Meeting adjourned at 4.28 pm, sine die.

MINUTES OF MEETING NO 22

4.00 pm Wednesday 19 November 2014
Room 1136, Parliament House

Members present
Mr Brookes, Mr Rohan, Mr Sidoti (Chair) and Mr Zangari.

Apologies
Apologies were received from Mr Anderson and Mr Patterson.

Due to a division being called in the Legislative Assembly, the meeting was suspended at 4.07 pm while members attended the Chamber for the division. When a quorum of members returned, the meeting resumed at 4.20 pm.

1. Confirmation of Minutes
   Resolved, on the motion of Mr Rohan, seconded Mr Brookes:
   'That the minutes of the meeting held on 22 October 2014 (No 21) be confirmed'.

2. Memorandum of Understanding Between the Independent Commission Against Corruption and the Speaker and the President

The Chair's Draft Report, having been previously circulated, was taken as read. Additional copies were circulated to members.

Resolved, on the motion of Mr Rohan, seconded Mr Brookes:

1) That the draft report be the report of the Committee and that it be signed by the Chair and presented to the House, or if not sitting, tabled with the Clerk.
2) That the Chair and Committee staff be permitted to correct stylistic, typographical and grammatical errors.

3. General Business

The Committee noted the report of the Legislative Council Privileges Committee titled: 'A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises', tabled Tuesday 11 November 2014.

***

Meeting adjourned at 4.38 pm, sine die.

Parliamentary privilege and the use of intrusive powers

Submission from the Clerk of the House of Commons

Introduction

The Standing Committee of Privileges of the Australian Senate has requested a memorandum relating to its inquiry into the adequacy of parliamentary privilege as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies—including telecommunications interception, electronic surveillance and metadata domestic preservation orders. The inquiry will also consider whether the use of intrusive powers by law enforcement and intelligence agencies interferes with the ability of members of Parliament to carry out their functions, and explore potential changes to oversight and accountability mechanisms in this regard. As part of the inquiry the committee will also consider whether existing protocols for the execution of search warrants in the premises of members of Parliament, or where matters of parliamentary privilege may be raised, sufficiently protect the ability of members to undertake their functions without improper interference.

This paper sets out the position in the House of Commons as relates to intrusive powers and the use of search warrants on parliamentary premises. The paper has been shared with the House of Lords.

The Wilson doctrine and the Investigatory Powers Act 2016

The relationship between intrusive powers and Westminster parliamentarians has been defined for over 50 years by the Wilson doctrine, and, more recently, by the Investigatory Powers Act 2016.

The Wilson doctrine, named after the contemporary Prime Minister, Harold Wilson, sets out that there should be no interception of MPs' communications by either the police or the security services. It was announced in the House of Commons on 17 November 1966 following allegations in *The Times* that the security services were tapping some MPs' phones. It was extended to the House of Lords on 22 November 1966.

While successive governments upheld the policy as stated in 1966 and confirmed that it applied to all types of communication and electronic surveillance,[1] it does not absolutely prohibit the interception of parliamentarians' communications, as confirmed in July 2014 by the then Home Secretary, Theresa May:

> It does not absolutely exclude the use of these powers against parliamentarians, but it sets certain requirements for those powers to be used in relation to a parliamentarian. It is not the case that parliamentarians are excluded and nobody else in the country is, but there is a certain set of rules and protocols that have to be met if there is a requirement to use any of these powers against a parliamentarian.[2]

This position was also supported by a judgement of the Investigatory Powers Tribunal (IPT) in October 2015 which explicitly stated that "it is clear to us that the Wilson doctrine as now constituted is as explained by Mrs May in July 2014" and that it is part of Government policy, not law.[3]

[1] Briefing Paper No. 4258: The Wilson Doctrine (House of Commons Library, 9 February 2016
[2] HC Deb 15 July 2014, col 713
[3] Wilson Doctrine Judgement (Investigatory Powers Tribunal, 10 October 2015)

Following the IPT's judgement, the doctrine's limitations were subject to an emergency debate in the House of Commons where a number of MPs raised concerns about the doctrine's parameters and application.[4] As a result, in November 2016 the Investigatory Powers Act 2016 (IPA 2016) was passed.[5] The Act states that the targeted interception or targeted examination of any communication sent by or to an MP can only occur if a warrant is granted with the approval of the Prime Minister and a Judicial Commissioner.[6] While communications between MPs and their constituents are classed as sensitive and confidential in the Act, they are not excluded from the powers of interception or examination.

The IPA 2016 makes no special legal provision for MPs in regards to metadata. The Act gives powers to the Secretary of State to require all telecommunication providers to retain users' communications data including internet connection records for up to 12 months. Public bodies do not need a warrant to access this data – applications to access data are considered by an internal designated member of staff. In the accompanying *draft* policy documents, MPs, as members of a 'sensitive profession', have a slightly higher threshold test which has to be met before authorisation to access Members' communications data can be given.

The Act extends the Wilson doctrine to members of the Scottish Parliament, National Assembly for Wales, Northern Ireland Assembly and the European Parliament (UK MEPs only).

There is an ongoing legal challenge which has currently been referred back to the Court of Appeal on the legitimacy of this type of data retention legislation.[7] The judgment has yet to be handed down, but may have significant implications for the data retention provisions under the IPA.

During the debate on the Wilson doctrine and the passage of the IPA 2016 through Parliament, Members raised a number of concerns about how these powers would impact upon their ability to carry out their functions:

- Confidential communication with constituents

A number of MPs raised concerns that communications between MPs and constituents were not subject to additional safeguarding. The then Shadow Home Secretary, Andy Burnham MP, said that "If someone seeks the help of an MP at a constituency advice surgery…, they should be able to do so with a high degree of confidence that the conversation is confidential."[8] His colleague, Harriet Harman MP, said that:

> … we are here not just to listen to what our constituents say, but to hold the Government to account. They are the Executive, and so the idea that the Executive has the power to hack into the emails and listen to the phones of those who are supposed to be holding them to account—to do all of this—offers a big prospect of the Executive abusing their power and undermining the legislature's ability to hold them to account.[9]

In particular, some Members stated that the ability of the police and intelligence services to access MPs' metadata would inhibit their ability to hold the Government to account by potentially identifying whistleblowers. David Davis MP, then a Government backbencher, stated that:

[4] HC Deb 19 October 2015, col 694
[5] Investigatory Powers Act 2016
[6] Section 26 and 111, Investigatory Powers Act 2016
[7] [2015] UKIPTrib 14_79-CH, para 124
[8] HC Deb 6 June 2016, col 953
[9] HC Deb 6 June 2016 col 970

> The collection of metadata cripples whistleblowers, because it tells us precisely who has talked to whom, when and where. Metadata tracking led to the arrest of my right hon. Friend the Member for Ashford.[10] That area is material to the operation of our holding the Government to account.[11]

- Routine monitoring of communications

Though there are safeguards in the IPA 2016 for interception and examining MPs' communications, it does not apply to routine monitoring. In November 2014, the Secretary of Justice, Chris Grayling MP, announced to the House that telephone calls between prisoners and MPs may have been recorded, and in some cases, listened to by prison staff as part of a broader monitoring of prisoners' phone calls. While this was found to have broken internal prison rules, the Justice Secretary confirmed that routine monitoring of calls of this kind was not covered by the Wilson doctrine.[12]

- Monitoring the usage of the Wilson doctrine and the IPA 2016

During the emergency debate on the Wilson doctrine in October 2015, the Shadow Leader of the House, Chris Bryant MP, stated that:

> I think we know from this debate that Members' phones have been tapped, yet successive Prime Ministers and Home Secretaries have sworn blind to this House—they have made written statements and said it time and again in this House—that the Wilson doctrine is fully in place. The truth of the matter is that it is not.[13]

There have been a number of alleged cases of undisclosed tapping of Members' phones. Most recently, Ian Paisley MP reported to the House claims that his father's phone had been tapped during the latter's time as an MP.[14] There is no obligation in the IPA 2016 for Parliament to be notified when a warrant to intercept or examine an MP's communications has been granted, or when Members' communications data has been acquisitioned by a public authority.

Search warrants

In considering the execution of search warrants in the premises of Members of Parliament there are two issues: first the ability of the police to enter the premises to search and secondly the treatment of any material which may be privileged.

In the United Kingdom system parliamentary control over premises extends only to the parliamentary estate and does not cover Members' own offices in their constituencies or elsewhere. Even within the Palace of Westminster privilege does not prevent the operation of the criminal law. There is therefore no restriction on the police searching parliamentary precincts or Members' offices on the grounds of parliamentary privilege where a crime is being investigated.

In July 2000 a guidance note was drawn up by the then Clerk of the House on the procedures to be followed when the police wished to search a Member's office on the estate. This note was shared with the Serjeant at Arms, the Speaker's Secretary and the Speaker's Counsel. However, the guidance was not followed some years later when the police asked to search the offices of the Conservative Opposition frontbencher, Damian Green (Member for Ashford), on Thursday 27

[10] See section on "Search warrants" below for explanation of the case referred to.
[11] HC Deb 19 October 2015, col 713.
[12] HC Deb 11 November 2014, col 1314
[13] HC Deb 19 October 2015, col 730
[14] HC Deb 18 April 2017, col 566

November 2008, while the House was prorogued. Most significantly, the search was allowed to proceed without a warrant.

As a result of these events, on 3 December 2008, the Speaker announced that a protocol would be developed which would require a warrant for any future searches or access to papers or records and that every case would have to be referred for his personal decision.[15]

The protocol was published on 8 December 2008. It read:

1. In my statement of 3 December 2008 (OR col 3) I said I would issue a protocol to all Members on the searching of Members' offices. In future a warrant will always be required for a search of a Member's office or access to a Member's parliamentary papers including his electronic records and any such warrant will be referred to me for my personal decision.
2. Though much of the precincts of the House are open to the public, there are parts of the buildings which are not public. The House controls access to its precincts for a variety of reasons, including security, confidentiality and effective conduct of parliamentary business.
3. Responsibility for controlling access to the precincts of the House has been vested by the House in me. It is no part of my duties as Speaker to impede the proper administration of justice, but it is of equal concern that the work of the House and of its Members is not necessarily hindered.
4. The precincts of Parliament are not a haven from the law. A criminal offence committed within the precincts is no different from an offence committed outside and is a matter for the courts. It is long established that a Member may be arrested within the precincts.
5. In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me. In all cases where any Officer or other member of the staff of the House is made aware that a warrant is to be sought the Clerk of the House, Speaker's Counsel, the Speaker's Secretary and the Serjeant at Arms must be informed. No Officer or other member of the staff of the House may undertake any duty of confidentiality which has the purpose or effect of preventing or impeding communication with these Officers.
6. I will consider any warrant and will take advice on it from senior officials. As well as satisfying myself as to the formal validity of the warrant, I will consider the precision with which it specifies the material being sought, its relevance to the charge brought and the possibility that the material might be found elsewhere. I reserve the right to seek the advice of the Attorney General and Solicitor General.
7. I will require a record to be provided of what has been seized, and I may wish to attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved.
8. Any search of a Member's office or belongings will only proceed in the presence of the Serjeant at Arms, Speaker's Counsel or their deputies. The Speaker may attach conditions to such a search which require the police to describe to a senior parliamentary official the nature of any material being seized which may relate to a Member's parliamentary work and may therefore be covered by parliamentary privilege. In the latter case, the police shall be required to sign an undertaking to maintain the confidentiality of that material removed, until such time as any issue of privilege has been resolved.

[15] HC Deb 3 December 2008 col 3 7

9. If the police remove any document or equipment from a Member's office, they will be required to treat any data relating to individual constituents with the same degree of care as would apply in similar circumstances to removal of information about a client from a lawyer's office.
10. The execution of a warrant shall not constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police.[16]

On 9 December 2008, the Speaker made a further statement:

> I undertook to look into the matter of the Wilson doctrine and access to the House of Commons server, which was raised by the hon. Member for Newbury (Mr. Benyon) on 4 December. The Parliamentary Information and Communications Technology service takes the security of its systems very seriously, and is grateful for the support that the Joint Committee on Security, the Administration Committee and the Commission give in that respect. PICT would not allow any third party to access the parliamentary network without proper authority. In the Commons, such access previously required the approval of the Serjeant at Arms. Following my statement on 3 December, if PICT receives any requests to allow access in future, it will also seek confirmation that a warrant exists and that I have approved such access under the procedure laid down and the protocol issued yesterday.
>
> With regard to the incident involving the hon. Member for Ashford (Damian Green), no access was given to data held on the server, as PICT was not instructed to do so by the Serjeant at Arms. No access will be given unless a warrant exists and I approve such access.[17]

In practice, a warrant may not necessarily be required where an allegation is made that a serious offence has been committed, and the police do not need to "search" premises in the ordinary meaning of that word (e.g. where the police wish to photograph a location which may be a crime scene). In such a situation, all those named in the Speaker's Protocol are notified of the police involvement, and a senior member of House staff will observe the police activity.

In addition to requests for physical searches of the premises, it is not uncommon for the police to ask to inspect computer records. In these situations, they are asked to obtain a production order specifying the material that they need and the purposes for which it is needed. On receipt of the production order, the Commons' IT team extract all relevant material from the network, and a senior member of staff will review the material with the police so that privileged material can be identified.

Search warrants and privilege

In July 2009 the Commons set up a Select Committee on an Issue of Privilege to examine the matter of Police Searches on the Parliamentary Estate.[18] The Committee reported in March 2010. It gave its "support and endorsement" to the Speaker's Protocol of 8 December 2008. Whilst it discussed questions of privilege which might touch upon the matter in hand, the Committee could not agree on the central question of whether it was desirable to legislate on parliamentary privilege and recommended merely that "Before setting out to define and limit parliamentary privilege in statute,

[16] See Committee on Issue of Privilege, *Police searches on the Parliamentary* Estate, First Report of Session 2009-10, HC 62, para 145
[17] HC Deb, 9 December 2008, col 407
[18] HC Deb, 13 July 2009, col 127

there needs to be a comprehensive review of how that privilege affects the work and responsibilities of an MP in the twenty-first century".[19]

Whilst recognising the report on police searches on the parliamentary estate to be a development in privilege, [20] the Joint Committee on Parliamentary Privilege which reported in 2013 had little to add on the substance of the matter. The issue of the protection offered to Member's correspondence or casework was raised in the context of the Damian Green case but the Joint Committee saw no need for change at the present time.[21] In general, it recommended against statutory provision (except for a couple of very limited cases). The discussion on whether or not to define privilege in statute remains a live one at Westminster.

I would of course be happy to provide any further information which the Committee might find helpful.

David Natzler

8 May 2017

[19] Committee on Issue of Privilege, *Police searches on the Parliamentary* Estate, First Report of Session 2009-10, HC 62, para 169

[20] Joint Committee on Parliamentary Privilege, Report of Session 2013-14, HL Paper 30, HC 100, pp81-82

[21] Joint Committee on Parliamentary Privilege, Report of Session 2013-14, HL Paper 30, HC 100, para 242

COMMONWEALTH OMBUDSMAN

Submission by the Commonwealth Ombudsman

SENATE STANDING COMMITTEE OF PRIVILEGES

PARLIAMENTARY PRIVILEGE AND THE USE OF INTRUSIVE POWERS

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM
June 2017

INTRODUCTION

On 28 November 2016, the Senate referred to the Senate Standing Committee of Privileges (the committee) an inquiry into the adequacy of parliamentary privilege with regard to the use of intrusive powers by law enforcement and intelligence agencies. The committee is due to inquire and report by 14 August 2017.

This submission addresses the following point from the committee's Terms of Reference[1]:

- whether current oversight and reporting regimes on the use of intrusive powers are adequate to protect the capacity of members of Parliament to carry out their function, including whether the requirements of parliamentary privilege are sufficiently acknowledged.

BACKGROUND

The Commonwealth Ombudsman (the Ombudsman) safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through the independent review of complaints about Australian Government administrative action;
- developing policies and principles for accountable and transparent Australian Government administration; and
- providing assurance that Commonwealth, state and territory law enforcement agencies are exercising certain covert and intrusive powers as Parliament intended.

The last point is carried out through statutory compliance audits of 20 law enforcement agencies. Our audits involve engaging with agencies, inspecting relevant records and reviewing agencies' processes and systems to assess compliance with certain statutory requirements.

The results of these audits are reported to Parliament and the public, which serves as an important community safeguard. Detailed reports are provided to the agencies exercising the powers which assists them to apply sound administrative practices and identifying areas for improvement. Currently, the Ombudsman conducts statutory compliance audits in relation to the following activities under Commonwealth legislation:

- telecommunications interceptions;
- preservation of and access to stored communications;
- access to telecommunications data;
- use of surveillance devices;
- conduct of controlled operations; and
- coercive examinations.[2]

[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/intrusivepowers/Terms_of_Reference

[2] performed by the Australian Building and Construction Commission.

RESPONSE TO TERMS OF REFERENCE

Whether current oversight and reporting regimes on the use of intrusive powers are adequate to protect the capacity of members of Parliament to carry out their function, including whether the requirements of parliamentary privilege are sufficiently acknowledged.

In performing our statutory compliance audits, we currently do not consider the implications for parliamentary privilege in the operation of the relevant legislative provisions.

However, the majority of the Ombudsman's audits are in relation to powers used to investigate a criminal offence and provide protections for unnecessary and unwarranted privacy intrusion for all members of the public, including Parliamentarians. For example, in order to use such powers, agencies must first demonstrate that they have met a number of thresholds to a Judge or a nominated member of the Administrative Appeals Tribunal, who, in determining whether to grant the authority to use such powers must be satisfied of matters such as:

- the powers are being applied for in relation to a specified offence
- there are reasonable grounds for the suspicion founding the application for the warrant, including the nature and gravity of offences that have been, or about to be, committed;
- the use of the power is necessary for the purposes of obtaining evidence
- the extent to which the privacy of any person is likely to be affected; and
- the existence of any alternative means of obtaining the evidence or information sought to be obtained.

Where an agency can internally grant the authority to use certain powers, the Ombudsman assesses whether the agency has kept sufficient information to demonstrate that legislative thresholds were met and considerations were properly made.

Additionally, the legislation includes prohibitions on using and communicating information obtained from the use of intrusive powers except in limited circumstances, such as investigating a criminal offence. If a person were to misuse obtained information, that person could face imprisonment, under some legislation, for a period of up to 10 years.

The scope of the Ombudsman's oversight role is prescribed in the legislation and generally includes consideration of whether an agency has:

- properly applied for, and received, the authority to engage in certain activities;[3]
- only engaged in authorised activities;
- appropriate processes for handling and disclosing obtained information; and
- met its reporting obligations and was transparent with our office and the relevant Minister.

Amendments to the legislation can change the scope and focus of our oversight. When this occurs, we adjust our audit methodology accordingly.

Michael Manthorpe PSM
Commonwealth Ombudsman

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[3] This does not include commenting on the decision of a Judge or Administrative Appeals Tribunal member to issue a warrant or authorisation.

Our ref: 17/427

Australian Government
Australian Commission for Law Enforcement Integrity

16 June 2017

Senator the Hon. Jacinta Collins
Chair, Senate Committee of Privileges
Parliament House
CANBERRA ACT 2600

Dear Chair

Inquiry into parliamentary privilege and the use of intrusive powers

I thank you for your invitation to make a submission to the Committee's Inquiry.

As requested, I have focused my comments on issues that may be raised by the potential use by my agency of covert information gathering powers (on the one hand) and the operation of parliamentary privilege[1] (on the other).

The Australian Commission for Law Enforcement Integrity (ACLEI) has a special role in the Australian Government's anti-corruption framework. With a statutory focus on those agencies with law enforcement functions that operate in high-corruption risk environments, ACLEI is the only Commonwealth agency dedicated solely to the prevention, detection and investigation of corrupt conduct. A summary of ACLEI's role, responsibilities and powers is attached.

As a starting point, I note that the *Law Enforcement Integrity Commissioner Act 2006*—which is the statutory basis for the Integrity Commissioner to perform his or her role—provides no specific waiver of parliamentary privilege in respect of ACLEI's functions.

Indeed, it is likely that the Integrity Commissioner—having the statutory power to examine witnesses on oath—would be regarded as a *tribunal* for the purposes of the *Parliamentary Privileges Act 1987 (Cth)*. If so, the effect would be to modify the operation of the Integrity Commissioner's coercive powers to summons a person (as to the timing of a hearing) or to limit the production of some types of unpublished documents.

However, ACLEI can also be regarded as a law enforcement agency, and has a statutory role in assembling evidence of offences relating to corrupt conduct. Although the occurrences are likely to be rare, it is conceivable that covert collection methods routinely used by ACLEI in investigations—namely, telecommunications interceptions, surveillance device product or telecommunications metadata analysis—could be applied in a situation

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[1] In his 2013 paper "*A Parliamentary Commissioner for Standards for New South Wales*", Mr David Blunt, Clerk of the Parliaments, noted that "Parliamentary privilege consists of the powers and immunities recognised as necessary for Parliament to fulfil its roles in legislating and holding executive government to account" (p 8).

that would cause me to consider whether parliamentary privilege might be a relevant issue. To date, ACLEI has not had occasion to turn its mind to this specific issue.

However, I routinely consider these sorts of public interest questions in other situations—such as where I may have cause to think that a journalist or a lawyer or an accountant may have knowledge about a corrupt law enforcement officer, or in broader circumstances where I might consider that the proposed use of a power would have an undue effect on the privacy of an individual.

It may be useful for me to note that most information gathered covertly by ACLEI remains confidential—whether to protect the law enforcement method used to obtain the information or to preserve the privacy or reputations of individuals. Most often, ACLEI uses covertly-obtained information as a basis to collect additional information using other investigatory tools—such as by issuing a summons to attend a private hearing to give evidence, or corroborating information in another way (including by issuing notices to produce documents, or by conducting a search under warrant).

It is generally a matter for each house of the Parliament to determine the scope of privilege—both as to principle, and as to how the principle might apply in a given situation. The *Parliamentary Privileges Act 1987* (Cth) gives expression to some of these principles and mechanisms. To date, although there are nuances, Australia's Parliaments—and Privilege Committees in particular—have taken care to ensure that the criminal law is able to apply equally to elected members of parliament, as it would to any other Australian. I expect that approach is very much consistent with the standards of accountability expected by constituents of their elected representatives.

ACLEI will pay close attention to the outcomes of the Committee's Inquiry, to ensure that our practices accord with appropriate standards.

Yours sincerely

Michael Griffin AM
Integrity Commissioner

ATTACHEMENT ONE

OVERVIEW OF ACLEI

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act). The objects of the LEIC Act (at section 3) are:

(a) to facilitate:
  (i) the detection of corrupt conduct in law enforcement agencies and
  (ii) the investigation of corruption issues that relate to law enforcement agencies and

(b) to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations and

(c) to prevent corrupt conduct in law enforcement agencies, and

(d) to maintain and improve the integrity of staff members of law enforcement agencies.

ACLEI's strategic purpose—through performance of functions prescribed by the LEIC Act—is to make it more difficult for corruption in law enforcement agencies to occur or remain undetected. The LEIC Act provides the basis for ACLEI's purpose and activities.

The LEIC Act agencies—those agencies subject to the Integrity Commissioner's jurisdiction—are:

- the Australian Criminal Intelligence Commission (ACIC)—including the Australian Crime Commission (ACC), the former CrimTrac Agency and the former National Crime Authority
- the Australian Federal Police (AFP), including Australian Capital Territory Policing
- the Australian Transaction Reports and Analysis Centre (AUSTRAC)
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR), and
- the Department of Immigration and Border Protection (DIBP), including the Australian Border Force (ABF).
- Other agencies with law enforcement functions may be added by regulation.

ACLEI's role

ACLEI's primary role is to detect and investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. Subject to procedural fairness requirements, the Integrity Commissioner may make administrative findings about the conduct of individuals.

When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws or administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for changes.

The Integrity Commissioner must consider the nature and scope of corrupt conduct revealed by investigations, and report annually on any patterns and trends concerning corruption in law enforcement agencies.

Under section 71 of the LEIC Act, the Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following:

- a corruption issue or issues
- an issue about corruption generally in law enforcement agencies, or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily
- is appointed for up to five years, with a maximum sum of terms of seven years
- can commence investigations on his or her own initiative, and
- can make public statements, and can release reports publicly.

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the relevant agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies in the Integrity Commissioner's jurisdiction to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency— also known as *mandatory reporting*.

The LEIC Act also enables any other person—including members of the public, other government agencies or the Minister—to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to receive information about any corruption issue involving an agency within the LEIC Act jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

Special legislative arrangements make it lawful for 'whistleblowers' to provide information about corruption direct to ACLEI. The LEIC Act provides for ACLEI to arrange protection for witnesses.

The Integrity Commissioner may disclose information to the head of a law enforcement agency or other government agency if satisfied that it is appropriate to do so, having regard to the functions of the agency concerned.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI's information collection and intelligence-sharing role.

To safeguard information—for instance to protect a person's safety or reputation from unfair harm—the LEIC Act establishes comprehensive confidentiality requirements for ACLEI staff.

Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction.

The Integrity Commissioner is not expected to investigate every allegation or information about corruption that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to the AFP (if the corruption issue does not relate to the AFP)
- investigate the corruption issue jointly with another government agency or an integrity agency for a state or territory, or
- take no further action.

Under the LEIC Act, the Integrity Commissioner must give priority to serious or systemic corruption. Section 27 of the LEIC Act also sets out criteria to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue. With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement.

Accordingly, the Integrity Commissioner gives strategic priority to corruption issues that may:

- indicate a link between law enforcement corruption and organised crime
- relate to law enforcement activities that have a higher inherent corruption risk
- involve suspected conduct which would seriously undermine an agency's law enforcement functions

- bring into doubt the integrity of senior law enforcement managers
- warrant the use of the Integrity Commissioner's information-gathering powers, or
- would otherwise benefit from independent investigation.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act. In this way, ACLEI aims to pursue those investigations which are most likely to yield the highest strategic contribution to maintaining and improving integrity in law enforcement agencies.

Investigation powers

Due to the adverse consequences of law enforcement related corruption, ACLEI has access to a range of statutory law enforcement, coercive and other powers, including:

- coercive notices to produce information, documents or things
- summons to attend a coercive information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things (or else face criminal prosecution or action for contempt)
- intrusive information-gathering (covert)
    - telecommunications interception
    - electronic and physical surveillance
    - controlled operations
    - assumed identities
    - integrity testing (in relation to the ACIC, AFP and DIBP)
    - scrutiny of financial transactions, and
    - access to specialised information databases for law enforcement purposes
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

Purpose of coercive powers

Investigations of law enforcement corruption often involve suspects and witnesses who are well-versed in law enforcement methods and therefore may be skilled in avoiding or countering them to avoid detection. For instance, counter-surveillance skills, the ability to conceal activities ('hide tracks') or the capacity to divulge confidential information to others ('tip-offs') may be the commodity that makes a criminal conspiracy possible or attractive to undertake.

A particular challenge in this context is to ensure that anti-corruption investigations are able to uncover the full network of people involved—for instance law enforcement officials and their criminal counterparts—rather than stop at the point of having identified a 'bad apple'. It is also important to seek to gain contemporary information about what methods are being exploited to compromise systems, so that 'target hardening' can take place.

To help meet these challenges, Part 9 of the LEIC Act establishes arrangements for the Integrity Commissioner to use coercive information-gathering powers during an ACLEI investigation or joint investigation. These powers require a person to produce documentary evidence and/or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a coercive notice or summons, not to answer questions (even if to do so would tend to self-incrimination), not to answer truthfully, or otherwise be in contempt of ACLEI. The Integrity Commissioner may also issue a non-disclosure direction in relation to coercive notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

Coercive powers are an important part of the suite of investigation powers available to the Integrity Commissioner. 'Notices to produce'—for instance, to obtain bank account details when warranted—assist ACLEI to build an intelligence picture. Hearings—particularly when combined with other law enforcement investigation methods—enable ACLEI to further investigations that might otherwise stall through lack of conventional investigation options.

Evidence given by a witness at a hearing (ie hearing material) may not be used in a criminal prosecution against that witness, unless it falls within one of the limited exceptions set out in subsection 96(4A) of the LEIC Act—thereby protecting the privilege against self-incrimination. For instance, such material may be used in a confiscation proceedings (where the hearing occurred before the proceedings were commenced against the witness, or before such proceedings were imminent). Similarly, hearing material may be used in a disciplinary proceeding relating to the hearing witness (if the witness is in ACLEI's jurisdiction). The privilege against self-incrimination also applies to a person who gives information, or produces documents, in response to a coercive notice.

Corruption prevention

ACLEI's approach to preventing corruption is to work closely with LEIC Act agencies to share information and insights that might strengthen anti-corruption arrangements. For instance, ACLEI's Corruption Prevention Practice distils intelligence from and variety of sources—including lessons learned from ACLEI operations—to identify vulnerabilities in practices and procedures of agencies. These insights also inform Commonwealth anti-corruption policy more generally.

ACLEI publishes case studies and investigation reports to its website, as well as articles designed to assist corruption prevention practitioners.

Australian Government

Australian Law Reform Commission

Emeritus Professor Rosalind Croucher AM
President

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20 June 2017

Dear Secretary,

Submission to Inquiry into parliamentary privilege and the use of intrusive powers

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to this Inquiry into parliamentary privilege and the use of intrusive powers.

In 2009, the ALRC considered the relationship between secrecy provisions and the operation of parliamentary privilege in its Report, *Secrecy Laws and Open Government in Australia* (ALRC Report 112). The relevant part of the Report is extracted below for your information:

Parliamentary privilege

Background

16.1 In response to IP 34, the Clerk of the Senate, Harry Evans, provided a submission to draw to the ALRC's attention an issue that arises from the relationship between secrecy provisions and the operation of parliamentary privilege:

> From time to time executive government officials suggest that statutory secrecy provisions prevent them providing information to either House of the Parliament or its committees and/or render them liable under such provisions for supplying relevant information.[1]

1 Clerk of the Senate, *Submission SR 03*, 23 January 2009. See also H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008), 51–55 for a discussion of the application of secrecy provisions to parliamentary inquiries.

16.2 Evans suggested further that secrecy provisions 'may also inhibit the provision of information to the Houses and their committees by prospective witnesses without the inhibition becoming known'.[2]

What is parliamentary privilege?

16.3 'Parliamentary privilege' refers to the privileges or immunities of the Houses of Parliament and the powers of the Houses of Parliament to protect the integrity of their processes.[3] Section 49 of the *Australian Constitution* gives the Australian Parliament power to declare the 'powers, privileges and immunities' of the Houses of Parliament and provides that, in the absence of any declaration by the Parliament, the powers, privileges and immunities held by the United Kingdom's House of Commons at the time of the establishment of the Commonwealth shall apply.

16.4 The importance of parliamentary privilege is clearly set out in the *Human Rights Handbook for Parliamentarians* prepared for the United Nations by Manfred Nowak:

> Parliament can fulfil its role only if its members enjoy the freedom of expression necessary in order to be able to speak out on behalf of constituents. Members of parliament must be free to seek, receive and impart information and ideas without fear of reprisal. They are therefore generally granted a special status, intended to provide them with the requisite independence: they enjoy parliamentary privilege or parliamentary immunities.[4]

16.5 There are two aspects of parliamentary privilege. The first is set out in art 9 of the *Bill of Rights 1688* (UK) (applied in Australia by virtue of s 49 of the *Australian Constitution*), which states that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament'. Article 9 confers an immunity from civil or criminal action, and examination in legal proceedings, on members of the Houses, witnesses and others taking part in proceedings in parliament. The *Parliamentary Privileges Act 1987* (Cth) clarifies that giving evidence or submitting a document to a House or committee amount to 'proceedings in parliament' covered by the immunity. The second aspect of parliamentary privilege is the parliament's power to conduct inquiries, including the ability to compel witnesses to give evidence or produce documents.

16.6 On this basis, the Parliament, or a parliamentary committee, generally has the power to compel the giving of evidence or the production of documents that otherwise would be covered by a secrecy provision. In this context, a person who discloses information will be immune from liability under any secrecy provision.

Express abrogation of parliamentary privilege

16.7 Parliament may choose to abrogate parliamentary privilege expressly and prevent the disclosure of information to the Parliament or its committees.[5] For example, s 37(3) of the *Auditor-General Act 1997* (Cth) provides that the Auditor-General 'cannot be required, and is not permitted, to disclose' certain information to a House of Parliament, a member of a House of the Parliament, or a parliamentary committee. The Explanatory Memorandum to the Act makes clear that 'the effect of [this subclause] is to act as a declaration for the purposes of section 49 of the Constitution'.[6]

16.8 A far more detailed regime for dealing with disclosures to ministers and parliament is included in the Exposure Draft of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) (Tax Laws Exposure Draft Bill). The draft Bill sets out an

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2 Clerk of the Senate, *Submission SR 03*, 23 January 2009.
3 H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008), Ch 2.
4 M Nowak, *Human Rights Handbook for Parliamentarians* (2005), 64.
5 An intention to abrogate parliamentary privilege requires express statutory words: H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008), 53; G Griffith, *Parliamentary Privilege: Major Developments and Current Issues*, NSW Parliamentary Library Research Service Background Paper No 1/07 (2007), 82–84.
6 Explanatory Memorandum, Auditor General Bill 1996 (Cth), [71]. See also *Migration Act 1958* (Cth) s 503A.

exhaustive list of permissible disclosures to ministers and parliamentary committees.[7] These include, for example, disclosure to any minister to enable him or her to exercise a power or perform a function under a taxation law; and disclosure to the Treasurer for the purpose of enabling him or her to respond to an entity's representation.

16.9 The Tax Laws Exposure Draft Bill makes clear that the disclosures listed in the Bill are the only permissible disclosures that an officer can make to ministers and parliament, 'despite any power, privilege or immunity of either House of the Parliament or members or committees of either House of Parliament'.[8] However, the Bill retains the Parliament's powers of compulsion, and authorises an officer to disclose taxation information where disclosure has been compelled.[9]

Implied abrogation of parliamentary privilege

16.10 A more controversial question is whether a secrecy provision may override parliamentary privilege by 'necessary implication'.

16.11 In 1991, the Commonwealth Solicitor-General, Dr Gavan Griffith QC, provided advice on the application of secrecy provisions to officials appearing before parliamentary committees, as follows:

> Although express words are not required, a sufficiently clear intention that the provision is a declaration under section 49 [of the *Australian Constitution*] must be discernible. Accordingly, a general and almost unqualified prohibition upon disclosure is, in my view, insufficient to embrace disclosure to committees. The nature of section 49 requires something more specific.[10]

16.12 In 2000, Bret Walker SC provided advice to the NSW Legislative Council about whether a secrecy provision applied to prohibit certain witnesses from disclosing information to the budget estimates committee of the NSW Legislative Council. Walker advised that, in order for a secrecy provision to prevent the disclosure of information to a parliamentary committee, there must be either an express reference to the Houses, or that the statutory scheme would be rendered 'fatally defective' unless such an application were implied.[11]

16.13 The view that parliamentary privilege can be abrogated by 'necessary implication' has been criticised by Evans;[12] and no definitive view or court ruling has emerged.

Parliamentary processes to protect information

16.14 Where a secrecy provision does not operate to abrogate parliamentary privilege, information may be protected through other means. One such example is public interest immunity claims—that is, a claim that information should be withheld from a parliamentary committee on grounds of public interest. The *Government Guidelines for Official Witnesses Before Parliamentary Committees and Related Matters* advise that considerations that may affect a decision about whether to make documents or information available may include—in addition to whether disclosure of the information could cause harm to specified public interests—whether the information is covered by a secrecy provision.[13] Another practical way to afford some protection to sensitive information is to have this adduced in camera—that is, in a closed session.[14]

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7 Exposure Draft, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) sch 1 pt 1 cl 355-55.
8 Ibid sch 1 pt 1 cl 355–60(3).
9 Ibid. For more information about the intended operation of this provisions see Explanatory Material, Exposure Draft, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth), [4.19]–[4.26].
10 Explanatory Memorandum, Parliamentary Privileges Amendment (Effect of Other Laws) Bill 1991 (Cth).
11 J Evans, 'Orders for Papers and Executive Privilege: Committee Inquiries and Statutory Secrecy Provisions' (2002) 17(2) *Australian Parliamentary Review* 198, 210.
12 H Evans (ed), *Odgers' Australian Senate Practice* (12th ed, 2008).
13 Parliament of Australia—Senate, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* (1989), [2.33].
14 Ibid, [2.35]–[2.38].

ALRC's views

16.15 Parliamentary privilege will normally override secrecy provisions, permitting the disclosure of protected information to Parliament or a parliamentary committee. This override will be supported by the exception for disclosures in the course of an officer's duties in the recommended general secrecy offence and most specific secrecy offences. In a small number of situations, however, the disclosure of certain information to Parliament or parliamentary committees may not be the desired outcome. Here, any legislative intent to abrogate parliamentary privilege should be clearly stated in the provision and supporting documents, as for example in the Tax Laws Exposure Draft Bill.[15]

We hope this submission is of assistance to your Committee. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,

Emeritus Professor Rosalind Croucher AM

15 Exposure Draft, Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Cth) sch 1 pt 1 cl 355-60(3).

25 January 2018

Committee Secretary
Senate Standing Committee of Privileges
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

UNSW LAW SOCIETY SUBMISSION REGARDING THE INQUIRY INTO PARLIAMENTARY PRIVILEGE AND THE USE OF INTRUSIVE POWERS

The University of New South Wales Law Society welcomes the opportunity to provide a submission to the Standing Privileges Committee Inquiry into whether existing measures regarding the use of intrusive powers adequately acknowledge and protect parliamentary privilege.

The UNSW Law Society is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The key findings of our submission can be found over the page. We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely

Nicholas Parker
Policy Submissions Director

Sophie Berton
Policy Submissions Director

KEY FINDINGS

1. The '*Australian Federal Police National Guideline for Execution of Search Warrants Where Parliamentary Privilege May Be Involved*' is adequate in directing actions of the Australian Federal Police when executing search warrants.
2. Concern surrounding potential unwarranted interruption to the work of Parliamentarians that fall outside parliamentary privilege are difficult to justify in the current political climate, but may become a well-founded fear in particular circumstances relating to the treatment of parliamentary proceedings.
3. External regimes for law enforcement or intelligence services should take precedence in assuring the existence of remedies, if not necessarily preventing possible breaches of privilege.
4. A Memorandum of Understanding of a similar nature to the agreement between the Speaker and the New Zealand Security Intelligence Service would present a simple answer to many of the difficulties raised concerning the use of intrusive powers on parliamentarians, however would set a precedent for a strong anti-interventionist stance by the Legislature.
5. It would be in the interests of future considerations on parliamentary privilege's interaction with intrusive technologies to avoid a strict definition of 'public interest', and observe the delineation made by the Courts to determine public interest immunity.

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UNSW Law Society Vice-President (Social Justice)	Angad Randhawa

I SUFFICIENCY OF EXISTING PROTOCOLS FOR THE EXECUTION OF SEARCH WARRANTS IN PROTECTING PARLIAMENTARY PRIVILEGE

A *What are the Relevant Privileges and Immunities of Members of Parliament?*

Parliamentary privilege is an integral element of the parliamentary system, serving to protect the independence of the legislature. It encompasses the range of powers, privileges, and immunities conferred upon those involved in proceedings in Parliament, and its source lies in section 49 of the Australian Constitution:

> The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

The Australian Parliament inherited the privileges of the UK House of Commons, including article 9 of the Bill of Rights: 'That the freedom of speech or proceedings in Parliament ought not to be impeached or questioned in any Court or Place outside of Parliament'. The Bill of Rights does not encompass the entirety of parliamentary privilege, which also includes the principle of 'exclusive cognisance' – that Parliament should rule its own sphere (for instance, Parliament has the power to issue penalties for contempt).

The only declaration made according to section 49 of the Constitution thus far has been the *Parliamentary Privileges Act 1987* (Cth). This statute did not set out to provide an exhaustive statement of parliamentary privilege,[1] and section 16 only prevents evidence 'for the purposes of or incidental to business of a House or of a committee' from being tabled in court. Referring to this statute alone, novel forms of information-gathering by police or intelligence agencies would seem to have no impact on the privileges or immunities of parliamentarians, because the newly-gathered information cannot be tabled in court in any case. And yet they do.

The process of sealing documents retrieved in a search warrant on which a claim of parliamentary privilege is made has no origins in statute. It is a policy decision for which the

[1] *Parliamentary Privileges Act 1987* (Cth) s 5.

reasons were first articulated in 2000, in a submission by counsel representing the President of the Senate in *Crane v Gething*.[2] The Senate argued that if police were allowed to access the documents, sources of information could be discovered and 'attacked through other investigations and legal proceedings' – even if the documents themselves could not be used in court.[3] With the agreement of police, a process whereby a neutral third party examines the documents for potential privilege claims has since been enshrined in a 2005 memorandum of understanding. The element of parliamentary privilege with which this inquiry is concerned is both recent and extrajudicial, and thus could be easily altered if policy priorities changed.

In brief, if intrusive powers impact on the privileges or immunities of Members of Parliament ('MP'), it is specifically and entirely related to the limitation of MPs' freedom of speech, occasioned by the reluctance of constituents to approach them with information. This reluctance would be the product of a climate of fear of reprisals by police or intelligence services, acting on behalf of the executive branch of government.

B *What is the Underlying Criticism of Existing Protocols?*

Traditional seizure through the execution of a search warrant contains a clear and necessary element of physical intrusion, and provides a House or its members with a logical opportunity during execution to claim parliamentary privilege. Consequently, search warrant protocols such as the *Australian Federal Police National Guideline for Execution of Search Warrants Where Parliamentary Privilege May Be Involved* ('the Protocol') rely upon promoting a procedure of execution where a member is appropriately afforded opportunity to 'raise' a claim of breach of privilege in order to allow review.[4] Even when a claim of breach of privilege occurs after Australian Federal Police have executed a search warrant such as the Australian Federal Police ('AFP') seizure of documents in 2016 at the office of Senator the Hon. Stephen Conroy, the protocol effectively neutralises the potential for contempt through stipulated neutral third-party possession of the contested documents until the House adopted the

[2] (2000) 97 FCR 9.
[3] Harry Evans, 'Parliamentary Privilege and Search Warrants: Will the US Legislate for Australia?' (Papers on Parliament No 48, Parliamentary Library, Parliament of Australia, 2008).
[4] Australian Federal Police, *National Guideline for Execution of Search Warrants Where Parliamentary Privilege May Be Involved*, 2005.

recommendations of the Privileges Committee and upheld the claim.[5] Practical application therefore suggests the effectiveness of existing protocol measures concerning the execution of search warrants relies on implementing a process that leverages the eventual triggering of in-built contingencies that enable the containment of a breach from the point that a House, or the relevant parliamentarian, becomes aware of a problematic intrusion.

The notion that the Protocol is insufficient therefore centres upon either rejecting that existing contingencies are satisfactory to assure Parliamentarians that their freedom of speech in parliamentary proceedings is protected, or that the measures fail to account for contemporary intrusive powers used by the AFP. Satisfactory assurances of a protected right to freedom of speech may arise under the assertion that the Protocol does not offer enough protection to parliamentarians' privilege, or that the process of accessing these protection measures is too disruptive to proceedings. Similarly, the application of the Protocol to contemporary intrusive powers, namely electronic surveillance, may inform an assertion that existing measures do not sufficiently protect a House from all potential intrusions upon privilege.

C *Are These Criticisms Valid?*

It is our submission that both of these assertions are unfounded. Under section 6 of the Protocol, the process of obtaining and preparing the execution of a warrant is overseen by, at the very least, a Manager in the AFP, and the office of the relevant Director of Public Prosecutions. As to the wording of the terms of reference, search warrants concerning premises of parliamentarians in Parliament House also require notification of the Presiding Officer of the relevant House in section 6.4, and in particular cases the relevant member may even be given specific opportunity to claim privilege under sections 6.5 and 6.7.[6] Beyond these proactive measures, the 2016 Conroy case also validated the merits of the Protocol regarding the safekeeping of documents by a neutral third-party under section 6.11, such that the operative outcome of the warrant's execution was negated.[7] The process established under the Protocol therefore provides clear consultation of the legislature in a manner that is respectful to the

[5] Australian Federal Police, above n 4, 5.
[6] Ibid.
[7] Standing Committee of Privileges, above n 5, 7-8 [2.21].

administration and protection of parliamentary privilege, since improper interference by the AFP can demonstrably be avoided.

Within the broader umbrella of assurances to the protection of freedom of speech afforded to a House, criticism may also arise with regards to the tangible disruption to parliamentary proceedings and functions associated with following the Protocol procedure. In response, our submission emphasises that a distinction ought to be made by the Committee between the execution of search warrants under the Protocol, and the parliamentary process involved with processing a claim of privilege. Potential disruption to essential parliamentary functions, particularly sitting weeks, are alleviated under section 6.6 of the Protocol.[8] Furthermore, section 6.11 of the Protocol stipulates the opportunity to 'take copies of any documents before they are secured'.[9] Not only do these measures demonstrate a sensitivity to parliamentary functions within the Protocol, but its application in the Conroy case revealed that the greater source of delay lay in deliberations as to the merits of the claim by the Senate Privileges Committee; the total disruption of the search warrant's execution totalled just under 12 hours.[10] No source of unreasonable disruption to members' parliamentary functions are attributable to the Protocol upon distinguishing its application from parliamentary procedures concerning resolving claims of privilege.

Finally, critics may assert that the execution of warrants pertaining to contemporary intrusive powers do not reliably provide parliamentarians with an equivalent opportunity to raise a claim of privilege in the execution. In counter to such an argument, electronic surveillance, whether by through phone tapping, collection of metadata or any other relevant means exist largely outside the remit of the Protocol, which was formulated with specific consideration to search warrants that involve the physical search of premises.[11] For this reason, our submission refers to the wording of term of reference (a) and recommends that applying the Protocol beyond its intended purview of search warrants unfairly places its measures under an incompatibly and

[8] Australian Federal Police, above n 4, 5.
[9] Australian Federal Police, above n 4, 4.
[10] Ashlynne McGhee, 'AFP Ordered to Return Former Senator Stephen Conroy's Seized Documents', ABC News (online), 28 March 2017 < http://www.abc.net.au/news/2017-03-28/afp-ordered-to-return-stephen-conroy-seized-documents/8394590>.
[11] Australian Federal Police, above n 4.

unnecessarily broad frame. Nonetheless, it is worth noting that further consideration on the implications of intrusive powers on other relevant existing frameworks, as well as the validity of concerns regarding the protection of privilege for forms of surveillance where the intrusion is more covert or on other premises, and whether there are grounds for an expansion of the Protocol lies within the other terms of reference listed for consideration by the Committee.

II IMPLICATIONS OF CONTEMPORARY INTRUSIVE POWERS BY LAW ENFORCEMENT AND INTELLIGENCE AGENCIES ON PARLIAMENTARY PRIVILEGE

A *Do Communications with Constituents Fall Within the Ambit of Parliamentary Privilege?*

While constituents bringing information to the attention of Members of Parliament might benefit from protections from surveillance, the question is whether parliamentary privilege is the appropriate avenue for these protections. The Senate's submission in *Crane* sidestepped this problem by contending that the information provided by a constituent would directly result in words spoken in Parliament.[12]

The consensus seems to be that communications with constituents are protected only if they result in words being spoken on the floor of Parliament. Records of meetings, or communications resulting in representations to Ministers on behalf of constituents, are not protected.[13] In *Crane*, French J made the apparently straightforward statement that:

> 'The fact that [seized documents] may include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator would want to make public does not of itself raise an issue of parliamentary privilege.'[14]

[12] Harry Evans, above n 3.
[13] Committee on Standards and Privileges, *Privilege: Hacking of Members' mobile phones*, House of Commons Paper No 14, Session 2010-2011 (2011) 11.
[14] *Crane v Gething* (2000) 97 FCR 9, 28.

In *R v Chaytor*,[15] Lord Phillips preferred a narrow interpretation of the concept, protecting Parliament from judicial and executive interference. Yet his Lordship left the door open for change, saying 'it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.'[16]

B *How do Intrusive Powers Impact on the Privileges and Immunities of Members of Parliament?*

Telecommunications interception, electronic surveillance, and metadata domestic preservation orders from law enforcement or intelligence agencies operate differently from search warrants because they take place without the subject's knowledge, precluding MPs from raising issues of parliamentary privilege. But in cases where the MP is unaware of the intrusion, there is no possibility for parliamentary privilege to be claimed at all.

There is a paradox at the core of the intersection of intrusive powers with parliamentary privilege, described by the Committee on Standards and Privileges in the House of Commons as 'an excursion into the realms of metaphysics'.[17] Unlike personal rights (e.g. privacy), parliamentary privilege is concerned with outcomes. In individual cases, knowledge by MPs and constituents that they are being spied upon is the prerequisite for the limitations on freedom of speech which would occasion a claim of parliamentary privilege. But if the intelligence operation remains undiscovered, then the MP's behaviour remains undistorted, so there is no relevant privilege to invoke.

However, MPs' actions might well be influenced by a climate of fear arising from widespread knowledge of the use of intrusive powers by law enforcement. This discussion turns on whether the climate of fear is a reasonable one. In this space, the House of Commons urged caution due to the subjectivity of 'Members' impressions of the impact on them'.[18] Discussion of protecting

[15] [2010] UKSC 52.
[16] *R v Chaytor* [2010] UKSC 52, [47].
[17] Committee on Standards and Privileges, above n 13, 15.
[18] Committee on Standards and Priviliges, above n 13.

MPs' sources of information finds a parallel in section 126 of the *Evidence Act 1995* (Cth), which protects journalists from having to reveal their sources in court (though this is rebuttable by a public interest test). For example, a person leaking information from the company they work for might fear the loss of their job. But it is difficult to see what reprisals a person providing information to an MP might fear from the police or intelligence agencies, operating impartially.

If such reprisals could be identified, then the climate of fear would be reasonable; intrusive powers would have a discernible impact on freedom of speech in Parliament (and thus privilege); and action should be taken to enable claims of privilege to be made on metadata and intercepted communications. Yet this would only be strictly necessary in cases where communications with constituents resulted in proceedings taking place on the floor of Parliament.

III ADEQUACY OF EXISTING OVERSIGHT AND REPORTING REGIMES ON THE USE OF INTRUSIVE POWERS IN PROTECTING PARLIAMENTARY PRIVILEGE

To assure the integrity of 'Parliamentary proceedings', the formulation of any documents for the purposes of the House remain protected processes, meaning a court cannot compel the production of such documents.[19] Intelligence gathering operations now rely more than ever on newer spectrum 'intrusive powers', consisting of metadata retention, telecommunications intercepts and electronic surveillance – collectively known as signals intelligence (SIGINT).[20] Due to secrecy in their use, breaches of privilege cannot be raised by the Member with the Speaker in the traditional fashion.[21] As such, external regimes for law enforcement or intelligence services therefore take precedence in assuring the existence of remedies, if not necessarily preventing possible breaches of privilege.

[19] *Parliamentary Privileges Act 1987* (Cth) s 16(2).
[20] See Australian Signals Directorate, Department of Defence.
[21] Parliament of Australia, *House of Representatives Standing Orders - Chapter 7 Privilege*, 13 September 2016, s 52 – 53.

A *Oversight Regimes in Operation Relating to the Usage of Intrusive Powers and Technologies.*

Several modes of institutional oversight are predominant in the regulation and reportage of conduct amongst law enforcement and intelligence. The scope of this inquiry demands that oversight be examined in consideration of legal accountability and governance.

1 *Inspector-General of Intelligence and Security*

The Inspector-General of Intelligence and Security ('IGIS') remains the premier mechanism by which accountability in the Australian Intelligence Community ('AIC') is achieved.[22] Importantly, the IGIS retains the power to access all reports from the AIC, classified or unclassified, for the purposes of determining compliance.[23] It should be noted, however, that such oversight does not extend to the Australian Federal Police, amongst other agencies is part of the greater National Intelligence Community ('NIC').[24] When it comes to the deployment of intrusive powers, the IGIS has access to all signals intelligence products generated by the AIC.[25] Until 2011, all domestic surveillance warrants issued to ASIO were checked by the IGIS on a 100% compliance basis, but later switched to a risk based sampling process – as such, many warrants now do not receive compliance checks.[26]

A finding by the committee that current oversight and reporting regimes on the use of intrusive powers are not sufficient in acknowledging the requirements of parliamentary privilege may

[22] For reference, the Australian Intelligence Community ('AIC') comprises the Australian Geospatial-Intelligence Organisation (AGIO), Australian Secret Intelligence Service (ASIS), Australian Security Intelligence Organisation (ASIO), Australian Signals Directorate (ASD), Defence Intelligence Organisation (DIO) and Office of National Assessments (ONA).
[23] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 8.
[24] Commonwealth of Australia, *2017 Independent Intelligence Review* (Department of Prime Minister and Cabinet, 2017) 21.
[25] Inspector-General of Intelligence and Security, *How IGIS Interacts with the AIC* <http://www.igis.gov.au/australian-intelligence-community/how-igis-interacts-aic>
[26] Inspector-General of Intelligence and Security, *Annual Report 2011 – 2012* (Commonwealth of Australia, 2012) 24.

find a quantifiable recommendation in amending the practices of the IGIS compliance evaluation to require the approval of any and all surveillance measures concerning parliamentarians.

2 *Office of the Commonwealth Ombudsman*

The Commonwealth Ombudsman cooperates closely with the Inspector-General of Intelligence and Security, with a Memorandum of Understanding ('MoU') between the two statutory offices facilitating the processing of administrative complaints against members of the AIC.[27] Separately, the Ombudsman inspects the records of the AFP and Australian Crime Commission for compliance in telecommunications interception and surveillance devices.[28] Due to the MoU, oversight responsibilities are evenly demarcated between the IGIS for the AIC and the Ombudsman for law enforcement.[29]

3 *Parliamentary Joint Committee on Intelligence and Security*

The Parliamentary Joint Committee on Intelligence and Security ('PJCIS') reviews administration of AIC agencies and various matters referred to it by a responsible Minister or Parliament.[30] The PJCIS is a direct means by which Members of Parliament can impose the discipline of external scrutiny on intelligence agencies and their conduct independent of the Executive.[31] Formerly known as the Parliamentary Committee on ASIO, the *Intelligence Services Amendment Act 2005* (Cth) renamed it to the PJCIS and expanded its remit to encompass all the AIC agencies. Recently, the PJCIS released a report recommending the

[27] Commonwealth Ombudsman and Inspector-General of Intelligence and Security, *Memorandum of Understanding Between the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security*, 14 December 2015.
[28] *Telecommunications (Interception) Act 1979* (Cth); see also *Surveillance Devices Act 2004* (Cth).
[29] Commonwealth Ombudsman and Inspector-General of Intelligence and Security, above n 27.
[30] *Intelligence Services Act 2001* (Cth) s 29(1).
[31] Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies, *General Report* (1984) 25.

establishment of independent oversight on metadata retention, and the empowerment of the Ombudsman to have such oversight.[32]

It is our submission that the Committee echo this recommendation, due to its positive outcomes relating to involving the legislature at an earlier juncture in the surveillance process as it relates to metadata retention.

4 *Independent National Security Legislation Monitor*

The Independent National Security Legislation Monitor ('INSLM'), while maintaining a focus on legislative developments, nevertheless reviews to what extent individual rights are contravened by the application of counter-terrorism laws by intelligence bodies, such as those enabling technologically intrusive powers.[33] In being able to compel answers from security organisations for the purposes of review, reports produced by the INSLM reports examine both legislative impact and their usage by intelligence organisations.[34]

[32] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) 264.
[33] Commonwealth of Australia, above n 24, 114, para 7.15.
[34] *Independent National Security Legislation Monitor Act 2010* (Cth) s 22.

IV WHETHER SPECIFIC PROTOCOLS REGARDING THE RELATIONSHIP BETWEEN INTRUSIVE POWERS AND PARLIAMENTARY PRIVILEGE SHOULD BE ESTABLISHED

A *'Access by law enforcement or intelligence agencies to information held by parliamentary departments, departments of state (or portfolio agencies) or portfolio agencies in relation to members of Parliament or their staff'*

This term of reference refers to law enforcement or intelligence services accessing information actually held by state agencies about members of Parliament. This could take the form of a search warrant, or a formal request. It does not involve telecommunications interception. Malicious use of communications technology, which might provide a means to access the information, does not seem to be the subject of this inquiry.

In our submission, the 2005 Memorandum of Understanding provides adequate protection for parliamentary privilege in the execution of search warrants.

B *'Access in accordance with the provisions of the Telecommunications (Interception and Access) Act 1979 by law enforcement or intelligence agencies to metadata or other electronic material in relation to members of Parliament or their staff, held by carriers or carriage service providers'*

Metadata can be used to identify journalists' sources. That was the thrust of the 2014 debate on data retention, empowering police to seek warrants to investigate preserved metadata for the purpose of identifying journalists' sources.

A protocol which would require police or intelligence services to inform MPs (or a neutral third party) of instances where their metadata had been accessed or telecommunications intercepted, allowing them to raise claims of privilege, would be an obvious resolution to these concerns. A level of technical expertise might be necessary in the task of filtering this material, narrowing the pool of candidates in the process.

Yet there exists a broad range of possible responses to issues raised by developments in intrusive technologies, as the agreement between the Speaker of the New Zealand House of Representatives and the New Zealand Security Intelligence Service demonstrates.[35]

C *'Activities of intelligence agencies in relation to members of Parliament or their staff (with reference to the agreement between the Speaker of the New Zealand House of Representatives and the New Zealand Security Intelligence Service)'*

The New Zealand agreement reflects strong opposition to surveillance of MPs in general. Once a person becomes a member of Parliament, the New Zealand Security Intelligence Service ('NZSIS') closes their file on that person and 'will not generally direct the collection of information against any sitting Member of Parliament.'[36]

There are two exceptions to this rule. The first is 'where a particular MP is suspected of undertaking activities relevant to security', the Director of NZSIS may personally authorise the collection and 'provides a confidential briefing to the Speaker of the House about the proposed collection and the reasons for it'.[37] Although NZSIS does not require the Speaker's approval, MPs targeted by surveillance may, through a separate process, make complaints to the New Zealand Inspector-General.[38]

The second exception involves information being collected about another person with whom the MP is in contact. This 'incidental' information must be attached to the file of that other person, and information about the MP will be destroyed unless it is necessary to provide context.[39]

[35] This is agreement is as per the document cited by the Committee in its terms of reference.
[36] Privileges Committee, *Question of Privilege Concerning the Agreements for Policing, Execution of Search Warrants, and Collection and Retention of Information by the NZSIS*, Interim Report, 2013, <https://www.parliament.nz/resource/en-nz/50DBSCH_SCR5878_1/505f4567d97947012fd02861c7abac2ad5032f86>, 11.
[37] Privileges Committee, above n 32, 12.
[38] Ibid.
[39] Ibid.

This process of restricting the Speaker's power, by requiring only that they be informed, seems appropriate in light of a case where the Speaker of the South Australian House of Assembly prevented police from executing a search warrant in his own office during an investigation into his business dealings with a convicted criminal.[40] The New Zealand memorandum is consistent with the practice of law enforcement in notifying the Speaker before proceeding with any operations on the grounds of Parliament, to avoid miscommunications which could result in charges of contempt of Parliament.[41] Although the interference is more subtle in cases of technological intrusion, and thus the possibility of contempt smaller, adherence to the same standards would be an effective means of preserving the freedom of speech of parliamentarians by precluding police intimidation.

Attitudes to parliamentary privilege and intrusive powers in New Zealand have developed in a manner that is strikingly protective of the independence, not just of the legislature, but also of individual MPs. A Memorandum of Understanding like that between the Speaker and NZSIS would present a simple answer to many of the difficulties raised in this submission, by intentionally and dramatically overshooting the mark required to preserve parliamentary privilege.

V PUBLIC INTEREST CONSIDERATIONS

A *Purview of the Committee limited to the Execution of Warrants*

This term of reference may be taken to provide scope for consideration of whether the current framework for the use of intrusive powers in matters that may attract parliamentary privilege perform in the public interest, or the implications for the Committee's findings upon public interest immunity. In the case of the latter, it is important to note that public interest immunity pertains to the protection of documents from being produced as evidence upon order of a court 'when it would be injurious to the public interest to do so', as articulated by Gibbs ACJ in *Sankey v Whitlam*.[42] The Court in *New South Wales v Ryan* also found 'no relevant difference'

[40] Martin Hinton, 'Parliamentary Privilege and Police Powers in South Australia' (2005) 16 *Public Law Review* 99, 99.
[41] Ibid 115.
[42] *Sankey v Whitlam* (1978) 142 CLR 1, 44.

between the definition of public interest immunity in common law to its statutory source under section 130 of the *Evidence Act 1995* (Cth).[43] Since the interpretation of public interest immunity rests with the courts as per *Crane*, it is our submission that the Committee avoid a strict application of this interpretation of term of reference (e), such that it may bear relevance to the purview of the House under the *Parliamentary Privileges Act* 1987 (Cth).[44]

Chris Wheeler of the Australian Institute of Administrative Law notes that: 'although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation or by the courts'.[45] He went on to cite the 1979 Australian Senate Committee on Legal and Constitutional Affairs Report on the Commonwealth Freedom of Information Bill;

> "… 'public interest' is a phase that does not need to be, indeed could not usefully, be defined... Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. …the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed".[46]

As to public considerations in this inquiry, it is our submission that the Committee follow the established position of avoiding any unnecessarily specific or exhaustively-worded particulars that constitute a public interest that may implicate itself as a definition of 'public interest' in its findings.

Certainly, the implications of not affording future iterations of this Committee the same freedom and flexibility in applying privilege to contemporary forms of intrusive powers enjoyed currently would paradoxically exacerbate the potential for disruption of parliamentary functions.

[43] *New South Wales v Ryan* (1998) 101 LGERA 246, in Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [15].
[44] Above n 2; Australian Law Reform Commission, above n 38.
[45] Chris Wheeler, 'The Public Interest, We Know it's Important, but do we Know What it Means?' (2006) 48 Australian Institute of Administrative Law Forum 48, 14.
[46] Committee on Legal and Constitutional Affairs, Senate, *Report on the Commonwealth Freedom of Information Bill*, (1979).