

# **REPORT ON A MEMORANDUM OF UNDERSTANDING WITH THE INDEPENDENT COMMISSION AGAINST CORRUPTION RELATING TO THE EXECUTION OF SEARCH WARRANTS ON THE PARLIAMENT HOUSE OFFICES OF MEMBERS**

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## CHAIRMAN'S FOREWORD

The Legislative Assembly Committee on Parliamentary Privilege and Ethics has recently considered, under its powers to carry out educative work, current issues which potentially impact on parliamentary privilege in New South Wales.

The issues considered by the Committee include:

- The need for a protocol to guide execution of search warrants in members' offices and parliamentary precincts.
- Concern about the Ombudsman's proposal to actively consider inclusion of Members of Parliament within the first full review of the *Government Information (Open Access) Act*.
- Members' vulnerability to defamation proceedings where a court finds that a statement made outside the House has incorporated reference to ("effectively repeated") a protected, but defamatory, statement made in parliamentary proceedings.

This report concerns the first issue, the adoption of a protocol to guide execution of search warrants on members' offices in Parliament House. This inquiry is a continuation of work originally undertaken by this Committee and the Privileges Committee of the Legislative Council in the wake of the Independent Commission Against Corruption's execution of a search warrant on the Parliament House office of the Hon Peter Breen MLC in 2003. The Inspector of the ICAC, in a Special Report tabled in the Legislative Assembly on 23 September 2008, reported on inadequacies in the ICAC's application for, and execution of, the search warrant and of clear deficiencies in the understanding of parliamentary privilege on the part of ICAC officers.

The Committee has recommended that, given a number of recent events in NSW and other jurisdictions, there is a need for parliamentary privilege to be confirmed by either formal protocol or legislative amendment. The primary recommendation in this report, that there be an agreed protocol between the Presiding Officers and the Commissioner of the ICAC regarding the execution of search warrants on the Parliament House offices of Members, will serve as a confirmation and preservation of the privilege necessary to maintain the balance between the role and function of the courts and Parliament in our constitutional system.

I commend this report to the House.

Paul Pearce, MP  
Committee Chairman



## **Summary of recommendations**

### **Recommendation 1:**

That the House resolve that the Speaker enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices, as set out in the Legislative Council's message to the Legislative Assembly dated 25 November 2009.

### **Recommendation 2:**

That the House send a message to the Legislative Council advising of its agreement to the request of the message reported on 25 November 2009.

### **Recommendation 3:**

That the Government be requested to introduce legislation similar to s16 of the Parliamentary Privileges Act (Commonwealth) to confirm the protection of Article 9 of the Bill of Rights.



## CHAPTER 1: Background to the Inquiry

The execution of search warrants, pursuant to the law, is a necessary aid to administrative investigation. However, such authorities on parliamentary privilege as Enid Campbell have noted “the extent to which such statutory powers to grant search and seizure warrants, and authority conferred by such warrants, may be constrained by laws about parliamentary privileges”.<sup>1</sup>

In general terms, the law of parliamentary privilege acts to protect a member's documents from seizure under search warrants, but only where the documents were specifically produced for the purposes of the members' actions or participation in Parliament. It is not a privilege of the individual member, so much as a protection of the processes of the House.

There is no general immunity preventing law enforcement bodies from exercising police powers within the precincts, where this is done in accordance with the law. To balance the needs of investigative authorities, and the privilege of the House, a number of parliaments have adopted protocols to govern the interaction of parliament with investigative bodies, to ensure that parliamentary privilege is preserved over members' documents where appropriate.

The parliamentary privilege of freedom of speech and immunity from civil and criminal proceedings, as encapsulated by Article 9 of the Bill of Rights, does not depend on or involve any inherent privilege attached to the parliamentary precincts as an area<sup>2</sup>. For privilege to attach to a document, the nexus to be established is that between the document and a proceeding of the House or committee.

Things said or done during proceedings of a House or one of its committees are immune to subpoena. Once off the floor of the House, the application of the Bill of Rights is confined to activities which have a close formal link with the business to be transacted in the House or in a select committee, or which are transacted in execution of an order of the House<sup>3</sup>.

In New South Wales, the question of the assertion of privilege in relation to documents claimed pursuant to a search warrant, and the determination of privilege where a document was in dispute, was a central issue in the Independent Commission Against Corruption's inquiry into the Hon Peter Breen in 2003<sup>4</sup>. The question of how to balance the right of an investigative agency to access the information required for the administration of justice, as opposed to the importance of parliamentary privilege in our system of government, was canvassed in the reports of the Legislative Council Privileges Committee<sup>5</sup>, as discussed further below.

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<sup>1</sup> Campbell E, *Parliamentary Privilege*, Federation Press 2003, p38.

<sup>2</sup> Evans H (ed), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p33

<sup>3</sup> McGee D, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> edn, Dunmore Publishing, 2005, p624

<sup>4</sup> Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, 2003.

<sup>5</sup> Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, 2003. Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, 2004. <sup>5</sup>

## **Development of Protocols and memoranda of agreement**

Apart from the NSW experience as noted above, recent events in the House of Commons<sup>6</sup>, the US Congress<sup>7</sup> and the New Zealand House of Representatives<sup>8</sup> above point to the difficulty in determining which of members' documents constitute "proceedings in Parliament" where they are subject to seizure under the terms of a search warrant. Both courts and Parliaments acknowledge the need to balance the important public interest in investigative bodies being able to carry out their statutory functions and obtain information without undue interference, against the need to protect parliament from external interference in the conduct of its business, which includes interference with the members of parliament in the performance of their role.

A number of parliaments have developed protocols in consultation with the relevant investigative bodies, to regulate the claiming of privilege by members over documents in their possession, but which are subject to seizure under a search warrant.

Examples of memoranda of understanding made between parliaments and law enforcement bodies such as the Police and DPP, regarding the parliamentary precincts include:

- ❑ Commonwealth of Australia Parliament Memorandum of Understanding with the Australian Federal Police (2005)<sup>9</sup>.
- ❑ New Zealand House of Representatives with Commissioner of New Zealand Police governing police functions within the parliamentary precinct (2006)<sup>10</sup>.
- ❑ ACT Legislative Assembly Agreement with Chief Police Officer of the ACT<sup>11</sup>.

Protocols typically set out the legal background for the procedures, acknowledge parliamentary privilege and contain substantive guidelines for procedure prior to obtaining the warrant. Protocols can cover not only entry to the Parliamentary precincts and access to a member's office, but also processes for assessing and determining the scope of a warrant or order for discovery, and the more difficult question of determining the application of privilege in the case of disputed documents.

## **Development of a formal protocol in the NSW Parliament**

The NSW Parliament has not formally adopted a protocol for the procedure to be followed in the execution of search warrants in the premises of members.

In the course of considering the privilege issues arising from the ICAC's seizure of documents and electronic files of the Hon Peter Breen MLC, the Privileges

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<sup>6</sup> Evans H "Recent developments in parliamentary privilege", ANZACATT Professional Development Seminar, 28-30 January 2009.

<sup>7</sup> Ibid.

<sup>8</sup> Parliament Matters, Issue 17, February 2007, p38.

<sup>9</sup> MOU on the execution of search warrants on federal members of Parliament between the Minister for Police and Emergency Management for Tasmania, the Attorney-General for Tasmania, the Speaker of the House of Representatives and the President of the Senate, tabled in the Australian Senate on 15 August 2006.

<sup>10</sup> Execution of Search Warrants on Premises Occupied or Used by Members of Parliament, An Agreement between the Speaker of the House of Representatives and the Commission of the New Zealand Police, October 2006.

<sup>11</sup> Execution of Search warrants where Parliamentary privilege may be applied, tabled in the ACT Legislative Assembly, May 2007.



Committee, in a report tabled in December 2003<sup>12</sup>, recommended that protocols be developed for the execution of search warrants on members' offices, and procedures for analysis and determination of which documents attracted privilege. In March 2004 the Privileges Committee tabled its second report on the parliamentary privilege aspects of the ICAC's seizure of documents<sup>13</sup>, and reported on the protocol used to determine and deal with the dispute over certain seized documents.

Shortly following his appointment as Commissioner of the ICAC, Commissioner Cripps wrote to the Presiding Officers on 3 March 2005 pursuing the development of a protocol between the ICAC and the Presiding Officers on the exercise of functions and powers by the ICAC in respect of Members of Parliament, noting that the Privileges Committee's recommendation related specifically to the execution of search warrants.

On 6 April 2005 the Legislative Council resolved that the Privileges Committee hold an inquiry into the appropriate protocols to be adopted for the execution of search warrants on members' offices by law enforcement agencies and investigative bodies. The Legislative Assembly Committee on Parliamentary Privilege and Ethics, as established in the 53rd Parliament, formally considered the Legislative Council draft protocol as recommended in the report of the Legislative Council Privileges Committee. The minutes of the meeting held on 9 June 2005<sup>14</sup> record that the Committee noted that the Privileges Committee had forwarded its proposed draft protocol for comment by the ICAC, and had subsequently incorporated some of the amendments suggested by the ICAC. It was further noted that there remained some areas of disagreement. The matter was never formally considered by the two committees sitting in joint session, and ultimately the Legislative Council Privileges Committee tabled its Final Report on a Protocol for execution of search warrants on members' offices on 28 February 2006.<sup>15</sup>

### **Committee of the 54th Parliament concerned to strengthen Parliamentary Privilege**

The Legislative Assembly Committee on Parliamentary Privilege and Ethics as constituted in the 54<sup>th</sup> Parliament has recently considered, under its powers to carry out educative work, current issues which potentially impact on parliamentary privilege in New South Wales. During meetings held in 2009, the Committee has given consideration to:

- The need for a protocol to guide execution of search warrants in members' offices and parliamentary precincts.
- Issues arising from the Ombudsman's proposal to actively consider inclusion of Members of Parliament within the first full review of the *Government Information (Open Access) Act*.
- Members' vulnerability to defamation proceedings where a court finds that a statement made outside the House has incorporated reference to ("effectively

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<sup>12</sup> Standing Committee on Parliamentary Privilege and Ethics, Parliamentary privilege and seizure of documents by ICAC, Report No 25, 2003.

<sup>13</sup> Standing Committee on Parliamentary Privilege and Ethics, Parliamentary privilege and seizure of documents by ICAC No 2, Report No 28, 2004.

<sup>14</sup> Minutes of the Committee of the 53<sup>rd</sup> parliament, dated 9 June 2005.

<sup>15</sup> Privileges Committee, Protocol for execution of search warrants on members' offices, Report No 33, February 2006.

repeated”) a protected, but defamatory, statement made in parliamentary proceedings.

The signing in 2009 of a Memorandum of Agreement with NSW Police for Special Constables to provide Security Services for the Parliament of NSW placed new emphasis on the need for a formal protocol to give practical force to the protections of the Parliamentary Precincts Act.

Section 26 of the Parliamentary Precincts Act 1997 specifically preserves to the Parliament, each House and the Presiding Officers, their powers, privileges and immunities, which includes amongst many others, the power to secure and protect each House, particularly from any form of impediment or obstruction in the discharge of the constitutional functions. The Memorandum of Agreement makes specific provision for observation of “all relevant protocols” before entry by Police, ICAC or another investigative agency to a member’s office.

As at June 2009, the only protocol that might have been relevant for the purposes of the MOA clause was the protocol applied by the Legislative Council in relation to determination of the Breen documents.

This Committee accordingly recommended in June 2009 that it formally inquire and report on the draft protocol used by the Legislative Council, with a view to recommending that the Parliament specifically resolve to adopt the protocol, to have on-going effect.

The Committee further recommended, that consequential to the resolution of the House, the protocol be incorporated into a Memorandum of Agreement with the NSW Police, the Independent Commission Against Corruption, the Director of Public Prosecutions and the Australian Federal Police<sup>16</sup>.

These resolutions were conveyed to the Speaker, the Premier, the Chair of the Privileges Committee, and the Attorney<sup>17</sup>. The Chair of the Privileges Committee responded on 8 September 2009 advising that the Privileges Committee had met to discuss the new search warrant procedures adopted by the ICAC, which had also been raised and discussed in the Committee on the ICAC as part of a review of the Commission’s 2007-2008 Annual Report<sup>18</sup>.

Subsequently the Chair of the Privileges Committee forwarded copies of correspondence between the Privileges Committee and the Commissioner of the ICAC regarding the Committee’s current inquiry on the draft protocol. The correspondence concerned three points of difference between the Privileges Committee’s protocol for execution of search warrants, as set out in Report 33, and the protocol developed by the ICAC, published as Procedure 9, Section 10 of its *Operations Manual*<sup>19</sup>.

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<sup>16</sup> Minutes of the Committee of 17 June 2009 (Appendix D)

<sup>17</sup> Correspondence from Chair of the Committee on Parliamentary Privilege and Ethics, 30 June 2009.

<sup>18</sup> Committee on the Independent Commission Against Corruption, Report No 7/54, March 2009.

<sup>19</sup> See Appendix B.

## **CHAPTER 2: REPORT OF THE LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE**

On 24 November 2009 the Privileges Committee reported on its inquiry.<sup>20</sup> The report contained a schedule outlining the differences between the ICAC Procedure 9 protocol, and the draft protocol developed by the Privileges Committee and published in February 2006 in its Report 33 entitled "Protocol for execution of search warrants on members' offices". This schedule forms Appendix A of this report.

On 25 November 2009 the Legislative Council forwarded a message to the Legislative Assembly advising that the House had noted the report of the Privileges Committee, and Finding 1 as set out in the report:

*"That Procedure 9 of the Commission's Operations Manual, and in particular s10, provides a suitable basis for the execution of search warrants on members' offices by the Independent Commission Against Corruption".*

This Committee notes that the ICAC's Procedure 9 protocol addresses many of the issues that were previously the source of disagreement between the Legislative Council and the ICAC. The Privileges Committee noted, at paragraph 4.24 of the report:

*"There remain differences between the Commission and the Committee concerning issues relating to the determination of the privilege claims. However, the Commission's views in relation to these matters are not reflected in the terms of the Commission's protocol itself. The actual procedures set out in that protocol, which concern the steps to be followed by Commission officers in practice when seeking to execute warrants on members' offices, incorporate the key measures for the protection of privileged material recommended by this Committee".<sup>21</sup>*

The Message from the Council further advised that the House had by resolution authorised the President to enter into a memorandum of understanding with the Commissioner of the ICAC concerning the execution of search warrants on members' offices, in the terms set out in the draft MOU which formed Appendix 7 of the Privileges Committee report. The MOU was appended to the Message from the Council, which is Appendix B to this report.

This Committee met on Thursday 26 November 2009 to consider the finding and recommendations contained in the Privileges Committee report, and the Message forwarded from the Legislative Council requesting that the Legislative Assembly pass a similar resolution.

Following its deliberations, the Committee recommends as follows.

### **Recommendation 1:**

That the House resolve that the Speaker enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices, as set out in the Legislative Council's message to the Legislative Assembly dated 25 November 2009.

### **Recommendation 2:**

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<sup>20</sup> Privileges Committee Report on A Memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices. Report 47, November 2009.

<sup>21</sup> Ibid. p21

That the House send a message to the Legislative Council advising of its agreement to the request of the message reported on 25 November 2009.

**Recommendation 3:**

That the Government be requested to introduce legislation similar to s16 of the Parliamentary Privileges Act (Commonwealth) to confirm the protection of Article 9 of the Bill of Rights.

## **APPENDIX A**

**Excerpt from Privileges Committee report:**

**Comparison of the draft protocol recommended in the Committee's 2006 report with the protocol adopted by the Independent Commission Against Corruption (s10, Procedure 9)**

2006 DRAFT PRIVILEGES COMMITTEE PROTOCOL	ICAC PROTOCOL
<p data-bbox="209 338 730 409" style="text-align: center;"><b>Procedure prior to obtaining a search warrant</b></p> <p data-bbox="156 450 774 629">An officer who proposes to apply for a search warrant in respect of premises used or occupied by a member should seek approval at a senior level within the agency/body before applying for the warrant.</p> <p data-bbox="156 669 743 775">If approval is given, the officer should obtain legal advice before applying for a search warrant.</p> <p data-bbox="156 889 767 1032">Care should be taken when drafting a search warrant to ensure that it <u>does not cover a wider range of material than is necessary to advance the relevant investigation.</u></p>	<p data-bbox="810 450 1430 521">2.1(2) All applications must be approved by the Executive Director, Investigation Division.</p> <p data-bbox="810 669 1425 775">2.1(1) Case officer must discuss with Case Lawyer if there is sufficient legal basis to make an application for a warrant</p> <p data-bbox="810 853 1457 1032">2.1(4) The Case Officer will be responsible for drafting the search warrant application using the legal macro. A separate application must be prepared for each warrant sought. The application must address:</p> <ul data-bbox="858 1037 1449 1469" style="list-style-type: none"> <li>- the authority of the applicant to make an application for a warrant;</li> <li>- the grounds on which the warrant is sought;</li> <li>- the address and description of the premises;</li> <li>- a description of the thing being searched for and if known its location; and</li> <li>- 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.</li> </ul> <p data-bbox="810 1473 1337 1543">The authorised officer is also required to consider:</p> <ul data-bbox="858 1547 1457 1765" style="list-style-type: none"> <li>- the reliability of the information;</li> <li>- the nature and source of the information (see informers); and</li> <li>- <u>whether there is sufficient connection between the thing(s) sought and the matter under investigation.</u></li> </ul> <p data-bbox="810 1805 1457 1984">2.1(7) In the case of a search warrant to be executed on a parliamentary office the Case Lawyer should ensure as far as possible that the documents described in the warrant are not likely to be subject to parliamentary privilege.</p>

**Procedure prior to executing a search warrant**

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

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

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

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

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

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

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

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

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

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

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

**Executing the search warrant**

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

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

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

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

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

10.3 As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

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

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

(IMPLICIT IN 10.10 BUT NOT EXPLICIT)



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

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

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

**Procedure to be followed if privilege or immunity is claimed**

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

***Procedure A***

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

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

(NOTE: ISSUE OF PUBLIC INTEREST IMMUNITY. ICAC DISPUTES WHETHER A CLAIM OF PUBLIC INTEREST IMMUNITY WOULD BE UPHOLD IN THE COURTS. THE CLAIMING OF PUBLIC INTEREST IMMUNITY OVER DOCUMENTS IS ULTIMATELY A MATTER FOR THE MEMBER CONCERNED.

NOT COVERED

NOT COVERED

(ICAC DEFAULTS TO PROCEDURE A IN ALL SITUATIONS – see below)

<p>resolved:</p> <ul style="list-style-type: none"> <li>• The relevant document or documents should be placed in audit bags in accordance with the ICAC guidelines or NSW Police Standard Operating Procedures on exhibits. A list of the documents should be prepared by the executing officer with assistance from the member or member of staff;</li> </ul> <ul style="list-style-type: none"> <li>• The member, or member's staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;</li> </ul> <ul style="list-style-type: none"> <li>• The items so secured should be delivered into the safekeeping of the Clerk;</li> </ul> <p>The member has three working days (or other agreed period) from the delivery of the items to the Clerk to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained</p> <ul style="list-style-type: none"> <li>• When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the Clerk until the disposition of the items is determined in accordance with the ruling; and</li> </ul> <ul style="list-style-type: none"> <li>• If the member has not contacted the executing officer within three working days (or other agreed period), the executing officer and the Clerk will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the Clerk will be entitled to deliver the items to the executing officer.</li> </ul>	<p>10.9 Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance from the member or staff member.</p> <p>10.11 At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.</p> <p>10.9 The member, or member's staff, should be given an opportunity to take copies before the documents are secured.</p> <p>10.10 The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.</p> <p>(THE TIME FRAME OF THREE DAYS IS NOT COVERED)</p> <p>10.14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.</p> <p>(ICAC IS ESSENTIALLY LEAVING THIS TO THE INTERNAL PROCESSES OF THE HOUSE)</p>
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If the member, or member's staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the circumstances of the case to minimise the extent to which the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

***Procedure B***

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

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

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

Obligations at the conclusion of a search The

(ICAC DEFAULTS TO PROCEDURE A)

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

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

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

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

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

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

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

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.

pursuant to an order of a House or a committee and the document so formulated, made or published.

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

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

YES → falls within ‘proceedings in Parliament’.

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’.

NO → move to question 3.

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

YES → falls within ‘proceedings in Parliament’.

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

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

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

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

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

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

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

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

<p>The President will immediately inform the member of any dispute, at which time the member may provide written reasons in support of the member's claim.</p> <p>The President will inform the House at its next sitting of any disputed claim, and table any documents provided by the agency/body or member relating to the dispute.</p> <p>The President will then set down consideration of the disputed privileged material as Business of the House on the Notice Paper for the next sitting day.</p> <p>Any material which the House determines is not within the scope of proceedings in Parliament will be immediately made available to the agency/body by the President.</p> <p>Any material which the House determines is within the scope of proceedings in Parliament will remain in the custody of the Clerk until the House otherwise decides, with a copy to be made available to the member.</p> <p>If a dispute concerning a claim of privilege occurs when the House is in an extended recess, or has been prorogued for a general election and Council periodic election, an independent legal opinion may be obtained by the Clerk from a suitably qualified person, such as a Senior Counsel or retired Supreme Court judge, to determine whether there is a claim of privilege.</p> <p>The legal opinion is to be made available to both parties, and tabled in the relevant House at its next sitting.</p>	<p>(AGAIN ALL THESE POINTS ARE LEFT TO THE INTERNAL PROCESSES OF THE HOUSE)</p>
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## **11 MESSAGE FROM THE LEGISLATIVE COUNCIL—EXECUTION OF SEARCH WARRANTS ON MEMBERS' OFFICES**

The Assistant Speaker (Mr McBride) reported the following message from the Legislative Council:

Mr SPEAKER

The Legislative Council desires to inform the Legislative Assembly that it has this day agreed to the following resolution:

1. That this House notes the report of the Privileges Committee entitled “A memorandum of understanding with the ICAC relating to the execution of search warrants on members’ offices” tabled on 24 November 2009, and in particular Finding 1 of the committee:  
  
“That Procedure 9 of the Commission’s *Operations Manual*, and in particular section 10, provides a suitable basis for the execution of search warrants on members’ offices by the Independent Commission Against Corruption.”
2. That this House authorises the President to enter into a memorandum of understanding with the Commissioner of the Independent Commission Against Corruption concerning the execution of search warrants on members’ offices in the terms set out in Appendix 7 to the report.
3. That a copy of the memorandum of understanding set out in Appendix 7 of the report be transmitted to the Legislative Assembly for its consideration and the Legislative Assembly be invited to pass a similar resolution.

Legislative Council  
25 November 2009

AMANDA FAZIO  
President

Ordered by the Assistant Speaker, That consideration of the Legislative Council’s message stand as an order of the day for a later time.

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 as 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 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 QC  
Commissioner

The Hon Amanda Fazio MLC  
President

The Hon Richard Torbay  
Speaker

## **Appendix 1**

**Procedure 9 of the ICAC's Operations Manual entitled 'Procedures for obtaining and executing search warrants'**

**OPERATIONS MANUAL**

**PROCEDURE NO. 9**

**PROCEDURES FOR OBTAINING AND EXECUTING  
SEARCH WARRANTS**

**APPROVED: 22 JULY 2009**

D10165525

## PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

### 01 GENERAL

#### 1.1 Search warrants issued in New South Wales

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

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

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

#### 1.2 Extra-territorial search warrants

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

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

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

#### 1.3 General warrants are invalid

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

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

## 02 APPLYING FOR A WARRANT

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

- i) a thing is on the premises or will be within 72 hours; and
- ii) the thing is connected with a matter that is being investigated under the *ICAC Act*.

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

### 2.1 Drafting and Approval

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

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.
2. All applications must be approved by the Executive Director, Investigation Division. If approved the Case Officer will arrange for the Executive Director, Investigation Division to sign the Authorisation Checklist (Appendix A).
3. The senior investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In the case of a search warrant to be executed on a parliamentary office approval must be obtained from the Commissioner or Deputy Commissioner.
4. The Case Officer will be responsible for drafting the search warrant application using the legal macro<sup>1</sup>. A separate application must be prepared for each warrant sought. The application must address:

<sup>1</sup> 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;<sup>2</sup>
- a description of the thing being searched for and if known its location;<sup>3</sup> 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<sup>4</sup>, Occupier's Notice and if needed, the cl.11 Certificate, using the legal macros.
  7. The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief

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

<sup>2</sup> '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.

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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.

<sup>5</sup> 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 warrant is not frustrated. In such circumstances, reasonable force may be used to gain entry.

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

- (i) identify the search team as members of the Independent Commission Against Corruption;
- (ii) read and explain the Search Warrant to the occupier and produce it for inspection if requested (**NOTE: The Search Team Leader must retain possession of the Search Warrant**);
- (iii) serve the Occupier's Notice. If the occupier is not present, the notice shall be served as soon as practicable after executing the warrant;
- (iv) invite the co-operation of the occupier;
- (v) execute the warrant,
- (vi) advise the Search co-ordinator of time of entry and exit.

#### 8.4 Service of the Occupier's Notice

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

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

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

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

#### 8.5 Execution

In executing the warrant ICAC officers must:

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

- (ii) cause the least amount of damage necessary in the course of the search and entry;
- (iii) not unduly restrict the movement of occupants of searched premises, unless they are hindering the search;
- (iv) wear the approved ICAC identification jacket unless exempted by the Search Team Leader (such exemption only to be given in exceptional circumstances);
- (v) if not wearing an ICAC identification jacket, display prominently the ICAC official identification badge during the execution;
- (vi) only break open receptacles in the premises if reasonably necessary for the purpose of the search;
- (vii) use such assistants as considered necessary.

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

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

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

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

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

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

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

## 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

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- (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.

## 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**

**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.

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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: \_\_\_\_\_

PROPERTY SEIZURE SHEET

OPERATION: \_\_\_\_\_

ADDRESS: \_\_\_\_\_  
\_\_\_\_\_

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Item No.:	_____	Seizure Officer:	_____
Description:	_____ _____		
Location:	_____		

Name/Signature - Occupier

Name/Signature - Property Officer

Date: \_\_\_\_\_

## **Appendix C: Resolution of the House conferring reference for inquiry**

Extract from Votes and Proceedings of the Legislative Assembly No 147, Entries 18 and 19, page 1594 Tuesday 22 September 2009

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### **18 MESSAGE FROM THE LEGISLATIVE COUNCIL— STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS REFERENCE**

The Deputy Speaker reported the following message from the Legislative Council:

Mr SPEAKER

The Legislative Council desires to inform the Legislative Assembly that it has this day agreed to the following resolution:

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

Legislative Council  
10 September 2009

PETER PRIMROSE  
President

Ordered by the Deputy Speaker, That the message from the Legislative Council be taken into consideration forthwith.

## **19 STANDING COMMITTEE ON PARLIAMENTARY PRIVILEGE AND ETHICS REFERENCE**

Mr Aquilina moved, That:

- (1) The Standing Committee on Parliamentary Privilege and Ethics inquire into and report on the development of a Memorandum of Understanding between the Speaker and the Commissioner of the Independent Commission Against Corruption covering execution of search warrants by the Independent Commission Against Corruption on the Parliament House offices of members, with particular reference to:
  - (a) the draft protocol recommended by the Legislative Council Privileges Committee in its Report No. 33 of February 2006 entitled “Protocol for execution of search warrants on members’ offices”;
  - (b) the Independent Commission Against Corruption protocol entitled “Procedures for Obtaining and Executing Search Warrants”, with particular reference to section 10; and
  - (c) recent answers to Questions on Notice concerning the execution of search warrants at Parliament House provided by the Independent Commission Against Corruption to the Committee on the Independent Commission Against Corruption as part of its review of the 2007-2008 annual report of the Independent Commission Against Corruption.
- (2) The Committee report by the last sitting day in November 2009.
- (3) The Standing Committee on Parliamentary Privilege and Ethics have leave to meet together with the Legislative Council Privileges Committee to discuss development of a general protocol for execution of search warrants on members’ offices.
- (4) A message be sent informing the Legislative Council accordingly.

Question put and passed.



## **Appendix D: Excerpts from Minutes of Meetings of the Committee**

### **Minutes of Meeting of the Standing Committee on Parliamentary Privilege and Ethics (no. 7)**

**11.00 am, Wednesday 17 June 2009, in Room 1136**

Parliament House

#### **Members Present**

Mr Pearce, MP (Chair)

Mr Amery, MP (Vice-Chair)

Mr Kerr, MP

Mr Martin, MP

Ms McMahon, MP

Ms Moore MP

Mr J. H. Turner, MP

Apology: Mr Terenzini, MP

In attendance: Ms Ronda Miller

#### **1. Minutes of the meeting held 26 November 2008**

The minutes of the meeting held on 26 November 2008, which were circulated, were adopted on the motion of Mr Martin, seconded by Ms McMahon.

#### **2. Discussion paper on three current privilege issues**

The Chairman addressed the Committee on the discussion paper, which had been previously circulated, and provided background to three privilege matters outlined in the paper:

1. Search warrants.

The recent UK experience, and the ICAC execution of a search warrant on the Parliament House office of the Hon Peter Breen, pointed to the need for action in this area.

2. Freedom of information.

The Ombudsman's report on reform of FOI and the exposure draft bills released by the Premier raised the issue of FOI and access to Member's correspondence.

3. Effective repetition.

This issue had been reviewed by the Standing Committee of Attorneys General in response to parliamentary committee reports in other jurisdictions, and the Attorneys had not agreed to legislative change to confirm MP's protection against defamation when merely confirming historical statements made in the course of proceedings.

The Clerk spoke to the draft recommendations contained in the discussion paper.

The Committee considered draft Recommendation 1 (Adopt a specific protocol for execution of search warrants by investigative agencies).

The Clerk undertook to obtain a copy of the draft protocol developed by the Legislative Council to guide execution of search warrants. The Committee resolved, on the motion of Mr Martin, seconded Mr Kerr, that the Chairman write and formally seek information about any work currently being undertaken on draft protocols from the Legislative Council Privileges Committee with a view to meeting jointly to progress towards a protocol.

The Committee considered draft Recommendation 2, and resolved, on the motion of Ms Moore, seconded Mr Martin that the adoption of protocols would be facilitated by the Houses making a clear statement confirming the application of parliamentary privilege to “proceedings in parliament”, together with a definition of the categories of documents that fall within the definition of “proceedings”.

The Committee considered draft Recommendation 3. Ms Moore suggested that the Committee defer consideration of this recommendation until the bills were tabled in the House.

Debate ensued.

The Chairman noted that the Ombudsman’s report on Open Government, while noting in passing that he may in the future recommend that Parliament fall under an FOI scheme, was vague about the scope and background to this statement.

The Committee resolved, on the motion of Ms McMahon, seconded Mr Martin, that consideration of Recommendation 3 be deferred.

The Committee considered draft recommendation 4. Debate ensued. The committee resolved, on the motion of Ms Moore, seconded Ms McMahon, that the Chair write to the Attorney General and the Premier, pointing to the need for parliamentary privilege legislation, similar to s16 of the Parliamentary Privileges Act, to confirm the protection of Article 9 of the Bill of Rights, and thus protection against defamation actions based on “effective repetition”.

The Committee adjourned at 11:30am, sine die.

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Chair

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Clerk to the Committee

## **Minutes of the meeting of the Standing Committee on Parliamentary Privilege and Ethics (no. 8)**

Held at 9.30 am, on Thursday 26 November 2009, in the Library meeting room, Parliament House

### **Members Present**

Mr Pearce, MP (Chair)

Mr Amery, MP (Vice-Chair)

Mr Martin, MP

Ms McMahon, MP

Mr J. H. Turner, MP

Apologies: Mr Kerr MP Ms Moore, MP

In attendance: Ms Ronda Miller

### **1. Minutes of the meeting held 17 June 2009**

The minutes of the meeting held on 17 June 2009, which were circulated, were adopted on the motion of Ms McMahon, seconded by Mr Amery.

### **2. Consideration of the report of the Privileges Committee on MOU on execution of search warrants by the ICAC on members' offices, and the Message from the Legislative Council dated 25 November 2009.**

The Committee noted the outline draft report which had been circulated prior to the meeting. The Chairman spoke to the MOU and the Privileges Committee report, noting that "public interest immunity" was still an unresolved issue with the ICAC.

The Committee deliberated.

The Committee considered draft recommendation 1.

The Committee resolved, on the motion of Mr Amery, seconded Mr Terenzini, THAT the Speaker enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices, as set out in the Legislative Council's message to the Legislative Assembly dated 25 November 2009.

The Committee considered draft recommendation 2.

The Committee resolved, on the motion of Mr Amery, seconded Mr Terenzini, THAT the House send a message to the Legislative Council advising of its agreement to the request of the message reported on 25 November 2009.

The Committee considered draft recommendation 3.

The Committee resolved, on the motion of Mr Terenzini, seconded by Ms McMahon, That the Government be requested to introduce legislation similar to s16 of the Parliamentary Privileges Act (Commonwealth) to confirm the protection of Article 9 of the Bill of Rights.

The Committee noted that Ms Moore had formally requested the Secretariat to convey to the Committee her support for the recommendations, and also requested that the Committee give consideration to requesting that similar MOUs be entered with the NSW Police, the Director of Public Prosecutions and the Australian Federal Police.

The Committee resolved, on the motion of Mr Terenzini, seconded by Mr Amery, THAT the Clerk prepare a briefing note on this matter.

The Committee further resolved, on the motion of Mr Terenzini, seconded by Mr Amery, THAT the draft report as previously circulated be adopted and tabled in the House.

The Committee adjourned at 9.46am, sine die.

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Chair

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Clerk to the Committee