



**PARLIAMENTARY PRIVILEGE AND  
SEARCHES BY INVESTIGATORY AGENCIES**

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to a seminar on

*Parliamentary Law*

Conducted by Legalwise Seminars at Primus Hotel,  
339 Pitt Street, SYDNEY

Friday 9 June 2017

Parliamentary privilege can be used as a sword – parliament asserts its sovereignty to submit the Executive to scrutiny, or uses coercive powers under either the *Parliamentary Evidence Act 1901* (NSW) or at common law to compel witnesses to attend a hearing or an agency to produce documents. In a paper delivered to the LegalWise parliamentary law seminar in 2016 entitled : *Parliamentary Privilege: New South Wales still at the cutting edge*<sup>1</sup> the Clerk of the Parliaments David Blunt dealt with then current developments in NSW. These included the concession by legal advisors within Executive government that parliamentary privilege can override statutory secrecy provisions, unless specifically excluded;<sup>2</sup> and the power of the Legislative Council to order documents from a statutory authority that was not under direct ministerial control, specifically at that time the NSW Greyhound Authority.<sup>3</sup>

But as well as the powers exercised by parliament, parliamentary privilege also concerns the immunities enjoyed by participants in parliamentary proceedings. Privilege is a shield as well as a sword. What protections do members of parliament have, when other agencies seek to use their coercive powers under statute to compel Parliament to provide documents? Does an investigatory body have the right to collect communications made between individuals providing information to MPs? How wide do any immunities extend? What search powers do investigatory agencies such as the ICAC and the Police have in NSW when parliamentarians and their constituents are the target of search warrants or other processes? Where can they search, and what protocols govern the searches?

Members to be able to enjoy the protection of free speech and communication with constituents concerning parliamentary proceedings, and participants in parliamentary processes need to be able to do so without fear of consequences. This can come into conflict with agencies, carrying out their legislated responsibilities, seeking to obtain documents held within parliamentary precincts or member's offices. To effectively undertake their role in scrutiny of the Executive, members of parliament need to have access to many sources of information. Sometimes these sources require protection – without the protection of parliamentary privilege many sources will not come forward, and members' access to the information needed to question government decisions and public expenditure is restricted.

This has been a major issue for both Houses of Federal Parliament in the last twelve months. The Australian Federal Police (AFP) search of Opposition members' offices during an election campaign has already been the subject of two Senate Privileges Committee inquiries and one House of Representatives inquiry, each with important implications for other jurisdictions. As a result of the 2016 searches the Senate committee has also begun an inquiry into the impact of intelligence agencies' activities and surveillance on parliamentary privilege.

This paper examines the NBN searches and the resulting claims of parliamentary privilege over documents seized, as well as an important Western Australian incident in 2016 where an

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<sup>1</sup>The paper itself, and many others on privilege issues, are published on the NSW Parliament's website <https://www.parliament.nsw.gov.au/lc/articles>

<sup>2</sup> As discussed in the paper, this was demonstrated in the parliamentary inquiry in 2014-15 into Operation Prospect, the inquiry by the Ombudsman into police bugging. Senior current and former Police officers gave evidence at hearings which they would be prosecuted for providing if given in other forums.

<sup>3</sup> Subsequently and after several twists and turns (not the least of which was the banning then unbanning of the industry!) the Authority has produced the documents required of it by the House.

investigatory agency overstepped the mark while actually aiming to assist the Western Australian Legislative Council in detecting the provision of misleading information in answer to questions from a member. The position in New South Wales is also considered in relation to search protocols with the Independent Commission Against Corruption (the ICAC) and the NSW Police Service.

#### Sources of Parliamentary Privilege in NSW<sup>4</sup>

To understand the protections provided by parliamentary privilege and the relevant search protocols it is essential to consider the sources of this privilege in New South Wales. New South Wales is different. Parliamentary privilege in this state is unusual, an anomaly among all other Australian jurisdictions. In every other Australian Parliament, with a partial exception of Tasmania, a statute defines the privileges enjoyed by the respective Houses. The most important legislation in this context is the *Parliamentary Privileges Act (Cth) 1987*, not only because it comprehensively defines the privileges enjoyed by the House of Representatives and the Senate but also because it has informed some of the arguments held in New South Wales as to how far privilege extends.

The impetus for privileges legislation is often to fix a poor court decision, when judicial determinations have, in the view of Parliament, unnecessarily restricted the privileges and immunities of the House. For the Commonwealth this was the two *Murphy* cases in the 1980s,<sup>5</sup> when judges allowed witnesses to be cross examined as to the veracity of what was said to parliamentary committees and even allowed in camera parliamentary evidence to be tendered. More recently in New Zealand the Parliament passed the *Parliamentary Privilege Act 2014*. This followed several difficult cases, but particularly the controversial decision of *Attorney-General v Leigh*<sup>6</sup> in 2011 in which evidence was used regarding material provided to a Minister in preparation for Question Time. So controversial was the decision, that, in a slightly bizarre exercise in drafting, the following provisions now appear in s8D in the Act:

(3) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, words spoken or acts done for purposes of or incidental to the transacting of reasonably apprehended business of the House or of a committee must be taken to fall within subsection (1).

(4) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted to be used.

(5) Necessity test includes, but is not limited to, a test based on or involving whether the words or acts are or may be (absolutely, or to any lesser degree or standard) necessary for transaction of the business.

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<sup>4</sup> The next sections rely heavily upon Blunt, David “Parliamentary Sovereignty and Parliamentary Privilege” paper presented at “The Fundamentals of Law: Politics, Parliament and Immunity” Legalwise Seminars at UNSW CBD Campus June 2015, “A Case for a Parliamentary Privileges Act for New South Wales”, Frappell, Stephen *Australasian Parliamentary Review* Autumn/Winter 2015 Vol 30 No. 1 p8-25, and Lovelock and Evans *New South Wales Legislative Council Practice* (2008) Federation Press, Chpt3 and 17.

<sup>5</sup> *R v Murphy* (1986) 5 NSWLR 18, the first case was unreported.

<sup>6</sup> NZSC 106, [2012] 2 NZLR 713 (SC),

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(7) This section applies despite any contrary law (including, without limitation, every enactment or other law in the decision in *Attorney-General v Leigh* [2011] NZSC 106, [2012] 2 NZLR 713 (SC)).

Clearly the drafters did not want to leave anything open to doubt!

So New South Wales may yet be only one controversial judgement away from having its own privileges defined in statute. Until or unless that happens, it is important to understand the current sources of privilege for the NSW Parliament. There are three main sources:

- The common law principle of “reasonable necessity”
- Article 9 of the *Bill of Rights 1689*
- A patchwork of statutes such as the *Parliamentary Evidence Act* NSW 1901 (NSW).

The privileges and immunities of any Parliament in the Westminster system link back to the long battle between the Parliament and the Crown in the UK, settled largely by the constitutional arrangements in the 17<sup>th</sup> century and by later key cases in the 19<sup>th</sup> century. The common law recognises that UK Houses of Parliament possess inherent powers established by ancient usage and practice. For New South Wales though the common law position is not a simple matter of looking to Westminster.

The colony which began as a military dictatorship evolved by stages into the beginnings of responsible government with the *Constitution Act* 1855 (NSW). However the Parliament did not inherit all the powers of the House of Commons, even then. *Keilley v Carson*<sup>7</sup> held that in the absence of legislation, colonial legislatures possess such powers as are ‘necessary to the existence of such a body, and the proper exercise of the functions it is intended to execute’. The power to regulate its own affairs, the power to deal with contempts, the power to discipline members, to conduct inquiries and order the production of state papers all derive in New South Wales from “necessity” as variously articulated in *Kielly v Carson* and similar decisions.<sup>8</sup> As was stated in the seminal case of *Stockdale and Hansard*:

If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.<sup>9</sup>

### The Egan cases

While the principle of reasonable necessity may have at times appeared to be a limitation, the *Egan* decisions in the 1990s established that this is a very flexible source of power. The cases began as a result of a dispute between the Legislative Council and the Leader of the Government in the Council, the Honourable Michael Egan. The Leader of the Government resisted a number of orders of the House to produce papers held by the Executive on decisions such as the Fox Studios approval and mining approvals. By resolution the House suspended him - President Willis directed the Usher of the Black Rod to remove Mr Egan from the House. The power of

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<sup>7</sup> (1842) 12 ER 225.

<sup>8</sup> See for instance *Barton v Taylor*(1986) 11 AC 197 and *Willis and Christie v Perry* (1912) 13 CLR 592.

<sup>9</sup> (1839) 112ER 1112 at 1169

the House was challenged by the NSW Government, unsuccessfully in the Court of Appeal,<sup>10</sup> with the decision upheld in the High Court in *Egan v Willis*.<sup>11</sup> It was conclusively determined that a power to order the production of documents by the executive government is reasonably necessary for the exercise of the Council's functions, and as such suspending the Leader of the Government from the House was also necessary as a protective measure, given his refusal to respond to the will of the House.

The key statement as to the source of parliamentary privilege in New South Wales was made by Justices Gaudron, Gummow and Hayne:

What is reasonably necessary at any time for the proper exercise of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.<sup>12</sup>

In the final instalment, *Egan v Chadwick*,<sup>13</sup> the Court of Appeal went on to hold that the power to order papers extends to documents which at common law would be protected from disclosure by legal professional privilege or public interest immunity. There was a limitation - the majority took the view that the power did not extend to Cabinet documents, the disclosure of which would conflict with the principle of ministerial responsibility.

As to the functions of the Legislative Council for which a power to call for documents was considered to be 'reasonably necessary', Gleeson CJ in the Court of Appeal observed:

The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.<sup>14</sup>

### Article 9 of the Bill of Rights

The second foundation for parliamentary privilege in NSW is the essential safeguard of freedom of speech. The immunity given to freedom of speech is one of the most important ways in which privilege can be understood as a shield. Article 9 of the *Bill of Rights 1689* applies in New South Wales by virtue of its adoption in New South Wales in s6 and schedule 2 of the *Imperial Acts Application Act 1969 (NSW)*. It provides:

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out Parliament.

This provision protects members of Parliament, witnesses at parliamentary hearings and other participants in parliamentary proceedings from being subject to civil or criminal proceedings as a result of their participation, or from having their words questioned or criticised in such proceedings. The immunity extends beyond the courts to include executive inquiries such as those made by the ICAC, preventing for instance the Commission from traversing into an

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<sup>10</sup> *Egan v Willis and Cabill*(1996) 40 NSWLR 650

<sup>11</sup> *Egan v Willis* (1998) 195 CLR 424

<sup>12</sup> *Ibid* at 454.

<sup>13</sup> *Egan v Chadwick* (1999) 46 NSWLR 563

<sup>14</sup> *Egan v Willis and Cabill*(1996) 40 NSWLR 650 at 667

inquiry into what was said in a parliamentary proceeding.<sup>15</sup> It is essential to the separation of powers, and this privilege can only be abrogated by express words in legislation. Parliament must make clear its intent to waive privilege – there needs to be no doubt, it is not something which should be implied.

There are of course several terms here open to interpretation:

- What does “proceedings in parliament” mean?
- What is a “place out of parliament”?
- What does “impeached or questioned” mean?

No answers are provided in the Bill of Rights itself. In the New South Wales Legislative Council we have increasingly looked to the *Parliamentary Privileges Act 1987* (Cth) as a guide, particularly during the Breen inquiries referred to below.

### Miscellaneous legislation

The final source of privileges and immunities is really an ad hoc collection of statutes which have over time been brought in to address specific gaps or problems. Some minor examples are the *Parliamentary Papers (Supplementary Provisions) Act 1975*, s28 of the *Defamation Act 2005*, s26 and the *Parliamentary Precincts Act 1997*. By far the most significant of these is the *Parliamentary Evidence Act 1901* NSW, introduced initially because of difficulties experienced by committees in compelling witnesses to attend. Under the Act, a person who fails to comply with a summons to attend and give evidence before a House or committee may be apprehended, retained in custody and brought before the committee from time to time for the purpose of giving evidence (ss 7-9), while a person who, having attended, fails to answer a ‘lawful question’ may be committed to gaol for up to one month (s 11). The punitive sanctions in the Act have never been applied and there is debate as to whether in their current form they accord with contemporary notions of the Parliament’s role.<sup>16</sup> However the provisions provide a very strong incentive for witnesses to comply with committee proceedings and help underpin the strength and effectiveness of the Legislative Council committee system.<sup>17</sup>

Having outlined the sources of parliamentary privilege in New South Wales it is then necessary to examine the way in which they relate to search powers used by external agencies. To understand this it is important to understand the reason these privileges exist – to protect elected representatives from coercive interventions by the Executive and its agencies. They do not exist to provide protection for parliamentarians who have committed a crime or incurred civil liability, and attempts by any member to use their privileges in this way are doomed to fail. They do however, prevent any use of parliamentary proceedings in such actions.

### Serving of legal processes within the precinct

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<sup>15</sup> See also s122 of *Independent Commission Against Corruption Act* (1988) NSW.

<sup>16</sup> Duffy and Ohnesorge, “Out of Step? The New South Wales Parliamentary Evidence Act 1901”, (2016) 27 *Public Law Review*

<sup>17</sup> Reynolds, Griffith and Higgins “Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales” paper presented to 46<sup>th</sup> Presiding Officers and Clerks Conference, Hobart, July 2015.

In New South Wales when faced with searches by external agencies there have been several touchpoints. For instance while it is well established that members of parliament have no general immunity from being served with legal processes, this does not extend to there being an open slather within the parliamentary precincts. The matter arose in the Legislative Council in 1988 in connection with the serving of process on the Hon Richard Jones by a private solicitor. The President submitted his view to the House that the ‘established privileges of every member would be affected if members were impeded in the pursuit of their parliamentary business within the precincts of the House’. The President stated:

I feel that members could be placed in an intolerable situation by being subjected to the service of process on these premises and that such an action constitutes a serious contempt of the rights and privileges of members of the House.<sup>18</sup>

The House subsequently adopted the following resolution, which was conveyed by the President to the solicitors concerned:

(1) This House re-asserts that any attempt to serve legal process upon a Member of the Legislative Council within the precincts of the Parliament constitutes a serious contempt of the House.

(2) In the opinion of this House, the service of process upon the Honourable RSL Jones at Parliament House on 31 May 1988 was an invasion of Members’ privileges and a serious contempt of this House.

(3) It would be regarded as an acceptable apology to the Member and to this House if the Solicitors for the Petitioners in this matter forthwith withdrew the process as presently served and, if so desired, effect service upon the Member in the conventional manner outside the precincts of Parliament House.

The solicitors subsequently withdrew the process and sent a written apology to the House. In accepting the apology, the House re-affirmed its position that the service of process, without the consent of the House, on one of its members within the precincts of the Parliament constitutes a serious contempt of the privileges of the House.<sup>19</sup> It is possible that today the service of a summons is less likely to be seen as a contempt unless it occurred while the House was sitting or interfered with a member’s participation in a committee hearing.<sup>20</sup>

The two agencies in New South Wales which are most likely to seek to conduct a search of a member’s office or home are the Independent Commission Against Corruption (ICAC) and the NSW Police. The New South Wales Parliament has adopted protocols with both agencies for the execution of search warrants on members’ offices which include procedures designed to prevent the seizure of material protected by parliamentary privilege. These protocols were developed following an incident in 2003 in which documents were seized from a member’s office under a warrant.

#### Seizure of a member’s documents, 2003

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<sup>18</sup> *LC Minutes* 1 June 1988 at 953.

<sup>19</sup> Lovelock and Evans *New South Wales Legislative Council Practice* (2008) Federation Press p79.

<sup>20</sup> *Erskine May Parliamentary Practice* 24<sup>th</sup> edition p248.

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

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

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

On the one hand, the ICAC argued that the seizure of documents pertaining to parliamentary proceedings does not contravene article 9 because the act of seizure does not involve an impeaching or questioning of proceedings. Similarly, the New South Wales Crown Solicitor and Solicitor General advised that it is only if seized material is subsequently used in a way that amounts to impeaching or questioning that any contravention of parliamentary privilege may arise.<sup>21</sup> On the other hand, the Clerk of the Senate, Harry Evans, advised that there is a 'testimonial' element to article 9 which includes an immunity against the compulsory production of documents which are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings and that this immunity extends to the seizure of documents under a search warrant. Similarly, Bret Walker SC advised that it would be very difficult to construe legislation governing the execution of search warrants as permitting the seizure of material which it is conceded cannot then be used by reason of parliamentary privilege.

The Privileges Committee concluded that the execution of the warrant had involved a breach of the immunities of the House as at least one of the documents seized was within the scope of 'proceedings in Parliament' and the seizure of such a document results in the impeaching or questioning of parliamentary proceedings. The Committee also recommended a set of procedures to allow the seized material to be further examined so that all of the issues of parliamentary privilege arising could be explored and resolved.<sup>22</sup>

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

- the seized material was to be returned to the President and retained in the possession of the Clerk until the issue of parliamentary privilege had been determined

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<sup>21</sup> A similar view was expressed by Professor Anne Twomey the following year in *The Constitution of NSW* Federation Press 2004, p502.

<sup>22</sup> Legislative Council Privileges Committee *Parliamentary privilege and the seizure of documents by ICAC* Report 25, December 2003.



- Mr Breen, the Clerk and a representative of the Commission were to be jointly present at the examination of the material and Mr Breen and the Clerk were to identify any items claimed to be within the scope of ‘proceedings in Parliament’
- the Commission had the right to dispute any claim of privilege and any disputed claim was to be determined by the House
- material not subject to a privilege claim or in respect of which such a claim was not upheld by the House was to be released to the Commission.<sup>23</sup>

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

To assist with assessing the documents the Privileges Committee developed a ‘three step’ test for determining whether records form part of ‘proceedings in Parliament’, based on approaches which have been adopted in a range of judicial and parliamentary authorities.

(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’.<sup>24</sup>

Applying that test the committee concluded that, while none of the documents had been brought into existence for the purpose of transacting business in the House or a committee (step 1), the documents had been retained by Mr Breen for purposes of or incidental to the transacting of such business (step 3), and were thus within the scope of proceedings in Parliament. The House subsequently upheld the claim of privilege pertaining to the documents which the

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<sup>23</sup> LC *Minutes* 4 December 2003, pp493-495

<sup>24</sup> Legislative Council Privileges Committee *Parliamentary privilege and the seizure of documents by ICAC No. 2 Report* 28, March 2004.

Committee had identified as within proceedings in Parliament, and those documents were returned to Mr Breen.<sup>25</sup>

#### MoU with ICAC, 2009

In 2005, in the wake of the Breen case, the Legislative Council referred to its Privileges Committee an inquiry into the appropriate protocols to be adopted by law enforcement agencies and investigative bodies such as the ICAC when executing search warrants on members' offices. The Committee reported in 2006 recommending the adoption of a protocol to be followed in any future instances involving the execution of search warrants by investigatory or law enforcement bodies at Parliament House.<sup>26</sup>

In December 2009, following further reports by the privileges committees of each House,<sup>27</sup> the Presiding Officers and the Commissioner of the Independent Commission Against Corruption entered into a 'Memorandum of Understanding on the execution of search warrants in the Parliament House offices of members of the New South Wales Parliament'.

The Memorandum of Understanding with the ICAC provides that the process to be followed for executing search warrants in members' offices is that spelt out in the relevant part of the Commission's Operations Manual, section 10 of which, entitled 'Execution on parliamentary office', is 'based on the protocol recommended by the Legislative Council Privileges Committee in February 2006'.<sup>28</sup> Section 10 includes procedures for claims of privilege to be made by the member and if necessary disputed by the Commission and for such disputes to be determined by the House.

#### Draft revised MoU with ICAC 2014

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

A draft revised Memorandum was subsequently developed which included coverage of all premises occupied by members. As well as coverage of members' offices, the draft included:

- a procedure allowing a forensic image or report to be made of material on an electronic device

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<sup>25</sup> Legislative Council *Minutes* 1 April 2004, at 650.

<sup>26</sup> Legislative Council Privileges Committee *Protocols for execution of search warrants on members' offices*, Report 33, February 2006.

<sup>27</sup> Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, Report 47, November 2009; Legislative Assembly, Parliamentary Privileges and Ethics Committee, *Memorandum of Understanding – Execution of search warrants by the Independent Commission Against Corruption on members' offices*, November 2009.

<sup>28</sup> Independent Commission Against Corruption, 'Operations manual, Procedure No. 9, Procedures for obtaining and executing search warrants, approved 22 July 2009, p16.

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

The draft revised Memorandum was referred to the privileges committee of each House for inquiry and report. The Legislative Council's committee recommended that the draft revised Memorandum be amended to extend the specified timeframes for making claims of privilege where a member is not present at the search, or items have been removed for examination.<sup>29</sup> However the Committee was unable to gain the Commission's agreement to those amendments. The Legislative Assembly's committee recommended that the draft revised Memorandum be adopted as proposed without recommending any amendments but noted in its report that a further review of the timeframes for making a claim of privilege may be warranted in future.<sup>30</sup> Since then no further action has been taken to implement the draft in the absence of agreement on the times available for making claims of privilege.

It is unfortunate that this impasse has been reached. At present any search of members' offices or homes outside the parliamentary precincts by the ICAC is not governed by any formal agreement between the Parliament and the Commission. Thankfully the position is clearer in regards to searches by the NSW Police.

#### MoU with NSW Police, 2010

In November 2010, following further reports by the privileges committee of each House,<sup>31</sup> the Presiding Officers and the New South Wales Commissioner of Police entered into a 'Memorandum of understanding on the execution of search warrants in the premises of members of the New South Wales Parliament'.

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

The Memorandum does not extend to the Federal Police. However, during the inquiry by the Legislative Council Privileges Committee which led to the adoption of the Memorandum, the Australian Federal Police advised that in the unlikely event of the Federal Police seeking to execute a search warrant on the premises of a member of the New South Wales Parliament, the

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<sup>29</sup> Legislative Council Privileges Committee, *A revised memorandum of understanding with the ICAC relating to the execution of search warrants on members' premises*, Report 71, November 2014.

<sup>30</sup> Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into the revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, Report 3/55, November 2014.

<sup>31</sup> Legislative Council Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report 53, November 2010.

Legislative Assembly, Parliamentary Privileges and Ethics Committee, *Report on a Memorandum of Understanding with the NSW Police relating to the execution of search warrants on members' premises*, October 2010.

2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the AFP (discussed below) would provide an appropriate framework for dealing with any privilege claims.<sup>32</sup>

#### Other MoUs with NSW Police

The NSW Parliament also has two other agreements with the NSW Police, though neither directly relate to search warrants. In December 2004 the Presiding Officers and the Commissioner of Police entered into a revised Memorandum of Understanding for police access to the parliamentary precinct which provides that:

During their attendance within the Parliamentary Precincts or the Parliamentary Zone, the Police will not, without the prior authorisation from the Presiding Officers:

- conduct any investigation,
- execute any process (eg, search warrants),
- interview, hold in custody or arrest any Member of Parliament or any Parliamentary employee.

This clause does not prevent Police carrying out an investigation, within the limited confines of the Parliamentary Zone, with respect to any accident or incident which does not involve a Member of Parliament or the Parliamentary buildings or structures.<sup>33</sup>

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

#### 'Notices to produce' to ICAC

There is an alternative to using a search warrant available to the officers of the ICAC, by using notices to produce documents under s 22 of the *Independent Commission Against Corruption Act* 1988 (NSW). Unlike the execution of search warrants which involves the attendance of Commission officers at Parliament House, a notice to produce requires parliamentary officers to attend upon the Commission to hand over material.

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

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<sup>32</sup> Legislative Council Privileges Committee, A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises, Report 53, November 2010, Appendix 10.

<sup>33</sup> Memorandum of Understanding between the Presiding Officers and the Commissioner of Police, 3 December 2004, para 2.13.

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

Given the New South Wales protocols, it is instructive to look at examples in other Australian jurisdictions. The most recent Federal NBN case provides a very good example of a search process by an agent of the Executive that crossed the line and offended against a member's privileges.

#### The AFP inquiry into NBN leaks

On the 19 to 20<sup>th</sup> May 2016 the Australian Federal Police executed search warrants at the Victorian office of Senator Stephen Conroy, and at the home of a staff member, and on 24 August a search warrant was executed at the Senator's Parliament House office, which included searches of servers of the Department of Parliamentary Services. In both instances the AFP was investigating a complaint by The National Broadband Network (NBN) Co Ltd regarding the unauthorised disclosure of information by its employees to the Senator. There were also similar search warrants executed in relation to the Member for Blaxland, the shadow communications minister, Jason Clare MP. The AFP followed procedures contained in a protocol between the AFP and the Commonwealth Parliament regarding such searches. The documents seized in the search were sealed and delivered to the Clerk of the Senate to enable a claim of parliamentary privilege to be made.

On 24 May 2016 Senator Conroy made a claim of privilege over all documents seized from his Victorian office and the home of his staff member. This was lodged with the Clerk of the Senate, as the raid was in the middle of the Federal election campaign, and the office of President of the Senate was vacant. On 30 August 2016, after the election, Senator Conroy lodged a claim of privilege with the President of the Senate regarding both the May and August searches. This went beyond a claim over the content of the documents, to a claim that the investigation may have involved the commission of a contempt of parliament through the improper interference with his capacity as a senator to carry out his functions. The claim also argued that there was a contempt by way of the NBN management disciplining two staff members effectively for providing information to the Senator. The grounds for this included:

- The AFP refusing to respond to requests by the Senator to advise whether his telecommunications data including telephone calls had been intercepted,
- That despite the Senator claiming privilege over all documents during the search of his Victorian office, an NBN officer accompanying the AFP took photographs of the documents and shared them with other NBN employees, and
- As a result of documents viewed during the raid being disseminated, disciplinary action was taken against two NBN employees for providing Senator Conroy with information for use in parliamentary proceedings.<sup>34</sup>

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<sup>34</sup> Description of events based upon The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163rd report, especially Chapter 2 and Appendix.

The claim was referred to the Senate Committee of Privileges. To date it has resulted in three inquiries by that committee, two of which have reported,<sup>35</sup> as well as an inquiry by the House of Representatives Committee on Privileges and Members Interests which reported on 28 November 2016 into the claim of privilege arising from the search of Parliament's servers on the Member for Blaxland.<sup>36</sup>

#### MoU between Commonwealth Parliament and AFP

The current Memorandum of Understanding between the two Houses of Federal Parliament and the AFP regarding execution of search warrants on the premises of members or where parliamentary privilege may be involved was signed in 2005. It followed the case of *Crane v Gething*.<sup>37</sup> The Federal Court determined that the search of a Senator's office is an executive act, not a judicial proceeding, so that only the House concerned and the executive could resolve whether parliamentary privilege should prevent seizure of the documents. There was concern by the Parliament that the decision created uncertainty as to how such disputes could be resolved, with the MoU being the final outcome to provide clarity to both the Parliament and the investigatory agency.

The MoU provides that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned. Its Preamble states that it is:

designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and Members and their staff are given opportunity to raise claims for parliamentary privilege

Features of the procedures include:

- ensuring the search does not occur on a sitting day (para 5.6)
- that the member or a senior member of their staff be present and have reasonable time to seek advice
- that the member be invited to identify which documents may be privileged (5.7, 5.9) and
- that the member has an opportunity to make copies of any documents being seized (5.11).

The procedure is for the identified documents to be placed in sealed audit bags and delivered to the safekeeping of a neutral third party, in this case the Clerk of the Senate. The member has five working days to notify the executing officer whether the claim is abandoned or whether to commence action to seek a ruling on the status of the documents.

While the MoU was signed in 2005, the 2016 NBN searches are the first time it has been tested. The first issue required to be considered was how and by whom the Senator's claim of privilege

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<sup>35</sup> The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163rd report December 2016; *Search Warrants and the Senate* 164th Report, March 2017

<sup>36</sup> There are complexities involving the two Houses both being involved in the same search process which are not dealt with here but have been addressed in the Senate reports.

<sup>37</sup> (2000) 97 FCR 9

over the whole documents was to be determined. In referring the inquiry to the committee the President specifically precluded the committee from examining the documents, and instead the President instructed it to consider whether it could determine the status of the material on the basis of detailed descriptions of it and submissions from the affected parties.<sup>38</sup>

On request the Clerk of the Senate provided an advice to the Chair of the Committee. The Clerk rejected formulations of determining if a document related to parliamentary proceedings such as the “dominant purpose” test used for legal professional privilege and was particularly critical of the suggestion by the AFP that the test should be whether there is a “close and direct” connection between the document and proceedings in parliament. Her advice proposed instead that the committee adopt the three step test used by the NSW Legislative Council in 2004, noting this NSW test was developed using s16(2) of the *Parliamentary Privileges Act 1987* (Cth) as a guide. Acknowledging the difficulty of the third step of the NSW test, the Clerk of the Senate reformulated it in the following words:

Is there any contemporary or contextual evidence that the documents were retained or intended for use in the course of, or for purposes incidental to, the transacting of the business of a House or committee?<sup>39</sup>

In regard to who should apply the test in assessing the documents, the Clerk recommended the appointment of a retired judge, so as to replicate as far as possible the judicial manner in determining the facts during the assessment, while the final determination was to be made by the House on the advice of the assessor. Despite this, the Committee in its report recommended that it be authorised to examine the material itself and be able to appoint independent experts to advise it.<sup>40</sup>

Following the tabling of this report, the Senate on 1 December 2016 authorised the committee to examine the documents. As a consequence, the Committee began an inquiry that tested two aspects of use of the search guideline- (a) whether to uphold Senator Conroy’s claim, in full or in part, by finding that the material comes within the definition of “proceedings in parliament”, and (b) whether the Parliament had been protected against improper interference during the search.

In regard to the first, the committee was persuaded by arguments made by Senator Conroy that the documents seized under warrant were sufficiently connected to his parliamentary business – in regard to debate in the House and his work as Chair of the NBN Select Committee that the documents were relevantly covered by the definition of “proceedings in parliament” for the claim of privilege to be upheld.<sup>41</sup> A consideration in this appeared to be that taking a narrower view of the documents in a search process of this nature may contribute to a chilling effect on the provision of information to members which may be relevant to committee inquiries. As a result the committee’s finding on the status, the documents were withheld from the AFP and returned to (by then former) Senator Conroy.

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<sup>38</sup> The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163rd report p5.

<sup>39</sup> The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163rd report Appendix A

<sup>40</sup> The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163rd report p9

<sup>41</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017, p8.

The most interesting aspect of the second inquiry was the committee's consideration of whether the guidelines sufficiently safeguard against improper interference with parliamentary proceedings and ensure that privilege claims may be properly raised and determined.

To determine "improper interference" the Committee used the statutory test in s4 of the *Parliamentary Privileges Act 1987*:

Conduct (including the use of words) does not constitute an offence against a House [that is contempt] unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

However the committee indicated the threshold for a finding of contempt is a high one, requiring evidence of an improper act intended to substantially interfere with the functions of the Senate or duties of Senators.<sup>42</sup> Understandably the Committee received conflicting submissions from Senator Conroy, the AFP and the NBN regarding the conduct of the officers involved in the searches. In particular, the AFP argued that the images taken and transmitted by the NBN officer was only undertaken to assist compliance with the search guidelines – the officer was transmitting the cover sheet of each document to third parties in the NBN so as to reduce the number of documents seized, by having them confirm whether the documents were relevant to the investigation.<sup>43</sup> The AFP stated there was no intent to interfere with Senator Conroy's duties.

It was conceded by NBN that in the course of the search certain emails were seen that appear to show that two NBN employees were communicating with the Senator's staffer. However NBN stated that the disciplinary action taken against each was solely as a result of its own internal investigations, not deriving from the AFP search. The committee queried whether the actions predated the searches – NBN confirmed that in one case this was correct but the other, while previously identified as having access to the stolen documents, was not the subject of an active action. The committee was uneasy about the answer provided:

These matters concern the committee. They demonstrate the risk that information which – to use Senator Conroy's phrase – ought to be quarantined may be used for purposes which are not authorised by the warrant and are inconsistent with the purpose of the guideline. (p16)

....

The fact that unauthorised use may have been made of such information demonstrates that the processes provided for under the guidelines may not adequately protect members' information. The guideline is intended to enable claims of privilege to be made and determined, with seized material sealed away with a third party until the question is resolved. Any practice which, in the meantime, allows the use of material discovered at the scene of a search warrant undermines that purpose.<sup>44</sup>

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<sup>42</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017 p12.

<sup>43</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017 p15

<sup>44</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017 p17.



The committee found (a) the appointment by the AFP of an officer from the NBN to assist the AFP in the search, and (b) the AFP allowing information from the search sites to be communicated off site when claims of privilege were being made, both weakened the protections provided by the search guideline.

The committee found that the first part of the test for contempt was met – an improper interference with the duties of the Senator occurred, and that this included the use of information to the detriment of a person with a connection to parliamentary proceedings (the second NBN employee). Despite this, in considering whether to find a contempt, the committee could not find the requisite intent.<sup>45</sup> This finding was based on submissions from the NBN and the AFP that the unintended interference occurred as a result of execution of a valid warrant, conducted within an existing legal and policy framework by officers fulfilling their public duties in good faith and for a proper purpose. The committee did consider that its earlier finding that the claim of privilege be upheld over all the documents was relevant and provided a sufficient protection:

One of the effects of the recommendation that the claim of privilege be upheld is that the subject material would be withheld from the investigation and, therefore, incapable of being used in any prosecution or other legal proceedings against any person, thereby limiting any detriment to the persons involved. The committee considered this an acceptable outcome, given the difficulty of further establishing the facts of the matter.<sup>46</sup>

The committee did recommend remedial action be taken with the guideline itself to ensure that all persons involved in the execution of warrants understand and respect the requirement to quarantine all information while claims of privilege were being determined. In this case it was the third parties, not on site, who were not aware of the strict requirements and where the problem arose.

Overall the case shows how extremely sensitive investigatory bodies need to be even when following closely a search protocol. The finding is not unusual – a very strong stand taken on protection of privileged information, combined with a reluctance to make definitive findings of contempt against individuals who have breached this privilege.

The third Senate inquiry, into cyber security, is discussed at the end of this paper.

### WA and the Buswell Questions

In Western Australia last year the Privileges Committee of their Legislative Council tabled a report which raises an unusual instance of an investigatory body, believing it was actually assisting Parliament, inadvertently committing a breach of parliamentary privilege. The case involved the colourful WA member Troy Buswell, former Treasurer in the Barnett government in WA. His career unravelled in 22 February 2014 when after attending a friend's wedding he drove home, crashed into several parked vehicles and finally crashed into his front gate. Mr Buswell later pleaded guilty to 11 offences under traffic legislation following a police investigation. An internal Department of Premier and Cabinet investigation into the incident

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<sup>45</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017 p18.

<sup>46</sup> The Senate Committee of Privileges *Search Warrants and the Senate 164th Report*, March 2017 p19.

cleared his Chief of Staff of any wrongdoing in failing to promptly report the damage to the government vehicle and other actions in the hours after the accident. The Crime and Corruption Commission (CCC) however received multiple notifications of possible misconduct and commenced its own investigation.

A member of the Legislative Council the Hon Sue Ellery MLC asked a series of questions to the Leader of the House (representing the Premier). The answers provided to Ms Ellery by the Leader of the House were prepared with the advice of the former Chief of Staff and Deputy Chief of Staff to Mr Buswell. Those answers subsequently proved to contain false and misleading information, and as a result the two staff members were found guilty of contempt of Parliament and required to apologise in writing to the House.<sup>47</sup>

The episode is a striking reminder to political staffers to be truthful in providing information in response to questions raised in parliament. Equally interesting though is the role of the Corruption and Crime Commission (the CCC). The provision of the false information in the answers emerged as a result of a wider inquiry by the CCC into the events surrounding the accident. In fact the WA Legislative Council became aware of the issue with the answers Chief of Staff's actions through the Commission's inquiry. It became apparent that the CCC had questioned Mr Buswell's Chief of Staff based on the final and draft answers to enable it to reach its opinion of misconduct against her. The Privileges Committee found that the draft answer and the final answer signed off by the Premier were parliamentary proceedings. In the words of the Privileges Committee:

The Committee acknowledges that in the absence of the CCC investigation, it would have been unlikely that the evidence ...against [the staffers] would have come to light. This evidence included draft answers to a parliamentary question prepared by [one staffer] with the assistance of [the other staffer] for the consideration and approval of the Premier and the Leader of the Government in the Legislative Council.<sup>48</sup>

Noting the immunity afforded by Article 9, the committee found that the CCC had stumbled into an area of exclusive jurisdiction of the Parliament

The Committee cannot overstate the importance of the immunity provided under Article 9 as a bulwark against oppression of the Legislature by the Executive and Judicial arms of government. This remains the *raison d'être* of the continuing relevance of a 330 year old UK statute to our parliamentary democracy.

On occasion, the demarcation of the jurisdiction of the Parliament and of investigative bodies such as the CCC may be difficult to discern. It is not always a bright line of separation. However, in this instance, there was such a clear bright line. The evidence relied on by the CCC to form its adverse opinion about [the staffer's ] conduct was so closely and directly connected to actions occurring in the Legislative Council as to make it obvious that this evidence constituted a proceeding in parliament. The Committee would have expected the CC to have known that using

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<sup>47</sup> Facts described in Chapter 2 of Standing Committee on Procedure and Privileges *A Matter of Privilege raised raised by Hon Sue Ellery MLC* November 2016.

<sup>48</sup> Standing Committee on Procedure and Privileges *A Matter of Privilege raised by Hon Sue Ellery MLC* Report 44 November 2016 p i.

such materials to form an opinion on the conduct of a public officer in these circumstances would breach the immunity provided by Article 9.<sup>49</sup>

The point was strongly made that the offending behaviour by the two staffers was against the Parliament, and it was Parliament's role, not the CCC's, to investigate and deal with the consequences of individuals involved to the extent they relate to parliamentary proceedings. Recommendation 5 of the Committee report was for both Houses of Parliament to develop a Memorandum of Understanding between the Houses and the Crime and Corruption Commission to ensure future investigations, however well intentioned, did not attempt to investigate breaches of parliamentary privilege.

### Parliamentary Privilege and cyber surveillance

There is one area which increasingly will concern Parliaments in future. That is the area of cyber surveillance, searches of meta data. There is currently a third inquiry on foot, and it may well be the most important of the three. As the final aspect of the claim of privilege lodged by Senator Conroy the Senate is currently conducting an inquiry into the adequacy of parliamentary privilege as a protection for parliamentary material against the use of intrusive powers by law enforcement and intelligence agencies – including telecommunications interception, electronic surveillance and metadata preservation orders. The inquiry is to consider whether the use of intrusive powers by law enforcement and intelligence agencies interferes with the ability of members of Parliament to carry out their functions, and whether new protocols are required for the new intelligence environment.

The inquiry is only at the stage of seeking submissions but will be followed very closely by the Legislative Council. Not long after it began its inquiry the AFP publicly announced that its first use of meta data, to examine phone records of a journalist, accidentally breached the protections under the *Telecommunications (Interception and Access) Act 1979* (Cth) because the officer failed to obtain a warrant for the searches<sup>50</sup> Interestingly, the Acting Ombudsman in NSW in his most recent report has described the AFP's self-reporting of the breach as “model behaviour by a law enforcement agency to address the wrongful exercise of coercive information gathering powers”.<sup>51</sup> Slightly worrying for a local audience, however, is that the Acting Ombudsman compares this unfavourably to the current approach of the New South Wales Crime Commission, the body in the state with the most secretive and coercive powers available to it.

There is great difficulty in assessing how significant a threat the use of intrusive surveillance powers is to parliamentary privilege in New South Wales. If the surveillance occurs by an agency without notice to Parliament there is no way of claiming privilege. There are Inspectors and there are committees given the role of parliamentary oversight. But the shield of privilege only works when you can see the arrows. As the Senate Committee has stated in its background paper to the inquiry:

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<sup>49</sup> Standing Committee on Procedure and Privileges *A Matter of Privilege raised by Hon Sue Ellery MLC* Report 44 November 2016. P i-ii.

<sup>50</sup>Fleur Anderson” Australian Federal Police illegally accessed journalist's metadata in search of leak” *Australian Financial Review* 28 April 2017

<sup>51</sup> Ombudsman NSW “*Operation Prospect: a report on developments*”, special report to the Parliament under s31 of the Ombudsman Act 1974, May 2017, p46

More recent manifestations of intrusive powers – such as telecommunication interceptions, electronic surveillance and the storage and production of metadata – are commonly utilised without the knowledge of the target of the investigation, either before or after the fact. The integrity of investigations by law enforcement and intelligence agencies often depends on a large measure of secrecy in exercising such intrusive powers. However it is unclear how a member of Parliament might raise a claim of privilege in such circumstances, given a member will typically have little if any visibility of the investigation or knowledge of what material has been procured by investigators.<sup>52</sup>

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

### Conclusion

The Legislative Council has asserted that article 9 operates so as to prevent the compulsory disclosure of records forming part of proceedings in Parliament during the execution of a search warrant. This view is embedded in the Memorandums of Understanding on search warrants currently held with the ICAC and the AFP, although with the ICAC there is currently no coverage of searches of members’ offices outside of the parliamentary precincts. As the recent NBN inquiries have shown, search protocols when tested can reveal gaps with serious consequences, and none in Australia effectively deal with cybersecurity and metadata issues.

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

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<sup>52</sup> The Senate Committee of Privileges *Background Paper: Inquiry into parliamentary privilege and the use of intrusive powers*, p2.