LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Office of the Clerk

The ICAC is coming – What consequences for the Assembly and what do we need to be ready for?

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Almost 30 years after the first state anti-corruption commission was legislated for in NSW, the Northern Territory is following a well-worn path. This paper considers how the Northern Territory proposal intersects with the day to operations of the Assembly and matters relating to parliamentary privilege.

Background - What has been happening in the Northern Territory?

- Historically there has been resistance to an ICAC - Costs and smallness of jurisdiction were often cited (the media release which informs dot point five below is one example)
- A Private Member's motion to establish an inquiry into political donations passes Assembly 20 August 2014
- A Government Motion to rescind the inquiry motion passes on 22 October 2014 and substitutes it for an inquiry to be headed by an appointee of the Department of the Chief Minister rather than by way of the *Inquiries Act*
- McGuinness Report into Political Donations tabled on 28 April 2015
- Proposal for more powers for Public Interest Disclosure Commissioner announced by Attorney General on 14 August 2015
- Appointment to Hon Brian Martin QC on 14 December 2015 to inquire into the establishment of an ICAC in the Northern Territory
- Martin Report released May 2016
- 52 Recommendations
- NT Election held August 2016 – Change of Government with a Labor landslide. 18 seats to 2 with 5 independents
- New Government commits to 50 recommendations 'in principle'

- Draft legislation to bring about an ICAC – exposure draft for consultation to be released late June 2017
- Public Submissions to be due 7 July 2017
- Legislation to be introduced August 2017
- Proposed that legislation be passed November 2017
- NT ICAC to be up and running first quarter 2018

What Ramifications for the Assembly?

The Government is releasing[1] an exposure draft bill to establish an Independent Commission Against Corruption for consultation ahead of introduction into the Assembly. The Government's commitment to an ICAC is also contained in the 2017-18 Budget allocating $3 million to the establishment of the Commission in 2018.

During the 2016 Martin Inquiry, The Clerk of the Legislative Assembly made a submission concerning matters of privilege, arguing that the legislation follow the NSW example to explicitly preserve privilege but to go further and outline any parameters the Assembly agreed to in relation to searches and use of potentially privileged documents such as the Register of Interests.

The Clerk submitted that there was an opportunity arising from the experience elsewhere of three decades which can inform the Northern Territory model and the ability to commence a regime with strong clear directions on operation for more abundant clarity with draft legislation ensuring that any partial concessions or waivers concerning parliamentary privilege were well considered and were spelt out.

One of the interesting challenges in the context of developing the new legislation has been the eye opening experience of the level of understanding on the part of experienced government lawyers and officers about parliament as an institution and its privileges.

Limits of the understanding of parliamentary privilege were given a recent outing in the Northern Territory in the context of the Royal Commission into children in custody arising from a Four Corners television report[2].

Counsel Assisting that Inquiry made submissions to the Commission during May that the Clerk should appear before the Commission in order to waive parliamentary privilege so the Commission could examine transcripts of proceedings of the Assembly to consider alleged inconsistencies and allegations of lying in relation to the evidence of a former Minister.

When the Clerk's view was sought on the proposal, the Solicitor General for the Northern Territory advised the Commission that the Clerk was unable to assist in this manner.

It has been evident in discussions with a working party contributing to the Attorney General's Department work on the ICAC Bill that a limited understanding of the Assembly and the privileges of Members of Parliament prevails amongst policy makers and lawyers.

The tone of meetings has often reverted to inherent distrust of Members of the Assembly and citing examples of Member and Ministerial behaviour which on its face was not corrupt.

For example, a discussion occurred about the Government chartering private aircraft when commercial aircraft is an available option. This practice which occurred in a blaze of publicity

[1] At the time of writing it has been advised it will be released by 1 July 2017
[2] "Australia's Shame" ABC TV broadcast 25 July 2016

during the previous Assembly may be a poor decision in terms of expenditure of monies and the public perception, but without any corrupt benefit flowing to anyone, appears to fall short of corrupt conduct.

Subject to final amendments and decisions of the Cabinet it is likely that some of the perceptions of the policy officers may be evident in the content of the legislation.

Parliamentary Privilege

The Clerk's submission to the 2016 Inquiry noted the experiences in some other jurisdictions including the role of a Commissioner for Standards and the many years of NSW experience with the ICAC and matters of privilege and search warrants.

The draft ICAC bill contemplates the ability of the ICAC to examine the words, actions and documents of a Member of the Legislative Assembly of the Northern Territory.

It is a long-standing principle that courts do not inquire into statements a Member makes, or documents a Member relies upon in the Assembly and there are good public interest reasons why this is so.

In our consultations on the drafting of the bill we have been in discussions about the context within which those words, actions and documents were created and whether they would be a 'proceeding of the Assembly'.

Section 6 of the *Legislative Assembly (Powers and Privileges) Act* is similar to the Federal legislation which specifically preserves the *Bill of Rights* of 1688.

The New South Wales experience of the *Independent Commission Against Corruption Act 1988,* which provides extensive powers for the ICAC to conduct investigations has been informative.

That Commission has the power to obtain information by service of notice, obtain documents, enter premises, compulsory examination and cross-examination of witnesses, the protection of witnesses, and powers for the referral to other bodies.

Significantly, the NSW legislation at s.122 expressly preserves parliamentary privilege.

Arguably privilege is preserved in any event unless there is an express enactment to the contrary. Yet experience in NSW has shown that where the powers of the ICAC and the privileges of the parliament intersect there has been conflict.

The approach we have taken in the Clerk's office has been to attempt to avoid as far as possible too much conflict over vague and ambiguous matters by ensuring defined boundaries in the enacting legislation to make it quite clear the extent of the powers of the ICAC body and the intention of the Assembly to relax any aspects of parliamentary privilege.

In his paper at the 2013 Australasian Study of Parliament Group (ASPG) Annual Conference, titled *Oversight: Parliamentary Committees, Corruption Commissions and Parliamentary Statutory Officers,* the then President of the NSW Legislative Council, the Hon Don Harwin said:

> *The ICAC's constrained jurisdiction has also been a source of contention between the ICAC and the Parliament in the past. Of note, in 2004, relations between the Parliament and the ICAC were strained significantly when the ICAC executed a search warrant on the Parliament House office of the Hon Peter Breen, a cross-bench member of the Upper House.*

During the execution of the warrant, officers of the ICAC seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It later became evident that, despite section 122, and assurances from the officers themselves that they would respect parliamentary privilege, at least one document seized was immune from removal by virtue of being protected by privilege.

It is noted that in NSW a *Memorandum of Understanding on the execution of Search Warrants in the Parliament House Offices of Members of the New South Wales Parliament* (MOU) has been in place since 2009 between the Presiding Officers and the ICAC Commissioner.

In the Australian Parliament, an MOU is in place with the Australian Federal Police.

In the United Kingdom, the House of Commons MOU with the Metropolitan Police requires the Speaker's Counsel to be present upon the execution of a search warrant on a Member in order for Counsel to assist and advise what is a proceeding of the parliament, and therefore may not be impeached in a court.

The Northern Territory Government has now directed that an MOU be put in place between the Assembly and the Northern Territory Police, however momentum has not proceeded to fruition.

My predecessor Clerk commenced discussion with the then Commissioner of Police (three Commissioners ago) on this matter more than a decade ago.

There has not been any recent execution of a search warrant on a Member of the Legislative Assembly and execution on the Parliamentary Precinct is prohibited without Speaker approval[3], should one occur without an MOU in place there remains a risk of seizure of privileged material which is inadmissible in court proceedings.

Without a suitable MOU in place, the Speaker would be well advised to uphold the prohibitions in s.8 of the *Legislative Assembly* (*Powers and Privileges) Act*.

Where an ICAC body seeks to investigate Members of the Assembly in relation to allegations of corrupt behaviour such as bribery or for misconduct or breaches of the Code of Conduct then the legislature must be mindful of how it will do so and where privilege may arise and could curtail such investigations.

For example, the NSW Parliament has had to consider whether privilege applies to documents disclosed in a Member's return on their pecuniary interest Register.

Discussions we have had with the Attorney General's officers in the Northern Territory have noted that experience and given that such documents are available for public inspection, it has been considered that notwithstanding any privilege which may attach as a consequence of how the Register came into existence, the legislation will allow the ICAC to take note of and use the content of the Northern Territory Register.

How this will be done remains to be clarified. Under the existing arrangements in the Northern Territory, the Clerk has no authority to make copies of the Register available to any person. A static version is tabled annually (first done in March 2017).

The *Legislative Assembly* (*Disclosure of Interests) Act* provides at s.6(2) for the Assembly to sanction a breach of the requirement of a Member to provide an accurate return as a contempt of the Assembly, and a contempt is to be dealt with under the *Legislative Assembly* (*Powers and Privileges)Act*.

[3] S.8 Powers and Privileges Act

Similarly a breach of the Code of Conduct under the *Legislative Assembly* (*Members Code of Conduct and Ethical Standards) Act* is able to be punished as a contempt, the penalties for which include imprisonment as per the *Powers and Privileges Act*.

While the waiver of any privilege where disclosure of interest documents are concerned is most unlikely to impact upon the freedom of a Member to engage in unfettered speech, parliaments are rightly loathe to restrict their privileges.

The degree of privilege in the Northern Territory is somewhat more constrained than in the original colonies (now the six states of the Australian Federation) as they all enjoy the same privileges of the House of Commons as adopted at certain points in time in the 19th century, the Northern Territory Assembly has no more powers or privileges than the House of Representatives[4] which has intentionally applied some limits by the enactment of the *Parliamentary Privileges Act 1987.*

The developments relating to privilege and where an ICAC body intersects with the role of the parliament in policing itself and its Member's behaviour brings us to other proposed content in the bill.

Consideration of the Proposals in the Bill

- **Clauses 10 (Meaning Of Corrupt Conduct) and 11 (Meaning of Misconduct)** may involve the ICAC assessing when conduct is intentionally or recklessly inconsistent with the functions of an MLA.

Arguably that it is the Assembly's role alone, whether by Act or its internal procedures, to determine the type of conduct that is consistent with the functions of an MLA.

It is inappropriate to give the ICAC the role of determining whether conduct that is not otherwise contrary to an Act, or a rule or code of the Assembly is inconsistent with the function of an MLA.

- **Clause 12 (Meaning of Unsatisfactory Conduct)** may involve the ICAC assessing whether the conduct of an MLA is negligent or incompetent.

The determination of the standards of diligence or competence of an MLA is either for the Assembly, whether by Act or its internal procedures, or more generally by the electorate through elections.

It is inappropriate to give the ICAC the role of determining the standards of diligence or competence required of an MLA. The exclusion of judicial conduct from this provision should also be extended to the legislature.

For the ICAC to audit or review the practices, polices or procedures of an MLA could arguably be a breach of parliamentary privilege, however, for the avoidance of doubt it is preferable for MLAs to be excluded, as are judicial officers.

- **Clause 26 Directions to Referral Entity**

The consultation process has been effective in refining the draft bill so that a proposal to permit the ICAC to give directions to the Speaker and Deputy Speaker requiring them to be accountable to the ICAC on how they were dealing with a referred matter has not been included.

- **Clause 46 Publication of General Report made to Speaker**

[4] S.12 of the Northern Territory (Self Government) Act 1978 (Cth)

This revised clause as drafted was inserted after consultation which has resulted in a specific procedure for the Speaker tabling a General Report to the Speaker by the ICAC and the method for which it is tabled and made public.

A previous iteration had the report going to the ICAC Minister (which will be the Chief Minister) rather than the Speaker, and that 6 sitting days are allowed for tabling unless the ICAC recommends the report be tabled forthwith on the basis that the report is identifying an issue across the public sector that the Chief Minister will need to prepare and respond rather than the Speaker.

However, our submission was that providing the report directly to the Parliament is preferred because having the ICAC's public communication being mediated by the Minister appeared odd and that Ministers have been known to miss statutory reporting timeframes. If things got very messy the ICAC's report to be under the control of the Minister could cause tension. A convoluted process to table immediately when the Assembly is not sitting would have been required with the ICAC providing the Minister with the report who when then provides it to the Speaker or Clerk. Also an ICAC report to the public going via a Minister seemed not to be the practice in other jurisdictions.

Involving us in this drafting detail has led to a better outcome here.

- **Clause 52** gives the ICAC the ability to make a public statement about a request to the Assembly to authorise the publication of or disclose to the ICAC information or a document that might otherwise be subject to parliamentary privilege.

It remains questionable as to how far the Legislative Assembly is capable of agreeing to waive its privileges.

The Australian Constitution is relevant in that parliamentary privilege (as stated in the 9th article of the *Bill of Rights 1688) that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament* is the law of the Commonwealth and in the Northern Territory the *Legislative Assembly (Powers and Privileges) Act* mirrors the Commonwealth law through the *Northern Territory (Self Government) Act.*

Why the Assembly would agree and permit the ICAC to have access to privileged material is a matter which will be questioned when and if the situation arises.

The first question no doubt would be as to why the ICAC would *need* a document which is subject to parliamentary privilege.

If the ICAC was allowed to traverse privilege the next logical question might be why should not the Courts or any other body also be allowed to examine documents subject to parliamentary privilege for the purposes of questioning or investigating a Member?

- **Clause 80** relates specifically to Parliamentary Privilege as follows:

1. Except as provided expressly or by necessary implication, this act does not limit the privileges, immunities and powers of the Legislative Assembly.

2. The following things do not amount to a breach of parliamentary privilege

   (a) An allegation that an MLA has engaged or is engaging in improper conduct;
   (b) Conducting an investigation into an allegation mentioned in paragraph (a) whether or not the allegation is also the subject of a referral to the Speaker or Deputy Speaker;
   (c) Making findings in relation to an allegation made in paragraph (a) that are not based on material the subject of parliamentary privilege.

An earlier consultation draft which claimed to preserve the privileges, immunities and powers of the Speaker and 'any other MLA' was commented upon in terms of it being misconceived to consider that a Member has a privilege separate from the Assembly.

The Speaker and Members have no more powers than the Assembly itself.

Privilege is not the prerogative of Members in their own right, Members only enjoy rights for so long as they are Members privilege belongs to the Assembly in its corporate capacity and only to the Members on behalf the citizens they represent for the time being.

The definition in the *Independent Commission Against Corruption Act 1988* at section 122 in New South Wales is: *Nothing in this act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and papers and proceedings, in Parliament.*

This precise wording was proposed as a possible template but not adopted in the current draft.

The draft contains 'necessary implication', which if a test is applied as to what this means in practice will no doubt be interesting.

The Martin Inquiry recommended:

> *Recommendation 16 - judicial independence and parliamentary privilege be maintained. In particular with respect to parliamentary privilege, the boundaries between the powers of the NT Anticorruption Commission and parliamentary privilege be clearly defined.*

A question arises as to whether the draft bill achieves this outcome of being 'clearly defined'.

- **Clauses 83 through to 87** deal with what happens when a document which may be privileged is seized by an authorised officer. These provisions as drafted continue to raise some concern about the role of the Assembly and the role of the courts.

Clause 83 (3) reads:

> (3) An authorised officer who intends to inspect, copy or seize an item, or require a person searched to surrender an item, the officer considers likely to be the subject of parliamentary privilege must give reasonable notice to the Clerk of the officer's intention.

Clause 84 considers the process for dealing with claim of parliamentary privilege:

> (1) If a memorandum is in effect, an authorised officer must act in accordance with it in relation to a claim that an item the officer wishes to inspect, copy or seize, or require a person searched to surrender, is the subject of parliamentary privilege.
>
> (2) If the matter cannot be resolved in accordance with the memorandum, or if there is no memorandum in effect, the authorised officer must deal with the item in accordance with section 85.
>
> (3) In this section: ***memorandum*** means a memorandum of understanding between the Legislative Assembly and the ICAC in relation to parliamentary privilege.

Clause 85 considers privilege claims generally

> (2) The authorised officer must consider the claim of privilege and either:
> (a) cease exercising the power in relation to the item over which the claim of privilege is made; or

(b) if the authorised officer believes on reasonable grounds the item may not be the subject of privilege – require the claimant or claimant's representative to immediately seal the item in an envelope, or otherwise secure the item if it cannot be sealed in an envelope, and give the secured item to the officer.

(3) The authorised officer must not inspect the item in considering the claim of privilege but may copy the item if it is in electronic form as long as copying the item does not disclose any part of the item that may be privileged to the officer or another person not entitled to view that part of the item.

(4) If the authorised officer requires the claimant to give the secured item to the officer under subsection (2)(b), the officer must:

(a) notify the ICAC as soon as reasonably practicable; and
(b) as soon as reasonably practicable, give the secured item to the proper officer to be held in safe custody.

(5) Subject to section 87, a person must not open a sealed envelope, or otherwise interfere with a secured item, before delivery to the proper officer.

(6) Despite subsection (2)(b), the authorised officer must not require the claimant to give the secured item to the officer under that subsection unless the officer gives the claimant or claimant's representative a reasonable opportunity to accompany the officer in giving the item to the proper officer.

Clause 86 outlines the process for the application to Supreme Court to determine privilege:

(1) Within 7 days after a secured item is given to the proper officer under section 85, an application to the Supreme Court to determine whether or not the item is the subject of privilege may be made by:
(b) for parliamentary privilege – the ICAC.

(2) If an application is not made within 7 days, the proper officer must give the item:
(b) for parliamentary privilege – to the Clerk.

(3) Within a reasonable time before the hearing of the application:
(b) for parliamentary privilege – the ICAC must notify the Clerk of the application.

(4) The ICAC is entitled to appear and be heard on the hearing of an application.

(5) The Clerk is entitled to appear and be heard on the hearing of an application relating to parliamentary privilege.

(6) If the proper officer gives an item to the ICAC under subsection (2)(a):
(a) the claimant is taken to have authorised the ICAC to view the item; and
(b) the claimant is not to be taken to have waived privilege for any other purpose.

Clause 87 outlines the procedure for the determination of a privilege claim:

(1) On an application under section 86, the Supreme Court is to determine whether or not the item is the subject of privilege in whole or part.

(2) For making a determination, the Judge constituting the Supreme Court and any other person authorised by the Court may:
(a) open the sealed envelope or otherwise access the item; and
(b) inspect the item.

(3) If the Supreme Court determines that the whole of the item is the subject of privilege, the Court must order that the item be returned to the claimant or claimant's representative.

(4) If the Supreme Court determines that the whole of the item is not the subject of privilege the Court must order that the item be given to the ICAC.

(5) If the Supreme Court determines that part of the item is the subject of privilege (the ***privileged part***) and part is not (the ***non-privileged part***):

(a) if the item is able to be divided into the privileged part and the non-privileged part – the Court must divide the item and order that the privileged part be returned to the claimant or claimant's representative and the non-privileged part be given to the ICAC; or

(b) if paragraph (a) does not apply but the Court considers it possible to produce a copy of the item from which the privileged part has been removed:

(i) the Court must make orders the Court considers appropriate for production of the copy; and

(ii) the Court must order that the copy be given to the ICAC and the item to be returned to the claimant or claimant's representative; or

(c) otherwise – the Court must order that the item be returned to the claimant or claimant's representative.

(6) Except as provided in subsection (2), a person must not open a sealed envelope containing the item, or otherwise have access to the item, before:

(a) the Supreme Court determines the claim of privilege; or

(b) the item is returned to the claimant.

(7) A person commits an offence if:

(a) the person intentionally engages in conduct; and

(b) the conduct results in a contravention of subsection (6) and the person is reckless in relation to the result.

Maximum penalty: 100 penalty units or imprisonment for 12 months.

Commentary

One of the concerns arising in relation to references to the privileges of the Assembly is that in some respects the bill seems to take the position that the ICAC comes before parliamentary privilege, rather than requiring the ICAC to understand and respect parliamentary privilege as a core principle.

While not wanting to overstate the circumstances where parliamentary privilege may be applied, given that many items in the possession of a MLA will not be privileged, it remains a concern if the principles underpinning the bill do not truly respect or value the existence of parliamentary privilege when investigating corrupt conduct.

In the draft bill, authority is given to the Supreme Court without any particular explanation as to why the arbiter of privilege is to be a *court or place out of Parliament*.

The question arises as to whether it should be the Assembly itself rather than a court which determines items being privileged.

An MOU for a process for dealing with a claim of parliamentary privilege is more than essential in light of this proposed role for the courts.

Such an MOU could also address searches within the precincts in accordance with section 8 of the *Legislative Assembly (Powers and Privileges) Act*.

Outside the context of litigation, Westminster Parliaments have traditionally asserted the right to determine the privileges necessary for their effective operation.

While courts have often considered matters of privilege when settling disputes between two parties, it is unusual for a court to intervene in a dispute involving the Legislature.

Traditionally the Legislature has asserted the privileges it requires to perform its functions and any dispute has been a matter between the Legislature and the second party.

Courts have only determined such questions when they have arisen in litigation between two persons. Placing the court as an arbiter between the ICAC and the Legislative Assembly, as proposed by clause 85, diminishes the constitutional position of the Assembly and places it as subordinate to the court.

At clause 86(5) it is submitted that the Speaker rather than the Clerk should be entitled to appear on behalf of the Assembly as the Speaker rather than the Clerk speaks on behalf of the Assembly. It is understood that by the time this paper is delivered the exposure draft will reflect this submission.

As a matter of recent experience and commentary it is instructive to look at what the then President of the New South Wales Legislative Council stated in October 2003 in relation to seizure of documents in possession of a member of the Legislative Council:

> ..*only the House can resolve the question of parliamentary privilege arising from an execution of a search warrant to seize documents and things in the possession of a member. I regard the seizure of material protected by parliamentary privilege seriously and am concerned to ensure that proper procedures are put in place to determine questions of parliamentary privilege arising from an execution of search warrants to seize documents and things in possession of members. In this regard I note the work of the Senate committee of privileges in its reports numbers 75, 105 and 114 concerning the execution of search warrants in senators' officers.*

As a consequence of the President's view, that matter was referred to the Standing Committee on Parliamentary Privilege and Ethics and as a result the ICAC in NSW understands that privilege claims are to be determined by the Parliament.

That Standing Committee looked into whether documents within the scope of proceedings in Parliament in and of themselves are immune from seizure because of privilege.

That question provided the widest divergence of views in the evidence received by the Committee. It was submitted that the effect of article 9 of the *Bill of Rights* is to prevent seizure itself, where the seizure of specific documents would be impeaching or questioning the proceedings of the Parliament.

Interestingly in the case of *Crane v. Gething*[5] cited by the Committee relating to the seizure of documents under a search warrant in the offices of a Senator, French J, in the Federal Court decided that the court did not have jurisdiction to determine whether privilege prevented the seizure.

His Honour's reasoning was that the issue of search warrants is an executive act and not a judicial proceeding and the question of the application of privilege in that specific context was one which only the House and the Executive could resolve[6].

The ICAC's submission in New South Wales in 2003 was that Article 9 did not prevent the seizure of documents, but only their subsequent use.

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[5] *(2000) 169 ALR 727*

[6] See page 26 of Report 25 of December 2003

It is worth noting however, that the submission from the ICAC to the inquiry was that the ICAC has no intention to seize documents that would attract parliamentary privilege.

Whether the Northern Territory bill reflects this principle in its final form remains to be seen.

In its existing form it permits the ICAC to scoop up material and have it assessed later on, rather than taking all due care to ensure that no intention to seize privileged documents is the guiding principle.

The then Clerk of the Senate submitted to the New South Wales inquiry that Article 9 confers an immunity from the compulsory production of documents, including by means of the execution of a search warrant, where documents are of such relevance to parliamentary proceedings that their production would of itself amount to the impeachment and questioning of those proceedings.

It must be remembered the Senate Clerk's reference to Article 9, is also in the context of the relevant section of the Powers and Privileges legislation in operation in the Australian Parliament, which by virtue of section 12 of the *Northern Territory (Self-Government) Act* and sections 4 and 6 of the *Legislative Assembly (Powers and Privileges) Act* is applicable in the Northern Territory.

While Article 9 does not prevent the seizure of documents per se, it arguably operates to prevent the seizure of documents when the use would amount to impeaching or questioning parliamentary proceedings.

The idea that privileged documents may be seized but not used requires an active seizure to be contemplated in isolation from the purpose of which the seizure was effected.

In the Northern Territory draft legislation, the proposal is for the ICAC ‘authorised officer’ to seize material and as soon as ‘reasonably practicable’ give it to the ‘proper officer’ at the Supreme Court.

The question has to be about what principles will prevail when there is little point in seizing documents in the first place if it is already clear that privilege will apply. Will seizures take place just to test the question?

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

While drafting has been improved since earlier drafts (there have been seven drafts) this remains a concern because it gives custody of potentially privileged documents to an outside individual and body.

In the New South Wales experience (there have been no fewer than six inquiries concerning the execution of search warrants on Members), a Memorandum of Understanding with the ICAC relating to the execution of search warrants on Members’ offices was considered by the Privileges Committee in Report Number 47 of November 2009 and a revised Memorandum of Understanding was considered in Report Number 71 of November 2014.

It is understood that the 2009 MOU continues to apply, as the revised 2014 MOU with ICAC has not yet been put into place.

Under the NSW Memorandum of Understanding, Procedure 9 of the ICAC’s Operations Manual is adopted as the procedure for obtaining and executing search warrants.

Clause 10 of which states:

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

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

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

The protocol allows for contacting the Member as well as the Clerk and the attendance of an ICAC lawyer to attend a search with the Search Team to provide legal advice on the matter of parliamentary privilege.

Specifically clause 10 subclause 8 states: *The Search Team Leader should not seek to access, read or seize any document over which a claim for parliamentary privilege is made.*

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

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

In the draft legislation proposed for the Northern Territory this process is different by reference to an arbiter in the form of the Supreme Court with an officer of the ICAC as an intermediary.

In the draft bill, the 'authorised officer' pursuant to clause 85 (2), "must consider the claim of privilege".

This wording is concerning.

The authorised officer should have no role in 'consideration', arguably they are not qualified or in any position to question a claim of privilege.

While subclause (3) states *the authorised officer must not inspect the item in considering the claim of privilege.* The words *in considering the claim of privilege* raise a concern as to the role of the authorised officer.

Subclause (4) is a further concern because it requires the claimant to give a secured item to the authorised officer who is acting on behalf of the ICAC. Placing a disputed item into the custody of the body you have a dispute with is not a good idea.

It is understood that in New South Wales the Clerk secures and takes custody of any documents over which the claim for Parliamentary privilege has been made.

1. Why is it considered that an officer of the ICAC is the appropriate person?

2. Why is it considered that the Supreme Court should be the proper arbiter of privilege? The question of privilege should arguably be referred to the presiding officer to be determined by the Assembly.

The Northern Territory draft bill policy rationale remains unclear.

The Drafting Instructions referred to a process adopted in South Australia pursuant to the *Independent Commissioner Against Corruption Miscellaneous Amendment Bill 2016* (now in schedule 3 of the principal Act.

Having read the South Australia Attorney General's second reading speech introducing the bill, the policy rationale still remains unclear.

The South Australia Attorney said: *the bill will also make clear what I understand is already the practice of the ICAC investigators when undertaking a search to secure documents over which the claim of privilege is made. It also provides clarity around the use of information obtained during an investigation under the ICAC act.*

That South Australia has created such a precedent does not mean that it should be followed.

The procedure outlined in clause 85 of the proposed Northern Territory bill will require close consideration by all 25 Members of the Legislative Assembly in the context of what is proposed in relation to permitting an authorised officer access to handle material which is in dispute in relation to claims of privilege and the role of body outside of Parliament, in this case the Supreme Court, in determining parliamentary privilege.

Giving a judge the power to open the sealed document and inspect the item and determine whether the item is privileged is to give the court a role which may bring it into dispute with the Assembly.

While not wanting to overstate the potential for some major separation of powers catastrophe, avoidance of any future dispute in this area is preferable at this early stage of putting together this new legislation.

Conclusion

The decision to implement an ICAC in the Northern Territory is a matter for the Government and the Parliament and no doubt its existence will be a welcome addition to the scrutiny of decision making.

How that interacts with the Assembly itself will be of considerable interest to Members and the parliament as an institution. We shall watch how the matter unfolds and an assessment of the outcome may be some years away.

Michael Tatham
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